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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

**Amendment No. 1  
to  
Form S-1**

REGISTRATION STATEMENT UNDER  
THE SECURITIES ACT OF 1933

**WINDTREE THERAPEUTICS, INC.**

*(Exact name of registrant as specified in its charter)*

Delaware  
(State or other jurisdiction of  
incorporation or organization)

2836  
(Primary Standard Industrial  
Classification Code Number)

94-3171943  
(I.R.S. Employer  
Identification Number)

**2600 Kelly Road, Suite 100  
Warrington, Pennsylvania 18976  
Telephone: (215) 488-9300**

*(Name, address, including zip code, and telephone number,  
including area code, of registrant's principal executive offices)*

**Mary B. Templeton, Esq.  
Senior Vice President, General Counsel and Corporate Secretary  
Windtree Therapeutics, Inc.  
2600 Kelly Road, Suite 100  
Warrington, Pennsylvania 18976  
Telephone: (215) 488-9300**

*(Name, address, including zip code, and telephone number,  
including area code, of agent for service)*

**Copies to:**

**Michael F. Nertney  
Ellenoff Grossman & Schole LLP  
1345 Avenue of the Americas  
New York, New York 10105  
(212) 370-1300**

**Rachael M. Bushey, Esq.  
Jennifer Porter, Esq.  
Pepper Hamilton LLP  
3000 Two Logan Square  
Philadelphia, Pennsylvania 19103  
Telephone: (215) 981-4331**

Approximate date of proposed sale to public: As soon as practicable on or after the effective date of this registration statement.

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If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933 check the following box.

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

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 7(a)(2)(B) of the Securities Act.

#### CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to Be Registered	Proposed Maximum Aggregate Offering Price(1)(3)	Amount of Registration Fee
Units consisting of:		
(i) Common stock, par value \$0.001 per share (2)	\$ 5,750,000	\$ 746.35
(ii) Warrants to purchase Common Stock (4)	Included with the units	\$ -
Common stock issuable on exercise of warrants to purchase common stock (5)	\$ 3,450,000	\$ 447.81
Total	\$ 9,200,000	\$ 1,194.16(6)

- (1) Estimated solely for the purpose of computing the amount of registration fee pursuant to Rule 457(o) under the Securities Act of 1933, as amended. Includes the offering price of additional shares of common stock and warrants to purchase common stock that the underwriters have the option to purchase.
- (2) Pursuant to Rule 416 under the Securities Act, the securities being registered hereunder include such indeterminable number of additional shares of common stock as may be issued after the date hereof as a result of stock splits, stock dividends or similar transactions.
- (3) Calculated pursuant to Rule 457(o) based on an estimate of the proposed maximum aggregate offering price of all securities being registered.
- (4) No separate fee is required pursuant to Rule 457(g) or Rule 457(i) under the Securities Act.
- (5) The warrants are exercisable at a per share exercise price equal to 120% of the public offering price. The proposed maximum aggregate public offering price of the shares of common stock issuable upon exercise of the warrants was calculated to be to be \$3,450,000, which is equal to 120% of \$2,875,000 (which is 50% of \$5,750,000 since each share of common stock will receive a warrant to purchase one-half of one share of common stock). Includes shares of common stock issuable upon exercise of the warrants that the underwriters have the option to purchase to cover over-allotments, if any.
- (6) A filing fee of \$649.00 was previously paid

The Registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its effective date until the Registrant shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933, as amended, or until this Registration Statement shall become effective on such date as the Securities and Exchange Commission, acting pursuant to such Section 8(a), may determine.

**The information in this preliminary prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This preliminary prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.**

Preliminary Prospectus

Subject to Completion, dated May 6, 2020

**Windtree Therapeutics, Inc.**



**510,725 Units**

**Consisting of One Share of Common Stock and**

**A Warrant to Purchase 0.50 of a Share of Common Stock**

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We are offering 510,725 units, consisting of one share of common stock, par value \$0.001 per share, or common stock, of Windtree Therapeutics, Inc., a Delaware corporation, or the Company, and a warrant to purchase 0.50 of a share of our common stock at an exercise price per share of common stock equal to \$ , or 120% of the price of each unit sold in the offering, or the Offering Warrants. The Offering Warrants will be exercisable upon issuance and will expire on the fifth anniversary of the original issuance date. Each unit will be sold at an assumed public offering price of \$9.79 per unit, which represents the last reported sale price of our common stock as reported on The OTCQB® Market, or OTCQB on May 5, 2020. The units will not be issued or certificated. The shares of common stock and the Offering Warrants are immediately separable and will be issued separately, but will be purchased together in this offering. The shares of common stock issuable from time to time upon the exercise of the Offering Warrants are also being offered pursuant to this prospectus.

Our common stock is currently traded on the OTCQB, under the symbol "WINTD." Prior to this offering, there has been a limited public market for our common stock on the OTCQB. On May 5, 2020, the last reported sale price of our common stock as reported on the OTCQB was \$9.79 per share. We have applied to list our common stock on the Nasdaq Capital Market, or Nasdaq, under the symbol "WINT" and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering. The closing sale price of our common stock as reported on the OTCQB may not be indicative of the market price of our common stock on Nasdaq and there can be no assurance that a trading market will develop for our shares of common stock on Nasdaq. The final public offering price will be determined through negotiation between us and the underwriters in the offering and the recent market price used throughout this prospectus may not be indicative of the final offering price. In addition, quotes of stock trading prices on an over-the-counter marketplace may not be indicative of the market price on a national securities exchange. There is no established public trading market for the Offering Warrants and we do not expect a market to develop. In addition, we do not intend to apply for the listing of the Offering Warrants on any national securities exchange. Without an active trading market, the liquidity of the Offering Warrants may be limited. Except as otherwise indicated, all share and per share information in this prospectus gives effect to the reverse stock split of our outstanding common stock, which was effected at a ratio of one-for-three as of 12:01 a.m. Eastern Time on April 29, 2020.

**Investing in our securities involves significant risks. See "Risk Factors" beginning on page 8 of this prospectus for a discussion of information that should be considered in connection with an investment in our securities.**

**Neither the Securities and Exchange Commission (the SEC) nor any state securities commission has approved or disapproved of these securities or passed upon the accuracy or adequacy of this prospectus. Any representation to the contrary is a criminal offense. The securities are not being offered in any jurisdiction where the offer is not permitted.**

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	<b>Per Unit</b>	<b>Total</b>
Public offering price	\$	\$
Underwriting discounts and commissions (1)	\$	\$
Proceeds, before expenses, to us	\$	\$

- (1) The public offering price and underwriting discount corresponds to (i) a public offering price per share of common stock of \$ and, (ii) a public offering price per warrant of \$ .
- (2) We refer you to the section titled “Underwriting” beginning on page 124 of this prospectus for additional information regarding total underwriter compensation.

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The underwriters have the option to purchase up to (i) 76,609 additional shares of common stock, and/or (ii) additional warrants to purchase up to 38,304 additional shares of common stock solely to cover over-allotments, if any, at the public offering price per share of common stock and the public offering price per warrant set forth above less the underwriting discounts and commissions. The over-allotment option may be used to purchase shares of common stock and/or warrants, or any combination thereof, as determined by the underwriters, but such purchases cannot exceed an aggregate of 15% of the number of shares of common stock and 15% of the warrants sold in the primary offering. The over-allotment option is exercisable for 45 days from the date of this prospectus.

Certain of our officers, directors and existing stockholders, including certain stockholders affiliated with our directors or that beneficially own more than 5% of our outstanding common stock, have indicated an interest in purchasing an aggregate of \$2.0 million of our units in this offering on the same terms as those offered to the public. However, because indications of interest are not binding agreements or commitments to purchase, the underwriters may determine to sell more, fewer or no units in this offering to any of these officers, directors or stockholders, or any of these officers, directors or stockholders may determine to purchase more, fewer or no units in this offering. The underwriters will receive the same underwriting discounts and commissions on any units purchased by these officers, directors and stockholders as they will on any other shares sold to the public in this offering.

The underwriters expect to deliver the securities being offered pursuant to this prospectus against payment therefor on or about , 2020.

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*Sole Book-Running Manager*

**Ladenburg Thalmann**

*Lead Manager*

**National Securities Corporation**

The date of this prospectus is , 2020.

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You should rely only on the information contained in this prospectus and any related free writing prospectus that we may provide to you in connection with this offering. We have not, and the underwriters have not, authorized any other person to provide you with different information. If anyone provides you with different or inconsistent information, you should not rely on it. We are not, and the underwriters are not, making an offer to sell these securities in any jurisdiction where the offer or sale is not permitted. You should assume that the information appearing in this prospectus is accurate only as of the date on the front cover of this prospectus. Our business, financial condition, results of operations and prospects may have changed since that date. Neither the delivery of this prospectus nor any sale made in connection with this prospectus shall, under any circumstances, create any implication that there has been no change in our affairs since the date of this prospectus or that the information contained in this prospectus is correct as of any time after its date. Information contained on our website, or any other website operated by us, is not part of this prospectus.

**For investors outside the United States:** neither we nor the underwriters have done anything that would permit this offering or possession or distribution of this prospectus or any free writing prospectus we may provide to you in connection with this offering in any jurisdiction where action for that purpose is required, other than in the United States of America, or the U.S. Persons outside the U.S. who come into possession of this prospectus must inform themselves about, and observe any restrictions relating to, the offering of the shares of our common stock and the distribution of this prospectus and any such free writing prospectus outside of the U.S.

We use “Windtree Therapeutics,” as our trademark, and we have been granted a trademark or have a trademark application on file with the United States Patent and Trademark Office. All trademarks or trade names referred to in this prospectus are the property of their respective owners. Solely for convenience, the trademarks and trade names in this prospectus are referred to without the ® and ™ symbols, but such references should not be construed as any indicator that their respective owners will not assert, to the fullest extent under applicable law, their rights thereto. We do not intend the use or display of other companies’ trademarks and trade names to imply a relationship with, or endorsement or sponsorship of us, by any other companies.

This prospectus contains forward-looking statements that are subject to a number of risks and uncertainties, many of which are beyond our control. See “Risk Factors” and “Special Note Regarding Forward-Looking Statements.”

Unless the context otherwise requires, references in this prospectus to “Windtree,” “Windtree Therapeutics,” “the Company,” “we,” “our,” and “us” refer to Windtree Therapeutics, Inc., a Delaware corporation, and its consolidated subsidiaries.

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## PROSPECTUS SUMMARY

*This summary highlights information contained in other parts of this prospectus. This summary is not complete and does not contain all of the information that you should consider in making your investment decision. Before investing in our common stock, you should carefully read this entire prospectus carefully including “Risk Factors” included in this prospectus at page 8 and the financial statements and the notes to those financial statements in this prospectus. Except as otherwise indicated, all share and per share information in this prospectus gives effect to the reverse stock split of our outstanding common stock, which was effected at a ratio of one-for-three as of 12:01 a.m. Eastern Time on April 29, 2020.*

When used herein, unless the context requires otherwise, references to “Windtree,” “Windtree Therapeutics,” “the Company,” “we,” “our” and “us” refer to Windtree Therapeutics, Inc.

### Overview

We are a clinical-stage, biopharmaceutical and medical device company focused on the development of novel therapeutics intended to address significant unmet medical needs in important acute care markets. Our development programs are primarily focused in the treatment of acute cardiovascular and pulmonary diseases. Our lead cardiovascular product candidate, istaroxime, a first-in-class, dual-acting agent being developed to improve cardiac function in patients with acute heart failure, or AHF, and cardiogenic shock with a potentially differentiated safety profile from existing treatments. Istaroxime demonstrated significant improvement in diastolic and systolic function in phase 2 clinical trials and has been granted Fast Track designation for the treatment of AHF by the U.S. Food and Drug Administration, or FDA. Our lead pulmonary product candidate is AEROSURF® (lucinactant for inhalation), a novel drug/medical device combination for non-invasive delivery of our proprietary aerosolized KL4 surfactant, using our proprietary Aerosol Delivery System, or ADS, technology for the treatment of respiratory distress syndrome, or RDS, in premature infants. AEROSURF has been granted Fast Track designation by the FDA for the treatment of RDS. We are also developing plans to study our proprietary KL4 surfactant for treatment of lung injury resulting from severe COVID-19 infections, if we are able to secure the required additional capital resources necessary to initiate and complete the study. Our other drug product candidates include rostafuroxin, a novel medicine for the treatment of hypertension, in patients with a specific genetic profile. We also have a number of pipeline preclinical product candidates that we are evaluating for progression into clinical development. We are pursuing a number of early exploratory research programs to identify potential product candidates, including oral and intravenous SERCA 2a heart failure compounds and other product candidates utilizing our KL4 surfactant and ADS technologies.

### Our Development Programs

The table below summarizes the current status and anticipated milestones for our principal product development programs. However, due to the recent global outbreak of a novel strain of the coronavirus (COVID-19), our clinical trials and next expected milestones of our product candidates may be impacted, and we may experience delays in anticipated timelines and milestones.

Product Candidate	Indication	Status	Next Expected Milestone
Istaroxime	AHF	Phase 2b	Initiate start-up activities for second phase 2b clinical trial in ~300 patients in second half of 2020.
Istaroxime	Early Cardiogenic Shock	Phase 2a	Initiate phase 2a clinical trial in ~60 patients mid-year 2020.
AEROSURF (aerosolized KL4 surfactant)	RDS	Phase 2b	Initiated in second quarter of 2020 a ~90-patient bridging study with new ADS (developed for use in our phase 3 program), relying on licensee resources.
Rostafuroxin	Genetically Associated Hypertension	Phase 2b	Out-licensing.
Lyophilized KL4 Surfactant	Lung Injury resulting from COVID-19	Pilot	Program planning; targeted IND filing in May 2020 and start mid-year 2020, subject to securing the additional capital resources required for the program.

*Istaroxime (Acute Heart Failure)*

Istaroxime is a first-in-class, dual action investigational drug that we are developing to treat AHF with a potentially differentiated safety profile from current AHF therapies. We recently completed a successful phase 2b clinical trial of istaroxime in which the primary endpoint of cardiac function, E/Ea ratio (echocardiographic assessment reflecting changes in pulmonary capillary wedge pressure, or PCWP, or left ventricular filing pressure), was significantly improved. Istaroxime has been granted Fast Track designation by the FDA for the treatment of AHF.

Heart failure is a chronic, progressive condition in which patients often experience episodic periods of increased symptoms known as AHF, where the heart fails to adequately pump, resulting in worsening symptoms, including pulmonary and peripheral edema and other severe complications. In the United States, approximately 6 million people (nearly two percent of the adult population) have heart failure and approximately half of these patients are expected to die within 5 years of diagnosis; and in the combined U.S., European Union, or EU, and Japan markets, there are over 18 million patients suffering from heart failure. We estimate that AHF may represent a potential addressable market of approximately \$1.6 billion dollars annually (in the U.S., EU and Japan).

We plan to initiate start-up activities for an additional phase 2b clinical trial of istaroxime in the second half of 2020 in patients with low systolic blood pressure and those who are diuretic resistant. We also plan to extend dosing in this clinical trial beyond what was previously studied and include clinical outcome measures that we believe will support the further development of istaroxime. We plan to initiate start-up activities for this next phase 2 study in the second half of 2020 and plan to extend dosing beyond that previously studied and include clinical outcome measures that we believe may be acceptable for registration

*Istaroxime (Cardiogenic Shock)*

We are also planning to study istaroxime for the treatment of early cardiogenic shock, a severe presentation of heart failure characterized by very low blood pressure and hypo-perfusion to critical organs which is associated with high mortality and morbidity and is not well treated with current therapies. We believe istaroxime may fulfill an unmet need in cardiogenic shock based on the profile observed in our phase 2 clinical studies in AHF. Because of the unmet need in the treatment of early cardiogenic shock, we believe there may be an opportunity with a breakthrough therapy designation, which may provide an expedited development program. Receipt of either Fast Track or breakthrough therapy designation may increase the likelihood of receiving priority review of a marketing application, which would provide for an expedited review timeframe.

By mid-year 2020, we plan to initiate a small study of istaroxime in early cardiogenic shock patients to evaluate the potential to improve blood pressure and organ perfusion. The study will also evaluate the safety and side effect profile of istaroxime in this patient population.

*AEROSURF (lucinactant for inhalation)*

AEROSURF is an investigational combination drug/medical device product that we are developing to improve the management of RDS in premature infants. RDS is a condition that occurs in premature infants who may not have fully-developed natural lung surfactant, which is essential to normal respiratory function and survival, and may require surfactant therapy to sustain life, and can result in long-term respiratory problems, developmental delays and death. Surfactant therapy is the primary therapy to address an underlying surfactant deficiency, and AEROSURF is designed to deliver aerosolized KL4 surfactant noninvasively using our proprietary ADS technology. We have completed three AEROSURF phase 2 clinical trials. While our most recent phase 2 clinical trial did not achieve its primary endpoint, we believe that the results of our phase 2 clinical program supports the further development of AEROSURF to reduce both the rate of nasal continuous positive airway pressure, or nCPAP, failure and the need for intubation in premature infants being treated for RDS. In addition, a pooled post-hoc analysis of data from two phase 2 studies suggests that AEROSURF may have the potential to lower the incidence and severity of bronchopulmonary dysplasia, or BPD, a chronic lung disease of premature infants who have required intubation, mechanical ventilation and oxygen therapy. AEROSURF has been granted Fast Track designation by the FDA for the treatment of RDS.

We have completed design verification activities for a newly-designed ADS, which combines the same aerosolization technology used during the phase 2 clinical program, but with improved ergonomics, interface, controls, and dose monitoring in a modular design. The new ADS also implements design changes to potentially mitigate the risks of device-related treatment interruptions experienced in the prototype phase 2 device used in the phase 2b clinical trial, and we believe it will be easier and faster to use and may support enhanced clinical outcomes by potentially allowing for reduced time to initial administration of our KL4 surfactant and reduced time intervals between doses compared to our phase 2 prototype.

In the second quarter of 2020, we commenced a small, approximately 90-patient, phase 2 bridging study and prepare to transition to our phase 3 clinical program by demonstrating the new ADS performance in the NICU. This trial will not be powered to establish statistical significance but will generate clinical experience with the new ADS as well as additional higher dose treatment data to augment data previously obtained in the phase 2 clinical program. We expect to advance the bridging study at a reduced cost to us by leveraging development opportunities in the People's Republic of China, or China (the largest RDS and surfactant market), with our licensee in the region.

#### *Rostafuroxin*

Rostafuroxin is a novel investigational drug product candidate that we are developing for the treatment of hypertension in patients with a specific genetic profile. Rostafuroxin targets resistant hypertensive patients with a specific genetic profile, which is found in approximately 20% – 25% of the adult hypertensive population. We have studied rostafuroxin in three phase 2 clinical trials assessing reduction in blood pressure in a hypertensive population selected in accordance with a specified genetic profile. After positive phase 2a results, a phase 2b study was initiated. In this most recent phase 2b clinical trial, rostafuroxin demonstrated efficacy in Caucasian patients but not in Chinese patients. We are exploring potential reasons for the different responses.

We are working to finalize the rostafuroxin drug formulation and an analytical method to increase the sensitivity of our existing assay to measure low concentrations of the compound in the body.

#### *Lyophilized KL4 Surfactant – Lung Injury and Other Studies*

We are developing plans to study our proprietary KL4 surfactant for treatment of lung injury resulting from severe COVID-19 infections, if we are able to secure the required additional capital resources necessary to initiate and complete the study as existing cash resources will not be used to conduct this work. We plan to file an IND application with the FDA in May 2020 for an initial pilot clinical trial to assess the ability of our proprietary KL4 surfactant to impact key respiratory parameters in ventilated COVID-19 patients with a targeted start date by mid-year 2020. We recently applied to BARDA requesting funding for our development plans of KL4 surfactant in COVID-19 patients and we were granted a meeting to review our proposal with BARDA representatives. In addition, we continue to pursue multiple COVID-19 study funding opportunities with other government and private foundations as well as potential collaboration arrangements with leading academic institutions.

Patients with COVID-19 pneumonia may progress to severe respiratory failure requiring supplemental oxygen and mechanical ventilation. This acute lung injury, known as acute respiratory distress syndrome, or ARDS, has no approved therapies and is associated with significant morbidity, mortality and healthcare resource utilization. The COVID-19 virus infects via angiotensin-converting enzyme 2 (ACE2) on cells in the lung which impair surfactant production, resulting in decreased lung compliance, and increased likelihood of needing mechanical ventilation. Pre-clinical and clinical evidence shows surfactant replacement therapy has the potential to improve lung function, oxygenation, lung compliance and decrease pulmonary inflammation. These beneficial effects could lead to potential clinical improvements such as decreased need for mechanical ventilation, decreased time on ventilator (freeing the devices for other patients) and possibly mortality.

Our KL4 surfactant can be lyophilized for reconstitution to a liquid just prior to administration. We plan to conduct studies to assess potential reduction of cold chain storage and refrigeration requirements of lyophilized KL4 surfactant in the hospital. We have demonstrated in laboratory experiments that our lyophilized KL4 surfactant retains many of the key attributes and characteristics of our liquid instillate. We are assessing potential development pathways to secure marketing approval for lyophilized KL4 surfactant as an intratracheal instillate for the treatment and/or prevention of RDS.

#### *Other Programs*

We are pursuing a number of early exploratory research programs to identify potential product candidates, including oral (and intravenous) SERCA 2a heart failure compounds and other product candidates utilizing our KL4 surfactant and ADS technologies.



## Recent Developments

### *Reverse Stock Split*

On April 28, 2020, we filed an amendment to our Amended and Restated Certificate of Incorporation, or Certificate of Incorporation, to implement the reverse split stock. The reverse stock split of our outstanding common stock was effected at a ratio of one-for-three as of 12:01 a.m. Eastern Time on April 29, 2020. Moreover, the reverse stock split correspondingly adjusted, the per share exercise price and the number of shares issuable upon the exercise of all outstanding options and the per share exercise price of all outstanding options and all shares underlying any of our outstanding warrants by reducing the conversion ratio for each outstanding warrant and increasing the applicable exercise price or conversion price in accordance with the terms of each outstanding warrant and based on the reverse stock split ratio. After giving effect to the reverse split, if any stockholder beneficially owned a fractional share of common stock, such stockholder received in lieu of the fractional share a prorated cash payment.

The reverse stock split resulted in a reduction of our outstanding shares of common stock from 41,092,186 shares prior to the reverse stock split to 13,697,395 shares of common stock after giving effect to the reverse stock split. The number of shares of common stock authorized under the our Certificate of Incorporation is unchanged at 120,000,000 shares.

### *Financial Update as of March 31, 2020*

As of March 31, 2020, we estimate that cash and cash equivalents were approximately \$16,799,290.

These estimates are preliminary and actual results may differ from these estimates due to the completion of our closing procedures with respect to the quarter ended March 31, 2020, the final adjustments and other developments that may arise between now and the time the financial results for the first quarter of 2020 are finalized. As such, these estimates should not be viewed as a substitute for our full unaudited first quarter financial statements prepared in accordance with U.S. generally accepted accounting principles. These expected results could change materially and are not necessarily indicative of the results to be achieved for our quarter ending March 31, 2020 or any future period. As a result, of the foregoing considerations and other limitations described herein, investors are cautioned not to place undue reliance on this preliminary financial information. We do not undertake any obligation to publicly update or revise this estimate, except as required by law.

## Our Strategy

We intend to maximize the value of our product candidates and proprietary technologies. Our strategy to achieve this goal includes plans to:

- **Advance istaroxime for the treatment of AHF to a phase 3-ready position.** We plan to complete the istaroxime AHF phase 2b clinical program and develop a strong phase 3-ready position for continued development and potential partnering;
- **Study istaroxime for early cardiogenic shock, which, if the drug demonstrates adequate potential to raise blood pressure with acceptable safety, may create the opportunity for a breakthrough therapy designation and an expedited development program.** In 2020, we plan to initiate a small phase 2a clinical trial in early cardiogenic shock to explore a potential expedited regulatory pathway for istaroxime in this area of unmet medical need;
- **Advance development of preclinical heart failure programs.** To create added value to the istaroxime programs, we plan to our advance oral/chronic and intravenous SERCA2a preclinical product candidates through proof of concept;
- **Advance AEROSURF to a phase 3-ready position.** In 2020, we initiated a small phase 2 bridging study to clinically evaluate the performance of the new ADS in the NICU and introduce a potentially optimized dose regimen. We intend to advance AEROSURF to a phase 3-ready position by leveraging development opportunities in China (the largest RDS and surfactant market), with our licensee for Asia supporting clinical costs;

- **Assess KL4 surfactant's ability to impact key respiratory parameters in ventilated COVID-19 patients.** We are actively pursuing multiple non-dilutive funding opportunities to secure the additional capital resources necessary to initiate and complete a pilot clinical trial of KL4 surfactant to potentially mitigate the pulmonary effects of severe COVID-19 infection with a targeted start date by mid-year 2020;
- **Seek strategic collaborative relationships for the development and potential commercialization of rostafuroxin.** We are exploring strategic collaborations to out-license and use proceeds to provide non-dilutive funding of our core programs;
- **List our common stock on The Nasdaq Capital Market®**, beginning with this offering. In 2020, we plan to obtain a listing on The Nasdaq Capital Market®, or Nasdaq. We have applied to list our common stock in connection with this offering and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering; and
- **Execute business development and explore acquiring additional product candidates.** We plan to execute robust business development for partnerships for current development programs as well as explore acquiring additional product candidates to add to our development pipeline.

### **Risks Related to Our Business**

Our ability to execute on our business strategy is subject to numerous risks, as more fully described in the section titled "Risk Factors" immediately following this Prospectus Summary. These risks include, among others:

- We have incurred significant operating losses since inception, we expect to incur operating losses in the future and we may not be able to achieve or sustain profitability;
- Delays associated with COVID-19 in anticipated timelines and milestones;
- Clinical development is a lengthy and expensive process with an uncertain outcome, and results of earlier studies and trials may not be predictive of future trial results. Clinical failure can occur at any stage of clinical development;
- We will continue to require significant additional capital to support our research and development activities and operations;
- We are subject to regulatory approval processes that are lengthy, time consuming and unpredictable, and we may not obtain approval for our product candidates;
- Even though some of our product candidates have Fast Track designation, the FDA may not approve them at all or any sooner than other product candidates that do not have Fast Track designation;
- We depend on the performance of third parties, including third-party manufacturers;
- Our plan to use strategic alliances and collaboration arrangements to leverage partner capabilities may not be successful if we are unable to integrate their capabilities with our own or if our partners' capabilities do not meet our expectations;
- Our activities are subject to various and complex laws and government regulations, and we are susceptible to a changing regulatory environment;
- If we are unable to adequately protect our intellectual property rights, or if we are accused of infringing on the intellectual property rights of others, our competitive position could be harmed or we could be required to incur significant expenses to enforce or defend our rights;
- We may be unable to recruit or retain key employees, including our senior management team; and
- We have applied to list our common stock on Nasdaq and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering. The closing sale price of our common stock as reported on the OTCQB may not be indicative of the market price of our common stock on Nasdaq and there can be no assurance given that a trading market will develop for our shares of common stock on Nasdaq. In addition, we can provide no assurance that our common stock, if listed, will continue to meet Nasdaq listing requirements. If we fail to comply with the continuing listing standards of Nasdaq, our securities could be delisted.

### **Corporate Information**

We were incorporated in Delaware on November 6, 1992. Our principal executive offices are located at 2600 Kelly Road, Suite 100, Warrington, Pennsylvania, 18976, and our telephone number is 215-488-9300. Our website address is [www.windtreetx.com](http://www.windtreetx.com). The information contained in, or accessible through, our website does not constitute part of this prospectus. We have included our website address as an inactive textual reference only.

This prospectus includes trademarks, tradenames and service marks that are the property of other organizations. Solely for convenience, trademarks and tradenames referred to in this prospectus appear without the ® and ™ symbols, but those references are not intended to indicate, in any way, that we will not assert, to the fullest extent under applicable law, our rights or that the applicable owner will not assert its rights, to these trademarks and tradenames.

## THE OFFERING

*The following summary contains basic information about this offering. The summary is not intended to be complete. You should read the full text and more specific details contained elsewhere in this prospectus.*

<b>Units offered by us</b>	<p>We are offering 510,725 units. Each unit will consist of one share of our common stock and a warrant to purchase 0.50 of a share of our common stock. The unit will not be certificated and the shares of our common stock and the related warrant are immediately separable and will be issued separately in this offering.</p> <p>This prospectus also relates to the offering of shares of our common stock issuable upon exercise of the warrants that are part of the unit.</p>
<b>Offering price per Unit</b>	<p>Assumed public offering price of \$9.79, which represents the last reported sale price of our common stock as reported on the OTCQB on May 5, 2020</p>
<b>Description of Warrants</b>	<p>Each warrant, or Offering Warrant, included in the units will have an exercise price per share equal to \$ _____ or 120% of the price of each unit sold in the offering. The Offering Warrants will be exercisable immediately upon issuance and will expire on the fifth anniversary of the original issuance date.</p> <p>A holder may not exercise any portion of the warrant to the extent that the holder would beneficially own more than 4.99% (or, at the election of the purchaser prior to the date of issuance, 9.99%) of the outstanding common stock after exercise, except that upon at least 61 days' prior notice from the holder to us, the holder may increase the amount of ownership of outstanding stock after exercising the holder's warrants up to 9.99% of the number of shares of our common stock outstanding immediately after giving effect to the exercise, as such percentage ownership is determined in accordance with the terms of the Offering Warrants.</p> <p>There is no established public trading market for the Offering Warrants, and we do not expect a market to develop. In addition, we do not intend to apply for a listing of the warrants on any national securities exchange or any other trading system.</p>
<b>Common stock outstanding prior to this offering</b>	<p>13,697,395 shares.</p>
<b>Common stock to be outstanding after this offering</b>	<p>14,208,120 shares.</p>
<b>Over-allotment option</b>	<p>We have granted the underwriters an option to purchase additional shares of common stock equal to 15% of the shares in the offering and/or additional warrants equal to 15% of the warrants in the offering at the assumed public offering price per share of common stock and the assumed public offering price per warrant set forth on the cover page hereto less the underwriting discounts and commission. This option is exercisable, in whole or in part, for a period of 45 days from the date of this prospectus.</p>
<b>Use of proceeds</b>	<p>We estimate that the net proceeds to us from this offering will be approximately \$4.0 million, or approximately \$4.7 million if the underwriters exercise their option to purchase additional shares of common stock and/or warrants from us in full, after deducting estimated underwriting discounts and commissions and estimated offering expenses payable by us (assuming none of the warrants issued in this offering are exercised).</p>

We intend to use the net proceeds from this offering, together with our existing cash and cash equivalents, to fund development activities, including clinical and regulatory development and for working capital and other general corporate purposes. See the section titled “Use of Proceeds” for a more complete description of the intended use of proceeds from this offering.

**Risk factors**

Investing in our common stock involves significant risks. See “Risk Factors” beginning on page 8 and other information contained in this prospectus for a discussion of factors you should carefully consider before deciding to invest in shares of our common stock.

**OTCQB marketplace symbol**

“WINTD”

**Proposed Nasdaq Capital Market symbol**

Our common stock is currently listed on The OTCQB® Market and we have applied to list our common stock on The Nasdaq Capital Market, or Nasdaq, under the symbol “WINT” and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering.

**Transfer Agent and registrar**

Continental Stock Transfer and Trust Company

Except as otherwise indicated, the number of shares of our common stock to be outstanding upon completion of this offering is based on 13,697,395 shares of our common stock outstanding as of April 23, 2020, and excludes:

- 1,769,727 shares of our common stock issuable upon the exercise of stock options outstanding as of April 23, 2020, at a weighted-average exercise price of \$17.38 per share;
- 4,741,486 shares of our common stock issuable upon the exercise of the warrants outstanding as of April 23, 2020, at a weighted-average exercise price of \$22.01 per share; and
- 151,778 shares of common stock available for future grant as of April 23, 2020 under our 2011 Long-Term Incentive Plan, as amended;
- 35,000 shares of common stock issuable upon the vesting of restricted stock units outstanding as of April 23, 2020; and
- 252,525 shares of our common stock issuable upon the exercise of the Offering Warrants to be issued with the units in this offering (or 290,404 shares if the underwriters exercise their over-allotment option in full).

Unless otherwise indicated, all information in this prospectus reflects or assumes the following:

- no issuance or exercise of stock options or warrants on or after April 23, 2020; and
- no exercise by the underwriters of their option to purchase additional shares of common stock and/or warrants in this offering.

Certain of our officers, directors and existing stockholders, including certain stockholders affiliated with our directors or that beneficially own more than 5% of our outstanding common stock, have indicated an interest in purchasing an aggregate of \$2.0 million of our units in this offering on the same terms as those offered to the public. However, because indications of interest are not binding agreements or commitments to purchase, the underwriters may determine to sell more, fewer or no units in this offering to any of these officers, directors or stockholders, or any of these officers, directors or stockholders may determine to purchase more, fewer or no units in this offering. The underwriters will receive the same underwriting discounts and commissions on any units purchased by these officers, directors and stockholders as they will on any other shares sold to the public in this offering.

**Lock-up Agreements**

In addition, certain of our existing stockholders beneficially owning approximately 71% of our outstanding shares of common stock have agreed with us to be bound by a lock-up whereas such stockholders will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of shares of our common stock for 90 days following the closing of this offering.

## RISK FACTORS

*Investing in our common stock involves a high degree of risk. These risks include, but are not limited to, those described below, each of which may be relevant to an investment decision. You should carefully consider the risks described below, together with all of the other information in this prospectus, including our consolidated financial statements and related notes, before investing in our common stock. While we believe that the risks and uncertainties described below are the material risks facing our business, additional risks that we do not know of or that we currently think are immaterial may also arise and materially affect our business. The realization of any of these risks could have a material adverse effect on our business, financial condition, results of operations, and our ability to accomplish our strategic objectives. In that event, the trading price of our common stock could decline, and you may lose part or all of your investment.*

### **Risk Related to Our Financial Condition**

***We have incurred significant operating losses since inception, we expect to incur operating losses in the future and we may not be able to achieve or sustain profitability.***

We have incurred operating losses since our incorporation on November 6, 1992. For the years ended December 31, 2019 and 2018, we had operating losses of \$24.9 million and \$16.2 million, respectively. As of December 31, 2019, we had an accumulated deficit of \$686.1 million. To date, we have financed our operations primarily through private placements and public offerings of our common and preferred stock and borrowings from investors and financial institutions.

We expect to continue to incur significant research and clinical development, regulatory and other expenses as we continue to develop our product candidates, obtain regulatory clearances or approvals for our planned or future product candidates, conduct clinical trials on our existing and planned or future product candidates and manufacturing, marketing and selling any products for which we may obtain regulatory approval. As a result, we expect to continue to incur operating losses for the foreseeable future and may never achieve profitability. Even if we do achieve profitability, we may not be able to sustain or increase profitability on an ongoing basis. If we do not achieve or sustain profitability, it will be more difficult for us to finance our business and accomplish our strategic objectives, either of which would have a material adverse effect on our business, financial condition and results of operations and may cause the market price of our common stock to decline.

***We will require substantial additional financing to achieve our goals, and a failure to obtain this necessary capital when needed on acceptable terms, or at all, could force us to delay, limit, reduce or terminate our product development programs, or other operations.***

The development of biopharmaceutical product candidates is capital-intensive. We expect our expenses to increase in connection with our ongoing activities, particularly as we conduct our ongoing and planned clinical trials, continue research and development and initiate clinical trials of our other development programs and seek regulatory approval for our current product candidates and any future product candidates we may develop. In addition, as our product candidates progress through development and toward commercialization, we may need to make milestone payments to licensors and other third parties from whom we have in-licensed or acquired our product candidates. Furthermore, if and to the extent we seek to acquire or in-license additional product candidates in the future, we may be required to make significant upfront payments, milestone payments, and/or licensing payments. If we obtain regulatory approval for any of our product candidates, we also expect to incur significant commercialization expenses related to product manufacturing, marketing, sales and distribution. Because the outcome of any clinical trial or preclinical study is highly uncertain, we cannot reasonably estimate the actual amounts necessary to successfully complete the development and commercialization of our product candidates. Accordingly, we will need to obtain substantial additional funding in connection with our continuing operations. If we are unable to raise capital when needed or on attractive terms, we could be forced to delay, reduce or eliminate our research and development programs or any future commercialization efforts.

We believe that, including the proceeds of this offering, our existing cash and cash equivalents will enable us to fund our operations into the third quarter of 2021. We have based these estimates on assumptions that may prove to be wrong, and we could use our capital resources sooner than we currently expect. Our operating plans and other demands on our cash resources may change as a result of many factors currently unknown to us, and we may need to seek additional funds sooner than planned, through public or private equity or debt financings or other capital sources, including potentially collaborations, licenses and other similar arrangements. In addition, we may seek additional capital due to favorable market conditions or strategic considerations even if we believe we have sufficient funds for our current or future operating plans. Attempting to secure additional financing may divert our management from our day-to-day activities, which may adversely affect our ability to develop our product candidates.

Our future capital requirements will depend on many factors, including:

- the type, number, scope, progress, expansions, results, costs and timing of, our clinical trials and preclinical studies of our product candidates which we are pursuing or may choose to pursue in the future;
- the costs and timing of manufacturing for our product candidates, including commercial manufacturing if any product candidate is approved;
- the costs, timing and outcome of regulatory review of our product candidates;
- the costs of obtaining, maintaining and enforcing our patents and other intellectual property rights;
- the timing and amount of the milestone or other payments we must make to the licensors and other third parties from whom we have in-licensed or acquired our product candidates;
- the costs and timing of establishing or securing sales and marketing capabilities if any product candidate is approved;
- our ability to achieve sufficient market acceptance, coverage and adequate reimbursement from payors and adequate market share and revenue for any approved products;
- the terms and timing of establishing and maintaining collaborations, licenses and other similar arrangements; and
- costs associated with any products or technologies that we may in-license or acquire.

Conducting clinical trials and preclinical studies is a time consuming, expensive and uncertain process that takes years to complete, and we may never generate the necessary data or results required to obtain regulatory approval and achieve product sales. In addition, our product candidates, if approved, may not achieve commercial success.

Accordingly, we will need to continue to rely on additional financing to achieve our business objectives. Adequate additional financing may not be available to us on acceptable terms, or at all.

***Raising additional capital may cause dilution to our stockholders, including purchasers of common stock in this offering, restrict our operations or require us to relinquish rights to our technologies or product candidates.***

Until such time, if ever, as we can generate substantial product revenues, we expect to finance our cash needs through equity offerings, debt financings or other capital sources, including potentially collaborations, licenses and other similar arrangements. To the extent that we raise additional capital through the sale of equity or convertible debt securities, your ownership interest will be diluted, and the terms of these securities may include liquidation or other preferences that adversely affect your rights as a common stockholder. Debt financing and preferred equity financing, if available, may involve agreements that include covenants limiting or restricting our ability to take specific actions, such as incurring additional debt, making capital expenditures or declaring dividends.

If we raise funds through future collaborations, licenses and other similar arrangements, we may have to relinquish valuable rights to our future revenue streams, research programs or product candidates or grant licenses on terms that may not be favorable to us and/or that may reduce the value of our common stock.

***Our existing and future debt obligations could impair our liquidity and financial condition, and if we are unable to meet our debt obligations, including with respect to any collateral requirements, the lenders could foreclose on our assets or seek a judgment against us and execute against our assets.***

As of December 31, 2019, we had approximately \$4.6 million in loans payable under a credit facility with O-Bank Co., Ltd., or O-Bank, in Taiwan that we assumed in the CVie Acquisition and which expired on September 11, 2019 and was scheduled to mature in March 2020, or the O-Bank Facility. In March 2020, the O-Bank Facility was amended to extend the maturity date to March 2022, amongst other things. Our borrowings under the O-Bank Facility are secured by a cash account provided by Lee's Pharmaceutical Holdings Limited, or Lee's, however, Lee's does not have a contractual obligation to us to maintain its guarantee.

Our debt obligations:

- could impair our liquidity;
- could make it more difficult for us to satisfy our other obligations;
- require us to dedicate cash flow to debt service payments, which would reduce the availability of our cash flow to fund working capital, capital expenditures and other corporate requirements;
- impose restrictions on our ability to incur other indebtedness, grant liens on our assets, and could impede us from obtaining additional financing in the future for working capital, capital expenditures, acquisitions and general corporate purposes;
- impose restrictions on us with respect to our ability to license our products in the United States, or U.S., and other markets around the world;
- could adversely affect our ability to enter into strategic transactions, public or private equity offerings, and similar agreements, or require us to obtain the consent to enter into such transactions;
- make us more vulnerable in the event of a downturn in our business prospects and could limit our flexibility to plan for, or react to, changes in our licensing markets; and
- could place us at a competitive disadvantage when compared to our competitors.

Should we fail to pay our obligations, fail to comply with any covenants contained in any related agreements, including the collateral maintenance agreement under the O-Bank Facility, or if Lee's withdraws its pledge of collateral to secure the O-Bank Facility, we could be in default regarding that indebtedness and the lender could accelerate payment of the outstanding indebtedness. Moreover, in the future, to secure our obligations under any loans, we may be required to grant to the lender a security interest in some or substantially all of our assets.

***In the past we have engaged in cash conservation activities and, to the extent necessary, may continue to do so. Such cash conservation management may adversely affect our relationship with our vendors and service providers.***

We have from time to time experienced periods in which our cash resources have been constrained. As such, it is our practice to routinely closely monitor and control our cash resources to assure that investment and spending decisions advance our corporate objectives at any time. To manage our cash, we tightly control purchasing and retention of consultants, closely monitor the release of funds and may defer payment on invoices to conserve cash. This practice of conserving cash may adversely impact our relationships with key vendors and service providers and the pace at which we are able to advance our programs. While we work closely with our vendors and service providers to preserve our key relationships, there can be no assurance that we will be successful and that our vendor and service providers will continue to work with us, particularly during a period of constrained cash resources. Failure to retain such key relationships could have a material adverse effect on our development activities and our business and operations.

***We have a significant amount of intangible assets, including goodwill, recorded on our balance sheet which may lead to potentially significant impairment charges.***

We review long-lived assets, including intangible assets and goodwill, for impairment whenever events or changes in estimates and circumstances indicate that the related carrying amounts may not be recoverable based on the existence of certain triggering events. Intangible assets and goodwill are also subject to an impairment assessment at least annually. The amount of identifiable intangible assets and goodwill in our consolidated balance sheet has increased significantly because of the acquisition of CVie Therapeutics Ltd., or CVie Therapeutics, in December 2018. The identifiable intangible assets resulting from the CVie Therapeutics acquisition relate to in-process research and development of istaroxime and rostafuroxin. At December 31, 2019, intangible assets and goodwill recorded on our consolidated balance sheet was \$77.1 million and \$15.7 million, respectively.



If long-lived assets are determined to be impaired in the future, we would be required to record a potentially significant write-off, which would have an adverse effect on our results of operations and financial condition.

## **Risks Related to our Development and Regulatory Approval of our Product Candidates**

***Clinical development involves a lengthy and expensive process with an uncertain outcome, and results of preclinical studies and early clinical trials are not necessarily predictive of future results. In addition, our assumptions about why our product candidates are worthy of future development and potential approval are based on data primarily collected by other companies. Our product candidates may not have favorable results in later clinical trials, if any, or receive regulatory approval on a timely basis, if at all.***

Clinical drug development is expensive and can take many years to complete, and its outcome is inherently uncertain. We cannot guarantee that any clinical trials will be conducted as planned or completed on schedule, if at all, and failure can occur at any time during the preclinical study or clinical trial process as a result of inadequate study design, inadequate performance of a drug, inadequate adherence by patients or investigators to clinical trial protocols, or other factors. For example, there is not currently data available to show the impact of istaroxime on cardiogenic shock and any studies we may perform to evaluate the impacts of our KL4 Surfactant on COVID-19 is highly uncertain. In addition, we previously had to implement design changes to our Aerosol Delivery System, or ADS, to potentially mitigate the risks of device-related treatment interruptions experienced in the prototype Phase 2 ADS used in the AEROSURF phase 2b clinical trial. Despite promising preclinical or clinical results, any product candidate can unexpectedly fail at any stage of preclinical or clinical development. The historical failure rate for product candidates in our industry is high.

New drugs in later stages of clinical trials may fail to show the desired safety and efficacy traits despite having progressed through earlier clinical trials. As a result, data we obtain from our phase 2 clinical trials may not accurately predict phase 3 trial results, whether due to differences in sample size, study arms, duration, endpoints, other factors, or, in the case of AEROSURF, features of the ADS used. If either or both istaroxime or AEROSURF should fail to perform as designed in their respective phase 3 clinical programs, such failures could adversely affect the results of our clinical development program despite promising results in earlier trials. If clinical trials for any of our product candidates fail to demonstrate safety or efficacy to the satisfaction of the U.S. Food and Drug Administration, or FDA, or the equivalent regulatory authorities in other countries, the FDA or the equivalent regulatory authorities in other countries will not approve that drug and we would not be able to commercialize it, which could have a material adverse effect on our business, financial condition, results of operations, and prospects. Moreover, if we are required to cease development activities on any of our recently acquired product candidates due to adverse clinical results or otherwise, it could result in impairment of related intangible assets and goodwill on our balance sheet.

Even if later stage clinical trials are successful, regulatory authorities may question the trial design or sufficiency for approval of the endpoints we select for our clinical trials or add new requirements, such as the completion of additional studies, as conditions for obtaining approval or obtaining an indication. For the foregoing reasons, we cannot be certain that our ongoing and planned clinical trials and preclinical studies will be successful. Any safety concerns observed in any one of our clinical trials in our targeted indications could limit the prospects for regulatory approval of our product candidates in those and other indications, which could have a material adverse effect on our business, financial condition and results of operations, and result in significant additional costs and expenses, require additional time and have an adverse effect on our business, including our financial condition and results of operations.

***Delays in clinical trials are common and have many causes, and any delay could result in increased costs to us and jeopardize or delay our ability to obtain regulatory approval and commence product sales or allow for competition to emerge.***

We may experience delays in clinical trials of our product candidates or the time required to complete clinical trials for our product candidates may be longer than anticipated. Our planned clinical trials may not begin on time, have an effective design, enroll a sufficient number of patients, or be completed on schedule, if at all. Our clinical trials can be delayed for a variety of reasons, including, but not limited to:

- delays associated with a novel strain of coronavirus, or COVID-19, which will impact our healthcare systems and our trial sites ability to conduct trials to varied degrees and times. COVID-19 creates risk of interrupting availability of necessary clinical supplies, local regulatory reviews, hospital ethics committee reviews, site monitors and other necessary travel;
- our inability to raise funding necessary to initiate or continue a trial;



- delays in obtaining regulatory approval to commence a trial or reaching a consensus with regulatory authorities on trial design;
- delays in reaching an agreement with the FDA or the equivalent foreign regulatory authorities in other countries on final trial design or the scope of the development program;
- inability to develop studies that are acceptable in all markets of interest;
- inability to come to an agreement on clinical trial design or execution factors with potential development partners;
- imposition of a clinical hold following an inspection of our clinical trial operations or trial sites by the FDA or the equivalent regulatory authorities in other countries;
- failures or delays in reaching agreement on acceptable terms with prospective contract research organizations, or CROs, and clinical trial sites, the terms of which can be subject to extensive negotiation and may vary significantly among different CROs and trial sites;
- delays in obtaining contracts with clinical sites and required institutional review board, or IRB, approval at each site;
- IRBs refusing to approve, suspending or terminating the trial at an investigational site, precluding enrollment of additional subjects, or withdrawing their approval of the trial;
- competition with other studies for study patients;
- changes to clinical trial protocol;
- delays in recruiting suitable patients to participate in a trial;
- subjects choosing an alternative treatment for the indication for which we are developing our product candidates, or participating in competing clinical trials;
- delays in having subjects complete participation in a trial or return for post-treatment follow-up;
- clinical sites deviating from trial protocol or dropping out of a trial to the detriment of enrollment;
- subjects experiencing severe or unexpected adverse events;
- occurrence of serious adverse events in trials of the same class of agents conducted by other companies;
- selection of clinical endpoints that require prolonged periods of clinical observation or analysis of the resulting data;
- third-party clinical investigators losing the licenses or permits necessary to perform our clinical trials, not performing our clinical trials on our anticipated schedule or consistent with the clinical trial protocol, good clinical practices, or GCP, or other regulatory requirements;
- third-party contractors not performing data collection or analysis in a timely or accurate manner;
- third-party contractors becoming debarred or suspended or otherwise penalized by the FDA or other government or regulatory authorities for violations of regulatory requirements, in which case we may need to find a substitute contractor, and we may not be able to use some or all of the data produced by such contractors in support of our marketing applications;
- manufacturing sufficient quantities of product candidate or obtaining sufficient quantities of combination therapies for use in clinical trials or changes in the manufacturing process that may be necessary or desired;
- time required to add new clinical sites; or
- delays by our contract manufacturers to produce and deliver a sufficient supply of clinical trial materials or being ordered by the FDA or comparable foreign regulatory authorities to temporarily or permanently shut down due to violations of current good manufacturing practices, or cGMP, regulations or other applicable requirements, or infections or cross-contaminations of product candidates in the manufacturing process.

We may not reach agreement with the FDA, or a foreign regulator on the extent of our phase 3 programs, the design of any one or more of the clinical trials necessary for approval, or we may be unable to reach agreement on a single design that would permit us to conduct a common pivotal phase 3 clinical development program in all markets of interest. For example, we may not be able to design a study that is acceptable to both the FDA and European Medicines Agency, or EMA, regulators, which would cause us to limit the scope of our geographical activities or greatly increase our investment. Even if we complete the clinical trial within our anticipated time, if our results are inconclusive or non-compelling or otherwise insufficient to support a strategic or financing transaction, we potentially could be forced to limit or cease our development activities, which would have a material adverse effect on our business.

***Use of our product candidates could be associated with side effects, adverse events or other properties or safety risks, which could delay or preclude approval, cause us to suspend or discontinue clinical trials, abandon a product candidate, limit the commercial profile of an approved label or result in other significant negative consequences that could severely harm our business, prospects, operating results and financial condition.***

As is the case with pharmaceuticals generally, there may be adverse events in patients treated with our product candidates. Results of our clinical trials could reveal a high and unacceptable severity and prevalence of side effects or unexpected characteristics. Undesirable side effects caused by our product candidates could cause us or regulatory authorities to interrupt, delay or halt clinical trials and could result in a more restrictive label or the delay or denial of regulatory approval by the FDA or comparable foreign regulatory authorities. Adverse events could affect patient recruitment or the ability of enrolled patients to complete the trial or result in potential product liability claims. Any of these occurrences may harm our business, financial condition and prospects significantly.

Moreover, if our product candidates are associated with undesirable side effects in clinical trials or have characteristics that are unexpected, we may elect to abandon their development or limit their development to more narrow uses or subpopulations in which the undesirable side effects or other characteristics are less prevalent, less severe or more acceptable from a risk-benefit perspective, which may limit the commercial expectations for the product candidate if approved. We may also be required to modify our study plans based on findings in our ongoing clinical trials. Many compounds that initially showed promise in early-stage testing have later been found to cause side effects that prevented further development of the compound. In addition, regulatory authorities may draw different conclusions or require additional testing to confirm these determinations.

It is possible that as we test our product candidates in larger, longer and more extensive clinical trials, or as the use of these product candidates becomes more widespread if they receive regulatory approval, illnesses, injuries, discomforts and other adverse events that were observed in earlier trials, as well as conditions that did not occur or went undetected in previous trials, will be reported by subjects. If such side effects become known later in development or upon approval, if any, such findings may harm our business, financial condition and prospects significantly.

In addition, if one or more of our product candidates receives marketing approval, and we or others later identify undesirable side effects caused by such products, a number of potentially significant negative consequences could result, including:

- regulatory authorities may withdraw, suspend or limit approvals of such product;
- we may be required to recall a product or change the way such product is administered to patients;
- regulatory authorities may require additional warnings on the label, such as a “black box” warning or a contraindication;

- we may be required to implement a Risk Evaluation and Mitigation Strategy, or REMS, or create a medication guide outlining the risks of such side effects for distribution to patients;
- we may be required to change the way a product is distributed or administered, conduct additional clinical trials or change the labeling of a product or be required to conduct additional post-marketing studies or surveillance;
- we could be sued and held liable for harm caused to patients;
- sales of the product may decrease significantly, or the product could become less competitive; and
- our reputation may suffer.

Any of these events could prevent us from achieving or maintaining market acceptance of the particular product candidate, if approved, and could significantly harm our business, results of operations and prospects.

***Our product candidates are subject to extensive regulation and compliance, which is costly and time consuming, and such regulation may cause unanticipated delays or prevent the receipt of the required approvals to commercialize our product candidates.***

The clinical development, manufacturing, labeling, storage, record-keeping, advertising, promotion, import, export, marketing and distribution of our product candidates are subject to extensive regulation by the FDA in the U.S. and by comparable foreign regulatory authorities in foreign markets. In the U.S., we are not permitted to market our product candidates until we receive regulatory approval from the FDA. The process of obtaining regulatory approval is expensive, often takes many years following the commencement of clinical trials and can vary substantially based upon the type, complexity and novelty of the product candidates involved, as well as the target indications and patient population. Approval policies or regulations may change, and the FDA has substantial discretion in the drug approval process, including the ability to delay, limit or deny approval of a product candidate for many reasons. Despite the time and expense invested in clinical development of product candidates, regulatory approval is never guaranteed. We are not permitted to market any of our product candidates in the U.S. until we receive approval of a New Drug Application, or NDA, from the FDA.

Prior to obtaining approval to commercialize a product candidate in the U.S. or abroad, we must demonstrate with substantial evidence from adequate and well-controlled clinical trials, and to the satisfaction of the FDA or comparable foreign regulatory authorities, that such product candidates are safe and effective for their intended uses.

Results from nonclinical studies and clinical trials can be interpreted in different ways.

Even if we believe the nonclinical or clinical data for our product candidates are promising, such data may not be sufficient to support approval by the FDA and comparable foreign regulatory authorities. The FDA or comparable foreign regulatory authorities, as the case may be, may also require us to conduct additional preclinical studies or clinical trials for our product candidates either prior to or post-approval, or may object to elements of our clinical development program.

The FDA or comparable foreign regulatory authorities can delay, limit or deny approval of a product candidate for many reasons, including:

- such authorities may disagree with the design or implementation of our clinical trials;
- negative or ambiguous results from our clinical trials or results may not meet the level of statistical significance required by the FDA or comparable foreign regulatory agencies for approval;
- serious and unexpected adverse events may be experienced by participants in our clinical trials or by individuals using drugs similar to our product candidates;
- the population studied in the clinical trial may not be sufficiently broad or representative to assure safety in the full population for which we seek approval;
- such authorities may not accept clinical data from trials which are conducted at clinical facilities or in countries where the standard of care or patient characteristics are potentially different from that of the U.S.;

- we may be unable to demonstrate that a product candidate's clinical and other benefits outweigh its safety risks or the safety data base may not be large enough;
- such authorities may disagree with our interpretation of data from preclinical studies or clinical trials;
- such authorities may not agree that the data collected from clinical trials of our product candidates are acceptable or sufficient to support;
- the submission of an NDA or other submission or to obtain regulatory approval in the U.S. or elsewhere, and such authorities may impose requirements for additional preclinical studies or clinical trials;
- such authorities may disagree regarding the formulation, labeling and/or the specifications of our product candidates;
- approval may be granted only for indications that are significantly more limited than what we apply for and/or with other significant restrictions on distribution and use;
- such authorities may find deficiencies in the manufacturing processes or facilities of our third-party manufacturers with which we contract for clinical and, if approved, commercial supplies; or the approval policies;
- regulations of such authorities may significantly change in a manner rendering our or any of our potential future collaborators' clinical data insufficient for approval;
- such authorities may not accept a submission due to, among other reasons, the content or formatting of the submission; or
- delays associated with COVID-19, which may impact local regulatory reviews occurring in a timely manner and result in delays for trial and site initiations.

We may conduct clinical development in the U.S., Canada, the European Union, or EU, Latin America, and Asia Pacific regions and sell our products in the U.S. and potentially in other major markets. To accomplish this objective, we must obtain and maintain regulatory approvals and comply with regulatory requirements in each jurisdiction. To avoid the significant expense and lengthy time required to complete multiple regional clinical development programs, we expect to meet with relevant regulatory authorities. While we would prefer to design a single, global clinical development program that would satisfy the regulators in all of our target markets, there can be no assurance that our efforts will be successful. If we are unable to reach agreement with the various regulatory authorities, we may not be able to pursue regulatory approval of our products in all of our selected markets.

With respect to foreign markets, approval procedures vary among countries and, in addition to the foregoing risks, may involve additional product testing, administrative review periods and agreements with pricing authorities. In addition, events raising questions about the safety of certain marketed pharmaceuticals may result in increased cautiousness by the FDA and comparable foreign regulatory authorities in reviewing new drugs based on safety, efficacy or other regulatory considerations and may result in significant delays in obtaining regulatory approvals. Any delay in obtaining, or inability to obtain, applicable regulatory approvals would prevent us or any of our potential future collaborators from commercializing our product candidates.

Of the large number of drugs in development, only a small percentage successfully complete the FDA or foreign regulatory approval processes and are commercialized. The lengthy approval process as well as the unpredictability of future clinical trial results may result in our failing to obtain regulatory approval to market our product candidates, which would significantly harm our business, financial condition, results of operations and prospects.

***Because we have multiple product candidates in our clinical pipeline, we may expend our limited resources to pursue a particular product candidate and fail to capitalize on product candidates or indications that may be more profitable or for which there is a greater likelihood of success.***

Because we have limited financial and managerial resources, we focus on specific product candidates, indications and development programs. We also plan to conduct several clinical trials for multiple product candidates in parallel over the next several years, which may make our decision as to which product candidates to focus on more difficult. As a result, we may forgo or delay pursuit of opportunities with other product candidates that could have had greater commercial potential. Our resource allocation decisions may cause us to fail to capitalize on viable commercial products or profitable market opportunities. Our spending on current and future research and development programs and product candidates for specific indications may not yield any commercially viable products. If we do not accurately evaluate the commercial potential or target market for a particular product candidate, we may relinquish valuable rights to that product candidate through future collaborations, licenses and other similar arrangements in cases in which it would have been more advantageous for us to retain sole development and commercialization rights to such product candidate.

Additionally, we may pursue additional in-licenses or acquisitions of development-stage assets or programs, which entails additional risk to us. Identifying, selecting and acquiring promising product candidates requires substantial technical, financial and human resources expertise. Efforts to do so may not result in the actual acquisition or license of a particular product candidate, potentially resulting in a diversion of our management's time and the expenditure of our resources with no resulting benefit. For example, if we are unable to identify programs that ultimately result in approved products, we may spend material amounts of our capital and other resources evaluating, acquiring and developing products that ultimately do not provide a return on our investment.

***Even though some of our product candidates have Fast Track designation, the FDA may not approve them at all or any sooner than other product candidates that do not have Fast Track designation.***

We have received Fast Track designation from the FDA for AEROSURF for the treatment of respiratory distress syndrome, or RDS, in infants and for istaroxime for the treatment of acute heart failure, or AHF. Fast Track designation does not ensure that we will receive marketing approval or that approval will be granted within any particular timeframe. We may not experience a faster development, regulatory review or approval process with Fast Track designation compared to conventional FDA procedures. Additionally, the FDA may withdraw Fast Track designation, for reasons such as it comes to believe a drug candidate no longer adequately addresses an unmet medical need. Fast Track designation alone does not guarantee qualification for the FDA's priority review procedures. If we seek Fast Track designation for other product candidates, we may not receive such a designation from the FDA.

***Although we may pursue expedited regulatory programs for a product candidate or an indication, it may not qualify for expedited development or, if it does qualify for expedited development, it may not actually lead to a faster development or regulatory review or approval process.***

Although we have received Fast Track designation for certain of our product candidates, we believe there may be an opportunity to expedite the development of other product candidates or indications through one or more of the FDA's expedited programs, such as fast track, breakthrough therapy or priority review, we cannot be assured that any of our product candidates or indications will qualify for such programs.

For example, a drug may be eligible for designation as a breakthrough therapy if the drug is intended, alone or in combination with one or more other drugs, to treat a serious or life-threatening condition and preliminary clinical evidence indicates that the drug may demonstrate substantial improvement over existing therapies on one or more clinically significant endpoints. Although breakthrough therapy designation or access to any other expedited program may expedite the development or approval process, it does not change the standards for approval. If we apply for breakthrough therapy designation or any other expedited program for our product candidates, the FDA may determine that our proposed target indication or other aspects of our clinical development plans do not qualify for such expedited program. Even if we are successful in obtaining a breakthrough therapy designation or access to any other expedited program, we may not experience faster development timelines or achieve faster review or approval compared to conventional FDA procedures. Access to an expedited program may also be withdrawn by the FDA if it believes that the designation is no longer supported by data from our clinical development program. Additionally, qualification for any expedited program does not ensure that we will ultimately obtain regulatory approval for such product candidate.

***We may not be able to obtain or maintain Orphan Drug exclusivity for our product candidates.***

Regulatory authorities in some jurisdictions, including the U.S. and Europe, may designate drugs for relatively small patient populations as Orphan Drugs. In the U.S., Orphan Drug designation entitles a party to financial incentives such as tax advantages and user-fee waivers. In addition, if a product candidate that has Orphan Drug designation subsequently receives the first FDA approval for the disease for which it has such designation, the product is entitled to Orphan Drug exclusivity, which means that the FDA may not approve any other applications, including an NDA, to market the same drug for the same indication for seven years, except in limited circumstances, including if the FDA concludes that the later drug is clinically superior to the approved drug. A drug is clinically superior if it is safer, more effective, or makes a major contribution to patient care. The FDA has granted Orphan Drug designation for our (i) KL4 surfactant (lucinactant) for the treatment of RDS in premature infants, (ii) our KL4 surfactant for the prevention and treatment of BPD in premature infants, (iii) our KL4 surfactant for the treatment of acute respiratory distress syndrome, or ARDS, in adults, and (iv) our KL4 surfactant for the treatment of cystic fibrosis, or CF.

If we obtain Orphan Drug exclusivity, we may lose such exclusivity if the FDA or the European Commission, or EC, determines that the request for designation was materially defective or if we are unable to assure sufficient quantity of the drug to meet the needs of patients with the rare disease or condition. Moreover, Orphan Drug exclusivity may not effectively protect our product candidates from competition because different drugs can be approved for the same condition. Even after an Orphan Drug is approved, the FDA or comparable foreign regulatory authority can subsequently approve the same drug for the same condition if such regulatory authority concludes that the later drug is clinically superior if it is shown to be safer, more effective or makes a major contribution to patient care. Orphan drug designation neither shortens the development time or regulatory review time of a drug nor gives the drug any advantage in the regulatory review or approval process.

***Interim, topline and preliminary data from our clinical trials that we announce or publish from time to time may change as more patient data become available and are subject to audit and verification procedures that could result in material changes in the final data.***

From time to time, we may publicly disclose preliminary or topline or data from our clinical studies, which is based on a preliminary analysis of then-available data, and the results and related findings and conclusions are subject to change following a more comprehensive review of the data related to the particular study or trial. We also make assumptions, estimations, calculations and conclusions as part of our analyses of data, and we may not have received or had the opportunity to fully and carefully evaluate all data. As a result, the topline results that we report may differ from future results of the same studies, or different conclusions or considerations may qualify such results, once additional data have been received and fully evaluated. Topline data also remain subject to audit and verification procedures that may result in the final data being materially different from the preliminary data we previously published. As a result, topline data should be viewed with caution until the final data are available. From time to time, we may also disclose interim data from our clinical studies. Interim data from clinical trials that we may complete are subject to the risk that one or more of the clinical outcomes may materially change as patient enrollment continues and more patient data become available. Adverse differences between preliminary or interim data and final data could significantly harm our business prospects.

***Even if we receive regulatory approval for any product candidates, we will be subject to ongoing regulatory obligations and continued regulatory review, which may result in significant additional expense. Additionally, our product candidates, if approved, could be subject to labeling and other restrictions on marketing or withdrawal from the market, and we may be subject to penalties if we fail to comply with regulatory requirements or if we experience unanticipated problems with our product candidates, when and if any of them are approved.***

Following potential approval of any our product candidates, the FDA may impose significant restrictions on a product's indicated uses or other aspects of the directions for use or marketing or impose ongoing requirements for potentially costly and time-consuming post-approval studies, post-market surveillance or clinical trials to monitor the safety and efficacy of the product. The FDA may also require a REMS as a condition of approval of our product candidates, which could include requirements for a medication guide, physician communication plans or additional elements to ensure safe use, such as restricted distribution methods, patient registries and other risk minimization tools. In addition, if the FDA or a comparable foreign regulatory authority approves our product candidates, the manufacturing processes, labeling, packaging, distribution, adverse event reporting, storage, advertising, promotion, import, export and recordkeeping for our products will be subject to extensive and ongoing regulatory requirements. These requirements include submissions of safety and other post-marketing information and reports, registration, as well as continued compliance with cGMPs and GCP requirements for any clinical trials that we conduct post-approval. Later discovery of previously unknown problems with our products, including adverse events of unanticipated severity or frequency, or with our third-party manufacturers or manufacturing processes, or failure to comply with regulatory requirements, may result in, among other things:

- restrictions on the marketing or manufacturing of our products, withdrawal of the product from the market or voluntary or mandatory product recalls;

- restrictions on product distribution or use, or requirements to conduct post-marketing studies or clinical trials;
- fines, restitutions, disgorgement of profits or revenues, warning letters, untitled letters or holds on clinical trials;
- refusal by the FDA to approve pending applications or supplements to approved applications filed by us or suspension or revocation of approvals;
- product seizure or detention, or refusal to permit the import or export of our products; and
- injunctions or the imposition of civil or criminal penalties.

The occurrence of any event or penalty described above may inhibit our ability to commercialize our product candidates and generate revenue and could require us to expend significant time and resources in response and could generate negative publicity.

In addition, if any of our product candidates is approved, our product labeling, advertising and promotion will be subject to regulatory requirements and continuing regulatory review. The FDA strictly regulates the promotional claims that may be made about drug products. In particular, a product may not be promoted for uses that are not approved by the FDA as reflected in the product's approved labeling. If we receive marketing approval for a product candidate, physicians may nevertheless prescribe it to their patients in a manner that is inconsistent with the approved label. If we are found to have promoted such off-label uses, we may become subject to significant liability. The FDA and other agencies actively enforce the laws and regulations prohibiting the promotion of off-label uses, and a company that is found to have improperly promoted off-label uses may be subject to significant sanctions. The federal government has levied large civil and criminal fines against companies for alleged improper promotion and has enjoined several companies from engaging in off-label promotion. The FDA has also requested that companies enter into consent decrees or permanent injunctions under which specified promotional conduct is changed or curtailed.

The FDA's and other regulatory authorities' policies may change and additional government regulations may be enacted that could prevent, limit or delay regulatory approval of our product candidates. If we are slow or unable to adapt to changes in existing requirements or the adoption of new requirements or policies, or if we are not able to maintain regulatory compliance, we may lose any marketing approval that we may have obtained and we may not achieve or sustain profitability.

***We are currently conducting, and may in the future conduct, certain of our clinical trials for our product candidates at clinical sites located in the U.S. and outside of the U.S. If the FDA and other foreign equivalents raise concerns about certain of the clinical sites based on location and regulatory environment, they may not accept data from such trials, in which case our development plans will be delayed, which could materially harm our business.***

We are currently conducting, and may in the future conduct one or more of our clinical trials for our product candidates at clinical sites located in the U.S. and outside of the U.S. Although the FDA may accept data from clinical trials conducted outside the U.S., acceptance of this data may be subject to certain conditions imposed by the FDA. For example, the FDA requires the clinical trial to have been conducted in accordance with GCPs, and the FDA must be able to validate the data from the clinical trial through an onsite inspection if it deems such inspection necessary. There can be no assurance the FDA will accept data from clinical trials conducted outside of the U.S. If the FDA does not accept data from our clinical trials of our product candidates, it would likely result in the need for additional clinical trials, which would be costly and time consuming and delay or permanently halt our development of our product candidates.

***If we fail to obtain and maintain regulatory approval in foreign jurisdictions, our market opportunities will be limited.***

In order to market our product candidates in the EU or other foreign jurisdictions, we must obtain and maintain separate regulatory approvals and comply with numerous and varying regulatory requirements. The approval procedure varies from country to country and can involve additional testing. The time required to obtain approval abroad may be longer than the time required to obtain FDA clearance or approval. Foreign regulatory approval processes include many of the risks associated with obtaining FDA clearance or approval and we may not obtain foreign regulatory approvals on a timely basis, if at all. FDA clearance or approval does not ensure approval by regulatory authorities in other countries, and approval by one foreign regulatory authority does not ensure approval by regulatory authorities in other foreign countries. However, the failure to obtain clearance or approval in one jurisdiction may have a negative impact on our ability to obtain clearance or approval elsewhere. If we do not obtain or maintain necessary approvals to commercialize our products in markets outside the U.S., it would negatively affect our overall market penetration.

***If the FDA or other applicable regulatory authorities approve generic products with claims that compete with our product candidates, it could reduce our sales of our product candidates if approved.***

In the U.S., after an NDA is approved, the product covered thereby becomes a “listed drug” which can, in turn, be cited by potential competitors in support of approval of an abbreviated NDA, or ANDA. The Federal Food, Drug, and Cosmetic Act, or the FDC Act, FDA regulations and other applicable regulations and policies provide incentives to manufacturers to create modified, non-infringing versions of a drug to facilitate the approval of an ANDA or other application for generic substitutes. These manufacturers might only be required to conduct a relatively inexpensive study to show that their product has the same active ingredients, dosage form, strength, route of administration, and conditions of use, or product labeling, as our product candidates and that the generic product is absorbed in the body at the same rate and to the same extent as, or is bioequivalent to, our product candidates. These generic equivalents would be significantly less costly than ours to bring to market and companies that produce generic equivalents are generally able to offer their products at lower prices. Thus, after the introduction of a generic competitor, a significant percentage of the sales of any branded product are typically lost to the generic product. Accordingly, competition from generic equivalents to our product candidates would substantially limit our ability to generate revenues and therefore to obtain a return on the investments we have made in our product candidates.

***Even if we receive regulatory approval for any of our product candidates, we may not be able to successfully commercialize the product and the revenue that we generate from its sales, if any, may be limited.***

If approved for marketing, the commercial success of our product candidates will depend upon each product’s acceptance by the medical community, including physicians, patients and health care payors. The degree of market acceptance for any of our product candidates will depend on a number of factors, including:

- demonstration of clinical safety and efficacy;
- relative convenience, dosing burden and ease of administration;
- the prevalence and severity of any adverse effects;
- the willingness of physicians to prescribe our product candidates, and the target patient population to try new therapies;
- efficacy of our product candidates compared to competing products;
- our ability to obtain and maintain sufficient third-party coverage or reimbursement from government health care programs, including Medicare and Medicaid, global government payors, private health insurers and other third-party payors or to receive the necessary pricing approvals from government bodies regulating the pricing and usage of therapeutics;
- the willingness of patients to pay out-of-pocket in the absence of third-party coverage or reimbursement or government pricing approvals;
- government health care payor imposed mandatory pricing discounting and reductions;
- delays in achieving hospital formulary acceptance or limitations of use that are more narrow than the approved label;
- the introduction of any new products that may in the future become available targeting indications for which our product candidates may be approved;
- new procedures or therapies that may reduce the incidences of any of the indications in which our product candidates may show utility;
- pricing and cost-effectiveness;



- the inclusion or omission of our product candidates in applicable therapeutic guidelines;
- the effectiveness of our own or any future collaborators' sales and marketing strategies; and
- limitations or warnings contained in approved labeling from regulatory authorities.

If any of our product candidates are approved, but do not achieve an adequate level of acceptance by physicians, health care payors, and patients, we may not generate sufficient revenue and we may not be able to achieve or sustain profitability. Our efforts to educate the medical community and third-party payors on the benefits of our product candidates may require significant resources and may never be successful.

In addition, even if we obtain regulatory approvals, the timing or scope of any approvals may prohibit or reduce our ability to commercialize our product candidates successfully. For example, if the approval process takes too long, we may miss market opportunities and give other companies the ability to develop competing products or establish market dominance. Any regulatory approval we ultimately obtain may be limited or subject to restrictions or post-approval commitments that render our product candidates not commercially viable. For example, regulatory authorities may approve any of our product candidates for fewer or more limited indications than we request, may grant approval contingent on the performance of costly post-marketing clinical trials, or may approve any of our product candidates with a label that does not include the labeling claims necessary or desirable for the successful commercialization for that indication. Further, the FDA or comparable foreign regulatory authorities may place conditions on approvals or require risk management plans or a REMS to assure the safe use of the drug. If the FDA concludes a REMS is needed, the sponsor of the NDA must submit a proposed REMS and, if a REMS is required, the FDA will not approve the NDA without an approved REMS. A REMS could include medication guides, physician communication plans, or elements to assure safe use, such as restricted distribution methods, patient registries and other risk minimization tools. The FDA may also require a REMS for an approved product when new safety information emerges. Any of these limitations on approval or marketing could restrict the commercial promotion, distribution, prescription or dispensing of our product candidates. Moreover, product approvals may be withdrawn for non-compliance with regulatory standards or if problems occur following the initial marketing of the product. Any of the foregoing scenarios could materially harm the commercial success of our product candidates.

***We currently have no sales and marketing organization. If we are unable to establish satisfactory sales and marketing capabilities or secure a sales and marketing partner, we may not successfully commercialize any of our product candidates.***

We may not be able to enter into collaboration agreements on terms acceptable to us or at all. In addition, even if we enter into such relationships, we may have limited or no control over the sales, marketing and distribution activities of these third parties. Our future revenues may depend heavily on the success of the efforts of these third parties. If we elect to establish a sales and marketing infrastructure, we may not realize a positive return on this investment. In addition, we will have to compete with established and well-funded pharmaceutical and biotechnology companies to recruit, hire, train and retain sales and marketing personnel. Factors that may inhibit our efforts to commercialize our product candidates without strategic partners or licensees include:

- the inability of sales personnel to obtain access to or educate and appropriately persuade adequate numbers of physicians to prescribe any of our product candidates;
- inability to obtain a competitive share of voice and frequency of meeting with physicians against multiple, larger competitors;
- unforeseen costs and expenses associated with creating an independent sales and marketing organization; and
- inability to control or influence partner sales and marketing personnel or their prioritization of promotion of our products.

***Failure of our new ADS to perform as intended for our AEROSURF phase 2 bridging study and phase 3 development activities and, if approved, initial commercial activities, would have a material adverse effect on our efforts to develop AEROSURF as well as our other aerosolized KL4 surfactant products, and our business strategy.***

Our development activities are subject to certain risks and uncertainties, including, without limitation:

- the new ADS for use in our phase 2 bridge study that is intended for use in our remaining AEROSURF development activities including our planned phase 3 program, may not achieve acceptable levels of efficiency, consistent performance, reliability and may not be cost appropriate for commercial activities;
- we will require access to sophisticated engineering capabilities. We have our own medical device engineering staff and we have worked with Battelle Memorial Institute, or Battelle, on certain development initiatives. We currently are working with Mack Molding Company, or Mack, to complete a technology transfer of our device manufacturing process and expect to manufacture with Mack a sufficient number of ADS to support our remaining development activities. If we are unable to identify design engineers and medical device experts to support our continued development efforts in the future, including, potentially, for commercial use and later versions of the new ADS for use in our phase 3 program, it would have a material adverse effect on our business strategy and impair our ability to commercialize or develop AEROSURF or other aerosolized KL4 surfactant products; if we are unable to secure the necessary medical device development expertise to support our development program, this could impair our ability to commercialize or develop AEROSURF or other aerosolized KL4 surfactant products;
- the ADS may perform to specifications in the bench setting and internal tests, however, at clinical sites in our phase 2 bridge study or the phase 3 program with multiple operators of the device, we may experience an unanticipated issue with performance that could have a negative effect on trial outcomes; and
- even if the ADS performs adequately in the bridging study, additional development to the ADS platform may be required before phase 3 and commercialization.

The realization of any of the foregoing risks would have a material adverse effect on our AEROSURF development programs and our business.

***The successful commercialization of our product candidates, if approved, will depend in part on the extent to which governmental authorities and health insurers establish coverage, adequate reimbursement levels and favorable pricing policies. Failure to obtain or maintain coverage and adequate reimbursement for our products could limit our ability to market those products and decrease our ability to generate revenue.***

The availability of coverage and the adequacy of reimbursement by governmental healthcare programs such as Medicare and Medicaid, private health insurers and other third-party payors are essential for most patients to be able to afford prescription medications such as our product candidates, if approved. Our ability to achieve coverage and acceptable levels of reimbursement for our products by third-party payors will have an effect on our ability to successfully commercialize those products. Even if we obtain coverage for a given product by a third-party payor, the resulting reimbursement payment rates may not be adequate or may require co-payments that patients find unacceptably high. We cannot be sure that coverage and reimbursement in the U.S., the EU or elsewhere will be available for any product that we may develop, and any reimbursement that may become available may be decreased or eliminated in the future.

Third-party payors increasingly are challenging prices charged for pharmaceutical products and services, and many third-party payors may refuse to provide coverage and reimbursement for particular drugs when an equivalent generic drug or a less expensive therapy is available. It is possible that a third-party payor may consider our products as substitutable and only offer to reimburse patients for the less expensive product. Even if we are successful in demonstrating improved efficacy or improved convenience of administration with our products, pricing of existing drugs may limit the amount we will be able to charge for our products. These payors may deny or revoke the reimbursement status of a given product or establish prices for new or existing marketed products at levels that are too low to enable us to realize an appropriate return on our investment in product development. If reimbursement is not available or is available only at limited levels, we may not be able to successfully commercialize our products and may not be able to obtain a satisfactory financial return on products that we may develop.

There is significant uncertainty related to third-party payor coverage and reimbursement of newly approved products. In the U.S., third-party payors, including private and governmental payors, such as the Medicare and Medicaid programs, play an important role in determining the extent to which new drugs will be covered. Some third-party payors may require pre-approval of coverage for new or innovative devices or drug therapies before they will reimburse healthcare providers who use such therapies. It is difficult to predict at this time what third-party payors will decide with respect to the coverage and reimbursement for our products.

Obtaining and maintaining reimbursement status is time consuming, costly and uncertain. The Medicare and Medicaid programs increasingly are used as models for how private payors and other governmental payors develop their coverage and reimbursement policies for drugs. However, no uniform policy for coverage and reimbursement for products exists among third-party payors in the U.S. Therefore, coverage and reimbursement for products can differ significantly from payor to payor. As a result, the coverage determination process is often a time consuming and costly process that will require us to provide scientific and clinical support for the use of our products to each payor separately, with no assurance that coverage and adequate reimbursement will be applied consistently or obtained in the first instance. Furthermore, rules and regulations regarding reimbursement change frequently, in some cases at short notice, and we believe that changes in these rules and regulations are likely.

Outside the U.S., international operations are generally subject to extensive governmental price controls and other market regulations, and we believe the increasing emphasis on cost-containment initiatives in Europe and other countries has and will continue to put pressure on the pricing and usage of our products. In many countries, the prices of medical products are subject to varying price control mechanisms as part of national health systems. Additional foreign price controls, discounts or other changes in pricing regulation could restrict the amount that we are able to charge for our products. Accordingly, in markets outside the U.S., the reimbursement for our products may be reduced and experience continual mandatory price reductions compared with the U.S. and may be insufficient to generate commercially reasonable revenue and profits.

Moreover, increasing efforts by governmental and third-party payors in the U.S. and abroad to cap or reduce healthcare costs may cause such organizations to limit both coverage and the level of reimbursement for newly approved products and, as a result, they may not cover or provide adequate payment for our products. We expect to experience pricing pressures in connection with the sale of any of our products due to the trend toward managed healthcare, the increasing influence of health maintenance organizations and additional legislative changes. The downward pressure on healthcare costs in general, particularly prescription drugs and surgical procedures and other treatments, has become very intense. As a result, increasingly high barriers are being erected to the entry of new products.

### **Risks Related to Our Reliance on Third Parties**

***We rely on third parties to conduct many of our preclinical studies and clinical trials. Any failure by a third party to conduct the clinical trials according to GCPs and other requirements and in a timely manner may delay or prevent our ability to seek or obtain regulatory approval for or commercialize our product candidates.***

We are dependent on third parties to conduct our clinical trials and preclinical studies and preclinical studies for our other development programs. Specifically, we have used and relied on, and intend to continue to use and rely on, medical institutions, clinical investigators, CROs and consultants to conduct our clinical trials in accordance with our clinical protocols and regulatory requirements. These CROs, investigators and other third parties play a significant role in the conduct and timing of these trials and subsequent collection and analysis of data. While we have agreements governing the activities of our third-party contractors, we have limited influence over their actual performance. Nevertheless, we are responsible for ensuring that each of our clinical trials is conducted in accordance with the applicable protocol and legal, regulatory and scientific standards, and our reliance on the CROs and other third parties does not relieve us of our regulatory responsibilities. We and any third-party that we rely upon are required to comply with GCP requirements, which are regulations and guidelines enforced by the FDA and comparable foreign regulatory authorities for all of our product candidates in clinical development. Regulatory authorities enforce these GCPs through periodic inspections of trial sponsors, principal investigators and trial sites. If we or any third-party that we rely on or trial sites fail to comply with applicable GCPs, the clinical data generated in our clinical trials may be deemed unreliable, and the FDA or comparable foreign regulatory authorities may require us to perform additional clinical trials before approving our marketing applications. In addition, our clinical trials must be conducted with product produced under cGMP and/or Quality System Regulation, or QSR requirements. Our failure to comply with these regulations may require us to repeat clinical trials, which would delay the regulatory approval process.

There is no guarantee that any such CROs, investigators or other third parties will devote adequate time and resources to such trials or perform as contractually required. If any of these third parties fail to meet expected deadlines, adhere to our clinical protocols or meet regulatory requirements, or otherwise performs in a substandard manner, our clinical trials may be extended, delayed or terminated. In addition, many of the third parties with whom we contract may also have relationships with other commercial entities, including our competitors, for whom they may also be conducting clinical trials or other drug development activities that could harm our competitive position. In addition, principal investigators for our clinical trials may serve as scientific advisors or consultants to us from time to time and may receive cash or equity compensation in connection with such services. If these relationships and any related compensation result in perceived or actual conflicts of interest, or the FDA concludes that the financial relationship may have affected the interpretation of the study, the integrity of the data generated at the applicable clinical trial site may be questioned and the utility of the clinical trial itself may be jeopardized, which could result in the delay or rejection of any NDA we submit by the FDA. Any such delay or rejection could prevent us from commercializing our product candidates.

If any of our relationships with these third parties terminate, we may not be able to enter into arrangements with alternative third parties or do so on commercially reasonable terms. Switching or adding additional CROs, investigators and other third parties involves additional costs and requires management time and focus. In addition, there is a natural transition period when a new CRO commences work. As a result, delays occur, which can materially impact our ability to meet our desired clinical development timelines. Though we carefully manage our relationships with our CROs, investigators and other third parties, there can be no assurance that we will not encounter challenges or delays in the future or that these delays or challenges will not have a material adverse impact on our business, financial condition and prospects.

***We currently do not have back-up facilities for our contract manufacturing organizations, or CMOs, our suppliers of active pharmaceutical ingredients, or APIs, our third-party analytical testing and other materials. If the parties we depend on for supplying our APIs and materials, as well as analytical testing and manufacturing-related services do not supply these products and services in a timely manner, it may delay or impair our ability to execute our development plans for our current and potential pipeline products. Such delays could adversely impact our operations and financial condition.***

In most cases, we are dependent upon a single supplier to provide all of our requirements for our APIs and materials or one or more of our drug product subcomponents, components and subassemblies, analytical testing and manufacturing-related services. While we are working on second source manufacturing, we rely on single CMOs to manufacture drug product that meets appropriate content, quality and stability standards for use in preclinical programs and clinical trials. If we do not maintain these manufacturing and service relationships that are important to us and are not able to identify replacement suppliers, vendors and laboratories, or develop our own manufacturing capabilities, our ability to obtain regulatory approval for our products could be impaired or delayed and our costs could substantially increase. For example, we are currently discussing the wind down of our AEROSURF drug product manufacturing agreement and we are seeking to develop a new process for the manufacture of our API KL4. These CMOs have indicated a willingness to continue manufacturing on an interim basis to build drug product and API inventory to support our planned development efforts, but there can be no guarantee that they will remain willing or able to do so and thus are working with others as a replacement CMO.

We may be unable to identify additional manufacturers with whom we might establish appropriate arrangements on acceptable terms, if at all, because the number of potential CMOs is limited. Even if we are able to find replacement manufacturers, suppliers, vendors and service providers when needed, we may not be able to enter into agreements with them on terms and conditions favorable to us or there could be a substantial delay before such manufacturer, vendor or supplier, or a related new facility is properly qualified and registered with the FDA or other foreign regulatory authorities. A new manufacturer would have to be educated in, or develop substantially equivalent processes for, production of our approved products after receipt of FDA approval. To qualify and receive regulatory approval for a new manufacturer could take as long as two years. The process of changing a supplier could have an adverse impact on our current clinical development programs if supplies of drug substances or materials on hand are insufficient to satisfy demand. Such delays could have a material adverse effect on our development activities and our business.

***We plan to rely on third parties to manufacture our drug products and manufacture and assemble our medical devices, which exposes us to risks that may affect our ability to maintain supplies of our clinical materials and could potentially delay our research and development activities, as well as eventual regulatory approval and commercialization of our drug product candidates.***

Our manufacturing strategy includes manufacturing our drug products and our ADS, using CMOs.

We do not own or operate manufacturing facilities and have no plans to build our own clinical or commercial scale manufacturing capabilities. We rely, and expect to continue to rely, on third parties for the manufacture of our product candidates and related raw materials for clinical and preclinical development, as well as for commercial manufacture if any of our product candidates receive marketing approval. The facilities used by third-party manufacturers to manufacture our product candidates must be approved by the FDA pursuant to inspections that will be conducted after we submit an NDA to the FDA. We do not control the manufacturing process of, and are completely dependent on, third-party manufacturers for compliance with cGMP requirements for manufacture of drug products and QSR requirements for the manufacture of medical devices and other government regulations and corresponding international standards. If these third-party manufacturers cannot successfully manufacture material that conforms to our specifications and the strict regulatory requirements of the FDA or others, including requirements related to the manufacturing of high potency compounds, they will not be able to secure and/or maintain regulatory approval for their manufacturing facilities. In addition, we have no control over the ability of third-party manufacturers to maintain adequate quality control, quality assurance and qualified personnel and the third-party manufacturers may fail to manufacture our product according to our schedule or at all. If the FDA or a comparable foreign regulatory authority does not approve these facilities for the manufacture of our product candidates or if it withdraws any such approval in the future, we may need to find alternative manufacturing facilities, which would significantly impact our ability to develop, obtain regulatory approval for or market our product candidates, if approved. Our failure, or the failure of our third-party manufacturers, to comply with applicable regulations could result in sanctions being imposed on us, including clinical holds, fines, injunctions, civil penalties, delays, suspension or withdrawal of approvals, seizures or recalls of product candidates or products, operating restrictions and criminal prosecutions, any of which could significantly and adversely affect supplies of our products. In addition, any performance failure on the part of our existing or future manufacturers could delay clinical development or marketing approval, and any related remedial measures may be costly or time consuming to implement. We do not currently have arrangements in place for redundant supply or a second source for all required raw materials used in the manufacture of our product candidates. If our current third-party manufacturers cannot perform as agreed, we may be required to replace such manufacturers and we may be unable to replace them on a timely basis or at all.

Our or a third party's failure to execute on our manufacturing requirements, technology transfers of our manufacturing and our planned future reliance on CMOs exposes us, among other things, to the following risks:

- an inability to initiate or continue clinical trials of istaroxime or AEROSURF or any future product candidates under development;
- subjecting third-party manufacturing facilities or our manufacturing facilities to additional inspections by regulatory authorities;
- we may implement a plan to execute a technology transfer of our manufacturing process to a CMO and, after investing significant time and resources, learn that the CMO we chose is unable to successfully complete the technology transfer and thereafter manufacture our products in accordance with our plan;
- CMOs might be unable to manufacture our products in the volume and to our specifications to meet our clinical and commercial needs, or we may have difficulty scheduling the production of drug product and devices in a timely manner to meet our timing requirements;
- if we desire to make our drug products and/or devices available outside the U.S. for clinical or commercial purposes, our CMOs would become subject to, and may not be able to comply with, corresponding manufacturing and quality system regulations or standards of the various foreign regulators having jurisdiction over our activities abroad. Such failures (such as in-country quality testing) could result in not only a loss of approved supply to that country, but a total loss of a lot (or lots) of materials globally and could restrict our ability to execute our business strategies;
- we may have difficulty implementing changes or necessary modifications to our manufacturing processes that may be required by the FDA or foreign regulator or our CMO, if, for example, such changes would burden our CMO or otherwise disrupt operations, or our CMO could impose significant financial terms to implement any such change that could adversely affect our business. We may fail to adequately develop new manufacturing processes. Failure to achieve such required changes or modifications could delay or prevent our gaining regulatory approval for our product candidates or prevent us from continuing to market our approved products, which would have a material adverse effect on our business, financial condition and operations;
- we may fail to adequately scale manufacturing to achieve our objectives for cost of goods and profit margins;
- we may be subject to disputes arising with respect to the ownership of rights to any technology developed with third parties; and
- we may be subject to the misappropriation of our proprietary information, including our trade secrets and know-how.

Each of the foregoing risks and others could delay our development programs and, if approved, commercial manufacturing plans, limit our ability to maintain continuity of supply for our approved products, delay or impair the approval, if any, of our product candidates by the FDA, or result in higher costs or deprive us of potential product revenues.

In addition, our product candidates and any products that we may develop may compete with other product candidates and products for access to manufacturing facilities. There are a limited number of manufacturers that operate under cGMP regulations and that might be capable of manufacturing for us.

Our current and anticipated future dependence upon others for the manufacture of our product candidates or products may adversely affect our future profit margin and our ability to commercialize any products that receive marketing approval on a timely and competitive basis.

***Our ability to manufacture our product candidates depends upon receiving adequate supplies and related services, which may be difficult or uneconomical to procure.***

Supply chain or manufacturing interruptions could negatively impact our operations and financial performance. In connection with our drug product manufacturing activities, we own certain specialized manufacturing equipment installed at our CMO. However, we do not have fully-redundant systems and equipment to respond promptly in the event of a significant loss at a CMO's manufacturing operations. Under certain conditions, we may be unable to produce our drug product and medical devices at the required volumes or to appropriate standards, if at all. The supply of any of our manufacturing materials may be interrupted because of supply shortages, poor vendor performance or other events outside our control, which may require us, among other things, to identify alternate vendors, which could involve a lengthy process, and result in increased expenses.

### **Risks Related to our Business and Operations**

***Our operating results may fluctuate significantly, which makes our future operating results difficult to predict and could cause our operating results to fall below expectations or any guidance we may provide.***

Our quarterly and annual operating results may fluctuate significantly, which makes it difficult for us to predict our future operating results.

These fluctuations may occur due to a variety of factors, many of which are outside of our control, including, but not limited to:

- the timing and cost of, and level of investment in, research, development, regulatory approval and commercialization activities relating to our product candidates, which may change from time to time;
- the timing and success or failure of preclinical studies or clinical trials for our product candidates or competing product candidates, or any other change in the competitive landscape of our industry, including consolidation among our competitors or partners;
- the level of investment funding we are able to achieve and apply to our development operations;
- future changes or changes in requirements to achieve regulatory approval;
- coverage and reimbursement policies with respect to our product candidates, if approved, and potential future drugs that compete with our products;
- the cost of manufacturing our product candidates, which may vary depending on the quantity of production and the terms of our agreements with third-party manufacturers;
- the timing and amount of the milestone or other payments we must make to the licensors and other third parties from whom we have in-licensed our acquired our product candidates;
- expenditures that we may incur to acquire, develop or commercialize additional product candidates and technologies;

- our allocation of resources and ability to raise additional capital;
- the capital markets stability and openness to investing;
- delays associated with COVID-19 which will impact our healthcare systems and our trial sites ability to conduct trials to varied degrees and times;
- the level of demand for any approved products, which may vary significantly; and
- future accounting pronouncements or changes in our accounting policies.

The cumulative effects of these factors could result in large fluctuations and unpredictability in our quarterly and annual operating results. As a result, comparing our operating results on a period-to-period basis may not be meaningful. Investors should not rely on our past results as an indication of our future performance.

This variability and unpredictability could also result in our failing to meet the expectations of industry or financial analysts or investors for any period. If our revenue or operating results fall below the expectations of analysts or investors or below any forecasts we may provide to the market, or if the forecasts we provide to the market are below the expectations of analysts or investors, the price of our common stock could decline substantially. Such a stock price decline could occur even when we have met any previously publicly stated revenue or earnings guidance we may provide.

***Our industry is highly competitive, and we have less capital and resources than many of our competitors, which may give them an advantage in developing and marketing products similar to ours or make our products obsolete.***

Our industry is highly competitive and subject to rapid technological innovation and evolving industry standards. We compete with numerous existing companies in many ways. We need to successfully introduce new products to achieve our strategic business objectives. If we cannot successfully introduce new products, adapt to changing technologies or anticipate changes in our current and potential customers' requirements, our products may become obsolete and our business could suffer.

Many of our competitors' companies have substantially greater research and development, manufacturing, marketing, financial, and technology personnel and managerial resources than we have. In addition, many of these competitors, either alone or with their collaborative partners, have significantly greater experience than we do in developing products, preclinical testing and human clinical trials management, obtaining FDA approval and other regulatory approvals, and manufacturing and marketing products. Accordingly, our competitors may succeed in receiving FDA or foreign regulatory approval or commercializing products and obtaining patent protection before us. Our competitors may successfully secure regulatory exclusivities in various markets, which could have the effect of barring us or limiting our ability to market our products in such markets. In addition, developments by our competitors may render our drug product candidates obsolete or noncompetitive.

We also face, and will continue to face, competition from colleges, universities, governmental agencies and other public and private research organizations. These competitive forces frequently and aggressively seek patent protection and licensing arrangements to collect royalties for technologies that they develop. Some of these technologies may compete directly with the technologies that we are developing. These institutions will also compete with us in recruiting highly qualified scientific personnel.

***The political and healthcare policy environment is becoming more challenging for pharmaceutical companies and medical device manufacturers and may adversely affect our business.***

Political, economic and regulatory influences globally are subjecting the healthcare industry to potential fundamental challenges that could substantially affect our business and results of operations. Government and private sector initiatives to limit the growth of healthcare costs, including price regulation, competitive pricing, coverage and payment policies, comparative effectiveness of therapies, technology assessments and managed-care arrangements, are continuing to arise in many countries where we potentially may seek to do business, including the U.S. There is increasing pressure on pricing, reimbursement and demands for value-based data to gain access to patients and healthcare funds globally. This may increase the costs of development, risks of commercialization and overall value of the opportunity.



Given the increasing uncertainty in the healthcare and pharmaceutical industries as well as increased regulatory scrutiny on foreign investment, capital investment in our industry and our ability to attract capital investment is becoming more challenging. This trend, if continued, may restrict or impair our ability to gain necessary funding for continued development and, if approved, commercialization of our products.

We also cannot predict the likelihood, nature or extent of government regulation that may arise from future legislation or administrative or executive action, either in the U.S. or abroad. For example, certain policies of the current administration may impact our business and industry. The current administration has taken several executive actions, including the issuance of a number of Executive Orders, that could impose significant burdens on, or otherwise materially delay, the FDA's ability to engage in routine regulatory and oversight activities such as implementing statutes through rulemaking, issuance of guidance, and review and approval of marketing applications. It is difficult to predict how these executive actions, including the Executive Orders, will be implemented, and the extent to which they will affect the FDA's ability to exercise its regulatory authority. If these executive actions impose constraints on the FDA's ability to engage in oversight and implementation activities in the normal course, our business may be negatively impacted.

***We depend upon key employees and consultants in a competitive market for skilled personnel. If we or our strategic partners or collaborators are unable to attract and retain key personnel, it could adversely affect our ability to develop and market our products.***

We have assembled a team of qualified personnel to advance the development programs for our product candidates. We have competed and will continue to compete for qualified individuals with numerous biopharmaceutical companies, universities and other research institutions. Competition for such individuals is significant and attracting and retaining qualified personnel will be critical to our success, and any failure to do so successfully may have a material adverse effect on us.

We are highly dependent upon the members of our executive management team and our directors, as well as our consultants and collaborating scientists. Many of these individuals have been involved with us for many years, have played integral roles in our progress and we believe that they continue to provide value to us. A loss of any of our key personnel may have a material adverse effect on aspects of our business and clinical development and regulatory programs. The loss of services from any of our executives could significantly adversely affect our ability to develop and market our products and obtain necessary regulatory approvals. Further, we do not maintain key man life insurance.

Our future success also will depend on the continued service of our key professional, scientific and management personnel and our ability to recruit and retain additional personnel. While we attempt to provide competitive compensation packages to attract and retain key personnel at all levels in our organization, many of our competitors have greater resources and more experience than we do, making it difficult for us to compete successfully for key personnel. We may experience intense competition for qualified personnel and the existence of non-competition agreements between prospective employees and their former employers may prevent us from hiring those individuals or subject us to lawsuits brought by their former employers.

***If our business development activities are unsuccessful, our business could suffer, and our financial performance could be adversely affected.***

As part of our long-term growth strategy, we engage in business development activities intended to identify strategic opportunities, including potential strategic alliances, joint development opportunities, acquisitions, technology licensing arrangements and other similar opportunities. Such opportunities may result in substantial investments in our business. Our success in developing products or expanding into new markets from such activities will depend on a number of factors, including our ability to find suitable opportunities for investment, alliance or acquisition; whether we are able to complete an investment, alliance or acquisition on terms that are satisfactory to us; the strength of our underlying technology, products and our ability to execute our business strategies; any intellectual property and litigation related to these products or technology; and our ability to successfully integrate the investment, alliance or acquisition into our existing operations, including to fund our share of any in-process research and development projects. If we are unsuccessful in our business development activities, we may be unable to secure needed capital and expertise to support our development programs and our financial condition could be adversely affected.



***We may seek to enter into collaborations, licenses and other similar arrangements and may not be successful in doing so, and even if we are, we may not realize the benefits of such relationships.***

We may seek to enter into collaborations, joint ventures, licenses and other similar arrangements for the development or commercialization of our product candidates, due to capital costs required to develop or commercialize the product candidate or manufacturing constraints. We may not be successful in our efforts to establish such collaborations for our product candidates because our research and development pipeline may be insufficient, our product candidates may be deemed to be at too early of a stage of development for collaborative effort or third parties may not view our product candidates as having the requisite potential to demonstrate safety and efficacy or significant commercial opportunity. In addition, we face significant competition in seeking appropriate strategic partners, and the negotiation process can be time consuming and complex. Further, any future collaboration agreements may restrict us from entering into additional agreements with potential collaborators. We cannot be certain that, following a strategic transaction or license, we will achieve an economic benefit that justifies such transaction.

Even if we are successful in our efforts to establish such collaborations, the terms that we agree upon may not be favorable to us, and we may not be able to maintain such collaborations if, for example, development or approval of a product candidate is delayed, the safety of a product candidate is questioned or sales of an approved product candidate are unsatisfactory.

In addition, any potential future collaborations may be terminable by our strategic partners, and we may not be able to adequately protect our rights under these agreements. Furthermore, strategic partners may negotiate for certain rights to control decisions regarding the development and commercialization of our product candidates, if approved, and may not conduct those activities in the same manner as we do. Any termination of collaborations we enter into in the future, or any delay in entering into collaborations related to our product candidates, could delay the development and commercialization of our product candidates and reduce their competitiveness if they reach the market, which could have a material adverse effect on our business, financial condition and results of operations.

***We could be adversely affected by any interruption to our ability to conduct business at our current location.***

We do not have redundant facilities. We perform substantially all of our research and development and back office activity in a small number of locations, including our headquarters in Warrington, Pennsylvania, research laboratories at a university in Milan, Italy, which are made available to us under a collaboration agreement, and access to a research laboratory at a university in Taipei, Taiwan under a separate collaboration agreement. We also depend upon third-party manufacturers and laboratories to manufacture our drug products and our ADS and perform important API and drug product release testing and stability work.

Our facilities, equipment and inventory would be costly to replace and could require substantial lead time to repair or replace. Our facilities and those of our third-party manufacturers and laboratories may be harmed or rendered inoperable by natural or man-made disasters, including, but not limited to, tornadoes, flooding, fire and power outages, which may render it difficult or impossible for us to perform our research, development and commercialization activities for some period of time. The inability to perform those activities, combined with the time it may take to rebuild our inventory of finished product, may result in the loss of customers or harm to our reputation. With respect to the analytical laboratory at our headquarters facility, any interruption in release and ongoing stability testing could have an adverse impact on our inventories needed to support our ongoing clinical activities and, if approved, commercial activities. Although we have insurance for damage to our property and the disruption of our business, this insurance may not be sufficient to cover all of our potential losses and this insurance may not continue to be available to us on acceptable terms, or at all.

***The recent outbreak of COVID-19 may negatively impact our ability to develop our product candidates.***

In December 2019, a novel strain of coronavirus, or COVID-19, was reported to have surfaced in Wuhan, China. As of March 2020, COVID-19 had spread to other countries, including Europe and the U.S., and been declared to be a pandemic by the World Health Organization. Efforts to contain the spread of COVID-19 have intensified and the U.S., Europe and Asia have implemented severe travel restrictions, social distancing and delays or cancellations of elective surgeries. The outbreak of COVID-19 poses the risk that we or our employees, contractors, suppliers, and other partners may be prevented from conducting normal business activities for an indefinite period of time, including due to shutdowns that may be requested or mandated by governmental authorities.

The continued spread of COVID-19 globally could materially and adversely impact our operations. We plan to initiate clinical trials for our product candidates in Poland, Italy, the United States and other worldwide locations impacted by the COVID-19 outbreak. These clinical trials could be materially delayed by governmental restrictions and enrollment difficulties as hospitals reduce and divert staffing, divert resources to patients suffering from the infectious disease and limit hospital access for nonpatients.

There is a risk that clinical supplies of our products may be significantly delayed or may become unavailable as a result of COVID-19 and the resulting impact on our suppliers' labor forces and operations, including as a result of governmental restrictions on business operations and the movement of people and goods in an effort to curtail the spread of the virus. There can be no assurance that we would be able to timely implement any mitigation plans. Disruptions in our supply chain, whether as a result of restricted travel, quarantine requirements or otherwise, could negatively impact clinical supplies of our products, which could materially adversely impact our clinical trial and development timelines.

The continued spread of COVID-19 has also led to severe disruption and volatility in the global capital markets, which could increase our cost of capital and adversely affect our ability to access the capital markets in the future. It is likely that the continued spread of COVID-19 has resulted in an economic slowdown or recession and could cause other unpredictable events, each of which could adversely affect our business, results of operations or financial condition.

The extent to which COVID-19 impacts our financial results will depend on future developments, which are highly uncertain and cannot be predicted, including new information which may emerge concerning the severity of the COVID-19 outbreak and the actions to contain the outbreak or treat its impact, among others. Moreover, the COVID-19 outbreak has begun to have indeterminable adverse effects on general commercial activity and the world economy, and our business and results of operations could be adversely affected to the extent that COVID-19 or any other pandemic harms the global economy generally.

***Failure in our information technology systems could disrupt our operations and cause the loss of confidential information and business opportunities.***

In the ordinary course of our business, we and our third-party contractors maintain sensitive data on our and their respective networks, including our intellectual property and proprietary or confidential business information relating to our business and that of our clinical trial participants and business partners. The secure maintenance of this sensitive information is critical to our business and reputation. Despite the implementation of security measures, our internal computer systems and those of our third-party contractors are vulnerable to damage from cyber-attacks, computer viruses, unauthorized access, human error, natural disasters, terrorism, war and telecommunication and electrical failures. For information stored with our third-party contractors, we rely upon, and the integrity and confidentiality of such information is dependent upon, the risk mitigation efforts such third-party contractors have in place. Our and our third-party contractors' respective network and storage applications may be subject to unauthorized access by hackers or breached due to operator error, malfeasance or other system disruptions. It is often difficult to anticipate or immediately detect such incidents and the damage caused by such incidents. Such incidents could compromise our intellectual property, expose sensitive business information, cause interruptions in our operations, result in a material disruption of our operations, or require substantial expenditures of resources to remedy.

***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, which will likely result in significant legal and accounting expense and diversion of management resources, and current and potential stockholders may lose confidence in our financial reporting and the market price of our stock will likely decline.***

Any failure to maintain internal controls could adversely affect our ability to report our financial results on a timely and accurate basis. If our financial statements are not accurate, investors may not have a complete understanding of our operations. If we do not file our financial statements on a timely basis as required by the Securities and Exchange Commission, or the SEC, we could face severe consequences. 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 can give no assurance that material weaknesses or restatements of financial results will not arise in the future due to a failure to implement and maintain adequate internal control over financial reporting or circumvention of these controls. In addition, in the future our controls and procedures may no longer be adequate to prevent or identify irregularities or errors or to facilitate the fair presentation of our consolidated financial statements. Responding to inquiries from the SEC, regardless of the outcome, are likely to consume a significant amount of our management resources and cause us to incur significant legal and accounting expense. Further, many companies that have restated their historical financial statements have experienced a decline in stock price and related stockholder lawsuits.

***The failure to prevail in litigation or the costs of litigation, including securities class actions, product liability claims and patent infringement claims, could harm our financial performance and business operations.***

Our business activities, including development, manufacture and, if our products are approved, marketing of our drug products and medical devices also exposes us to liability risks. Using our drug product candidates or medical devices, including in clinical trials, may expose us to product liability claims. Even if approved, our products may be subject to claims resulting from unintended effects that result in injury or death. Product liability claims alleging inadequate disclosure and warnings in our package inserts and medical device disclosures also may arise.

We face a potential risk of product liability as a result of the clinical testing of our product candidates and will face an even greater risk if we commercialize any of our product candidates or any other future product. For example, we may be sued if any product we develop, including any of our product candidates, or any materials that we use in our products allegedly causes injury or is found to be otherwise unsuitable during product testing, manufacturing, marketing or sale. Any such product liability claims may include allegations of defects in manufacturing, defects in design, a failure to warn of dangers inherent in the product, negligence, strict liability and a breach of warranties. In the U.S., claims could also be asserted under state consumer protection acts. If we cannot successfully defend ourselves against product liability claims, we may incur substantial liabilities or be required to limit commercialization of our product candidates. Even successful defense would require significant financial and management resources. Regardless of the merits or eventual outcome, liability claims may result in:

- decreased demand for any of our product candidates or any future products that we may develop;
- injury to our reputation;
- withdrawal of clinical trial participants;
- costs to defend the related litigation;
- a diversion of management's time, attention and our resources;
- substantial monetary awards to trial participants or patients;
- product recalls, withdrawals or labeling, marketing or promotional restrictions;
- the inability to commercialize some or all of our product candidates; and
- a decline in the value of our stock.

There can be no assurance that the insurance coverage we maintain is sufficient or will be available in adequate amounts or at a reasonable cost. A successful claim brought against us in excess of available insurance or not covered by indemnification agreements, or any claim that results in significant adverse publicity against us, could have an adverse effect on our business and our reputation.

We may be required to obtain additional product liability insurance coverage. However, such insurance is expensive and may not be available when we need it. In the future, we may not be able to obtain adequate insurance, with acceptable limits and retentions, at an acceptable cost. Any product, general liability or product liability claim, even if such claim is within the limits of our insurance coverage or meritless and/or unsuccessful, could adversely affect the availability or cost of insurance generally and our cash available for other purposes, such as research and development. In addition, such claims could result in:

- uninsured expenses related to defense or payment of substantial monetary awards to claimants;
- a decrease in demand for our drug product candidates;
- damage to our reputation; and
- an inability to complete clinical trial programs or to commercialize our drug product candidates, if approved.

#### **Risks Related to Government Regulation**

***Adverse safety events or restrictions on use and safety warnings for our products can negatively affect our business, potential future product sales and stock price.***

Adverse safety events involving our products under development and our marketed products may have a negative impact on our business. Safety issues with our products could create product liability and could cause additional regulatory scrutiny and requirements for additional labeling, withdrawal of products from the market, and the imposition of fines or criminal penalties. Adverse safety events may also damage physician and patient confidence in our products and our reputation. Any of these could result in liabilities, loss of revenue, material write-offs of inventory, material impairments of intangible assets, goodwill and fixed assets, material restructuring charges and other adverse impacts on our results of operations.

***Our activities are subject to various and complex laws and regulations, and we are susceptible to a changing regulatory environment. Any failure to comply could adversely affect our business, financial condition and results of operations.***

Our products and our operations are regulated by numerous government agencies, both inside and outside the U.S. Our drug product candidates and medical devices must undergo lengthy and rigorous testing and other extensive, costly and time-consuming procedures mandated by the FDA and foreign regulatory authorities. Our facilities and those of our third-party providers must pass inspection and/or be approved or licensed prior to production and remain subject to inspection at any time thereafter. Failure to comply with the requirements of the FDA or other regulatory authorities could result in warning or untitled letters, product recalls or seizures, monetary sanctions, injunctions to halt the manufacture and distribution of our products, civil or criminal sanctions, refusal of a government to grant approvals or licenses, restrictions on operations or withdrawal of existing approvals and licenses. Any of these actions could damage our reputation and have a material adverse effect on our sales.

If our products are approved for commercial sale, we will be required to comply with not only the requirements of applicable regulators, but also will become subject to various laws regulating the sales, marketing, and distribution of healthcare-related products. The sales and marketing of products and relationships that pharmaceutical and medical device companies have with healthcare providers are under increasing scrutiny by federal, state and foreign government agencies. The FDA and other federal regulators have increased their enforcement activities with respect to the Anti-Kickback Statute, False Claims Act, off-label promotion of products, and other healthcare related laws, antitrust and other competition laws. Foreign governments have also increased their scrutiny of pharmaceutical companies' sales and marketing activities and relationships with healthcare providers.

Of particular importance, federal and state anti-kickback laws make it illegal for a prescription drug manufacturer to solicit, offer, receive, or pay any remuneration in exchange for, or to induce, the referral of business, including the purchase or prescription of a particular drug. These laws can be complicated, are subject to frequent change and may be violated unknowingly. In addition, a number of states require that companies implement compliance programs or comply with industry ethics codes, adopt spending limits, and report to state governments any gifts, compensation, and other remuneration provided to physicians. Sanctions under these laws may include civil monetary penalties, exclusion of a manufacturer's products from reimbursement under government programs (including Medicare and Medicaid), criminal fines, and imprisonment. Companies that have chosen to settle these alleged violations have typically paid multi-million dollar fines to the government and agreed to abide by corporate integrity agreements, which often include significant and costly burdens.

There has been a recent trend of increased federal and state regulation of payments and transfers of value provided to healthcare professionals and entities. For example, the Physician Payment Sunshine Act imposes annual reporting requirements on certain manufacturers of drugs, medical devices, biologics and medical supplies with respect to payments and other transfers of value provided by them, directly or indirectly, to physicians and teaching hospitals, as well as with respect to certain ownership and investment interests held by physicians and their family members. A manufacturer's failure to submit timely, accurately and completely the required information regarding all payments, transfers of value or ownership or investment interests may result in civil monetary penalties. Certain states also mandate implementation of commercial compliance programs, impose restrictions on medical device manufacturers' marketing practices, and require the tracking and reporting of gifts, compensation and other remuneration to healthcare professionals and entities under certain circumstances.

We are continually evaluating our compliance programs, including policies, training and various forms of monitoring, designed to address the requirements outlined above. However, no compliance program can mitigate risk in its entirety. Violations or allegations of violations of these laws may result in large civil and criminal penalties, debarment from participating in government programs, diversion of management time, attention and resources and may otherwise have a material adverse effect on our business, financial condition and results of operations.

***We face risks related to our collection and use of data, which could result in investigations, inquiries, litigation, fines, legislative and regulatory action and negative press about our privacy and data protection practices.***

Our business processes personal data, including some data related to health. When conducting clinical trials, we face risks associated with collecting trial participants' data, especially health data, in a manner consistent with applicable laws and regulations. We also face risks inherent in handling large volumes of data and in protecting the security of such data. We could be subject to attacks on our systems by outside parties or fraudulent or inappropriate behavior by our service providers or employees. Third parties may also gain access to users' accounts using stolen or inferred credentials, computer malware, viruses, spamming, phishing attacks or other means, and may use such access to obtain users' personal data or prevent use of their accounts. Data breaches could subject us to individual or consumer class action litigation and governmental investigations and proceedings by federal, state and local regulatory entities in the U.S. and by international regulatory entities, resulting in exposure to material civil and/or criminal liability. Further, our general liability insurance and corporate risk program may not cover all potential claims to which we are exposed and may not be adequate to indemnify us for all liability that may be imposed.

As our operations and business grow, we may become subject to or affected by new or additional data protection laws and regulations and face increased scrutiny or attention from regulatory authorities, including various domestic and international privacy and security regulations. The legislative and regulatory landscape for privacy and data protection continues to evolve. In the U.S., certain states may adopt privacy and security laws and regulations that may be more stringent than applicable federal law. For example, California enacted the California Consumer Privacy Act, or CCPA, which took effect on January 1, 2020. The CCPA creates individual privacy rights for California consumers and increases the privacy and security obligations of entities handling certain personal data. We may also be subject to data protection laws and regulations of other jurisdictions, such as the EU's General Data Protection Regulation, which provides data subjects with certain rights and requires organizations to adopt technical and organizational safeguards to protect personal data. In the event that we are subject to or affected by privacy and data protection laws, including the CCPA, the EU's General Data Protection Regulation, or GDPR, and other domestic or international privacy and data protection laws, we may expend significant resources to comply with such laws, and any liability from failure to comply with the requirements of these laws could adversely affect our financial condition.

Additionally, we are subject to laws and regulations regarding cross-border transfers of personal data, including laws relating to transfer of personal data outside of the European Economic Area, or EEA and Switzerland. We rely on transfer mechanisms permitted under these laws, including EU Standard Contract Clauses. If we cannot rely on existing mechanisms for transferring personal data from the EEA, the United Kingdom, Switzerland or other jurisdictions, we could be prevented from transferring personal data of patients or employees in those regions, all of which could have a material adverse effect on our business, operating results and prospects.

***Healthcare reform measures in the U.S., as well as the general tightening of drug reimbursement pathways and levels of reimbursement globally, are expected to add additional pressure to achieve financial expectations for approved products.***

If approved, our products are expected to face increasing pricing and reimbursement pressures from payors globally. Such pressures can impair our ability to access patients in geographies or access certain types of patients - regardless of the breadth of our data or approved indications. Pressure from payors, particularly single source government payors and global price referencing, can result in companies being forced to give greater discounts and/or lower pricing than planned resulting in barriers to achieving financial forecasts or even justifying ongoing or additional investment in clinical development programs.

***Our international operations subject us to additional regulatory oversight in foreign jurisdictions, as well as economic, social, and political uncertainties, which could cause a material adverse effect on our business, financial position, and operating results.***

We are subject to certain risks associated with having assets and operations located in foreign jurisdictions, including our activities in Italy and Taiwan. Our activity in Italy and Taiwan are subject to regulatory agencies, such as the Italian Ministry of Health and the Taiwan Food and Drug Administration. Our operations in foreign jurisdictions may be adversely affected by general economic conditions and economic and fiscal policy, including changes in exchange rates and controls, interest rates and taxation policies, and increased government regulation, which could have a material adverse effect on our business, financial position, and operating results.

***We may seek to enter into collaborations, licenses or other similar arrangements for rostafuroxin with a third-party to complete clinical development, development of required analytical methods, drug formulation and companion diagnostic test if needed to commercialize the product candidate. Failure of our efforts to prepare for and develop key analytical method to increase the sensitivity of our existing assay, set the stage for successful drug formulation, other related delays, or failure in obtaining regulatory clearance or approval and, if approved, failure to complete development and gain marketplace acceptance for the genetic test could make it more difficult to enter into a collaborations or could harm our reputation or cause product sales and profitability of rostafuroxin, if approved, to suffer.***

We may seek to enter into collaborations, licenses or other similar arrangements for the development or commercialization of rostafuroxin, including all required analytical methods, drug formulation and companion diagnostic test. We are working on an analytical method to increase the sensitivity of our existing assay to measure low concentrations of the compound in the body. In addition, we anticipate a companion diagnostic may be required as a condition to prescribing rostafuroxin. The companion diagnostic for use with rostafuroxin would identify those patients who have a specific genetic profile who may benefit from rostafuroxin treatment for hypertension. Before approval of rostafuroxin, the licensee would be required to have an analytic method to increase sensitivity of our existing assay and a new formulation. Each of these measures could require additional time and expense for an uncertain outcome. If we are unable to improve our assay or if the third party we engage to assist us is unable to successfully develop a companion diagnostic, if needed, or experiences delays in doing so or if there are problems with any required test, rostafuroxin may not receive marketing clearance or approval.

If any of these actions were to occur, it could harm our reputation and cause product sales and profitability of rostafuroxin, if approved, to suffer which could adversely affect our business, operating results and prospects.

***The FDA and other regulatory agencies actively enforce the laws and regulations prohibiting the promotion of off-label uses. If we are found or alleged to have improperly promoted off-label uses, we may become subject to significant liability.***

The FDA and other regulatory agencies strictly regulate the promotional claims that may be made about prescription products, as our product candidates would be, if approved. In general, a product may not be promoted for uses that are not approved by the FDA or in ways that may not be consistent with the product's approved labeling. If we are found to have promoted such off-label uses, we may become subject to significant liability. The federal government has levied large civil and criminal fines against companies for alleged improper promotion and has enjoined several companies from engaging in off-label promotion. The FDA and other regulatory agencies have also requested that companies enter into consent decrees or permanent injunctions under which specified promotional conduct is changed or curtailed. If we cannot successfully manage the promotion of our product candidates, if approved, we could become subject to significant liability, which would materially adversely affect our business and financial condition.

***If product liability lawsuits are brought against us, we may incur substantial liabilities and may be required to limit commercialization of our products.***

We face an inherent risk of product liability as a result of the clinical trials of our product candidates and will face an even greater risk if we commercialize our product candidates. For example, we may be sued if our product candidates allegedly cause injury or are found to be otherwise unsuitable during product testing, manufacturing, marketing or sale. Any such product liability claims may include allegations of defects in manufacturing, defects in design, a failure to warn of dangers inherent in the product candidate, negligence, strict liability and a breach of warranties. Claims may be brought against us by clinical trial participants, patients or others using, administering or selling products that may be approved in the future. Claims could also be asserted under state consumer protection acts.

If we cannot successfully defend ourselves against product liability claims, we may incur substantial liabilities or be required to limit or cease the commercialization of our products. Even a successful defense would require significant financial and management resources. Regardless of the merits or eventual outcome, liability claims may result in:

- decreased demand for our products;
- injury to our reputation and significant negative media attention;
- withdrawal of clinical trial participants;
- costs to defend the related litigation;
- a diversion of management's time, attention and our resources;
- substantial monetary awards to trial participants or patients;
- product recalls, withdrawals or labeling, marketing or promotional restrictions;
- significant negative financial impact;
- the inability to commercialize our product candidates; and
- a decline in our stock price.



We currently hold product liability insurance coverage at a level consistent with our activities. We may need to increase our insurance coverage as we expand our clinical trials or if we commence commercialization of our product candidates. Insurance coverage is increasingly expensive.

Our inability to obtain and retain sufficient product liability insurance at an acceptable cost to protect against potential product liability claims could prevent or inhibit the commercialization of our product candidates. Although we maintain such insurance, any claim that may be brought against us could result in a court judgment or settlement in an amount that is not covered, in whole or in part, by our insurance or that is in excess of the limits of our insurance coverage. Our insurance policies will also have various exclusions, and we may be subject to a product liability claim for which we have no coverage. We may have to pay any amounts awarded by a court or negotiated in a settlement that exceed our coverage limitations or that are not covered by our insurance, and we may not have, or be able to obtain, sufficient capital to pay such amounts.

***Our employees and independent contractors, including principal investigators, CROs, consultants and vendors, may engage in misconduct or other improper activities, including noncompliance with regulatory standards and requirements.***

We are exposed to the risk that our employees and independent contractors, including principal investigators, CROs, consultants and vendors may engage in misconduct or other illegal activity. Misconduct by these parties could include intentional, reckless and/or negligent conduct or disclosure of unauthorized activities to us that violate: (1) the laws and regulations of the FDA and other similar regulatory requirements, including those laws that require the reporting of true, complete and accurate information to such authorities, (2) manufacturing standards, including cGMP requirements, (3) federal and state data privacy, security, fraud and abuse and other healthcare laws and regulations in the U.S. and abroad or (4) laws that require the true, complete and accurate reporting of financial information or data. Activities subject to these laws also involve the improper use or misrepresentation of information obtained in the course of clinical trials, the creation of fraudulent data in our preclinical studies or clinical trials, or illegal misappropriation of drug product, which could result in regulatory sanctions and cause serious harm to our reputation. It is not always possible to identify and deter misconduct by employees and other third parties, and the precautions we take to detect and prevent this activity may not be effective in controlling unknown or unmanaged risks or losses or in protecting us from governmental investigations or other actions or lawsuits stemming from a failure to be in compliance with such laws or regulations. In addition, we are subject to the risk that a person or government could allege such fraud or other misconduct, even if none occurred. If any such actions are instituted against us, and we are not successful in defending ourselves or asserting our rights, those actions could have a significant impact on our business and financial results, including, without limitation, the imposition of significant civil, criminal and administrative penalties, damages, monetary fines, disgorgements, possible exclusion from participation in Medicare, Medicaid and other federal healthcare programs, individual imprisonment, contractual damages, reputational harm, diminished profits and future earnings, additional reporting requirements and oversight if we become subject to a corporate integrity agreement or similar agreement to resolve allegations of non-compliance with these laws, and curtailment of our operations, any of which could adversely affect our ability to operate our business and our results of operations.

***We are subject to anti-bribery, anti-corruption, and anti-money laundering laws, including the U.S. Foreign Corrupt Practices Act, in which violations of these laws could result in substantial penalties and prosecution.***

We are exposed to trade and economic sanctions and other restrictions imposed by the U.S. and other governments and organizations. The U.S. Departments of Justice, Commerce, State and Treasury and other federal agencies and authorities have a broad range of civil and criminal penalties they may seek to impose against corporations and individuals for violations of economic sanctions laws, export control laws, the U.S. Foreign Corrupt Practices Act, or the FCPA, and other federal statutes and regulations, including those established by the Office of Foreign Assets Control. The Department of Justice, or DOJ, also has increased its focus on the enforcement of the FCPA, particularly as it relates to the conduct of pharmaceutical companies.

In addition, the U.K. Bribery Act of 2010, or the Bribery Act, prohibits both domestic and international bribery, as well as bribery across both private and public sectors. An organization that “fails to prevent bribery” by anyone associated with the organization can be charged under the Bribery Act unless the organization can establish the defense of having implemented “adequate procedures” to prevent bribery. Under these laws and regulations, as well as other anti-corruption laws, anti-money laundering laws, export control laws, customs laws, sanctions laws and other laws governing our operations, various government agencies may require export licenses, may seek to impose modifications to business practices, including cessation of business activities in sanctioned countries or with sanctioned persons or entities and modifications to compliance programs, which may increase compliance costs, and may subject us to fines, penalties and other sanctions. A violation of these laws or regulations would negatively affect our business, financial condition and results of operations.

***We and any of our third-party manufacturers or suppliers may use potent chemical agents and hazardous materials, and any claims relating to improper handling, storage or disposal of these materials could be time consuming or costly.***

We and any of our third-party manufacturers or suppliers will use biological materials, potent chemical agents and may use hazardous materials, including chemicals and biological agents and compounds that could be dangerous to human health and safety of the environment. Our operations and the operations of our third-party manufacturers and suppliers also produce hazardous waste products. Federal, state and local laws and regulations govern the use, generation, manufacture, storage, handling and disposal of these materials and wastes. Compliance with applicable environmental laws and regulations may be expensive, and current or future environmental laws and regulations may impair our product development efforts. In addition, we cannot eliminate the risk of accidental injury or contamination from these materials or wastes. We carry a limited amount of specific biological or hazardous waste insurance coverage, and our property, casualty and general liability insurance policies offer limited coverage for damages and fines arising from biological or hazardous waste exposure or contamination. In the event of contamination or injury, we could be held liable for damages or be penalized with fines in an amount exceeding our resources, and our clinical trials or regulatory approvals could be suspended.

Although we maintain workers' compensation insurance for certain costs and expenses we may incur due to injuries to our employees resulting from the use of hazardous materials or other work-related injuries, this insurance may not provide adequate coverage against potential liabilities.

We maintain a limited amount of insurance for toxic tort claims that may be asserted against us in connection with our storage or disposal of biologic, hazardous or radioactive materials.

In addition, we may incur substantial costs in order to comply with current or future environmental, health and safety laws and regulations, which have tended to become more stringent over time. These current or future laws and regulations may impair our research, development or production efforts. Failure to comply with these laws and regulations also may result in substantial fines, penalties or other sanctions or liabilities, which could materially adversely affect our business, financial condition, results of operations and prospects.

### **Risks Related to Intellectual Property Matters**

***If we cannot protect our intellectual property, other companies could use our technology in competitive products. Even if we obtain patents to protect our products, those patents may not be sufficiently broad or they may expire and others could then compete with us.***

The patent position of biotechnology companies is highly uncertain and involves complex legal and factual questions for which important legal principles are unresolved. To date, the U.S. Patent and Trademark Office, or USPTO, has not adopted a consistent policy regarding the breadth of claims that is accorded in biotechnology patents or the degree of protection that these types of patents afford. As a result, there are risks that we may not secure proprietary rights to products or processes that appear to be patentable.

The parties who licensed technologies to us and we have filed various U.S. and foreign patent applications with respect to the products and technologies under our development, and the USPTO and foreign patent offices have issued patents with respect to our products and technologies. These patent applications include international applications filed under the Patent Cooperation Treaty. Our pending patent applications, as well as those we may file in the future or those we may license from third parties may not result in the USPTO or foreign patent office issuing patents. In addition, if patent rights covering our products are not sufficiently broad, they may not provide us with sufficient proprietary protection or competitive advantages against competitors with similar products and technologies. For example, the core composition of matter patents covering istaroxime have expired. As such, istaroxime relies on data and market exclusivity, as well as method-of-use patents, which may offer a lesser scope of protection than the original core patents. Furthermore, even if the USPTO or foreign patent offices were to issue patents to us or our licensors, others may challenge the patents or circumvent the patents, or the patent office or the courts may invalidate the patents. Thus, any patents we own or license from third parties may not provide us any protection against competitors.

The patents that we own or in-license have a limited life. Certain of such patents related to lyophilized KL4 surfactant have issued in the U.S., Europe and elsewhere and will expire in March 2033. For our aerosolized KL4 surfactant, we hold worldwide exclusive licenses to our proprietary ADS technology for use with pulmonary surfactants alone or in combination with other products for all respiratory diseases and in the U.S. to other (non-surfactant) drugs to treat certain pediatric and adult respiratory indications in hospitals and other health care institutions. The ADS patents have expired or will expire on various dates beginning in May 2016 and ending as late as 2037. Patents related to our cardiovascular drug products issued in the U.S., Europe and elsewhere have expired or will expire on various dates between 2028 and 2030.



***Intellectual property rights of third parties could limit our ability to develop and market our products.***

Our success also depends upon our ability to operate our business without infringing the patents or violating the proprietary rights of others. Patent applications in most jurisdictions are not published until 18 months after filing. In certain cases, the USPTO keeps U.S. patent applications confidential for the entire time the applications are pending. As a result, we cannot determine in advance what inventions third parties may claim in their pending patent applications. We may need to defend or enforce our patent and license rights or to determine the scope and validity of the proprietary rights of others through legal proceedings, which would be costly, unpredictable and time consuming. Even in proceedings where the outcome is favorable to us, they would likely divert substantial resources, including management time, from our other activities. Moreover, any adverse determination could subject us to significant liability or require us to seek licenses that third parties might not grant to us or might only grant at rates that diminish or deplete the profitability of our products. An adverse determination could also require us to alter our products or processes or cease altogether any product sales or related research and development activities.

***We may need to license intellectual property from third parties, and such licenses may not be available or may not be available on commercially reasonable terms.***

We may need to obtain licenses from third parties to advance our research or allow commercialization of our product candidates, and we cannot provide any assurances that third-party patents do not exist which might be enforced against our product candidates in the absence of such a license. The licensing and acquisition of third-party intellectual property rights is a competitive practice and companies that may be more established, or have greater resources than we do, may also be pursuing strategies to license or acquire third-party intellectual property rights that we may consider necessary or attractive in order to commercialize our product candidates. We may fail to obtain any of these licenses on commercially reasonable terms, if at all. Even if we are able to obtain a license, it may be non-exclusive, thereby giving our competitors access to the same technologies licensed to us. In that event, we may be required to expend significant time and resources to develop or license replacement technology. If we are unable to do so, we may be unable to develop or commercialize the affected product candidates, which could materially harm our business and the third parties owning such intellectual property rights could seek either an injunction prohibiting our sales, or, with respect to our sales, an obligation on our part to pay royalties and/or other forms of compensation. Licensing of intellectual property is of critical importance to our business and involves complex legal, business and scientific issues. If disputes over intellectual property that we have licensed prevent or impair our ability to maintain our current licensing arrangements on acceptable terms, we may not be able to successfully develop and commercialize the affected product candidates, which would have a material adverse effect on our business.

***We rely on agreements containing obligations regarding intellectual property, confidentiality and noncompetition provisions that could be breached and may be difficult to enforce.***

Although we take what we believe to be reasonable steps to protect our intellectual property, including the use of agreements relating to the non-disclosure of our confidential and proprietary information and trade secrets to third parties, as well as agreements that provide for disclosure and assignment to us of all rights to the ideas, developments, improvements, discoveries and inventions of our employees, consultants, advisors and research collaborators while we employ them, such agreements can be difficult and costly to enforce. We generally seek to enter into these types of agreements with consultants, advisors and research collaborators; however, to the extent that such parties apply or independently develop intellectual property in connection with any of our projects, disputes may arise concerning allocation of the related proprietary rights. Such disputes often involve significant expense and yield unpredictable results.

Moreover, although all employees enter into agreements with us that include non-compete covenants, and our five senior executive officers have agreements that include broader non-competition covenants and provide for severance payments that are contingent upon the applicable employee's refraining from competition with us, such non-compete provisions can be difficult and costly to monitor and enforce, such that, if any should resign, we may not be successful in enforcing our noncompetition agreements with them.

Despite the protective measures we employ, we still face the risk that:

- agreements may be breached;
- agreements may not provide adequate remedies for the applicable type of breach;
- our trade secrets or proprietary know-how may otherwise become known;
- our competitors may independently develop similar technology; or
- our competitors may independently discover our proprietary information and trade secrets.

***Patents covering our product candidates could be found invalid or unenforceable if challenged in court or before administrative bodies in the U.S. or abroad.***

Although an issued patent is presumed valid and enforceable, its issuance is not conclusive as to its validity or its enforceability and it may not provide us with adequate proprietary protection or competitive advantages against competitors with similar product candidates. Competitors could attempt to replicate the competitive advantages we derive from our development efforts, willfully infringe our intellectual property rights, design around the relevant patents, or develop and obtain patent protection for more effective technologies, designs or methods. We may be unable to prevent the unauthorized disclosure or use of our technical knowledge or trade secrets by consultants, suppliers, vendors, former employees and current employees. The laws of some non-U.S. countries do not protect our proprietary rights to the same extent as the laws of the U.S., and we may encounter significant problems in protecting our proprietary rights in these countries.

In addition, proceedings to enforce or defend our patents, or patents to which we have ownership rights through licensing agreements, could put those patents at risk of being invalidated, held unenforceable or interpreted narrowly. Such proceedings could also provoke third parties to assert claims against us, including that some or all of the claims in one or more of those patents are invalid or otherwise unenforceable. If any of the patents covering our product candidates are invalidated or found unenforceable, or if a court found that valid, enforceable patents held by third parties covered one or more of our product candidates, our competitive position could be harmed or we could be required to incur significant expenses to enforce or defend our rights.

***Third parties may assert ownership or commercial rights to inventions we develop.***

Third parties may in the future make claims challenging the inventorship or ownership of our intellectual property. In addition, we may face claims by third parties that our agreements with employees, contractors or consultants obligating them to assign intellectual property to us are ineffective or in conflict with prior or competing contractual obligations of assignment, which could result in ownership disputes regarding intellectual property we have developed or will develop and interfere with our ability to capture the commercial value of such intellectual property. Litigation may be necessary to resolve an ownership dispute, and if we are not successful, we may be precluded from using certain intellectual property or may lose our exclusive rights in such intellectual property. Either outcome could harm our business and competitive position.

***Litigation or other proceedings or third-party claims of intellectual property infringement could require us to spend significant time and money and could prevent us from selling our product candidates or affect our stock price.***

Our commercial success will depend in part on not infringing the patents or violating other proprietary rights of others. Significant litigation regarding patent rights occurs in our industry. Our competitors 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, use and sell our product candidates. We do not always conduct independent reviews of patents issued to third parties. In addition, patent applications in the U.S. and elsewhere can be pending for many years before issuance, or unintentionally abandoned patents or applications can be revived, so there may be applications of others now pending or recently revived patents of which we are unaware. Patent applications in the U.S., the EU and elsewhere are published approximately 18 months after the earliest filing for which priority is claimed, with such earliest filing date being commonly referred to as the priority date. These applications may later result in issued patents, or the revival of previously abandoned patents, that will prevent, limit or otherwise interfere with our ability to develop and market our product candidates. Third parties may assert claims that we are employing their proprietary technology without authorization, including claims from competitors or from nonpracticing entities that have no relevant product revenue and against whom our own patent portfolio may have no deterrent effect.

As we attempt to commercialize our product candidates in their current or updated forms, launch new product candidates and enter new markets, we expect competitors may claim that one or more of our product candidates infringe their intellectual property rights as a strategy to impede our commercialization and entry into new markets. The large number of patents, the rapid rate of new patent applications and issuances, the complexities of the technologies involved, and the uncertainty of litigation may increase the risk of business resources and management's attention being diverted to patent litigation. We may in the future receive, letters or other threats or claims from third parties inviting us to take licenses under, or alleging that we infringe, their patents.

Moreover, we may become party to adversarial proceedings regarding our or third-party patent portfolios. Such proceedings could include supplemental examination or contested post-grant proceedings such as review, reexamination, inter parties review, interference or derivation proceedings before the USPTO and challenges in U.S. District Courts. Patents may be subjected to opposition, post-grant review or comparable proceedings lodged in various foreign, both national and regional, patent offices. The legal threshold for initiating litigation or contested proceedings may be low, so that even lawsuits or proceedings with a low probability of success might be initiated. Litigation and contested proceedings can also be expensive and time-consuming, and our adversaries in these proceedings may have the ability to dedicate substantially greater resources to prosecuting these legal actions than we can. We may also occasionally use these proceedings to challenge the patent rights of others. We cannot be certain that any particular challenge will be successful in limiting or eliminating the challenged patent rights of the third party.

Any lawsuits resulting from such allegations could subject us to significant liability for damages and/ or invalidate our proprietary rights. Any potential intellectual property litigation also could force us to do one or more of the following:

- stop making, selling or using product candidates or technologies that allegedly infringe the asserted intellectual property;
- lose the opportunity to license our technology to others or to collect royalty payments;
- incur significant legal expenses, including, in some cases, the attorney's fees and costs of litigation to the party whose intellectual property rights we may be found to be infringing;
- pay substantial damages (possibly treble damages) or royalties to the party whose intellectual property rights on which we may be found to be infringing;
- redesign product candidates that contain the allegedly infringing intellectual property; and
- attempt to obtain a license to the relevant intellectual property from third parties, which may not be available on reasonable terms or at all.

Any litigation or claim against us, even those without merit, may cause us to incur substantial costs, and could place a significant strain on our financial resources, divert the attention of management from our business and harm our reputation. If we are found to infringe the intellectual property rights of third parties, we could be required to pay substantial damages (which may be increased up to three times of awarded damages) and/or substantial royalties and could be prevented from selling our product candidates unless we obtain a license or are able to redesign our product candidates to avoid infringement. Any such license may not be available on reasonable terms, if at all, and there can be no assurance that we would be able to redesign our product candidates in a technically feasible way that would not infringe the intellectual property rights of others. We could encounter delays while we attempt to develop alternative methods or product candidates. If we fail to obtain any required licenses or make any necessary changes to our product candidates or technologies, we may be unable to commercialize one or more of our product candidates.

Even if we were ultimately to prevail, any of these events could require us to divert substantial financial and management resources that we would otherwise be able to devote to our business. Intellectual property litigation, regardless of its outcome, may cause negative publicity, or prohibit us from manufacturing, importing, marketing or otherwise commercializing our product candidates, services and technology. In addition, if the breadth or strength of protection provided by the patents and patent applications we own or in-license is threatened, it could dissuade companies from collaborating with us to license, develop or commercialize current or future product candidates. In addition, because of the substantial amount of discovery required in connection with intellectual property litigation, there is a risk that some of our confidential information could be compromised by disclosure during this type of litigation. There could also be public announcements of the results of hearings, motions or other interim proceedings or developments, and if securities analysts or investors view these announcements in a negative light, the price of our common stock could be adversely affected.

***If we are unable to protect the confidentiality of our trade secrets, our business and competitive position could be harmed.***

We also rely upon copyright and trade secret protection, as well as non-disclosure agreements and invention assignment agreements with our employees, consultants and third parties, to protect our confidential and proprietary information.

In addition to contractual measures, we try to protect the confidential nature of our proprietary information using commonly accepted physical and technological security measures. Such measures may not provide adequate protection for our proprietary information. Our security measures may not prevent an employee or consultant from misappropriating our trade secrets and providing them to a competitor, and recourse we take against such misconduct may not provide an adequate remedy to protect our interests fully. Unauthorized parties may also attempt to copy or reverse engineer certain aspects of our product candidates that we consider proprietary. Enforcing a claim that a party illegally disclosed or misappropriated a trade secret can be difficult, expensive and time-consuming, and the outcome of any such claim is unpredictable. Trade secret violations are often a matter of state law, and the criteria for protection of trade secrets can vary among different jurisdictions. In addition, trade secrets may be independently developed or reverse engineered by others in a manner that could prevent legal recourse by us. If any of our confidential or proprietary information, such as our trade secrets, were to be disclosed or misappropriated, or if any such information was independently developed by a competitor, our business and competitive position could be harmed.

***We may be unable to enforce our intellectual property rights throughout the world.***

Filing, prosecuting and defending patents covering our product candidates in all countries throughout the world would be prohibitively expensive, and the laws of some foreign countries do not protect intellectual property rights to the same extent as the laws of the U.S. Many companies have encountered significant problems in protecting and defending intellectual property rights in certain foreign jurisdictions. This could make it difficult for us to stop infringement of our foreign patents, if obtained, or the misappropriation of our other intellectual property rights. For example, some foreign countries have compulsory licensing laws under which a patent owner must grant licenses to third parties. In addition, some countries limit the enforceability of patents against third parties, including government agencies or government contractors. In these countries, patents may provide limited or no benefit. Patent protection must ultimately be sought on a country-by-country basis, which is an expensive and time-consuming process with uncertain outcomes. Accordingly, we may choose not to seek patent protection in certain countries, and we will not have the benefit of patent protection in such countries. Additionally, in the event that our trademarks are successfully challenged, we could be forced to rebrand our product candidates, which could result in loss of brand recognition and could require us to devote resources to advertising and marketing new brands. Our competitors may infringe our trademarks, and we may not have adequate resources to enforce our trademarks.

Proceedings to enforce our patent or trademark rights in foreign jurisdictions could result in substantial costs and divert our efforts and attention from other aspects of our business. Accordingly, our efforts to protect our intellectual property rights in such countries may be inadequate.

***Third parties may assert that our employees or consultants have wrongfully used or disclosed confidential information or misappropriated trade secrets.***

In the future, we may employ individuals who previously worked with other companies, including our competitors. Although we try to ensure that our employees and consultants do not use the proprietary information or know-how of others in their work for us, we may be subject to claims that we or our employees, consultants or independent contractors have inadvertently or otherwise used or disclosed intellectual property or personal data, including trade secrets or other proprietary information, of a former employer or other third party. Litigation may be necessary to defend against these claims. If we fail in defending any such claims or settling those claims, in addition to paying monetary damages or a settlement payment, we may lose valuable intellectual property rights or personnel. Even if we are successful in defending against such claims, litigation could result in substantial costs and be a distraction to management and other employees.

***Recent changes in U.S. patent laws may limit our ability to obtain, defend and/or enforce our patents.***

The U.S. has recently enacted and implemented wide ranging patent reform legislation. The U.S. Supreme Court has ruled on several patent cases in recent years, either narrowing the scope of patent protection available in certain circumstances or weakening the rights of patent owners in certain situations. In addition to increasing uncertainty with regard to our ability to obtain patents in the future, this combination of events has created uncertainty with respect to the value of patents, once obtained. Depending on actions by the U.S. Congress, the U.S. federal courts, and the USPTO, the laws and regulations governing patents could change in unpredictable ways that could weaken our ability to obtain new patents or to enforce patents that we have licensed or that we might obtain in the future. Similarly, changes in patent law and regulations in other countries or jurisdictions, changes in the governmental bodies that enforce them or changes in how the relevant governmental authority enforces patent laws or regulations may weaken our ability to obtain new patents or to enforce patents that we have licensed or that we may obtain in the future.

***Obtaining and maintaining our patent protection depends on compliance with various procedural, document submission, fee payment and other requirements imposed by governmental patent agencies, and our patent protection could be reduced or eliminated for non-compliance with these requirements.***

The USPTO and other patent agencies require compliance with a number of procedural, documentary, fee payment and other similar provisions during the patent application process. In addition, periodic maintenance and annuity fees on any issued patent are due to be paid to the USPTO and other patent agencies over the lifetime of the patent. While an inadvertent failure to make payment of such fees or to comply with such provisions can in many cases be cured by additional payment of a late fee or by other means in accordance with the applicable rules, there are situations in which non-compliance with such provisions will result in the abandonment or lapse of the patent or patent application, and the partial or complete loss of patent rights in the relevant jurisdiction. Non-compliance events that could result in abandonment or lapse of a patent or patent application include failure to respond to official actions within prescribed time limits, non-payment of fees and failure to properly legalize and submit formal documents within prescribed time limits. If we or our licensors fail to maintain the patents and patent applications covering our product or if we or our licensors otherwise allow our patents or patent applications to be abandoned or lapse, it can create opportunities for competitors to enter the market, which would hurt our competitive position and could impair our ability to successfully commercialize our product candidates.

***We may be unable to obtain a patent term extension in the U.S. under the Hatch-Waxman Act and in foreign countries under similar legislation.***

In the U.S., a patent that covers a drug product or medical device approved by the FDA may be eligible for a term extension designed to restore the period of the patent term that is lost during the premarket regulatory review process conducted by the FDA. Depending upon the timing, duration and conditions of FDA marketing approval of our product candidates, it is possible, though unlikely, that one or more of our U.S. patents may be eligible for limited patent term extension under the Drug Price Competition and Patent Term Restoration Act of 1984, or the Hatch-Waxman Act, which permits a patent term extension of up to five years for a patent covering an approved product as compensation for effective patent term lost during product development and the FDA regulatory review process. A patent term extension cannot extend the remaining term of a patent beyond a total of 14 years from the date of product approval, and only claims covering such approved drug product, a method for using it or a method for manufacturing it may be extended, and only one patent may be extended. In the EU, it is possible, though unlikely, that our product candidates may be eligible for term extensions based on similar legislation. However, in either jurisdiction, if we were eligible to apply for patent term extension, we may not receive an extension if we fail to apply within applicable deadlines, fail to apply prior to expiration of relevant patents or otherwise fail to satisfy applicable requirements. Even if we are granted such extension, the duration of such extension may be less than our request. If we are unable to obtain a patent term extension, or if the term of any such extension is less than our request, the period during which we can enforce our patent rights for that product will be in effect shortened and our competitors may obtain approval to market competing products sooner. The resulting reduction of years of revenue from applicable product candidates could be substantial.

***Intellectual property rights do not necessarily address all potential threats.***

The degree of future protection afforded by our intellectual property rights is uncertain because intellectual property rights have limitations and may not adequately protect our business or permit us to maintain our competitive advantage. For example:

- others may be able to make products that are similar to our product candidates or utilize similar technology but that are not covered by the claims of our patents or that incorporate certain technology in our product candidates that is in the public domain;
- we, or our future licensors or collaborators, might not have been the first to make the inventions covered by the applicable issued patent or pending patent application that we own now or may own or license in the future;

- we, or our future licensors or collaborators, might not have been the first to file patent applications covering certain of our or their inventions;
- we may not be able to successfully commercialize our product candidates before our relevant patents we may have, or to which we have ownership rights through licensing agreements, expire;
- others may independently develop similar or alternative technologies or duplicate any of our technologies without infringing our intellectual property rights;
- it is possible that our current or future pending patent applications will not lead to issued patents;
- issued patents that we hold rights to may be held invalid or unenforceable, including as a result of legal challenges by our competitors or other third parties;
- our competitors or other third parties might conduct research and development activities in countries where we do not have patent rights and then use the information learned from such activities to develop competitive products for sale in our major commercial markets;
- we may not develop additional proprietary technologies that are patentable;
- the patents of others may harm our business; and
- we may choose not to file a patent in order to maintain certain trade secrets or know-how, and a third party may subsequently file a patent covering such intellectual property.

Any of the foregoing could have a material adverse effect on our business, financial condition and results of operations.

#### **Risks Related to this Offering and the Ownership of our Securities**

***An active, liquid and orderly market for our common stock or the Offering Warrants may not develop, and you may not be able to resell your common stock or Offering Warrants at or above the public offering price.***

Prior to this offering, our common stock is traded on the OTCQB quotation system, which is a FINRA-sponsored entity and operated inter-dealer automated quotation system for equity securities not included in a national exchange. Quotation of our securities on the OTCQB limits the liquidity and price of our common stock more than if our common stock were quoted or listed on the New York Stock Exchange, or NYSE, or The Nasdaq Capital Market, or Nasdaq, which are national securities exchanges. Although we have applied to list our common stock on the Nasdaq and our common stock has been approved for listing contingent on the completion of this offering, an active trading market for our common stock may never develop or be sustained following this offering. In addition, the Offering Warrants are a new class of securities for which there is no existing market. The Offering Warrants are not listed on any stock exchange or other trading system, and we do not plan to apply to list the Offering Warrants on any other trading system or stock exchange. We and the underwriters will determine the public offering price of the units, consisting of one share of our common stock and a Offering Warrant, through negotiation. This price will not necessarily reflect the price at which investors in the market will be willing to buy and sell our shares of common stock or the Offering Warrants following this offering. In addition, an active trading market may not develop following the consummation of this offering or, if it is developed, may not be sustained. The lack of an active market may impair your ability to sell your shares of common stock or the Offering Warrants at the time you wish to sell them or at a price that you consider reasonable. As a result, investors in our common stock and Offering Warrants must bear the economic risk of holding those securities for an indefinite period of time. An inactive market may also impair our ability to raise capital by selling shares and may impair our ability to acquire other businesses, applications or technologies using our shares as consideration, which, in turn, could materially adversely affect our business.

***If you purchase shares of common stock in this offering, you will suffer immediate dilution in the net tangible book value of your investment in our common stock.***

The public offering price per unit is substantially higher than the net tangible book value per share of our common stock. Therefore, if you purchase securities in this offering, you will pay an effective price per share that substantially exceeds our net tangible book value per share after this offering. Assuming no exercise of the Offering Warrants, no value is attributed to the Offering Warrants and the Offering Warrants are classified as and accounted for as equity and based on the assumed public offering price of \$9.79 per share, the last reported sale price of our common stock on the OTCQB on May 5, 2020, you will experience immediate dilution of \$10.76 per share, representing the difference between our adjusted net tangible book value per share after giving effect to this offering and the public offering price per unit. Furthermore, if the underwriters exercise their option to purchase additional shares of common stock and/or warrants or our previously issued options, warrants and other rights to acquire common stock at prices below the public offering price are exercised, you will experience further dilution. For additional information on the dilution that you will experience immediately after this offering, see the section titled “Dilution.”

***We have broad discretion in the use of the net proceeds from this offering and may invest or spend the proceeds in ways with which you do not agree and in ways that may not yield a return on your investment.***

Although we currently intend to use the net proceeds from this offering in the manner described in the section titled “Use of Proceeds” in this prospectus, our management will have broad discretion in the application of the net proceeds from this offering and could spend the proceeds in ways that do not improve our results of operations or enhance the value of our common stock. The failure by our management to apply these funds effectively could result in financial losses that could harm our business, cause the price of our common stock to decline and delay the development of our product candidates.

***A small group of investors, including Lee’s, may be able to exercise significant influence over our business strategy and operations.***

As of April 23, 2020, Lee’s beneficially owns directly and through its affiliates, approximately 35% of our issued and outstanding shares of common stock and fund affiliates of our Chairman, James Huang, own directly and through affiliates approximately 16.0% of our issued and outstanding common stock. These investors could exercise their voting power in a coordinated fashion to approve any matter requiring shareholder approval by written consent without a stockholder meeting. As a result, there is a risk that these investors could cause corporate actions to be approved even if their interests conflict with the interests of our other stockholders. This concentration of voting power could have the effect of deterring or preventing institutional investors interested in us or a change in control that might be beneficial to our other shareholders. In addition, certain of our existing stockholders beneficially owning approximately 71% of our outstanding shares of common stock have agreed with us to be bound by a lock-up whereas such stockholders will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of shares of our common stock for 90 days following the closing of this offering.

***We have applied to list our common stock on Nasdaq and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering. We can provide no assurance that our common stock is listed, that we will be able to continue to meet Nasdaq listing requirements. If we are successful in obtaining the listing but subsequently fail to comply with the continuing listing standards of Nasdaq, our securities could be delisted.***

We have applied to list our common stock on Nasdaq and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering. If our common stock is listed on Nasdaq, we cannot ensure that we will be able to satisfy the continued listing requirements of Nasdaq after such listing occurs, such as the corporate governance requirements or the minimum closing bid price requirement, and Nasdaq may take steps to delist our common stock. Such a delisting would likely have a negative effect on the price of our common stock and would impair your ability to sell or purchase our common stock when you wish to do so. In the event of a delisting, we can provide no assurance that any action taken by us to restore compliance with listing requirements would allow our common stock to become listed again, stabilize the market price or improve the liquidity of our common stock, prevent our common stock from dropping below the Nasdaq minimum bid price requirement or prevent future non-compliance with Nasdaq’s listing requirements.

***The market price of our common stock may be highly volatile, and you may not be able to resell your shares at or above the price at which you purchase them.***

The market price of our common stock, like that of many other development stage pharmaceutical or biotechnology companies, has been and is likely to be volatile. In addition to general economic, political and market conditions, the price and trading volume of our stock could fluctuate widely in response to many factors, including:

- our ability to execute our ongoing and planned clinical trials on a timely basis consistent with timelines established;
- results of our clinical trials and preclinical studies, and the results of trials of our competitors or those of other companies in our market sector;
- regulatory approval of our product candidates, or limitations to specific label indications or patient populations for its use, or changes or delays in the regulatory review process;



- regulatory developments in the U.S. and foreign countries;
- changes in the structure of healthcare payment systems, especially in light of current reforms to the U.S. healthcare system;
- the scope of protection we are able to establish and maintain for intellectual property rights covering our product candidates, along with any product modifications and improvements;
- the success or failure of our efforts to acquire, license or develop additional product candidates;
- innovations or new products developed by us or our competitors;
- announcements by us or our competitors of significant acquisitions, strategic partnerships, joint ventures or capital commitments;
- manufacturing, supply or distribution delays or shortages;
- any changes to our relationship with any manufacturers, suppliers, licensors, future collaborators or other strategic partners;
- our expectations regarding the potential market size and the size of the patient populations for our product candidates;
- the implementation of our business model and strategic plans for our business and technology;
- achievement of expected product sales and profitability;
- variations in our financial results or those of companies that are perceived to be similar to us;
- market conditions in the biopharmaceutical sector and issuance of securities analysts' reports or recommendations;
- trading volume of our common stock;
- an inability to obtain additional funding;
- sales of our stock by insiders and stockholders;
- general economic, industry and market conditions other events or factors, many of which are beyond our control;
- our commercialization, marketing and manufacturing prospects and capabilities;
- additions or departures of key personnel; and
- intellectual property, product liability or other litigation against us.

In addition, the stock markets in general, and the markets for biopharmaceutical and biotechnology stocks in particular, have experienced extreme volatility that may have been unrelated to the operating performance of the issuer. These broad market fluctuations may adversely affect the market price or liquidity of our common stock. In the past, when the market price of a stock has been volatile, holders of that stock have sometimes instituted securities class action litigation against the issuer. If any of our stockholders were to bring such a lawsuit against us, we could incur substantial costs defending the lawsuit and the attention of our management would be diverted from the operation of our business.

***Future sales and issuances of our common stock or rights to purchase our common stock, stock incentive plans and upon the exercise of outstanding securities exercisable for shares of our common stock, including the exercise of the Offering Warrants, could result in substantial additional dilution of our stockholders, cause our stock price to fall and adversely affect our ability to raise capital.***

We will require additional capital to continue to execute our business plan and advance our research and development efforts. To the extent that we raise additional capital through the issuance of additional equity securities and through the exercise of outstanding warrants, including the exercise of the Offering Warrants, our stockholders may experience substantial dilution. We may sell shares of preferred stock or common stock in one or more transactions at prices that may be at a discount to the then-current market value of our common stock and on such other terms and conditions as we may determine from time to time. Any such transaction could result in substantial dilution of our existing stockholders. If we sell shares of our common stock in more than one transaction, stockholders who purchase our common stock may be materially diluted by subsequent sales. Such sales could also cause a drop in the market price of our common stock. The issuance of shares of our common stock in connection with a public or private financing, in connection with our compensation programs, and upon exercise of outstanding warrants, including the exercise of the Offering Warrants, will have a dilutive impact on our other stockholders and the issuance, or even potential issuance, of such shares could have a negative effect on the market price of our common stock.

The exercise of stock options and other securities could also cause our stockholders to experience substantial dilution. Moreover, holders of our stock options and warrants, including the Offering Warrants, are likely to exercise them, if ever, at a time when we otherwise could obtain a price for the sale of our securities that is higher than the exercise price per security of the options or warrants. Such exercises, or the possibility of such exercises, may impede our efforts to obtain additional financing through the sale of additional securities or make such financing more costly. It may also reduce the price of our common stock.

***We effected a reverse stock split on April 29, 2020 which may adversely impact the market price of our common stock.***

We effected a reverse stock split of our outstanding common stock at a ratio in of one-for-three shares, which was effected at 12:01 a.m. Eastern Time on April 29, 2020. The effect of the reverse stock split upon the market price of our common stock cannot be predicted with certainty and there is no assurance that our common stock will trade at a price consistent with such reverse stock split. Accordingly, it is possible that the market price of our common stock following the reverse stock split will decline, possibly more than would occur in the absence of a reverse stock split.

***The effective increase in the number of shares of our common stock available for issuance as a result of our reverse stock split could result in further dilution to our existing stockholders and have antitakeover implications.***

The reverse stock split alone had no effect on our authorized capital stock, and the total number of authorized shares remains the same as before the reverse stock split. The reverse stock split of our issued and outstanding shares was effected, increasing the number of shares of our common stock (or securities convertible or exchangeable for our common stock) available for issuance. The additional available shares are available for issuance from time to time at the discretion of our Board when opportunities arise, without further stockholder action or the related delays and expenses, except as may be required for a particular transaction by law, the rules of any exchange on which our securities may then be listed, or other agreements or restrictions. Any issuance of additional shares of our common stock would increase the number of outstanding shares of our common stock and (unless such issuance was pro-rata among existing stockholders) the percentage ownership of existing stockholders would be diluted accordingly. In addition, any such issuance of additional shares of our common stock could have the effect of diluting the earnings per share and book value per share of outstanding shares of our common stock.

Additionally, the effective increase in the number of authorized shares could, under certain circumstances, have anti-takeover implications. For example, the additional shares of common stock that have become available for issuance could be used by us to oppose a hostile takeover attempt or to delay or prevent changes in control or our management. Although our reverse stock split is prompted by other considerations and not by the threat of any hostile takeover attempt, stockholders should be aware that our reverse stock split could facilitate future efforts by us to deter or prevent changes in control, including transactions in which our stockholders might otherwise receive a premium for their shares over then-current market prices.

***Holders of the Offering Warrants will have no rights as a common stockholder until they acquire our common stock.***

Until you acquire shares of our common stock upon exercise of the Offering Warrants, you will have no rights with respect to shares of our common stock issuable upon exercise of your Offering Warrants. Upon exercise of your Offering Warrants, you will be entitled to exercise the rights of a common stockholder only as to matters for which the record date occurs after the exercise date.

***The Offering Warrants may not have any value.***

Each whole Offering Warrant will have an exercise price of \$ (120% of the offering price of the price of each unit sold in the offering) and will become exercisable upon issuance and expire on the fifth anniversary of the original issuance date. In the event our common stock price does not exceed the exercise price of the warrants during the period when the warrants are exercisable, the warrants may not have any value.

***Since the Offering Warrants are executory contracts, they may have no value in a bankruptcy or reorganization proceeding.***

In the event a bankruptcy or reorganization proceeding is commenced by or against us, a bankruptcy court may hold that any unexercised Offering Warrants are executory contracts that are subject to rejection by us with the approval of the bankruptcy court. As a result, holders of the Offering Warrants may, even if we have sufficient funds, not be entitled to receive any consideration for their Offering Warrants or may receive an amount less than they would be entitled to if they had exercised their Offering Warrants prior to the commencement of any such bankruptcy or reorganization proceeding.

***Provisions of our Amended and Restated Certificate of Incorporation, or Certificate of Incorporation, our Amended and Restated By-Laws, or By-Laws, and Delaware law could deter a change of our management and thereby discourage or delay offers to acquire us.***

Provisions of our Certificate of Incorporation, our By-Laws and Delaware law may make it more difficult for someone to acquire control of us or for our stockholders to remove existing management and might discourage a third party from offering to acquire us, even if a change in control or in management would be beneficial to our stockholders. Such provisions may make it costlier for a potential acquirer to engage in a business combination transaction with us. Provisions that have the effect of discouraging, delaying or preventing a change in control could limit the opportunity for our stockholders to receive a premium for their shares of our common stock and could also affect the price that some investors are willing to pay for our common stock.

***Our Certificate of Incorporation provides that the Court of Chancery of the State of Delaware will be the exclusive forum for substantially all disputes between us and our stockholders, which could limit our stockholders' ability to obtain a favorable judicial forum for disputes with us or our directors, officers or employees.***

Our Certificate of Incorporation provides that the Court of Chancery of the State of Delaware is the exclusive forum for any derivative action or proceeding brought on our behalf, any action asserting a breach of fiduciary duty, any action asserting a claim against us arising pursuant to the Delaware General Corporation Law, our Certificate of Incorporation or our By-Laws, or any action asserting a claim against us that is governed by the internal affairs doctrine; provided, that, this provision would not apply to suits brought to enforce a duty or liability created by the Securities Act and the Exchange Act. These choice of forum provisions may limit a stockholder's ability to bring a claim in a judicial forum that it finds favorable for disputes with us or our directors, officers or other employees, which may discourage such lawsuits against us and our directors, officers and other employees.

***If we fail to maintain proper and effective internal control over financial reporting, our ability to produce accurate and timely financial statements could be impaired, investors may lose confidence in our financial reporting and the trading price of our common stock may decline.***

Pursuant to Section 404 of Sarbanes-Oxley, we are required to furnish a report by our management on our internal control over financial reporting. We cannot assure you that there will not be material weaknesses or significant deficiencies in our internal control over financial reporting in the future. Any failure to maintain internal control over financial reporting could severely inhibit our ability to accurately report our financial condition, results of operations or cash flows. If we are unable to conclude that our internal control over financial reporting is effective, or if our independent registered public accounting firm determines we have a material weakness or significant deficiency in our internal control over financial reporting once that firm begin its Section 404 reviews, investors may lose confidence in the accuracy and completeness of our financial reports, the market price of our common stock could decline, and we could be subject to sanctions or investigations by Nasdaq, the SEC or other regulatory authorities. Failure to remedy any material weakness in our internal control over financial reporting, or to maintain effective control systems, could also restrict our future access to the capital markets. This could result in an adverse reaction in the financial markets due to a loss of confidence in the reliability of our financial statements.

***We do not intend to pay dividends on our common stock so any returns will be limited to the value of our stock.***

We currently anticipate that we will retain future earnings for the development, operation and expansion of our business and do not anticipate declaring or paying any cash dividends for the foreseeable future. Any return to stockholders will therefore be limited to the appreciation of their stock.

***We are a “smaller reporting company,” and the reduced disclosure requirements applicable to smaller reporting companies may make our common stock less attractive to investors.***

We are a “smaller reporting company” as defined in the Exchange Act and have elected to take advantage of certain of the scaled disclosures available to smaller reporting companies, including simplified executive compensation disclosures in our filings, exemption from the provisions of Section 404(b) of the Sarbanes-Oxley Act requiring that an independent registered accounting firm provide an attestation report on the effectiveness of internal control over financial reporting and certain other decreased disclosure obligations in our SEC filings. We cannot predict whether investors will find our common stock less attractive because of our reliance on any of these exemptions. If some investors find our common stock less attractive as a result, there may be a less active trading market for our common stock and our stock price may be more volatile.

## SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS

This prospectus contains forward-looking statements. All statements other than statements of historical facts contained in this prospectus are forward-looking statements. In some cases, you can identify forward-looking statements by terms such as "may," "will," "should," "expect," "plan," "anticipate," "could," "intend," "target," "project," "contemplate," "believe," "estimate," "predict," "potential" or "continue" or the negative of these terms or other similar expressions, although not all forward-looking statements contain these words. Forward-looking statements include, but are not limited to, statements concerning:

- our estimates regarding future results of operations, financial position, research and development costs, capital requirements and our needs for additional financing;
- how long we can continue to fund our operations with our existing cash and cash equivalents;
- delays associated with COVID-19 in anticipated timelines and milestones;
- the results, cost and timing of our preclinical studies and clinical trials, as well as the number of required trials for regulatory approval and the criteria for success in such trials;
- legal and regulatory developments in the U.S. and foreign countries, including any actions or advice that may affect the design, initiation, timing, continuation, progress or outcome of clinical trials or result in the need for additional clinical trials;
- the difficulties and expenses associated with obtaining and maintaining regulatory approval of our product candidates, and the indication and labeling under any such approval;
- our plans and ability to successfully execute development activities and commercialize our product candidates;
- risks related to manufacturing active pharmaceutical ingredients, drug product, medical devices and other materials we need;
- the size and growth of the potential markets for our product candidates, the rate and degree of market acceptance of our product candidates and our ability to serve those markets;
- the success of competing therapies and products that are or become available;
- our ability to limit our exposure under product liability lawsuits;
- our ability to obtain and maintain intellectual property protection for our product candidates;
- recently enacted and future legislation regarding the healthcare system, including changes to the Patient Protection and Affordable Care Act;
- delays, interruptions or failures in the manufacture and supply of our product candidates;
- the performance of third parties upon which we depend, including third-party contract research organizations, contract manufacturing organizations, contractor laboratories and independent contractors;
- our ability to recruit or retain key scientific, commercial or management personnel or to retain our executive officers; and
- our ability to maintain proper functionality and security of our internal computer and information systems and prevent or avoid cyber attacks, malicious intrusion, breakdown, destruction, loss of data privacy or other significant disruption.

The forward-looking statements in this prospectus are only predictions and are based largely on our current expectations and projections about future events and financial trends that we believe may affect our business, financial condition and results of operations. These forward-looking statements speak only as of the date of this prospectus and are subject to a number of known and unknown risks, uncertainties and assumptions, including those described under the sections in this prospectus entitled "Risk Factors" and "Management's Discussion and Analysis of Financial Condition and Results of Operations" and elsewhere in this prospectus. Because forward-looking statements are inherently subject to risks and uncertainties, some of which cannot be predicted or quantified and some of which are beyond our control, you should not rely on these forward-looking statements as predictions of future events. The events and circumstances reflected in our forward-looking statements may not be achieved or occur and actual results could differ materially from those projected in the forward-looking statements. Moreover, we operate in an evolving environment. New risk factors and uncertainties may emerge from time to time, and it is not possible for management to predict all risk factors and uncertainties. Except as required by applicable law, we do not plan to publicly update or revise any forward-looking statements contained herein, whether as a result of any new information, future events, changed circumstances or otherwise.

## MARKET AND INDUSTRY DATA

We obtained the industry, market and competitive position data used throughout this prospectus from our own internal estimates and research, as well as from independent market research, industry, medical and general publications and surveys, governmental agencies and publicly available information in addition to research, surveys and studies conducted by third parties. In some cases, we do not expressly refer to the sources from which this data is derived. In that regard, when we refer to one or more sources of this type of data in any paragraph, you should assume that other data of this type appearing in the same paragraph is derived from the same sources, unless otherwise expressly stated or the context otherwise requires. All market and industry data used in this prospectus involve a number of assumptions and limitations, and you are cautioned not to give undue weight to such estimates.

In addition, while we believe the industry, market and competitive position data included in this prospectus is reliable and based on reasonable assumptions, such data involve risks and uncertainties and are subject to change based on various factors, including those described in the section titled "Risk Factors." These and other factors could cause results to differ materially from those expressed in the estimates made by the independent parties or by us.

## USE OF PROCEEDS

We estimate that the net proceeds to us from this offering will be approximately \$4.0 million, or approximately \$4.7 million if the underwriters exercise their option to purchase additional shares of common stock and/or warrants from us in full, and after deducting estimated underwriting discounts and commissions and estimated offering expenses payable by us, and excluding the proceeds, if any, from the exercise of the warrants issued pursuant to this offering. In addition, if all of the warrants offered pursuant to this prospectus are exercised in full for cash, we will receive approximately an additional \$3.0 million in cash.

Our common stock is currently listed on OTCQB and we have applied to list our common stock on Nasdaq under the symbol “WINT” and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering.

We intend to use net proceeds from this offering for our working capital, development of our drug product candidates or acquisition of new drug product candidates, and/or general corporate purposes. As of the date of this prospectus, we cannot estimate with certainty the amount of net proceeds to be used for the purposes described above. We may find it necessary or advisable to use the net proceeds for other purposes, and we will have broad discretion in the application of the net proceeds. Pending the uses described above, we plan to invest the net proceeds from this offering in short-term, interest-bearing obligations, investment-grade instruments or other securities.



## DIVIDEND POLICY

We have not paid any dividends and we do not anticipate paying any cash dividends in the foreseeable future and we intend to retain all of our earnings, if any, to finance our growth and operations and to fund the expansion of our business. Payment of any dividends will be made in the discretion of our Board of Directors, or the Board, after our taking into account various factors, including our financial condition, operating results, current and anticipated cash needs and plans for expansion.

## CAPITALIZATION

The following table sets forth our cash and cash equivalents and our capitalization as of December 31, 2019, as follows:

- on an actual basis;
- on an as-adjusted basis, to reflect the sale by us of 510,725 units in this offering, at an assumed public offering price of \$9.79 per unit, (based on the last reported sale price of our common stock on OTCQB on May 5, 2020 and assuming the underwriters do not exercise their option to purchase additional units), after deducting estimated underwriting discounts and commissions and other estimated offering expenses payable by us.

You should read the following table in conjunction with our historical financial statements and the related notes thereto included in this prospectus.

	As of December 31, 2019	
	Actual	As Adjusted(1) (unaudited)
<i>(in thousands except share and per share data)</i>		
Cash and cash equivalents	22,578	26,653
Loans Payable – current portion	161	161
Loans Payable – non-current portion	4,608	4,608
Restructured Debt Liability – contingent milestone payments	15,000	15,000
Stockholders' equity:		
Preferred stock; \$0.001 par value; 5,000,000 shares authorized, no shares issued and outstanding, actual; 5,000,000 shares authorized, no shares issued and outstanding, as-adjusted	—	—
Common stock; \$0.001 par value; 120,000,000 shares authorized; 13,697,420 shares issued, and 13,697,395 shares outstanding, actual; and 14,208,120 shares issued and outstanding, as-adjusted	14	14
Additional paid-in capital	763,097	767,172
Accumulated deficit	(685,122)	(685,122)
Treasury stock (at cost); 25 shares	(3,054)	(3,054)
Total stockholders' equity	74,935	79,010
Total capitalization	\$ 94,704	98,779

(1) Each \$1.00 increase (decrease) in the assumed public offering would increase (decrease) each of cash and cash equivalents, additional paid-in capital and total stockholders' equity by \$0.5 million, assuming the number of shares offered by us, as set forth on the cover page of this prospectus, remains the same and after deducting the estimated underwriting discounts and commissions and estimated offering expenses payable by us. Similarly, each increase (decrease) of 50,000 in the number of shares of common stock offered by us would increase (decrease) the cash and cash equivalents, additional paid-in capital and stockholders' (deficit) equity by \$0.5 million, assuming the assumed public offering price per share remains the same, and after deducting the estimated underwriting discounts and commissions and estimated offering expenses payable by us.

The as adjusted information discussed above is illustrative only and will be adjusted based on the actual public offering price and other terms of this offering determined between us and the underwriters at pricing.

The number of shares of our common stock in the table above is based on 13,697,395 shares of common stock outstanding as of December 31, 2019. The information gives effect to the 1-for-3 reverse stock split of all of our outstanding shares of common stock effected on April 29, 2020 and excludes:

- 1,772,277 shares of our common stock issuable upon the exercise of stock options outstanding as of December 31, 2019, at a weighted-average exercise price of \$17.61 per share;
- 4,741,486 shares of our common stock issuable upon the exercise of the warrants outstanding as of December 31, 2019, at a weighted-average exercise price of \$22.01 per share;
- 149,228 shares of common stock available for future grant as of December 31, 2019 under our 2011 Long-Term Incentive Plan, as amended;
- 35,000 shares of common stock issuable upon the vesting of restricted stock units outstanding as of December 31, 2019; and
- 252,525 shares of our common stock issuable upon the exercise of the Offering Warrants to be issued with the units in this offering (or 290,404 shares if the underwriters exercise their over-allotment option in full).

## DILUTION

If you purchase units, which include shares of our common stock, your interest will be diluted immediately to the extent of the difference between the public offering price per unit you will pay in this offering and the as adjusted net tangible book value per share of our common stock immediately after this offering. Net tangible book value per share represents our total tangible assets less total liabilities, divided by the number of shares of our common stock outstanding. Dilution with respect to net tangible book value per share represents the difference between the amount per share paid by purchasers of shares of common stock in this offering and the net tangible book value per share of our common stock immediately after this offering.

As of December 31, 2019, our historical net tangible book value was \$(17.8) million, or \$(1.30) per share, based on 13,697,395 shares of common stock outstanding as of December 31, 2019.

After giving effect to our issuance and sale of 510,725 units in this offering at an assumed offering price of \$9.79 per unit (based on the last reported sale price of our common stock on OTCQB on May 5, 2020 and assuming the underwriters do not exercise their option to purchase additional units), and after deducting underwriting discounts and commissions and estimated offering expenses payable by us, the as-adjusted net tangible book value as of December 31, 2019 would have been \$(13.8) million, or \$(0.97) per share. This represents an immediate increase in as-adjusted net tangible book value to existing shareholders of \$0.33 per share and an immediate dilution to new investors purchasing shares of our common stock in this offering of \$10.76 per share.

Assumed public offering price per unit		\$	9.79
Historical net tangible book value per share as of December 31, 2019	\$	(1.30)	
Increase in net tangible book value per share attributable to new investors purchasing shares in this offering		0.33	
As-adjusted net tangible book value per share after this offering	\$	(0.97)	
Dilution per share to new investors participating in this offering	\$	10.76	

The foregoing table and calculations are based on 13,697,395 shares of our common stock outstanding as of December 31, 2019. The information gives effect to the 1-for-3 reverse stock split of all of our outstanding shares of common stock effected on April 29, 2020 and excludes:

- 1,772,277 shares of our common stock issuable upon the exercise of stock options outstanding as of December 31, 2019, at a weighted-average exercise price of \$17.61 per share;
- 4,741,486 shares of our common stock issuable upon the exercise of the warrants outstanding as of December 31, 2019, at a weighted-average exercise price of \$22.01 per share;
- 149,228 shares of common stock available for future grant as of December 31, 2019 under our 2011 Long-Term Incentive Plan, as amended; and
- 35,000 shares of common stock issuable upon the vesting of restricted stock units outstanding as of December 31, 2019.
- 252,525 shares of our common stock issuable upon the exercise of the Offering Warrants to be issued with the units in this offering (or 290,404 shares if the underwriters exercise their over-allotment option in full).

Each \$1.00 increase (decrease) in the assumed public offering price of \$9.79 per unit (which was the last reported sale price of our common stock on the OTCQB on May 5, 2020) would increase (decrease) our as-adjusted net tangible book value per share after this offering by approximately \$0.03, and the dilution per share to new investors purchasing shares in this offering would increase (decrease) by \$0.97 per share, assuming the number of units offered by us, as set forth on the cover page of this prospectus, remains the same and after deducting underwriting discounts and commissions and estimated offering expenses payable by us. We may also increase or decrease the number of units to be issued in this offering. Each increase (decrease) of 50,000 units offered by us would increase (decrease) our as-adjusted net tangible book value per share by \$0.04, and the dilution per share to new investors purchasing units in this offering would increase (decrease) by \$0.04 per share, assuming that the assumed public offering price remains the same, and after deducting underwriting discounts and commissions and estimated offering expenses payable by us. The information discussed above is illustrative only and will be adjusted based on the actual public offering price and other terms of this offering as determined between us and the underwriters at pricing. If the underwriters' option to purchase additional shares of common stock and/or warrants from us is exercised in full, the as-adjusted net tangible book value per share after this offering would be \$(0.92) per share, the increase in as-adjusted net tangible book value per share to existing shareholders would be \$0.05 per share and the dilution to new investors purchasing shares in this offering would be \$10.71 per share.

Certain of our officers, directors and existing stockholders, including certain stockholders affiliated with our directors or that beneficially own more than 5% of our outstanding common stock, have indicated an interest in purchasing an aggregate of \$2.0 million of our units in this offering on the same terms as those offered to the public. However, because indications of interest are not binding agreements or commitments to purchase, the underwriters may determine to sell more, fewer or no units in this offering to any of these officers, directors or stockholders, or any of these officers, directors or stockholders may determine to purchase more, fewer or no units in this offering. The underwriters will receive the same underwriting discounts and commissions on any units purchased by these officers, directors and stockholders as they will on any other shares sold to the public in this offering.

To the extent that any options or warrants are exercised, new options are issued under our equity incentive plans or we otherwise issue additional shares of common stock or preferred stock in the future at a price less than the public offering price, there may be further dilution to new investors purchasing units in this offering.

## MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

*You should read the following discussion and analysis of our financial condition and results of operations together with the consolidated financial statements and the related notes included elsewhere in this prospectus. In addition to historical financial information, the following discussion contains forward-looking statements based upon our current plans, expectations and beliefs that involve risks, uncertainties and assumptions. Our actual results may differ materially from those described in or implied by these forward-looking statements as a result of many factors, including those set forth under the section titled "Risk Factors" and in other parts of this prospectus.*

Management's discussion and analysis of financial condition and results of operations, or MD&A, is provided as a supplement to the accompanying consolidated financial statements and footnotes to help provide an understanding of our financial condition, the changes in our financial condition and our results of operations. This item should be read in connection with our Consolidated Financial Statements and notes thereto, or Notes, included in this prospectus.

### OVERVIEW

We are a clinical-stage, biopharmaceutical and medical device company focused on the development of novel therapeutics intended to address significant unmet medical needs in important acute care markets. Our development programs are primarily focused in the treatment of acute cardiovascular and pulmonary diseases. Our lead cardiovascular product candidate istaroxime, a first-in-class, dual-acting agent being developed to improve cardiac function in patients with acute heart failure, or AHF, and cardiogenic shock with a potentially differentiated safety profile from existing treatments. Istaroxime demonstrated significant improvement in diastolic and systolic function in phase 2 clinical trials, and has been granted Fast Track designation for the treatment of AHF by the U.S. Food and Drug Administration, or FDA. Our lead pulmonary product candidate is AEROSURF® (lucinactant for inhalation), a novel drug/medical device combination for non-invasive delivery of our proprietary aerosolized KL4 surfactant, using our proprietary Aerosol Delivery System, or ADS, technology for the treatment of respiratory distress syndrome, or RDS, in premature infants. AEROSURF has been granted Fast Track designation by the FDA for the treatment of RDS. We are also developing plans to study our proprietary KL4 surfactant for the treatment of lung injury resulting from severe COVID-19 infection if we are able to secure the required additional capital resources necessary to initiate and complete the study. Our other drug product candidates include rostafuroxin, a novel medicine for the treatment of hypertension in patients with a specific genetic profile. We also have a number of pipeline preclinical product candidates that we are evaluating for progression into clinical development. We are pursuing a number of early exploratory research programs to identify potential product candidates, including oral (and intravenous) SERCA 2a heart failure compounds and other product candidates utilizing our KL4 surfactant and ADS technologies.

In December 2018, we acquired CVie Investments Limited, or CVie Investments, an exempted company with limited liability incorporated under the laws of the Cayman Islands, which we refer to herein as the CVie Acquisition. Since the CVie Acquisition, we have operated CVie Investments, and its wholly-owned subsidiary, CVie Therapeutics, a Taiwan corporation organized under the laws of China, as a subsidiary focused on the development of drug product candidates for cardiovascular diseases. We undertook the merger as part of a strategic initiative to create stockholder value that resulted from a multi-year process focused on identifying strategic opportunities, including potential strategic alliances, collaborations (primarily outside the U.S.), joint development opportunities, acquisitions, technology licensing arrangements, as well as potential combinations (including by merger or acquisition) or other corporate transactions.

The reader is referred to, and encouraged to read in its entirety the Section titled, "Business – Company Overview" in this prospectus, which contains a discussion of our business and business plans, as well as information concerning our proprietary technologies and our current and planned development programs.

### RESULTS OF OPERATIONS

#### *Comparison of Years Ended December 31, 2019 and 2018*

#### **Net Loss and Operating Loss**

The operating loss for the years ended December 31, 2019 and 2018 was \$24.9 million and \$16.2 million, respectively. The increase in operating loss from 2018 to 2019 was due to a \$7.1 million increase in operating expenses and a \$1.6 million decrease in revenue.

The net loss for the years ended December 31, 2019 and 2018 was \$27.5 million and \$20.5 million, respectively. Included in the net loss is (i) a net loss on debt extinguishment of \$1.8 million and \$3.3 million in 2019 and 2018, respectively; (ii) interest expense of \$0.5 million and \$1.4 million for 2019 and 2018, respectively; (iii) \$0.4 million in foreign exchange losses in 2019; and (iv) \$0.4 million in proceeds from the sale of research and development tax credits in 2018.

The net loss attributable to common stockholders for the years ended December 31, 2019 and 2018 was \$27.5 million, or \$2.51 basic net loss per common share, and \$34.8 million, or \$23.20 basic net loss per common share, respectively. Included in the net loss attributable to common shareholders for 2018 is a \$12.5 million non-cash AEROSURF warrant dividend and a \$1.7 million non-cash deemed dividend on preferred stock.

## Grant Revenue

We did not recognize any grant revenue for the year ended December 31, 2019. We recognized grant revenue of \$0.8 million for the year ended December 31, 2018 related to funds received and expended under a Phase II SBIR grant from the National Heart, Lung, and Blood Institute of the National Institute of Health to support the AEROSURF phase 2b clinical trial and a Phase II SBIR grant from NIAID to support continued development of our aerosolized KL4 surfactant as a potential medical countermeasure to mitigate acute and chronic/late-phase radiation-induced lung injury.

## License Revenue with Affiliate

<i>(in thousands)</i>	<b>Year Ended December 31,</b>	
	<b>2019</b>	<b>2018</b>
License revenue with affiliate	\$ 198	\$ 1,023

License revenue with affiliate represents revenue from the License Agreement with Lee's Pharmaceutical (HK) Ltd., or Lee's (HK), an affiliate of Lee's Pharmaceutical Holdings Limited, or Lee's, which together with its affiliates is our largest shareholder, and constitutes a contract with a customer accounted for in accordance with ASC Topic 606. All revenue related to the License Agreement was recognized as of the second quarter of 2019 and no future material performance obligations are due.

## Research and Development Expenses

Our research and development expenses are charged to operations as incurred and we account for such costs by category rather than by project. As many of our research and development activities likely form the foundation for the potential development of multiple product candidates, including istaroxime, our KL4 surfactant and drug delivery technologies, and rostafuloxin, they are expected to benefit more than a single project. For that reason, we cannot reasonably estimate the costs of our research and development activities on a project-by-project basis. We believe that tracking our expenses by category is a more accurate method of accounting for these activities. Our research and development costs consist primarily of expenses associated with (a) product development and manufacturing, (b) clinical, medical and regulatory operations, and (c) direct preclinical and clinical development programs. We also account for research and development and report annually by major expense category as follows: (i) salaries and benefits, (ii) contracted services, (iii) raw materials, aerosol devices and supplies, (iv) rents and utilities, (v) depreciation, (vi) contract manufacturing, (vii) travel, (viii) stock-based compensation and (ix) other.

Research and development expenses by category for the years ended December 31, 2019 and 2018 are as follows:

<i>(in thousands)</i>	<b>Year Ended December 31,</b>	
	<b>2019</b>	<b>2018</b>
Product development and manufacturing	4,248	5,319
Clinical, medical and regulatory operations	6,532	4,255
Direct preclinical and clinical programs	1,907	988
Total research and development expenses	\$ 12,687	\$ 10,562

Research and development expenses include non-cash charges associated with stock-based compensation and depreciation of \$2.1 million and \$0.4 million for 2019 and 2018, respectively.

*Product Development and Manufacturing*

Product development and manufacturing includes (i) manufacturing operations, both in-house and with contract manufacturing organizations, or CMOs, validation activities, quality assurance and analytical chemistry capabilities that support the manufacture of our drug products used in research and development activities, and our medical devices, including our ADS, (ii) design and development activities related to our ADS for use in our AEROSURF clinical development program; and (iii) pharmaceutical and manufacturing development activities of our drug product candidates including development of istaroxime, lyophilized KL4 surfactant, and rostafuroxin. These costs include employee expenses, facility-related costs, depreciation, costs of drug substances (including raw materials), supplies, quality control and assurance activities, analytical services, and expert consultants and outside services to support pharmaceutical and device development activities.

Product development and manufacturing expenses decreased \$1.1 million from 2018 to 2019 due to a reduction of design and development activities on the phase 3 ADS following completion of the design verification activities in mid-2018.

*Clinical, Medical and Regulatory Operations*

Clinical, medical and regulatory operations include (i) medical, scientific, preclinical and clinical, regulatory, data management and biostatistics activities in support of our research and development programs; and (ii) medical affairs activities to provide scientific and medical education support for our KL4 surfactant and aerosol delivery systems under development. These costs include personnel, expert consultants, outside services to support regulatory and data management, symposiums at key medical meetings, facilities-related costs, and other costs for the management of clinical trials.

Clinical, medical and regulatory operations expenses increased \$2.3 million from 2018 to 2019 due to (i) an increase of \$1.3 million in non-cash, stock compensation expense as a result of employee stock option grants in the fourth quarter of 2018 and the first quarter of 2019; and (ii) an increase of \$0.7 million in personnel costs.

*Direct Preclinical and Clinical Development Programs*

Direct preclinical and clinical development programs include: (i) development activities, toxicology studies and other preclinical studies; and (ii) activities associated with conducting clinical trials, including patient enrollment costs, clinical site costs, clinical device and drug supply, and related external costs, such as consultant fees and expenses.

Direct preclinical and clinical development programs expenses increased \$0.9 million from 2018 to 2019 due to costs associated with continued clinical development of istaroxime and AEROSURF and preclinical activities related to potential follow-on product candidates in acute heart failure.

*Research and Development Expense by Major Expense Category*

We also account for our research and development expense by major expense category as shown in the following table:

<i>(in thousands)</i>	<b>Year Ended</b>	
	<b>2019</b>	<b>2018</b>
Salaries & benefits	\$ 4,741	\$ 4,029
Contracted services	3,373	4,194
Stock-based compensation	1,932	232
Raw materials, aerosol devices and supplies	664	195
Royalties	800	800
Rents and utilities	471	683
Travel	213	109
Depreciation	170	155
Other	323	165
	<u>\$ 12,687</u>	<u>\$ 10,562</u>

The increase in salaries and benefits of \$0.7 million from 2018 to 2019 is due to increased headcount as a result of the December 2018 CVie Acquisition.

Contracted services include third-party costs of preclinical studies, clinical trial activities, certain components of our manufacturing operations, quality control and analytical stability and release testing of our drug products, consulting services, aerosol device design and engineering services, etc. The decrease of \$0.8 million from 2018 to 2019 is due to a reduction of design and development activities on the phase 3 ADS following completion of the design verification activities in mid-2018, partially offset by an increase in contracted research and clinical trials expense in 2019.

The increase in stock-based compensation of \$1.7 million from 2018 to 2019 is due to employee stock option grants in the fourth quarter of 2018 and the first quarter of 2019.

The increase in raw materials, aerosol devices and supplies of \$0.5 million from 2018 to 2019 is due to costs associated with activities related to the planned AEROSURF bridge study including a \$0.3 million increase in aerosol device expense and a \$0.2 million increase in raw materials and supplies in 2019.

Royalties represent minimum royalties due under our licensing agreements with Philip Morris USA Inc. and Philip Morris Products S.A. for our ADS technology.

The category “Other” consists primarily of ongoing research and development costs such as insurance, taxes, education and training and software licenses.

### General and Administrative Expenses

<i>(in thousands)</i>	<u>Year Ended December 31,</u>	
	<u>2019</u>	<u>2018</u>
General and Administrative Expenses	\$ 12,404	\$ 7,421

General and administrative expenses consist of costs for executive management, business development, intellectual property, finance and accounting, legal, human resources, information technology, facility, and other administrative costs.

General and administrative expenses include non-cash charges associated with stock-based compensation of \$4.8 million and \$0.7 million, respectively, for the years ended December 31, 2019 and 2018. General and administrative expenses increased \$5.0 million from 2018 to 2019 due to the increase in stock-based compensation expense.

### Other Income / (Expense)

<i>(in thousands)</i>	<u>Year Ended December 31,</u>	
	<u>2019</u>	<u>2018</u>
Net loss on debt extinguishment	\$ (1,794)	\$ (3,345)
Interest income	153	15
Interest expense	(495)	(1,409)
Other (expense) / income	(446)	401
Other expense, net	\$ (2,582)	\$ (4,338)

#### *Net loss on debt extinguishment*

In December 2019, as part of a private placement financing, or the December 2019 Private Placement Financing, we converted \$2.95 million of existing loans payable obligations to LPH II Investments Ltd., a Cayman Islands company, or LPH II, an affiliate of Lee’s (HK), on the same terms as the investors of the December 2019 Private Placement Financing (see, “Private Placement Offerings”). The conversions of the loans payable are treated as extinguishments of debt and we recorded a loss on debt extinguishment of approximately \$1.8 million, resulting from the difference between the fair value of the common stock and warrants issued and the carrying value of the obligations.



In December 2018, as part of a private placement financing, or the December 2018 Private Placement Financing, we converted \$6.0 million of existing loan payable obligations to LPH Investments Limited, or LPH, and \$1.0 million of existing collaboration and device development payables, or the Battelle Payables, to Battelle Memorial Institute, or Battelle on the same terms as the investors of the December 2018 Private Placement Financing (see, “Private Placement Offerings”). The conversions of the loan payables are treated as extinguishments of debt and we recorded a loss on debt extinguishment of approximately \$3.2 million and \$0.5 million, respectively, resulting from the difference between the fair value of the common stock and warrants issued and the carrying value of the obligations. In December 2018, we also repaid our convertible note payable with Panacea Venture Management Company Ltd., or Panacea, in its entirety in cash of \$1.5 million (see, “Convertible Note Payable”). As part of the extinguishment of debt, we recorded a gain on extinguishment of debt of approximately \$0.4 million, relating to the reacquisition of the beneficial conversion option.

#### *Interest expense*

<i>(in thousands)</i>	<b>Year Ended December 31,</b>	
	<b>2019</b>	<b>2018</b>
Non-cash amortization of debt discounts	\$ 163	\$ 863
Cash interest expense	332	546
<b>Total interest expense</b>	<b>495</b>	<b>1,409</b>

Cash interest expense in 2019 consists of interest expense of \$0.1 million related to loans with LPH II, \$0.1 million related to the O-Bank credit facility, and \$0.1 million related to the Battelle Payables. Non-cash amortization of debt discounts relates to a discount on Battelle Payables related to a restructuring agreement.

Cash interest expense in 2018 consists of (i) interest expense of \$0.3 million related to the Battelle Payables; (ii) interest expense of \$0.2 million related to the loan payable obligations to LPH; and (iii) interest expense of \$0.1 million related to our convertible note payable with Panacea. Non-cash amortization of debt discounts relates to our convertible note payable with Panacea, which was extinguished in December 2018, and to a discount on Battelle Payables.

#### *Other (expense) / income*

Other expense in 2019 primarily consists of \$0.4 million in losses on foreign currency translation. Other income in 2018 consists of proceeds from the sale of Commonwealth of Pennsylvania research and development tax credits, partially offset by \$0.1 million of foreign currency losses.

## **LIQUIDITY AND CAPITAL RESOURCES**

We are subject to risks common to companies in the biotechnology industry, including but not limited to, the need for additional capital, risks of failure of preclinical and clinical studies, the need to obtain marketing approval and reimbursement for any drug product candidate that we may identify and develop, the need to successfully commercialize and gain market acceptance of our product candidates, dependence on key personnel, protection of proprietary technology, compliance with government regulations, development of technological innovations by competitors, reliance on third party manufacturers.

We have incurred net losses since inception. Our net loss was \$27.5 million and \$20.5 million for the years ended December 31, 2019 and 2018 respectively. We expect to continue to incur operating losses for at least the next several years. As of December 31, 2019, we had an accumulated deficit of \$685.1 million. Our future success is dependent on our ability to identify and develop our product candidates, and ultimately upon our ability to attain profitable operations. We have devoted substantially all of our financial resources and efforts to research and development and general and administrative expense to support such research and development. Net losses and negative cash flows have had, and will continue to have, an adverse effect on our stockholders’ equity and working capital, and accordingly, our ability to execute our future operating plans.

In the future, we will need to raise additional capital to continue funding our operations. We plan to obtain funding through a combination of public or private equity offerings, or strategic transactions including collaborations, licensing arrangements or other strategic partnerships. There is inherent uncertainty associated with these fundraising activities and, other than the funding recently committed by Lee’s (HK), as discussed below, they are not considered probable. In the absence of such funding, we plan to strategically manage our uncommitted spend to execute our priorities and implement cost saving measures to reduce research and development expenditures which would include limiting or delaying or terminating preclinical and clinical studies or other development activities for our AEROSURF product candidates.

We recently entered into a binding commitment with Lee's HK, pursuant to which Lee's HK will provide financing for the development of AEROSURF beginning April 1, 2020 through September 30, 2020. We are in the process of negotiating a definitive agreement with Lee's HK to set forth additional funding beyond September 30, 2020 through study completion. If we are unsuccessful at finalizing a definitive agreement with Lee's HK or if we are successful but Lee's HK subsequently terminates the agreement beyond September 30, 2020, our board of directors has approved a plan to suspend or terminate AEROSURF development until such time as we are able to secure the capital required to fund the program.

Management considers the successful implementation of these plans and efforts to manage uncommitted spending, including AEROSURF development, and to carry out necessary cost saving measures to be probable. Therefore, we expect our plans will enable our cash and cash equivalents as of the filing of our Annual Report on Form 10-K to be sufficient to fund operations through at least the next twelve months.

Our funding requirements, however, are based on estimates that are subject to risks and uncertainties and may change as a result of many factors currently unknown. Although management continues to pursue the plans described above, there is no assurance that we will be successful in obtaining sufficient funding on terms acceptable to us to fund continuing operations, if at all, including as a result of market volatility following the COVID-19 outbreak. Until such time as we can generate substantial product revenues, if ever, we expect to finance our cash needs through a combination of equity offerings, strategic partnerships and licensing arrangements. The terms of any future financing may adversely affect the holdings or the rights of our existing stockholders.

## Cash Flows

### *Cash flows for the years ended December 31, 2019 and 2018*

Net cash outflows for 2019 consisted of \$24.7 million net cash used for ongoing operating activities, \$13.8 million of net cash used in investing activities, offset by \$21.8 million of net cash provided financing activities.

### *Operating Activities*

Net cash used in operating activities was \$24.7 million and \$15.8 million for the years ended December 31, 2019 and 2018, respectively. The increase in net cash used in operating activities from 2018 to 2019 is attributable to a \$7.1 million increase in operating expenses as well as other changes in working capital.

### *Investing Activities*

Net cash provided by investing activities was \$13.8 million for the year ended December 31, 2019 and the net cash used in investing activities was \$13.7 for the year ended December 31, 2018. The net cash provided by investing activities in 2019 and used in investing activities in 2018 is due to the purchase of \$13.9 million of marketable securities with the proceeds from the December 2018 Private Placement Financing, which were then sold during 2019.

### *Financing Activities*

Net cash provided by financing activities was \$21.8 million and \$38.7 million for the years ended December 31, 2019 and 2018, respectively, summarized as follows:

<i>(in thousands)</i>	Year Ended December 31,	
	<b>2019</b>	<b>2018</b>
Proceeds from private placements, net of expenses	\$ 22,982	\$ 32,893
Proceeds from loan payable, net of expenses	1,000	6,160
Repayment of loan payable	(2,063)	(160)
Proceeds from convertible note payable	-	1,500
Repayment of convertible note payable	-	(1,500)
Payments for taxes related to net share settlements of equity awards	(151)	(155)
Cash flows from financing activities, net	<u>\$ 21,768</u>	<u>\$ 38,738</u>

The following sections provide a more detailed discussion of our available financing facilities.

## Financings Pursuant to Common Stock Offerings

Historically, we have funded, and expect that we will continue to fund, our business operations through various sources, including financings in the form of equity offerings. Since May 2017, we are no longer eligible to use a universal shelf registration statement on Form S-3. Accordingly, until we are again eligible to use the registration statement on Form S-3, we plan to conduct future equity offerings through private placement transactions.

### Private Placement Offerings

#### *December 2019 Private Placement Financing*

On December 6, 2019 we completed the December 2019 Private Placement Financing with select institutional investors, in which we issued and sold an aggregate of 2,916,666 shares of common stock at a price per share of \$9.06, for an aggregate purchase price of approximately \$26.4 million. Included in the purchase price, LPH II converted \$2.95 million of existing debt obligations on the same terms as the other select institutional investors. In connection with this offering, we issued warrants, or the Series I Warrants, to purchase up to an aggregate of 1,458,333 shares of common stock at an exercise price equal to \$12.09 per share, which are exercisable on the six-month anniversary of date of issuance and through the five-year anniversary of the date of issuance. The Series I Warrants (i) may be exercised for cash or on a cashless basis if there is no effective registration statement registering the resale of the warrant shares, (ii) may not be exercised to the extent that following such exercise, the holder would beneficially own more than 4.99% (or such other percent as designated by each holder not to exceed 19.99%) of our outstanding shares of common stock, and (iii) contain customary provisions that adjust the exercise price and the number of shares of common stock into which the Series I Warrants are exercisable in the event of a corporate transaction. Our Registration Statement on Form S-1, filed with the Securities and Exchange Commission, or the SEC, on January 21, 2020, registered the 2,916,666 shares of common stock sold and 1,458,333 shares of common stock underlying the Series I Warrants. On May 6, 2020, we entered into an amendment with certain holders of our Series I Warrants pursuant to which the exercise price of the Series I Warrant was amended from \$12.09 to \$9.67 if the Series I Warrant is exercised, in whole or in part, prior to December 5, 2021. In addition, the certain holders of the Series I Warrants agreed to be bound by a lock-up provision with respect to any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock that are beneficially owned, held or acquired by such holders for a period of ninety (90) days following the earlier of (i) the closing date of our next public offering of securities, or (ii) December 24, 2020. During the applicable lock-up period, the certain holders of the Series I Warrants will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock.

#### *December 2018 Private Placement Financing*

On December 21, 2018, we completed a private placement offering with select institutional investors for the purchase of an aggregate of 3,928,513 shares of common stock at a price per share of \$9.9396, for an aggregate purchase price of approximately \$39.0 million, or the 2018 Private Placement Financing. Included in the purchase price, each of LPH II, an affiliate of Lee's, and Battelle converted \$6.0 million and \$1.0 million, respectively, of existing debt obligations on the same terms as the other select institutional investors. In connection with this offering, we issued (i) Series F Warrants to purchase an aggregate of 667,847 shares of common stock at an exercise price equal to \$11.04 per share, which are exercisable through the 18-month anniversary of the date of issuance, or the Series F Warrants, and (ii) Series G Warrants to purchase an aggregate of 1,296,410 shares of common stock at an exercise price equal to \$12.15 per share, which are exercisable through the 5-year anniversary of the date of issuance, or the Series G Warrants and, together with the Series F Warrants, the December 2018 Warrants. The December 2018 Warrants (i) may not be exercised to the extent that following such exercise, the holder would beneficially own more than 9.99% (or other percent as designated by each holder) of our outstanding shares of common stock, and (ii) contain customary provisions that adjust the exercise price and the number of shares of common stock into which the December 2018 Warrants are exercisable in the event of a corporate transaction. On April 24, 2020, we entered into an amendment with the holders of our Series F Warrants whereby the expiration date of the Series F Warrant was extended from June 24, 2020 to December 24, 2020. In addition, the holders of the Series F Warrants agreed to be bound by a lock-up provision with respect to any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock that are beneficially owned, held or acquired by such holders for a period of ninety (90) days following the earlier of (i) the closing date of our next public offering of securities, or (ii) December 24, 2020. During the applicable lock-up period, the holders of the Series F Warrants will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock.

#### *April 2018 Private Placement Financing*

In April 2018, we completed a private placement with LPH II for the purchase of \$2.6 million of our common stock and warrants to purchase our common stock at a purchase price per share of \$14.40. In connection with this offering, we issued 180,555 shares of common stock and warrants to purchase 45,139 shares of common stock at an exercise price of \$16.56 per share. The warrants are exercisable after 6 months and through the seventh anniversary of the issue date.

## Loans Payable – Current Portion and Non-current Portion

### Loans Payable – Current Portion

#### *2019 Loan*

On October 24, 2019, we entered into a loan agreement with LPH II. Under the loan agreement, LPH II agreed to lend us \$1.0 million, or the 2019 Loan, to support our operations while we sought to complete a strategic transaction (as defined in the loan agreement). The 2019 Loan, which was funded in a single installment by wire transfer on October 28, 2019, accrued interest at a rate of 6% per annum and matured upon the closing date of the December 2019 private placement, which qualified as the strategic transaction under terms defined in the loan agreement. We repaid the 2019 Loan and related accrued interest in full upon consummation of the December 2019 Private Placement.

#### *2018 Loans*

In January 2018 and March 2018, LPH Investments Limited, or LPH, an affiliate of Lee's, agreed to lend us \$1.5 million and \$1.0 million, respectively, or the First Quarter 2018 Loans, to support our AEROSURF development activities and sustain our operations while we sought to identify and advance one or more potential strategic initiatives as defined in the related loan agreements, or the Funding Event. The loans accrued interest at a rate of 6% per annum and would mature upon the earlier of the closing date of the Funding Event or December 31, 2018. To secure our obligations under these loans, we granted LPH a security interest in substantially all our assets pursuant to the terms of a security agreement dated March 1, 2018, or the LPH Security Agreement.

During the third and fourth quarters of 2018, LPH agreed to lend us funds, or the Third and Fourth Quarter 2018 Loans, to sustain our operations while we continued to work on a strategic transaction. Of the Third and Fourth Quarter 2018 Loans, the initial loan was funded on August 14, 2018 in the amount of \$0.3 million, and subsequent Third and Fourth Quarter 2018 Loans were funded on the following dates and in the following amounts: August 29, 2018, in the amount of \$0.48 million; September 12, 2018 in the amount of \$0.5 million; September 27, 2018 in the amount of \$0.5 million; October 19, 2018 in the amount of \$0.43 million; November 2, 2018 in the amount of \$0.5 million; November 19, 2018 in the amount of \$0.35 million; and December 5, 2018 in the amount of \$0.6 million. The loans accrued interest at a rate of 6% per annum and matured upon the earlier of (i) the closing date for the strategic transaction (as defined in the related loan agreements), provided that we were able to raise a minimum of \$30 million in connection with such transaction, or (ii) March 31, 2019. In each case, we granted to LPH a security interest in substantially all of our assets pursuant to the terms of the LPH Security Agreement. Effective December 5, 2018, LPH assigned all outstanding loans to us to LPH II.

On December 21, 2018, as part of the December 2018 Private Placement Financing (see, "Private Placement Offerings"), we converted \$6.0 million of existing loan payable obligations comprised of \$2.5 million of the First Quarter 2018 Loans and \$3.5 million of the Third and Fourth Quarter 2018 Loans into equity securities on the same terms as those of the investors in the December 2018 Private Placement Financing. The conversion of the loan payable to LPH II was treated as an extinguishment of debt and does not represent a capital transaction as the December 2018 private placement financing included third-party investors and all investors received identical terms. We recorded a loss on extinguishment of debt approximately \$3.2 million. The loss was calculated as the difference between the aggregate fair value of the common stock and Series F and Series G Warrants on December 21, 2018 and the carrying value of the debt liabilities. The balance of the loans payable to LPH II of \$160,000 was paid along with accrued interest of \$182,000 on December 27, 2018. Following this conversion of the First Quarter 2018 Loans and the conversion and payoff of the Third and Fourth Quarter 2018 Loans into equity securities, the security interest granted under the LPH Security Agreement was discharged.

#### *Assumption of LPH II debt as part of the CVie Acquisition*

As part of the CVie Acquisition, we assumed approximately \$3.5 million of debt payable to LPH II.

From April 24, 2018 to November 16, 2018, CVie entered into four separate agreements to borrow an aggregate of approximately \$3.5 million from Lee's on the following dates and in the following amounts \$0.5 million in April 2018, or the April 2018 Loan; \$0.3 million in September 2018, or the September 2018 Loan; \$0.15 million in October 2018, or the October 2018 Loan; and \$2.5 million in November 2018, or the November 2018 Loan. The April 2018 Loan, the September 2018 Loan, the October 2018 Loan and the September 2018 Loan were subsequently assigned to LPH II. The terms of the loan agreements are identical with interest, payable in cash upon maturity, at a rate of 4% per annum and maturing one year from the effective date of the respective loan agreement.

During the quarter ended March 31, 2019, we made payments of \$0.45 million against the April 2018 Loan and paid the remaining \$50,000 balance plus accrued interest in April 2019. In December 2019, as part of the December 2019 Private Placement Financing (see, "Private Placement Offerings"), we converted the remaining \$2.95 million related to the September 2018 Loan, October 2018 Loan, and November 2018 Loan on the same terms as the Investors of the December 2019 Private Placement Financing. In connection of the conversion of LPH II debt, we issued: 325,607 shares of common stock based at \$9.06 per share and Series I Warrants to purchase 162,804 shares of common stock, at an exercise price equal to \$12.09 per share. The Series I Warrants are exercisable at any time after the six-month anniversary of the date of issuance and through the 5-year anniversary of the date of issuance. The conversion of the loan payable to LPH II is treated as an extinguishment of debt and does not represent a capital transaction as the December 2019 Private Placement Financing included third-party investors and all investors received identical terms. We recorded a loss on extinguishment of debt of approximately \$1.8 million. The loss was calculated as the difference between the aggregate fair value of the common stock and Series I Warrants on December 6, 2019 and the carrying value of the debt liabilities. The accrued interest of \$127,000 was paid in December 2019 and as of December 31, 2019 there are no remaining amounts outstanding.

#### *Loan payable to Bank Direct Capital Finance*

In May 2019, we entered into an insurance premium financing and security agreement with Bank Direct Capital Finance, or Bank Direct. Under the agreement, we have financed \$0.7 million of certain premiums at a 5.35% annual interest rate. As of December 31, 2019, the outstanding principal of the loan was \$0.2 million. The remaining payments were made during the first quarter of 2020.

#### Loans Payable – Non-current Portion

##### *Assumption of bank debt as part of the CVie Acquisition*

As part of the CVie Acquisition, we assumed approximately \$4.5 million in a bank credit facility.

In September 2016, CVie entered into a 12-month revolving credit facility of approximately \$2.9 million with O-Bank Co., Ltd., or O-Bank, to finance operating activities, or the O-Bank Facility. The O-Bank Facility was later renewed and increased to approximately \$5.8 million in September 2017. The O-Bank Facility was guaranteed by Lee's, which pledged bank deposits in the amount of 110% of the actual borrowing amount. The guaranty was part of the O-Bank Facility; however, we do not have a written commitment from Lee's to maintain the collateral. Interest, payable in cash on a monthly basis, is determined based on 90-day TAIBOR (the Taipei Interbank Offer Rate) plus 0.91%. The O-Bank Facility expired on September 11, 2019 and the loans were set to mature six months after the expiration date, on March 11, 2020. In March 2020, the O-Bank Facility was amended, to include amongst other things, the extension of the maturity date to March 2022. In addition to the extension of the maturity date, the total amount of the O-Bank Facility was decreased to approximately \$5.0 million, and the interest rate was changed to the TAIBOR plus 1.17% and the term was changed to 24-month non-revolving. All amounts due under the O-Bank Facility will be payable upon the earlier of (i) six months after the expiration date or (ii) two years after the drawdown date.

As of December 31, 2019, the outstanding principal of the O-Bank Facility was approximately \$4.6 million, and has subsequently been amended to mature in March 2022, therefore, the outstanding principal has been classified in Loans Payable - Non-current Portion.

#### **Convertible Note Payable**

On July 2, 2018, we issued to Panacea, a Secured Convertible Promissory Note, or the Panacea Note, with respect to a loan facility in the aggregate amount of up to \$1.5 million, which was funded in two loans of, \$1.0 million on the date of the Panacea Note and \$0.5 million on July 23, 2018. The Panacea Note had a maturity date of December 31, 2018 and accrued interest at a rate of 15% per annum until the Panacea Note was paid in full or converted into shares of our common stock at a price per share of \$4.00. In addition, in lieu of converting the Panacea Note, Panacea could deliver the Panacea Note into a private placement in which Panacea Venture Healthcare Fund I L.P., an affiliate of Panacea, participated. In connection with these loans, we granted to Panacea a security interest in substantially all our assets.

In connection with the Panacea Note, we issued to Panacea warrants, or the Series D Warrants to purchase 62,500 shares, or the Warrant Shares at an exercise price of \$12.00 per Series D Warrant Share, or the Exercise Price. The Series D Warrants may be exercised at any time beginning six months after the date of issuance and through the fifth anniversary of the date of issuance. The Series D Warrants may not be exercised to the extent that the holder thereof would, following such exercise, beneficially own more than 9.99% of our outstanding shares of common stock, which percentage may be increased, decreased or waived by such holder upon sixty-one days' notice to us. The Series D Warrants also contain customary provisions that adjust the Exercise Price and the number of Series D Warrant Shares in the event of a corporate transaction.

We recorded the Panacea Note as current debt at its face value of \$1.5 million less debt discounts consisting of (i) \$0.4 million fair value of the warrants issued in connection with the Panacea Note and (ii) a \$0.4 million beneficial conversion feature related to an embedded conversion option that had an effective conversion price that was less than the fair value of the underlying stock at the commitment date. The discount is being accreted to the \$1.5 million loan over its term using the effective interest method. The Series D Warrants are derivatives that qualify for an exemption from liability accounting as provided for in ASC Topic 815, *Derivatives and Hedging - Contracts in Entity's Own Equity*, and have been classified as equity.

The fair value at issuance of the Series D Warrants was determined using the Black-Scholes option-pricing model. The input assumptions used in the valuation are the historical volatility of our common stock price, the expected term of the warrants, and the risk-free interest rate based on the five-year treasury bill rate in effect at the measurement date.

#### Significant Input Assumptions of Warrant Valuation

Historical volatility	103%
Expected term (in years)	5
Risk-free interest rate	2.75%

The following amounts comprise the convertible note interest expense for the periods presented:

<i>(in thousands)</i>	<b>Year Ended December 31, 2018</b>
Non-cash amortization of debt discounts	\$ 833
Cash interest expense	106
<b>Total convertible note interest expense</b>	<b>939</b>

#### Extinguishment of Panacea Convertible Promissory Note

On December 27, 2018, we repaid the Panacea Note in its entirety in cash of \$1.5 million. As part of the extinguishment of debt, we recorded a gain on extinguishment of debt of approximately \$0.4 million, relating to the reacquisition of the beneficial conversion option. The gain was calculated using the intrinsic value of the beneficial conversion option, which is the product of: (i) the difference between the common stock price on the date of extinguishment of \$15.33 and the conversion price of \$12.00, and (ii) 125,000 shares convertible into common stock.

#### Restructured Debt Liability

<i>(in thousands)</i>	<b>December 31, 2019</b>	<b>December 31, 2018</b>
Restructured debt liability - contingent milestone payments	\$ 15,000	\$ 15,000

On October 27, 2017, we and Deerfield Management Company, L.P., or Deerfield, entered into an Exchange and Termination Agreement pursuant to which (i) promissory notes evidencing a loan with affiliates of Deerfield, or the Deerfield Loan, in the aggregate principal amount of \$25 million and (ii) warrants to purchase up to 8,333 shares of our common stock at an exercise price of \$2,360.40 per share held by Deerfield were cancelled in consideration for (i) a cash payment in the aggregate amount of \$2.5 million, (ii) 23,703 shares of common stock, representing 2% of fully-diluted shares outstanding (as defined in the Exchange and Termination Agreement) on the closing date, and (iii) the right to receive certain milestone payments based on achievement of specified AEROSURF development and commercial milestones, which, if achieved, could potentially total up to \$15 million. In addition, a related security agreement, pursuant to which Deerfield held a security interest in substantially all of our assets, was terminated. We established a \$15 million long-term liability for the contingent milestone payments potentially due to Deerfield under the Exchange and Termination Agreement. See Note 5 to the Audited Consolidated Financial Statements contained in this prospectus. The liability has been recorded at full value of the contingent milestones and will continue to be carried at full value until the milestones are achieved and paid or milestones are not achieved and the liability is written off as a gain on debt restructuring.

## OFF-BALANCE SHEET ARRANGEMENTS

We did not have any material off-balance sheet arrangements at December 31, 2019 or 2018 or during the periods then ended.

## CRITICAL ACCOUNTING POLICIES

The preceding discussion and analysis of financial condition and results of operations are based upon our Consolidated Financial Statements, which have been prepared in conformity with U.S. generally accepted accounting principles, or GAAP. Preparing financial statements requires us to make estimates and assumptions that affect the reported amounts of assets, liabilities, revenues and expenses. Estimates are based on our historical operations, our future business plans and projected financial results, the terms of existing contracts, our observance of trends in the industry, and information available from other outside sources, as appropriate. These estimates and assumptions are affected by the application of our accounting policies. Critical accounting policies and practices are both important to the portrayal of a company's financial condition and results of operations, and require management's most difficult, subjective or complex judgments, often as a result of the need to make estimates about the effects of matters that are inherently uncertain. Actual results could differ from such estimates due to changes in economic factors or other conditions that are outside the control of management. A summary of our significant accounting policies is described in Note 5 of the Audited Consolidated Financial Statements contained in this prospectus. Of those policies, we believe that the following accounting policy is critical to aid our stockholders in fully understanding and evaluating our reported financial results.

### *Business Combinations*

We follow the acquisition method for an acquisition of a business where the purchase price is allocated to the assets acquired and liabilities assumed based on their estimated fair values at the dates of acquisition. The excess costs of acquired businesses over the fair values of the assets acquired and liabilities assumed were recognized as goodwill. The valuations of the acquired assets and liabilities will impact the determination of future operating results. In addition to using management estimates and negotiated amounts, we used a variety of information sources to determine the estimated fair values of the assets and liabilities, including a third-party appraisal for the estimated value of identifiable intangible assets. The business and technical judgment of management and third-party experts was also used in determining the value of identifiable intangible assets.

### *Goodwill and Intangible Assets*

We record acquired identified intangibles, which includes intangible assets (such as goodwill and other intangibles), based on estimated fair value. The acquired in-process research and development (IPR&D) assets are considered indefinite-lived intangible assets until completion or abandonment of the associated research and development efforts. IPR&D is not amortized but reviewed for impairment at least annually, or when events or changes in the business environment indicate the carrying value may be impaired. The following table represents identifiable intangible assets as of December 31, 2019 and 2018:

<i>(in thousands)</i>	<u>Carrying Value</u>
Istaroxime drug candidate	\$ 22,340
Rostafuroxin drug candidate	54,750
<b>Total</b>	<u>\$ 77,090</u>

Goodwill represents the excess of the purchase price over the fair value of assets acquired and liabilities assumed in a business combination and is not amortized. It is reviewed for impairment at least annually or when events or changes in the business environment indicate its carrying value may be impaired.

When testing our goodwill and indefinite-lived intangible assets for impairment, we can elect to perform a qualitative assessment to determine if it is more likely than not that the fair values of our reporting unit and indefinite-lived intangible assets are less than the respective carrying values. Such qualitative factors can include, among others, industry and market conditions, overall financial performance, and relevant entity-specific events. If we conclude based on our qualitative assessments that it is more likely than not that the fair value of our reporting unit or indefinite-lived intangible assets are less than their respective carrying values, we perform a quantitative analysis. When conducting our annual impairment test of goodwill and indefinite-lived intangible assets as of December 1, 2019, we elected to perform quantitative assessments.



The Company consists of one reporting unit. In order to perform the quantitative goodwill impairment test, we compare the estimated fair value of our reporting unit to its carrying value. If the fair value exceeds the carrying value, no further evaluation is required, and no impairment exists. If the carrying amount exceeds the fair value, the difference between the carrying value and the fair value is recorded as an impairment loss, the amount of which may not exceed the total amount of goodwill. When performing our annual goodwill impairment assessment as of December 1, 2019, we determined the fair value of our reporting unit based upon the quoted market price and related market capitalization of the Company's common stock, adjusted for an estimated control premium. Based on the quantitative test performed, the fair value of our reporting unit exceeded its carrying value and no impairment loss was recognized.

When performing the quantitative impairment assessment for our indefinite-lived IPR&D intangible assets, we estimate the fair values of the assets using the multi-period excess earnings method, or MPEEM. MPEEM is a variation of the income approach which estimates the fair value of an intangible asset based on the present value of the incremental after-tax cash flows attributable to the intangible asset. Significant factors considered in the calculation of IPR&D intangible assets include the risks inherent in the development process, including the likelihood of achieving commercial success and the cost and related time to complete the remaining development. Future cash flows for each project were estimated based on forecasted revenue and costs, taking into account the expected product life cycles, market penetration, and growth rates. Other significant estimates and assumptions inherent in this approach include: 1) the amount and timing of the projected net cash flows associated with the IPR&D assets, 2) the long-term growth rate, 3) the discount rate, which seeks to reflect the various risks inherent in the projected cash flows; and 4) the tax rate, which considers geographic diversity of the projected cash flows. While we use the best available information to prepare our cash flows and discount rate assumptions, actual future cash flows could differ significantly based on the commercial success of the related drug candidates and market conditions resulting in future impairment charges related to our indefinite-lived intangible asset balances.

Based on our annual quantitative impairment assessment of our indefinite-lived IPR&D intangible assets on December 1, 2019, we concluded that the assets were not impaired.

#### *Revenue Recognition*

We account for revenue, including license revenue with affiliate, in accordance with ASC Topic 606, *Revenue from Contracts with Customers*, which was adopted on January 1, 2018. This standard applies to all contracts with customers with the exception of contracts that are within the scope of other standards, such as leases, insurance and financial instruments. Under ASC Topic 606, an entity recognizes revenue when its customer obtains control of promised goods or services, in an amount that reflects the consideration that the entity expects to be entitled in exchange for those goods or services.

We perform the following five steps to recognize revenue under ASC Topic 606: (i) identify the contract(s) with a customer; (ii) identify the performance obligations in the contract; (iii) determine the transaction price; (iv) allocate the transaction price to the performance obligations in the contract; and (v) recognize revenue when (or as) the entity satisfies a performance obligation. We only recognize revenue when it is probable that we will collect the consideration to which we are entitled in exchange for the goods or services that will be transferred to the customer.

We have concluded that our government grants are not within the scope of ASC Topic 606 as they do not meet the definition of a contract with a customer. We have concluded that the grants meet the definition of a contribution and are nonreciprocal transactions, and have also concluded that Subtopic 958-605, *Not-for-Profit-Entities-Revenue Recognition* does not apply, as we are a business entity and the grants are with governmental agencies.

In the absence of applicable guidance under GAAP, effective January 1, 2018, we developed a policy for the recognition of grant revenue when the related costs are incurred and the right to payment is realized.

We believe this policy is consistent with the overarching premise in ASC Topic 606, to ensure that revenue recognition reflects the transfer of promised goods or services to customers in an amount that reflects the consideration that we expect to be entitled to in exchange for those goods or services, even though there is no exchange as defined in ASC Topic 606. We believe the recognition of revenue as costs are incurred and amounts become realizable is analogous to the concept of transfer of control of a service over time under ASC Topic 606. We did not receive or recognize any grant revenue for the year ended December 31, 2019.

### *Accrued Research and Development Expenses*

As part of the process of preparing our financial statements, we are required to estimate our accrued expenses. This process involves reviewing quotations and contracts, identifying services that have been performed on our behalf and estimating the level of service performed and the associated cost incurred for the service when we have not yet been invoiced or otherwise notified of the actual cost. The majority of our service providers invoice us monthly in arrears for services performed or when contractual milestones are met. We make estimates of our accrued expenses as of each balance sheet date in our financial statements based on facts and circumstances known to us at that time. We periodically confirm the accuracy of our estimates with the service providers and make adjustments if necessary. The significant estimates in our accrued research and development expenses are related to expenses incurred with respect to CROs, CMOs, clinical trial sites, and other vendors supporting our research and development and manufacturing activities.

We base our expenses related to CROs, CMOs and clinical trial sites on our estimates of services received and efforts expended under quotations and contracts with those vendors that conduct research and development and manufacturing activities on our behalf. The financial terms of these agreements are negotiated, vary from contract to contract and may result in uneven payment flows. At times, payments made to our vendors may exceed the level of services provided and result in a prepayment of the applicable research and development or manufacturing expense. In accruing service fees, we estimate the time period over which services will be performed and the level of effort to be expended in each period. If the actual timing of the performance of services or the level of effort varies from our estimate, we adjust the accrual or prepaid expense accordingly. Although we do not expect our estimates to be materially different from amounts actually incurred, our understanding of the status and timing of services performed relative to the actual status and timing of services performed may vary and could result in us reporting amounts that are too high or too low in any particular period. There have been no material changes in estimates for the periods presented.

### *Leases*

Effective January 1, 2019, we adopted ASU 2016-02, *Leases* (ASU 2016-02). ASU 2016-02 establishes ASC Topic 842, *Leases* (ASC 842), which requires the recognition of the right-of-use assets and related operating and finance lease liabilities on the balance sheet. We adopted ASC 842 using the modified retrospective transition approach for all leases existing at January 1, 2019. The adoption of this standard resulted in the recognition of operating lease liabilities and related right-of-use assets on our consolidated balance sheet of \$2.2 million and \$2.0 million, respectively, related to our operating leases. The adoption of ASC 842 also resulted in the elimination of deferred rent of approximately \$72,000 and \$139,000 in accrued expenses and other long-term liabilities, respectively, in our consolidated balance sheet. The adoption of the standard did not have a material impact on our consolidated statements of operations or consolidated statements of cash flows.

At the inception of an arrangement, we determine whether an arrangement is, or contains, a lease based on the unique facts and circumstances present in the arrangement. An arrangement is, or contains, a lease if the arrangement conveys the right to control the use of an identified asset for a period of time in exchange for consideration. Leases with a term greater than one year are generally recognized on the balance sheet as operating lease right-of-use assets and current and non-current operating lease liabilities, as applicable. We elected not to recognize on the balance sheet leases with terms of 12 months or less. We typically only include the initial lease term in our assessment of a lease arrangement. Options to extend a lease are not included in our assessment unless there is reasonable certainty that we will renew.

Operating lease liabilities and their corresponding operating lease right-of-use assets are recorded based on the present value of lease payments over the expected remaining lease term. Certain adjustments to the right-of-use asset may be required for items such as incentives received. The interest rate implicit in our leases is typically not readily determinable. As a result, we utilize our incremental borrowing rate, which reflects the fixed rate at which we could borrow on a collateralized basis the amount of the lease payments in the same currency, for a similar term, in a similar economic environment. In transition to ASC 842, we utilized the remaining lease term of our leases in determining the appropriate incremental borrowing rates.

For contracts entered into on or after the effective date, at the inception of a contract, we assess whether the contract is, or contains, a lease. The assessment is based on: (1) whether the contract involves the use of a distinct identified asset, (2) whether we obtain the right to substantially all the economic benefit from the use of the asset throughout the period, and (3) whether we have the right to direct the use of the asset.

We evaluate the classification of our leases as either finance leases or operating leases. A lease is classified as a finance lease if any one of the following criteria are met: the lease transfers ownership of the asset by the end of the lease term, the lease contains an option to purchase the asset that is reasonably certain to be exercised, the lease term is for a major part of the remaining useful life of the asset, the present value of the lease payments equals or exceeds substantially all of the fair value of the asset, or the leased asset is of such a specialized nature that it is expected to have no alternative use to the lessor at the end of the lease. A lease is classified as an operating lease if it does not meet any of these criteria. Currently, all of our leases are classified as operating leases.

## BUSINESS

### Overview

We are a clinical-stage, biopharmaceutical and medical device company focused on the development of novel therapeutics intended to address significant unmet medical needs in important acute care markets. Our development programs are primarily focused in the treatment of acute cardiovascular and pulmonary diseases. Our lead cardiovascular product candidate, istaroxime, a first-in-class, dual-acting agent being developed to improve cardiac function in patients with acute heart failure, or AHF, and cardiogenic shock with a potentially differentiated safety profile from existing treatments. Istaroxime demonstrated significant improvement in diastolic and systolic function in phase 2 clinical trials and has been granted Fast Track designation for the treatment of AHF by the U.S. Food and Drug Administration, or FDA. Our lead pulmonary product candidate is AEROSURF® (lucinactant for inhalation), a novel drug/medical device combination for non-invasive delivery of our proprietary aerosolized KL4 surfactant, using our proprietary Aerosol Delivery System, or ADS, technology for the treatment of respiratory distress syndrome, or RDS, in premature infants. AEROSURF has been granted Fast Track designation by the FDA for the treatment of RDS. We are also developing plans to study our proprietary KL4 surfactant for the treatment of lung injury resulting from severe COVID-19 infection if we are able to secure the required additional capital resources necessary to initiate and complete the study. Our other drug product candidates include rostafuroxin, a novel medicine for the treatment of hypertension, in patients with a specific genetic profile. We also have a number of pipeline preclinical product candidates that we are evaluating for progression into clinical development. We are pursuing a number of early exploratory research programs to identify potential product candidates, including oral and intravenous SERCA 2a heart failure compounds and other product candidates utilizing our KL4 surfactant and ADS technologies.

### Our Development Programs

The table below summarizes the current status and anticipated milestones for our principal product development programs. However, due to the recent global outbreak of a novel strain of the coronavirus (COVID-19), our clinical trials and next expected milestones of our product candidates may be impacted, and we may experience delays in anticipated timelines and milestones.

Product Candidate	Indication	Status	Next Expected Milestone
Istaroxime	AHF	Phase 2b	Initiate start-up activities for second phase 2b clinical trial in ~300 patients in second half of 2020.
Istaroxime	Early Cardiogenic Shock	Phase 2a	Initiate phase 2a clinical trial in ~60 patients mid-year 2020.
AEROSURF (aerosolized KL4 surfactant)	RDS	Phase 2b	Initiated in second quarter of 2020 a ~90-patient bridging study with new ADS (developed for use in our phase 3 program), relying on licensee resources.
Rostafuroxin	Genetically Associated Hypertension	Phase 2b	Out-licensing.
Lyophilized KL4 Surfactant	Lung Injury resulting from COVID-19	Pilot	Program planning; targeted IND filing in May 2020 and start mid-year 2020, subject to securing the additional capital resources required for the program.

#### *Istaroxime (AHF)*

Istaroxime is a first-in-class, dual action investigational drug that we are developing to treat AHF with a potentially differentiated safety profile from current AHF therapies. We recently completed a successful phase 2b clinical trial of istaroxime in which the primary endpoint of cardiac function, E/Ea ratio (echocardiographic assessment reflecting changes in pulmonary capillary wedge pressure, or PCWP, or left ventricular filing pressure), was significantly improved. Istaroxime has been granted Fast Track designation by the FDA for the treatment of AHF.

Heart failure is a chronic, progressive condition in which patients often experience episodic periods of increased symptoms known as AHF, where the heart fails to adequately pump, resulting in worsening symptoms, including pulmonary and peripheral edema and other severe complications. In the United States, or U.S., approximately 6 million people (nearly two percent of the adult population) have heart failure and approximately half of these patients are expected to die within five years of diagnosis; and in the combined U.S., European Union, or EU, and Japan markets, there are more than 18 million patients suffering from heart failure. AHF can be precipitated by many factors and puts patients at increased risk for morbidity, hospital readmission and mortality. Heart failure is the leading cause of hospitalization in patients age 65 years and older. There are more than one million hospital admissions for heart failure in the U.S. each year and over 2.5 million hospital estimated admissions for AHF in the combined U.S., EU and Japan markets. We estimate that AHF may represent a potential addressable market of approximately \$1.6 billion dollars annually (in the U.S., EU and Japan).

Istaroxime represents a novel approach to the treatment of AHF. It has a dual mechanism of action, referred to as luso-inotropic, to improve cardiovascular physiology. Current therapy for heart failure in the hospital typically includes intravenous diuretics and, if the blood pressure is low, supportive therapy with inotropes. Inotropes are often associated with adverse effects such as hypotension, arrhythmias and, in some cases, increased mortality. These drugs are used only if needed to support blood pressure and cardiac function. We believe that istaroxime, if approved, may have the potential to address unmet medical needs of these patients by improving cardiac function and management of fluid accumulation that contributes to heart failure symptoms with a potentially differentiated safety profile from current AHF therapies, with the potential to reduce both complications and length of hospital stays.

#### *Istaroxime (Cardiogenic Shock)*

We are also planning to study istaroxime for the treatment of early cardiogenic shock, a severe presentation of heart failure characterized by very low blood pressure and hypo-perfusion to critical organs which is associated with high mortality and morbidity and is not well treated with current therapies. We believe istaroxime may fulfill an unmet need in cardiogenic shock based on the profile observed in our phase 2 clinical studies in AHF. Because of the unmet need in the treatment of early cardiogenic shock, we believe there may be an opportunity with a breakthrough therapy designation, which may provide an expedited development program. Receipt of either Fast Track or breakthrough therapy designation may increase the likelihood of receiving priority review of a marketing application, which would provide for an expedited review timeframe.

#### *AEROSURF (lucinactant for inhalation)*

AEROSURF is an investigational combination drug/medical device product that we are developing to improve the management of RDS in premature infants. RDS is a condition that occurs in premature infants who may not have fully-developed natural lung surfactant, which is essential to normal respiratory function and survival, and may require surfactant therapy to sustain life, and can result in long-term respiratory problems, developmental delays and death. Surfactant therapy is the primary therapy to address an underlying surfactant deficiency, and AEROSURF is designed to deliver aerosolized KL4 surfactant noninvasively using our proprietary ADS technology. We have completed three AEROSURF phase 2 clinical trials. While our most recent phase 2 clinical trial did not achieve its primary endpoint, we believe that the results of our phase 2 clinical program supports the further development of AEROSURF to reduce both the rate of nasal continuous positive airway pressure, or nCPAP, failure and the need for intubation in premature infants being treated for RDS. In addition, a pooled post-hoc analysis of data from two phase 2 studies suggests that AEROSURF may have the potential to lower the incidence and severity of bronchopulmonary dysplasia, or BPD, a chronic lung disease of premature infants who have required intubation, mechanical ventilation and oxygen therapy. AEROSURF has been granted Fast Track designation by the FDA for the treatment of RDS.

RDS is the most prevalent respiratory disease in the neonatal intensive care unit, or NICU. Surfactants currently available in the U.S. are generally administered using invasive endotracheal intubation, frequently with mechanical ventilation, procedures that may result in serious respiratory conditions and other complications. AEROSURF is designed to deliver aerosolized KL4 surfactant noninvasively using our proprietary ADS technology and potentially may meaningfully reduce the use of invasive endotracheal intubation and mechanical ventilation. We believe that AEROSURF, if approved, may meaningfully reduce the number of premature infants who are subjected to invasive surfactant administration, and potentially provide transformative clinical and pharmacoeconomic benefits. In addition, we believe that AEROSURF may support an expansion of the RDS market by reducing the need for intubation and mechanical ventilation, reducing hospital costs, and enabling dosing and repeat dosing as needed using AEROSURF's noninvasive delivery of KL4 surfactant via nCPAP. Moreover, while the current surfactant market represents drug-only revenues, we believe we can capture revenues from both the drug product and the ADS disposable cartridges, supported by anticipated pharmacoeconomic benefits associated with the successful use of nCPAP. We believe that AEROSURF, if approved, may be administered in less specialized hospitals and birthing centers, potentially further expanding access to treatment. We also believe that AEROSURF has the potential to achieve a higher price per patient in an addressable market that could be in excess of \$1 billion annually.

We have completed design verification activities for a newly-designed ADS, which combines the same aerosolization technology used during the phase 2 clinical program, but with improved ergonomics, interface, controls, and dose monitoring in a modular design. The new ADS also implements design changes to potentially mitigate the risks of device-related treatment interruptions experienced in the prototype phase 2 device used in the phase 2b clinical trial, and we believe it will be easier and faster to use and may support enhanced clinical outcomes by potentially allowing for reduced time to initial administration of our KL4 surfactant and reduced time intervals between doses compared to our phase 2 prototype.

### *Rostafuroxin*

Rostafuroxin is a novel investigational drug product candidate that we are developing for the treatment of hypertension in patients with a specific genetic profile. Rostafuroxin targets resistant hypertensive patients with a specific genetic profile, which is found in approximately 20% - 25% of the adult hypertensive population. We have studied rostafuroxin in three phase 2 clinical trials assessing reduction in blood pressure in a hypertensive population selected in accordance with a specified genetic profile. After positive phase 2a results, a phase 2b study was initiated. In this most recent phase 2b clinical trial, rostafuroxin demonstrated efficacy in Caucasian patients but not in Chinese patients. We are exploring potential reasons for the different responses.

According to the Centers for Disease Control, or CDC, patients with high blood pressure have a greater risk for heart disease and stroke, which are the leading causes of death in the U.S. Currently, an estimated 75 million adults, or approximately 33% of the adult population in the U.S., have high blood pressure and the incidence is increasing. During 2014, high blood pressure was a primary or contributing cause of death for more than 410,000 adults in the U.S. The estimated annual cost of high blood pressure in the U.S., including for health care services, medications, and missed days of work, is approximately \$48 billion. Unfortunately, hypertension is a heterogeneous disease in which a majority of treated patients (50%-85% globally) do not reach their therapeutic target blood pressure and patients often have persistent hypertension despite being on multiple therapies. Ethnicity and genetic makeup are known to impact the response to anti-hypertensive treatments, and uncontrolled hypertension has been associated with certain genetic makeups. Given the size of the market and the prevalence of unmet medical needs, major pharmaceutical companies have maintained hypertension as a key area of focus and continue to seek new drugs to compete in markets they have established with previous anti-hypertensive therapies. We plan to develop rostafuroxin and potentially leverage the industry's interest in licensing opportunities in this market.

We are working to finalize the rostafuroxin drug formulation and an analytical method to increase the sensitivity of our existing assay to measure low concentrations of the compound in the body.

### *Lyophilized KL4 Surfactant – Lung Injury and Other Studies*

We are developing plans to study our proprietary KL4 surfactant for the treatment of lung injury resulting from severe COVID-19 infection if we are able to secure the required additional capital resources necessary to initiate and complete the study as existing cash resources will not be used to conduct this work. We plan to file an IND application with the FDA in May 2020 for an initial pilot clinical trial to assess the ability of our proprietary KL4 surfactant to impact key respiratory parameters in ventilated COVID-19 patients with a targeted start date by mid-year 2020. Existing cash resources will not be used to conduct this work. We recently applied to BARDA requesting funding for our development plans of KL4 surfactant in COVID-19 patients and we were granted a meeting to review our proposal with BARDA representatives. In addition, we continue to pursue multiple COVID-19 study funding opportunities with other government and private foundations as well as potential collaboration arrangements with leading academic institutions.

Patients with COVID-19 pneumonia may progress to severe respiratory failure requiring supplemental oxygen and mechanical ventilation. This acute lung injury, known as acute respiratory distress syndrome, or ARDS, has no approved therapies and is associated with significant morbidity, mortality and healthcare resource utilization. The COVID-19 virus infects via angiotensin-converting enzyme 2 (ACE2) on cells in the lung which impair surfactant production, resulting in decreased lung compliance, and increased likelihood of needing mechanical ventilation. We believe this mechanism of injury may differentiate COVID-19 lung injury from other etiologies of ARDS and is the basis for a potentially important role for our KL4 surfactant. Lung fibrosis and severe interstitial changes occurring in these COVID-19 patients resemble those seen in premature infants who are initially ventilated due to RDS and later develop BPD – a condition in which KL4 surfactant clinical data suggests potential benefit. Pre-clinical and clinical evidence shows surfactant replacement therapy has the potential to improve lung function, oxygenation, lung compliance and decrease pulmonary inflammation. These beneficial effects could lead to potential clinical improvements such as decreased need for mechanical ventilation, decreased time on ventilator (freeing the devices for other patients) and possibly mortality.

Our KL4 surfactant can be lyophilized for reconstitution to a liquid just prior to administration. We plan to conduct studies to assess potential reduction of cold chain storage and refrigeration requirements of lyophilized KL4 surfactant in the hospital. We have demonstrated in laboratory experiments that our lyophilized KL4 surfactant retains many of the key attributes and characteristics of our liquid instillate. We are assessing potential development pathways to secure marketing approval for lyophilized KL4 surfactant as an intratracheal instillate for the treatment and/or prevention of RDS. Lyophilized KL4 surfactant is the drug product component of AEROSURF and a lyophilized dosage form of the liquid KL4 surfactant intratracheal instillate, or SURFAXIN®, which was approved by the FDA in 2012. In April 2015, we voluntarily ceased commercializing SURFAXIN to focus our resources on the development of aerosolized KL4 surfactant for respiratory diseases, beginning with AEROSURF. Going forward, if we are able to define an acceptable development program for lyophilized KL4 surfactant that is achievable from a cost, timing and resource perspective, we may seek approval to treat premature infants who, because they are unable to breathe on their own or other reason, are not candidates for AEROSURF.

## Other Programs

We are pursuing a number of early exploratory research programs to identify potential product candidates, including oral (and intravenous) SERCA 2a heart failure compounds and other product candidates utilizing our KL4 surfactant and ADS technologies.

We believe we can create added value to our istaroxime programs by advancing our oral/chronic intravenous SERCA 2a heart failure preclinical candidates through proof-of-concept and are actively exploring partnership opportunities for these potential product candidates as well.

We believe our KL4 surfactant and ADS technologies may potentially support a product pipeline to address a broad range of serious respiratory conditions in children and adults. We have also worked with Eleison Pharmaceuticals, Inc., or Eleison, a specialty pharmaceutical company developing life-saving therapeutics for rare cancers, to assess the feasibility of using our ADS technology potentially to deliver Eleison's inhaled lipid cisplatin and are contemplating next steps, and under a grant from the National Institutes of Health, or NIH, to address respiratory conditions. If we are able to identify a funding source, including from non-dilutive sources such as the NIH, we may consider a collaboration for the further study of this potential opportunity to address rare cancers affecting the lungs.

## Our Strategy

We intend to maximize the value of our product candidates and proprietary technologies. Our strategy to achieve this goal includes plans to:

- **Advance istaroxime for the treatment of AHF to a phase 3-ready position.** We plan to complete the istaroxime AHF phase 2b clinical program and develop a strong phase 3-ready position for continued development and potential partnering;
- **Study istaroxime for early cardiogenic shock, which, if the drug demonstrates adequate potential to raise blood pressure with acceptable safety, may create the opportunity for a breakthrough therapy designation and an expedited development program.** In 2020, we plan to initiate a small phase 2a clinical trial in early cardiogenic shock to explore a potential expedited regulatory pathway for istaroxime in this area of unmet medical need;
- **Advance development of preclinical heart failure programs.** To create added value to the istaroxime programs, we plan to our advance oral/chronic and intravenous SERCA2a preclinical product candidates through proof of concept;
- **Advance AEROSURF to a phase 3-ready position.** In 2020, we initiated a small phase 2 bridging study to clinically evaluate the performance of the new ADS in the NICU and introduce a potentially optimized dose regimen. We intend to advance AEROSURF to a phase 3-ready position by leveraging development opportunities in China (the largest RDS and surfactant market), with our licensee for Asia supporting clinical costs;
- **Assess KL4 surfactant's ability to impact key respiratory parameters in ventilated COVID-19 patients.** We are actively pursuing multiple non-dilutive funding opportunities to secure the additional capital resources necessary to initiate and complete a pilot clinical trial of KL4 surfactant to potentially mitigate the pulmonary effects of severe COVID-19 infection with a targeted start date by mid-year 2020;
- **Seek strategic collaborative relationships for the development and potential commercialization of rostafuloxin.** We are exploring strategic collaborations to out-license and use proceeds to provide non-dilutive funding of our core programs;
- **List our common stock on The Nasdaq Capital Market®,** beginning with this offering. In 2020, we plan to obtain a listing on The Nasdaq Capital Market®, or Nasdaq. We have applied to list our common stock in connection with this offering and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering; and
- **Execute business development and explore acquiring additional product candidates.** We plan to execute robust business development for partnerships for current development programs as well as explore acquiring additional product candidates to add to our development pipeline.



## Our Product Candidates

### Istaroxime

#### Overview

Our lead cardiovascular product is istaroxime, a first-in-class, dual action investigational drug that we are developing to treat AHF and cardiogenic shock. Istaroxime has been evaluated in two phase 2 clinical trials, the results of which suggest that istaroxime may improve cardiovascular physiology as assessed by parameters of pump function, decreases in PCWP, decreases in heart rate, increases in blood pressure without adverse events such as arrhythmias, cardiac damage (as indicated by elevated troponin values) or adverse impact on kidney function. In August 2019, the FDA granted Fast Track designation for istaroxime for the treatment of AHF.

#### AHF and Cardiogenic Shock Overview

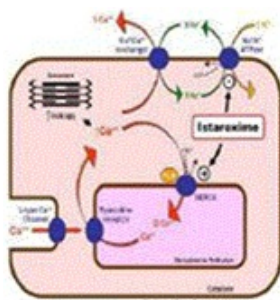
Heart failure can result from structural or functional cardiac abnormalities. Heart failure is a chronic, progressive disease that commonly but episodically worsens to a point of decompensation, where cardiac output fails to meet the body's metabolic needs. The disease is characterized by inadequate pumping function of the heart that results in fluid accumulation manifesting as pulmonary congestion, peripheral edema and congestion in other parts of the body. Insufficient cardiac output can result in inadequate peripheral perfusion that increases the risk of other organ dysfunction such as renal failure. Chronic heart failure is commonly treated with multiple medications including diuretics, inhibitors of neurohumoral imbalances (angiotensin, renin, aldosterone, natriuretic peptides) and beta blockers. Effective treatments for AHF are lacking.

Intensification of heart failure therapy in the hospital typically includes intravenous diuretics and, if the blood pressure is low, supportive therapy with inotropes. Inotropes can be associated with adverse effects that include hypotension, arrhythmias and possibly increased mortality. These drugs are used only if needed to support blood pressure and cardiac function.

Cardiogenic shock is a severe presentation of heart failure characterized by very low blood pressure and hypo-perfusion to critical organs. It is associated with high mortality and morbidity and is not well treated with current therapies.

#### Method of Action

Istaroxime represents a novel approach to the treatment of AHF. It has a dual mechanism of action, referred to as luso-inotropic, to improve cardiovascular physiology. First, it activates the SERCA2a calcium pump on the sarcoplasmic reticulum, or SR, leading to enhanced SR calcium uptake and a reduction in cytoplasmic calcium that is thought to improve myocardial relaxation (lusitropic). Second, it inhibits the sodium-potassium ATPase activity leading to improved myocardial contractility (inotropic). See Figure 1.



We believe that this mechanism of action may result in improvement in cardiac function and perfusion to reduce congestion and edema and preserve other organ function while avoiding the side effects associated with other classes of heart failure therapies. Preclinical and phase 2a and phase 2b clinical studies performed to date suggest that istaroxime may improve cardiovascular physiology as assessed by parameters of pump function, decreases in PCWP, decreases in heart rate, increases in blood pressure without an increase in adverse events such as arrhythmias, cardiac damage (as indicated by elevated troponin values) or adverse impact on kidney function. We believe that these features of istaroxime, if approved, could potentially result in clinical improvement of patients' heart failure symptoms and reduce both complications and length of hospital stays when compared to current therapeutic regimens for AHF.

### *Clinical Development*

#### AHF

Istaroxime has been evaluated in six clinical trials assessing three doses in 280 patients, including two phase 2 clinical trials. In a phase 2a randomized, double-blind, placebo-controlled, dose-escalation clinical trial, three doses of istaroxime were evaluated in a study of 120 hospitalized patients (~30 patients per cohort) with AHF and reduced left ventricular ejection fraction with three doses of istaroxime administered over a 6-hour infusion period. In this clinical trial, the primary endpoint of lowering of PCWP was significantly improved in all three doses relative to placebo, and the certain secondary hemodynamic endpoints (increased systolic blood pressure and decreased heart rate) also improved. The main side effects were vomiting (7.9%) and pain at the infusion site (5.6%); one severe adverse event of ventricular tachycardia was observed. The favorable effects on PCWP, blood pressure and heart rate with potential luso-inotropic effects provided the basis for moving the program forward into a phase clinical 2b trial and for selecting the doses to study.

In January 2019, we announced positive topline results of a phase 2b randomized, double-blind, placebo-controlled, dose-escalation clinical trial, a multicenter, randomized, placebo-controlled study in 120 hospitalized patients in Europe and Asia with AHF that was designed to evaluate two doses of istaroxime administered over a 24-hour infusion period (~ 40 patients per dose group).

The primary endpoint of this study was a change from baseline to 24 hours after start of infusion (Day 1) in  $E/e'$  with istaroxime 0.5 or 1.0  $\mu\text{g}/\text{kg}/\text{min}$  compared to placebo. The  $E/e'$  ratio is a marker of the function of the left ventricle, or LV, of the heart and was measured using doppler echocardiography read by a central laboratory. Secondary endpoints included change in other parameters of cardiac function, such as diastolic function, or  $E/A$ , stroke volume, or SVI, left ventricle ejection fraction, or LVEF, LV volumes, left atrial, or LA, area, inferior vena cava, or IVC, diameter. A 24-hour infusion of istaroxime was associated with significant improvements in cardiac function, in both dosing groups, with a mean  $E/e'$  of -4.55 for the 0.5  $\mu\text{g}/\text{kg}/\text{min}$  group and -3.16 for the 1.0  $\mu\text{g}/\text{kg}/\text{min}$  group, compared with mean placebo  $E/e'$  ratios of -1.55 and -1.08, respectively. Twenty-four-hour infusions of istaroxime were also associated with substantial increases in stroke volume in both dosing groups, with a mean SVI value of 5.33 ml/beat/m<sup>2</sup> for the 0.5  $\mu\text{g}/\text{kg}/\text{min}$  group and 5.49 ml/beat/m<sup>2</sup> for the 1.0  $\mu\text{g}/\text{kg}/\text{min}$  group, compared with the mean placebo SVI of 1.65 ml/beat/m<sup>2</sup> and 3.18 ml/beat/m<sup>2</sup>, respectively. Importantly, subjects also maintained or increased systolic blood pressure, SBP, with a mean change in SBP of 2.82 mmHg for the 0.5  $\mu\text{g}/\text{kg}/\text{min}$  group and 6.1 mmHg for the 1.0  $\mu\text{g}/\text{kg}/\text{min}$  group, compared with the mean placebo SBP values of -2.47 mmHg and 2.7 mmHg, respectively. There were no signs of increased risk for arrhythmias or increased troponin levels (a marker of heart muscle damage) during or after istaroxime infusion. Additionally, blood pressure tended to increase, and heart rate decreased, during the infusion with istaroxime, which may have contributed to the short-term trend toward improvement in renal function. The findings were consistent with the physiologic improvements seen in the phase 2a study and the effects of istaroxime in AHF.



Istaroxime was generally well tolerated. Istaroxime did not appear to be associated with an increase in risk for arrhythmias or increases in cardiac troponin T. Cardiovascular-related adverse events were 23 percent for placebo, 10 percent for istaroxime low dose, and 18 percent for istaroxime high dose with cardiac failure occurring in 3 percent, 5 percent and 8 percent of placebo, low and high dose of istaroxime patients, respectively. These cases of cardiac failure were reported by the investigator as “worsening of heart failure” symptoms that occurred approximately 10-14 days after study drug administration and were not considered to be drug related. The most common adverse drug reactions reported included pain at infusion site, generally associated with use of short catheters, and dose-related gastrointestinal adverse events in 5 percent, 10 percent and 38 percent of placebo, low and high dose istaroxime, respectively. Serious adverse events included one cardiac death and one case of cardiogenic shock (in the same patient who died) in the istaroxime 1.0 mg group, two cases of cardiac failure in the 0.5 mg group, three cases of cardiac failure in the 1.0 mg group, and one case of renal embolism in the 1.0 mg group. There was an additional cardiac death outside the 30-day window.

Based on feedback from the FDA in June 2019 and discussions with our scientific advisors, we are preparing for a phase 2 clinical trial focused on patients with low systolic blood pressure and those who are diuretic resistant. These two, difficult-to-treat patient groups have limited treatment options and could particularly benefit from the istaroxime unique profile and potential ability to increase cardiac function, increase blood pressure and improve renal function. We plan to initiate start-up activities for this next phase 2 study in the second half of 2020 and plan to extend dosing beyond that previously studied and include clinical outcome measures that we believe may be acceptable for registration. However, due to the recent global outbreak of COVID-19, our planned clinical trials may be impacted and we may experience delays in anticipated timelines and milestones.

### Cardiogenic Shock

After assessing the regulatory landscape and data from the istaroxime phase 2 clinical program in AHF, we held discussions with our advisors and added to our istaroxime development program a study in early cardiogenic shock. We believe that istaroxime may fulfill an unmet need in early cardiogenic shock based on the profile observed in prior phase 2 clinical studies in AHF, in which istaroxime increased SBP, suggesting that istaroxime could potentially contribute to the clinical improvement of select patients in cardiogenic shock due to heart failure. In addition, we believe there may be opportunities for an abbreviated regulatory pathway and review in cardiogenic shock. According to an FDA published position paper, we believe that approval for early cardiogenic shock potentially could be based on blood pressure changes alone (assuming comparable mortality compared to control patients at 30 days). We plan to execute a small study of istaroxime in early cardiogenic shock patients to evaluate the potential to improve blood pressure and organ perfusion. The study will also evaluate the safety and side effect profile of istaroxime in this patient population. We plan to initiate this study mid-year of 2020. However, due to the recent global outbreak of COVID-19, our planned clinical trials may be impacted and we may experience delays in anticipated timelines and milestones.

### *Manufacturing*

Istaroxime is manufactured for us by Zhaoke Pharmaceutical (Guangzhou) Co., Ltd. and/or Sigma Tau S.p.A. Secondary packaging is performed by DEPO PACK s.n.c.

The active pharmaceutical ingredient, or API, used in production of the drug product is manufactured by Farmabios S.p.A. and/or ScinoPharm Taiwan, Ltd.

### AEROSURF

#### *Overview*

AEROSURF® (lucinactant for inhalation) is an investigational combination drug/medical device product that we are developing to improve the management of RDS in premature infants who may not have fully-developed natural lung surfactant and may require surfactant therapy to sustain life. AEROSURF is designed to deliver aerosolized KL4 surfactant noninvasively using our proprietary ADS technology and potentially may meaningfully reduce the use of invasive endotracheal intubation and mechanical ventilation. We believe that AEROSURF, if approved, may meaningfully reduce the number of premature infants who are subjected to invasive surfactant administration, and potentially provide transformative clinical and pharmacoeconomic benefits. The FDA has granted Fast Track designation for AEROSURF to treat RDS.

## *RDS and BPD Overview*

RDS is the most prevalent respiratory disease in the NICU. Surfactant therapy can be a life-saving treatment for RDS and is the primary therapy to address an underlying surfactant deficiency. Unfortunately, surfactants currently available in the U.S. are animal-derived and are generally administered using invasive endotracheal intubation, frequently with mechanical ventilation, procedures that may result in serious respiratory conditions and other complications. We believe that this market has been constrained because of the invasive administration procedures for surfactants and that AEROSURF's non-invasive delivery system may provide a competitive edge in an expanding RDS market. We also believe that AEROSURF may support an expansion of the RDS surfactant market by reducing the need for intubation and mechanical ventilation, reducing hospital costs, and enabling dosing and repeat dosing as needed using noninvasive delivery of AEROSURF via nCPAP. Moreover, while the current surfactant market represents drug-only revenues, we believe we can capture revenues from both the drug product and the ADS disposable cartridges, supported by anticipated pharmacoeconomic benefits associated with the successful use of nCPAP. We believe that AEROSURF, if approved, may be administered in less specialized hospitals and birthing centers, potentially further expanding access to treatment and potentially achieving a higher price per patient in an addressable market that could be in excess of \$1 billion annually.

We are also evaluating AEROSURF for the treatment of BPD, a chronic lung disease of premature infants who have required intubation, mechanical ventilation and oxygen therapy. BPD is associated with ongoing pulmonary disease and neurodevelopmental impairment that contributes to substantial patient morbidity. This is associated with increased health care utilization and higher healthcare costs. Notwithstanding, effective prevention and treatment strategies for BPD have been elusive and there is no approved treatment.

## *Clinical Development*

We have evaluated AEROSURF for the treatment of RDS in premature infants in three phase 2 clinical trials. We believe the results support further exploration of a potentially beneficial treatment effect when the treatment is delivered as intended.

In two phase 2a multicenter, randomized, open-label controlled studies in premature infants 26 to 32 week gestational age receiving nCPAP, AEROSURF was generally well-tolerated. Efficacy was an exploratory endpoint in both trials. There was evidence of a beneficial treatment effect in one study of premature infants 29 to 34 week gestational age. In the other study of premature infants 26 to 28 week gestational age, there was no difference in rate of nCPAP failure, but the assessment was complicated by the occurrence of unanticipated treatment interruptions which may have obscured a potential efficacy signal.

In 2017 we completed a phase 2b clinical trial evaluating AEROSURF for the treatment of RDS in premature infants. The clinical trial was a multicenter, randomized, controlled study with masked treatment assignment in 221 premature infants that was designed to evaluate aerosolized KL4 surfactant administered to premature infants 26 to 32 week gestational age receiving nCPAP, in two dose groups (25 and 50 minutes) with up to two potential repeat doses, compared to infants receiving nCPAP alone. This trial was conducted in approximately 50 clinical sites in the U.S., Canada, Europe and Latin America.

In the phase 2b clinical trial, AEROSURF did not meet the primary endpoint of a reduction in nCPAP failure at 72 hours. We believe this result was attributable in large part to an unexpected rate of treatment interruptions, which occurred in about 23% of active enrollments, predominantly in the 50-minute dose group. These interruptions, we believe, were primarily related to specific lots of disposable cartridge filters with a higher tendency to clog. After excluding patients in the 50-minute dose group whose dose was interrupted, in accordance with the predesignated statistical plan, nCPAP failure rates were 44% in the control group (n=71) compared to 32% (n=44) in the AEROSURF 50-minute dose group, which is a 12% absolute reduction or a 27% relative reduction in nCPAP failure compared to control. These data suggest a meaningful treatment effect in line with our desired targeted outcome. The overall data suggest that the safety and tolerability profile of AEROSURF was generally comparable to the control group. Reported adverse events and serious adverse events were those that are common and expected among premature infants with RDS and comparable to the control group. As expected, some peridosing events occurred (e.g., changes in oxygen requirements and blood pressure in the time around dosing) more commonly in the AEROSURF groups, however, these were transient in nature and occurred less frequently than seen in intratracheal administration.

In the post hoc pooled analysis of the AEROSURF phase 2b clinical trial and phase 2a clinical trial in infants 26 to 28 weeks gestational age, AEROSURF treatment was associated with significantly lowered incidence and severity of BPD compared to infants on nCPAP alone. This effect was observed without excluding patients whose treatment was interrupted.

In 2018, we transitioned from our prototype 2 ADS used in the phase 2 clinical program, referred to as the Phase 2 ADS, to a newly-designed ADS for use in our phase 3 program, which combines the same aerosolization technology used during the phase 2 clinical program, but with improved ergonomics, interface, controls, and dose monitoring in a modular design. We successfully concluded design verification activities through a detailed assessment of the new ADS design and implemented design changes to potentially mitigate the risks of device-related treatment interruptions experienced in the prototype phase 2 ADS used in the phase 2b clinical trial. We have conducted extensive performance testing in which the ADS demonstrated consistent performance under rigorous testing and design verification protocols. We believe that the new ADS, which we plan to use in our phase 3 program will be easier and faster to use and may support enhanced clinical outcomes by potentially allowing for reduced time to initial administration of our KL4 surfactant and reduced time intervals between doses, if required.

As part of the phase 2 clinical program and to prepare to transition to phase 3, in the second quarter of 2020, we commenced a small, approximately 90-patient, phase 2 bridging study and prepare to transition to our phase 3 clinical program by demonstrating the new ADS performance in the NICU, as well as a more intensive dosing regimen. This trial will not be powered to establish statistical significance but will generate clinical experience with the ADS as well as additional higher dose treatment data to augment data previously obtained in the phase 2b clinical trial. The AEROSURF phase 2b bridging study is a multicenter, randomized, controlled study with masked treatment assignment in up to 90 premature infants 26 to 32 weeks gestational age (GA) receiving nCPAP for RDS. The trial will leverage the favorable safety profile from the previous phase 2 studies to evaluate higher and more frequent dosing of aerosolized KL4 surfactant compared to premature infants receiving standard care of nCPAP alone. The trial will utilize the new ADS technology and bridge to data generated in the phase 2 program utilizing a prototype device on the following endpoints: time to nCPAP failure (the need for intubation and delayed surfactant therapy), incidence of nCPAP failure and physiological parameters indicating the effectiveness of lung function.

We expect to advance the bridging study through the financial support of Lee's (HK) (our Asia licensing partner for KL4 surfactant). On March 18, 2020, we entered into a binding term sheet with Lee's (HK) that provides that in connection with the development of AEROSURF, Lee's (HK) will make non-refundable payments to us of up to \$3.9 million prior to September 1, 2020 (subject to reduction to \$2.8 million in certain events) to fund the development of AEROSURF for the period of April 1, 2020 through September 30, 2020. The term sheet also provides that we and Lee's (HK) will negotiate in good faith to determine the terms of definitive agreement prior to September 30, 2020, which will also set forth additional semi-annual non-refundable payments to fund the continued development of AEROSURF after September 30, 2020. However, due to the recent global outbreak of COVID-19, our planned clinical trials may be impacted and we may experience delays in anticipated timelines and milestones.

### *Manufacturing*

KL4 surfactant is comprised of four APIs. Our API suppliers are Bachem Americas, Inc., or Bachem Americas, Corden Pharma and Avanti Polar Lipids, Inc. We have supply agreements for KL4 (sinapultide) and POPG API, and source the other two APIs under purchase orders. Bachem Americas has been our supplier of KL4 since 2008. We received a notice of nonrenewal from Bachem Americas in June 2019 indicating their intent to discontinue the current manufacturing process. We discussed with them potential development of a new manufacturing process for KL4 to meet our future needs. Bachem Americas has agreed to continue manufacturing with the current process through 2020 and to produce an adequate supply of KL4 to satisfy our needs for the currently planned clinical programs for AEROSURF and lyophilized KL4 surfactant. We have received two comprehensive proposals for the development and validation of a new process for manufacturing KL4 (including one from Bachem Americas). Following initial feasibility studies of the new process, we expect to determine our go forward manufacturer.

Our lyophilized KL4 surfactant is manufactured for us by Pharma Services Group, Patheon, part of Thermo Fisher Scientific, or Patheon. We are currently in discussions with Patheon concerning the wind-down of our Master Services Agreement dated as of October 24, 2013 for the manufacture of lyophilized KL4 surfactant for AEROSURF. Patheon has indicated that it will continue to manufacture lyophilized KL4 surfactant to support our planned AEROSURF clinical trial and will assist us with the technology transfer to another contract manufacturing organization. We plan to seek proposals for the technology transfer and future manufacturing of lyophilized KL4 surfactant from certain entities that we have identified that we believe have appropriate experience to support this program.

In our Warrington laboratory, we conduct certain analytical and quality control activities including release testing of all API's and release and stability testing of our lyophilized and aerosolized KL4 surfactant drug product. We also work with a number of third-party institutions and laboratories that perform various studies as well as quality control release and stability testing.

We have contracted with Clinical Supplies Management, Inc. for the receipt, labeling, packaging and distribution of drug and materials to support our AEROSURF bridging study.

With respect to our ADS, we are currently engaged in a technology transfer of our device manufacturing process from Battelle Memorial Institute, or Battelle, to Mack Molding Company, or Mack, an FDA-registered medical device manufacturer that we have engaged to produce the new ADS for use in our phase 3 program and for our AEROSURF bridging study, and potentially address the unexpected rate of treatment interruptions in our phase 2b trial. If AEROSURF is approved for marketing, we expect that the new ADS for use in our phase 3 program will also support our commercial market platform. We currently have a Memorandum of Understanding with Mack to cover this transfer.

## Rostafuroxin

### *Overview*

Rostafuroxin is a novel investigational drug product candidate that we are developing for the treatment of hypertension in patients with a specific genetic profile. Rostafuroxin targets resistant hypertensive patients with a specific genetic profile, which is found in approximately 20% - 25% of the adult hypertensive population.

### *Hypertension Overview*

According to the CDC, patients with high blood pressure have a greater risk for heart disease and stroke, which are the leading causes of death in the U.S. Currently, an estimated 75 million adults, or approximately one-third of the adult population in the U.S., have high blood pressure and the incidence is increasing. During 2014, high blood pressure was a primary or contributing cause of death for more than 410,000 adults in the U.S. The estimated annual cost of high blood pressure in the U.S., including for health care services, medications, and missed days of work, is approximately \$48 billion. Unfortunately, hypertension is a heterogeneous disease in which a majority of treated patients (50%-85% globally) do not reach their therapeutic target blood pressure and patients often have persistent hypertension despite being on multiple therapies. Ethnicity and genetic makeup are known to impact the response to anti-hypertensive treatments, and uncontrolled hypertension has been associated with certain genetic makeups. Given the size of the market and the prevalence of unmet medical needs, major pharmaceutical companies have maintained hypertension as a key area of focus and continue to seek new drugs to compete in markets they have established with previous anti-hypertensive therapies. We plan to develop rostafuroxin and potentially leverage the industry's interest in licensing opportunities in this market.

### *Method of Action*

Rostafuroxin is designed to be a selective antagonist of adducin polymorphisms and endogenous ouabain, both known triggers of hypertension, and creates functional effects by enhancing renal tubular sodium reabsorption and increasing vascular tone.

### *Clinical Development*

Rostafuroxin has been studied in three phase 2 clinical trials assessing reduction in blood pressure in a hypertensive population selected in accordance with a specified genetic profile. A phase 2b clinical trial was conducted as a two-part study with the first part conducted in Italy with Caucasian patients and the second part conducted in Taiwan with ethnic Chinese patients. The efficacy results in Italy were positive in both this trial and in an earlier phase 2a clinical trial; however, the blood pressure response in Chinese patients in the second part of the phase 2b study was minimal. We are analyzing the results of these clinical trials potentially to identify the reasons for the minimal response in Chinese patients. We are finalizing the drug formulation and working on an analytical method to increase the sensitivity of our existing assay to measure low concentrations of the compound in the body. Once we have developed an improved, room temperature formulation, we plan to seek opportunities to out-license rostafuroxin to a larger company that has interest in and/or operates in the very large and broad antihypertension market. However, due to the recent global outbreak of COVID-19, our plans may be impacted, and we may experience delays in anticipated timelines and milestones.

### *Manufacturing*

The drug product for rostafuroxin is manufactured by Doppel Farmaceutici S.r.l. The API used in the manufacture of rostafuroxin is manufactured by China Gateway Pharmaceutical Development Co., Ltd.

### Lyophilized KL4 Surfactant – Lung Injury and Other Studies

We believe our lyophilized KL4 surfactant and ADS technologies may potentially support a product pipeline to address a broad range of serious respiratory conditions in children and adults. KL4 surfactant has been widely studied across 17 clinical studies in approximately 2,500 patients with various related acute pulmonary syndromes. We also previously announced results of a NIH funded preclinical study of aerosolized KL4 surfactant demonstrating reduced lung inflammation and improved overall survival in a well-established animal model of highly pathogenic avian influenza. We have received support, and plan to seek additional support, from the NIH and other government funding sources to explore the utility of our KL4 surfactant to address a variety of such respiratory conditions as acute lung injury, or ALI, including acute radiation exposure to the lung (acute pneumonitis and delayed lung injury), chemical-induced ALI, and influenza-induced ALI; as well as chronic rhinosinusitis, complications of certain major surgeries, mechanical ventilator-induced lung injury, often referred to as VILI, pneumonia, and diseases involving mucociliary clearance disorders, such as chronic obstructive pulmonary disease and cystic fibrosis, or CF.

We are developing plans to study our proprietary KL4 surfactant for the treatment of lung injury resulting from severe COVID-19 infection if we are able to secure the required additional capital resources necessary to initiate and complete the study as existing cash resources will not be used to conduct this work. Patients with COVID-19 pneumonia may progress to severe respiratory failure requiring supplemental oxygen and mechanical ventilation. This acute lung injury, known as acute respiratory distress syndrome (ARDS), has no approved therapies and is associated with significant morbidity, mortality and healthcare resource utilization. The COVID-19 virus infects via angiotensin-converting enzyme 2 (ACE2) on cells in the lung which impair surfactant production, resulting in decreased lung compliance, and increased likelihood of needing mechanical ventilation. We believe this mechanism of injury may differentiate COVID-19 lung injury from other etiologies of ARDS and is the basis for a potentially important role for our KL4 surfactant. Lung fibrosis and severe interstitial changes occurring in these COVID-19 patients resemble those seen in premature infants who are initially ventilated due to RDS and later develop BPD – a condition in which KL4 surfactant clinical data suggests potential benefit. Pre-clinical and clinical evidence shows surfactant replacement therapy has the potential to improve lung function, oxygenation, lung compliance and decrease pulmonary inflammation. These beneficial effects could lead to potential clinical improvements such as decreased need for mechanical ventilation, decreased time on ventilator (freeing the devices for other patients) and possibly mortality.

We plan to file an investigational new drug, or IND, application with the FDA in May 2020 for an initial pilot clinical trial to assess the ability of our proprietary KL4 surfactant to impact key respiratory parameters in ventilated COVID-19 patients, if we are able to obtain adequate funding and supplies, in mid-2020. We recently applied to BARDA requesting funding for our development plans of KL4 surfactant in COVID-19 patients and we were granted a meeting to review our proposal with BARDA representatives. In addition, we continue to pursue multiple COVID-19 study funding opportunities with other government and private foundations as well as potential collaboration arrangements with leading academic institutions. If the results in the initial pilot clinical trial are favorable, we will assess moving to an expanded clinical trial in ventilated patients to establish outcomes. Additionally, we plan to prepare for an aerosolized delivery of KL4 surfactant trial with the objective to avoid mechanical ventilation (similar to our RDS clinical trials) in COVID-19 infected patients. All intended clinical studies are highly dependent on funding, COVID-19 patients in the locations of study and the ability of a potentially over-loaded health care system to execute the study.

Our KL4 surfactant can be lyophilized (freeze-dried) and reconstituted to a liquid just prior to administration. We currently maintain continuous cold chain storage for this product. We are assessing potential development pathways to secure marketing approval for lyophilized KL4 surfactant as an intratracheal instillate for the treatment and/or prevention of RDS. Lyophilized KL4 surfactant is the drug product component of AEROSURF and a lyophilized (freeze-dried) dosage form of the liquid KL4 surfactant intratracheal instillate, or SURFAXIN®, that was approved by the FDA in 2012. In April 2015, we voluntarily ceased commercializing SURFAXIN to focus our resources on the development of aerosolized KL4 surfactant for respiratory diseases, beginning with AEROSURF.

We plan to conduct studies to assess potential reduction of cold chain storage and refrigeration requirements in the hospital. We have demonstrated in laboratory experiments that our lyophilized KL4 surfactant retains many of the key attributes and characteristics of our liquid instillate. We previously discussed with the FDA a potential development plan, trial design and regulatory plan for approval and plan potentially to re-engage with the FDA. If we can define an acceptable development program that is achievable from a cost, timing and resource perspective, we may seek approval to treat premature infants who, because they are unable to breathe on their own or other reason, are not candidates for AEROSURF.

In addition, on March 12, 2018, we announced a collaboration with Eleison, a specialty pharmaceutical company developing life-saving therapeutics for rare cancers. We worked with Eleison to assess the feasibility of using our ADS technology potentially to deliver Eleison's inhaled lipid cisplatin, or ILC, and under a grant from the NIH to address respiratory conditions. Eleison is developing ILC for non-small cell lung cancer and completed a phase 2 study of ILC in patients with bone cancer (osteosarcoma) metastatic to the lung. If we are able to identify a funding source, including from non-dilutive sources such as the NIH, we may consider a collaboration for the further study of this potential opportunity to address rare cancers affecting the lungs.

#### Other Preclinical Product Candidates

We continue to advance our preclinical follow-on oral and intravenous SERCA 2a heart failure compounds and are actively exploring partnership opportunities for these potential product candidates as well.

## Material Licenses and Collaborations

### *Lee's Pharmaceutical (HK) Ltd.*

We are party to a License, Development and Commercialization Agreement, as amended, or the License Agreement, as amended, with Lee's (HK), a company organized under the laws of Hong Kong, and an affiliate of Lee's Pharmaceutical Holdings Limited, or Lee's. Under the License Agreement, we granted to Lee's (HK) an exclusive license with a right to sublicense (i) to develop, manufacture and commercialize our KL4 surfactant products, including SURFAXIN, which was approved by the FDA in 2012 for RDS in premature infants, SURFAXIN LS™, the lyophilized dosage form of SURFAXIN, and AEROSURF, and (ii) to register and manufacture SURFAXIN and SURFAXIN LS for use in the licensed territory, which includes China, Japan, Hong Kong, Thailand, Taiwan and 12 other countries. Under the License Agreement Lee's (HK) made an upfront payment to us of \$1 million. We also may receive up to \$35.8 million in potential clinical, regulatory and commercial milestone payments and will share in any sublicense income Lee's (HK) may receive at a rate equal to low double digits. In addition, Lee's (HK) is responsible for all costs and expenses in and for the Licensed Territory related to development activities, including a planned AEROSURF phase 3 clinical program, regulatory activities, and commercialization activities.

We will be eligible to receive tiered royalties based on a percent of Net Sales (as defined in the License Agreement), depending on the product, in the range of high single to low-to-mid double-digit percentages. Royalties are payable on a country-by-country basis until the latest of (i) the expiration of the last valid patent claim covering the product in the country of sale, (ii) the expiration or revocation of any applicable regulatory exclusivity in the country of sale, and (iii) ten years after the first commercial sale in the country of sale. Thereafter, in consideration of licensed rights other than patent rights, royalties shall continue for the commercial life of each product and, for the initial three years, shall be in the range of low-to- mid single digits. In addition, in the event that one or more generic products are introduced, the royalty rates will be reduced, subject to certain minimums if we are subject to continuing obligations at the time to pay royalties under our in-license agreements.

Under the License Agreement, Lee's (HK) is responsible for all activities related to development, regulatory approval and commercialization of KL4 surfactant and combination drug / device products in the licensed territory. Lee's (HK) will hold the product licenses for all non-aerosolized products in the licensed territory and will seek regulatory approval initially for SURFAXIN and SURFAXIN LS for RDS. We will hold the product license in the licensed territory (except where prohibited by law) for all aerosolized products and will designate Lee's (HK) its exclusive agent and representative to develop and register AEROSURF and other aerosolized products in our name and on our behalf. Lee's (HK) also has agreed that, except as provided in the License Agreement, for a period of ten (10) years beginning with the later of the first commercial sale of the first aerosolized product and the first commercial sale of the first non-aerosolized product in China, it will not develop, register, manufacture, or commercialize any product for the prevention and/or treatment of RDS in premature infants or other diseases and conditions in humans, in either case, that administers, utilizes or contains pulmonary surfactant without our prior written consent.

The term of the License Agreement will continue on a country-by-country basis for the commercial life of the products. Either party may terminate the License Agreement in the event of bankruptcy or a material breach of the License Agreement by the other party that remains uncured for a period of sixty (60) days. In addition, either party may terminate the License Agreement in its entirety or with respect to any individual product or country if a regulatory authority terminates, suspends or discontinues development of a product and such termination, suspension or discontinuance persists for a period in excess of eighteen (18) months. Upon termination of the License Agreement in its entirety or with respect to a particular product or country, generally all related rights and licenses granted to Lee's (HK) will terminate, all rights under our technology will revert to us, and Lee's (HK) will cease all use of our technology.

### *Battelle Collaboration Agreement*

In October 2014, we entered into a Collaboration Agreement with Battelle, or the Battelle Collaboration Agreement, for the development of our new ADS for use in our phase 3 program. We had previously worked with Battelle, which has expertise in developing and integrating aerosol devices using innovative and advanced technologies, in connection with development of our prototype phase 2 ADS used in the AEROSURF phase 2b clinical trial. Under the Battelle Collaboration Agreement, we and Battelle shared the costs of development for a three-stage development plan that included (i) defining the requirements and a detailed project plan for a new ADS for use in our phase 3 program, (ii) executing the project plan, and (iii) completing required testing, verification and documentation, putting us in a position to manufacture a new ADS for use in the remaining AEROSURF development activities, including in our phase 3 program, and, if approved, in initial commercial activities. We agreed that, if Battelle successfully completed the project plan in a timely manner, we would pay Battelle royalties equal to a low single-digit percentage of the worldwide net sales and license royalties on sales of AEROSURF for the treatment of RDS in premature infants, up to an initial aggregate limit of \$25 million, which under the Battelle Payment Restructuring (discussed below) was increased to \$35 million. The Battelle Collaboration Agreement will end at the time we fulfill our payment obligations to Battelle, unless sooner terminated by a party as provided therein.



In December 2018, we and Battelle entered into a Payment Restructuring Agreement, or the Battelle Payment Restructuring, which reflected the terms of an October 2017 nonbinding memorandum of understanding, in which we outlined terms to restructure approximately \$4.3 million then due to Battelle, or the Battelle Payables, under a Research and Development Services Agreement dated as of June 22, 2012 and the Battelle Collaboration Agreement. Under the Battelle Payment Restructuring, Battelle Payables accrue interest at a rate of 6% per annum. In December 2018, we exchanged \$1.0 million of the debt for shares of our common stock. And since December 2018 we have paid \$2.2 million of the Battelle Payables. In addition, under the terms of the Battelle Payment Restructuring, we agreed to make two milestone payments to Battelle as follows: (i) upon enrollment of the first patient in the next AEROSURF clinical study, or the First Milestone, an amount equal to one half of the then-outstanding Battelle Payables (including unpaid interest), and (ii) when we complete the device technology transfer for the new ADS for use in our phase 3 program to Mack, or the Second Milestone, an amount equal to the then-outstanding Battelle Payables, including unpaid interest. If any amounts of the Battelle Payables remained unpaid by December 31, 2019, then all unpaid Battelle Payables would be due on January 7, 2020. Neither milestone was achieved as of December 31, 2019. On March 30, 2020, we and Battelle entered into an amendment to the Battelle Payment Restructuring such that the First Milestone would be payable no later than April 15, 2020 and the Second Milestone would be payable no later than September 1, 2020.

*Laboratorios del Dr. Esteve, S.A.*

We have a strategic alliance with Laboratorios del Dr. Esteve, S.A., or Esteve, for the development, marketing and sales of a portfolio of potential KL4 surfactant products in Andorra, Greece, Italy, Portugal, and Spain, or, collectively, the Territory. Under the alliance, Esteve will pay us a transfer price on sales of our KL4 surfactant products. We are responsible for the manufacture and supply of all covered products and Esteve will be responsible for all sales and marketing in the Territory. Esteve is obligated to make stipulated cash payments to us upon our achievement of certain milestones, primarily upon receipt of marketing regulatory approvals for the covered products. In addition, Esteve has agreed to contribute to phase 3 clinical trials for the covered products by conducting and funding development performed in the Territory. As part of a 2004 restructuring, Esteve returned certain countries to us, referred to as the Former Esteve Territories, and we agreed to pay Esteve 10% of any cash up front and milestone fees (up to a maximum aggregate of \$20 million) that we receive in connection with any strategic collaborations for the development and/or commercialization of certain of our KL4 surfactant products in the Former Esteve Territories. In addition, with respect to our aerosolized KL4 surfactant, Esteve will pay us \$0.5 million upon the initial filing for regulatory approval with the European Medicines Agency, or EMA, and \$0.5 million upon receipt of regulatory approval. Esteve will also contribute up to \$3 million to support a phase 3 clinical trial in the Territory. The alliance will terminate as to each covered product, on a country-by-country basis, upon the latest to occur of: the expiration of the last patent claim related to a covered product in such country; the first commercial sale in such country of the first-to-appear generic formulation of the covered product, and the tenth anniversary of the first sale of the covered product in such country. In addition to customary termination provisions for breach of the agreement by a party, the alliance agreement may be terminated by Esteve on 60 days' prior written notice, up to the date of receipt of the first marketing regulatory approval, or, on up to six months' written notice, if the first marketing regulatory approval has issued. We may terminate the alliance agreement in the event that Esteve acquires a competitive product (as defined in the agreement).

*Università degli Studi di Milano-Bicocca*

In April 2015, CVie Therapeutics Ltd., or CVie Therapeutics, entered into an Agreement for Scientific Collaboration, or the 2015 Agreement, with the Università degli Studi di Milano-Bicocca, or Bicocca, in Milan, Italy, focused on defining the role of sarco (endo) plasmic reticulum Ca<sup>2+</sup> -ATPase 2a, or SERCA2a, and phospholamban, or PLN, in modulating cardiac contraction, and discovering new small molecules to modulate SERCA2a activity or new drugs for treating chronic and acute human heart failure. The initial term of the 2015 Agreement was three years but the term was extended for approximately an additional year, with option for further renewal. In June 2019, we entered into a second Agreement for Scientific Collaboration with Bicocca, or the 2019 Agreement, focused on continuing the studies under the 2015 Agreement. The 2019 Agreement supersedes and replaces all prior agreements with Bicocca.

Under the 2015 Agreement, we provided funds aggregating € 0.2 million (approximately \$0.22 million) to upgrade equipment and pay laboratory expenses for the renewal term expiring in 2019. We also funded several related research contracts for the period covered by the 2015 Agreement. In connection with our research activities, Bicocca agreed to provide us exclusive use of a research laboratory for the collaboration work, and nonexclusive access to a physiology laboratory within the university. Bicocca serves as our primary location in Milan. Under the 2019 Agreement, we have agreed to provide funds aggregating € 0.16 million (approximately \$0.178 million) to extend our use of Bicocca laboratories and to fund research conducted pursuant to the collaboration.

Under the 2019 Agreement, results obtained from the collaboration will be jointly owned by the parties. However, Bicocca will assign to us its interest in patent applications and patents covering any new SERCA2a compounds and diagnostic products suitable for further clinical development. We have agreed to pay Bicocca (corresponding to stage of development): (i) €0.1 million (approximately \$0.11 million) for new SERCA2a compounds developed up to phase 1 studies in humans upon the completion and availability of the proof of concept of biological efficacy of new compounds on modulating the SERCA2a activity in cell-free systems, or its functional counterpart in cardiac myocytes and (ii) €1.5 million (approximately \$1.7 million) upon obtaining marketing authorization in the U.S., EU, or China of new compounds with the corresponding companion diagnostic assay. We have also agreed to pay royalties on products generated from the collaboration in the range of a fraction of a single digit to a low single digit percent of net sales for any products sold in any country for a period of ten years from the date of the first commercial sale or until the expiry of patent(s) covering the products.

*Philip Morris USA Inc. and Philip Morris Products S.A. License*

In 2008, we entered into an Amended and Restated License Agreement with Philip Morris USA, Inc., or PMUSA, with respect to the U.S., or the U.S. License Agreement, and, as PMUSA had assigned its ex-U.S. rights to Philip Morris Products S.A., or PMPSA, effective on the same date and on substantially the same terms and conditions, we entered into a license agreement with PMPSA with respect to rights outside of the U.S., which we refer to, together with the U.S. License Agreement, as the PM License Agreements.

Pursuant to the PM License Agreements, we have worldwide exclusive rights to the medical device component of our AEROSURF product candidate. We are currently developing a new ADS for use in our phase 3 program and potentially for use in our remaining AEROSURF development activities, and, if approved, initial commercial activities. Our ADS technology and our new ADS for use in our phase 3 program are protected by a portfolio of issued patents, as well as pending and new patent applications, covering the core components of the system. These patents and applications will expire on dates ranging from 2018 to 2037, with the core patents expiring in 2033 or later.

Under the PM License Agreements, we are obligated to pay royalties at a rate equal to a low single-digit percent of sales of products sold in the Exclusive Field (as defined in the PM License Agreements) in the territories. In connection with exclusive undertakings of PMUSA and PMPSA not to exploit the aerosol technology for all licensed uses, we are obligated to pay royalties on all product sales, including sales of certain aerosol devices that are not based on the licensed aerosol technology; provided, however, that no royalties are payable to the extent that we exercise our right to terminate the license with respect to a specific indication. We also have been required to pay minimum royalties quarterly but are entitled to reduce future quarterly royalties above the quarterly minimums in the amount of the true-up payments we make to satisfy minimum royalties for prior quarters. Our license rights extend to innovations to the aerosol technology that are made under the PM License Agreements.

In addition to customary termination provisions for breach of the agreements, we may terminate the PM License Agreements, in whole or in part, upon advance written notice to the licensor. In addition, either party to each PM License Agreement may terminate upon a material breach by the other party (subject to a specified cure period). Our license under each PM License Agreement, unless terminated earlier, will expire as to each licensed product, on a country-by-country basis, upon the latest to occur of: the date on which the sale of such licensed product ceases to be covered by a valid patent claim in such country; the date a generic form of the product is introduced in such country; or the tenth anniversary of the first commercial sale of such licensed product.

**Intellectual Property**

We continue to invest in maintaining and enforcing our potential competitive position through a number of means: (i) by protecting our exclusive rights in our cardiovascular agents including istaroxime, rostafuloxin and potential follow-on compounds, (ii) by protecting our exclusive rights in our lyophilized KL4 surfactant, ADS and aerosol-conducting airway connector technologies through patents that we own or exclusively license, (iii) by seeking regulatory exclusivities, including potential Orphan Drug and new drug product exclusivities, and (iv) through protecting our trade secrets and proprietary methodologies that support our manufacturing and analytical processes.

Patents and Proprietary Rights

In addition to the inventions covered by the patents and patent applications described in this prospectus, we have been active in identifying and seeking to identify new patents. We have filed and plan to file patent and provisional patent applications to protect our innovations relating to our current and potential future product candidates, including for composition of matter, new dosage forms, formulations, methods of manufacture, methods of use and related processes. We intend to file for patent protection for select inventions, in such markets that we deem material to our patent strategy, as well as for other new inventions that we may identify.



### *Rostafuroxin Patent*

Our subsidiary, CVie Therapeutics holds a patent portfolio of six patent families that include more than 40 patents and patent filings directed to compounds, pharmaceutical formulations, methods of manufacturing, methods of delivery, and treatment methods using derivatives of rostafuroxin for the treatment of cardiovascular diseases and related conditions. We plan to continue these patent activities and focus on new follow-on compounds, dosage forms, formulations, and treatment methods related to AHF and persistent hypertension. At this time, the patents originally covering istaroxime composition of matter have expired. To benefit from potential non-patent exclusivity within the U.S., we believe that we may qualify istaroxime as a new chemical entity entitled to market exclusivity for a period of years. See the section titled “- Government Regulation - Drug Products - The Hatch-Waxman Act - Market Exclusivity”.

### *Rostafuroxin-Related Patents*

In June 2008, international patent application PCT/EP2008/056928 was filed and directed to rostafuroxin derivatives useful for the prevention or treatment of restenosis after angioplasty or endarterectomy, as well as diseases resulting from organ fibrosis. The international application entered into the national phase in the U.S., European Patent Office, or EPO, and several other foreign jurisdictions. In this patent family, multiple foreign counterparts are pending or granted. U.S. Patent Application No. 12/602,827 was abandoned following an unsuccessful appeal of a decision of the U.S. Patent Office examiner. European Patent No. 2160190B1 will expire on June 4, 2028.

In March 2010, international patent application PCT/EP2010/053571 was filed and directed to rostafuroxin derivatives for the treatment of proteinuria, glomerulosclerosis, and renal failure. The international patent application entered into the national phase in the EPO (EP10709529.1, now European Patent No. 2411015B1), U.S., and multiple other foreign nations. U.S. Patent Application No. 13/258,728 was abandoned on June 2, 2016 in favor of child application U.S. 14/931,083, now U.S. Patent No. 9,868,757. U.S. Patent No. 9,868,757 and European Patent No. 2411015B1 will expire on March 18, 2030.

In October 2010, international patent application PCT/EP2010/065589 was filed covering methods of rostafuroxin administration for the treatment or prevention of cardiovascular conditions in individuals with various single nucleotide polymorphisms, or SNPs, associated with improved therapeutic response to rostafuroxin administration. The international patent application entered into the national phase in the EPO (EP10807525.0, now European Patent No. 2490694B1), U.S. (U.S. 13/502,518, now U.S. Patent No. 9,408,854), and multiple other foreign nations. U.S. Patent No. 9,408,854 and European Patent No. 2490694B1 will expire on October 18, 2030.

### *Johnson & Johnson Patents*

Our precision-engineered KL4 surfactant technology was invented at The Scripps Research Institute, or Scripps, and was exclusively licensed to and further developed by Johnson & Johnson, or J&J. We received an exclusive, worldwide license and sublicense from J&J and its wholly-owned subsidiary, Ortho Pharmaceutical Corporation, to a series of over 30 patents and patent filings (worldwide), or the J&J Patents. All J&J Patents have expired. Under the license agreement, we are obligated to pay the licensors fees of up to \$3.0 million in the aggregate upon our achievement of certain milestones, primarily upon receipt of marketing regulatory approvals for certain designated products. We have made milestone payments totaling \$1.0 million to date. In addition, the agreement provides that we are required to pay royalties at different rates based on the type of revenue and country, in amounts in the range of a high single-digit percent of net sales (as defined in the license agreement) of licensed products sold by us or sublicensees, or, if greater, a percentage of royalty income from sublicensees in the low double digits. The license agreement provides that the license will expire, on a country-by-country basis, upon the payment of royalties for all licensed products for ten years beginning on the date of the first commercial sale of the first licensed product in such country. Thereafter, the license agreement provides that royalties shall be paid in respect of a licensed product until the expiration of the last licensed patent containing a valid claim covering the licensed product in such country. For countries in the EU in which royalties are paid only by virtue of licensed know-how, royalties shall be payable commencing from the date of first commercial sale of the first licensed product in such country and ending on the earlier of (i) the date on which the licensed know-how becomes public or (ii) the tenth anniversary of the first commercial sale of the first licensed product in any country of the EU. In addition to customary termination provisions for breach of the agreement by a party, we may terminate the agreement, as to countries other than the U.S. and Western Europe territories (as defined in the agreement), on a country-by-country basis, on six months' prior written notice; and as to the entire agreement, on 60 days' prior written notice.

### *Our KLA -Related Patents and Patent Rights*

We have been active in seeking patent protection for our innovations relating to new dosage forms, formulations and methods of manufacturing and delivering synthetic peptide containing pulmonary surfactants. Our patent activities have focused particularly on improved dosage forms and delivery of aerosolized pulmonary surfactant.

In January 2006, we filed U.S. and international patent applications (U.S. 11/326,885 which is now U.S. Patent No. 7,541,331 issued on June 2, 2009 and PCT/US06/000308, now entered national phase), directed to a surfactant treatment regimen for BPD. U.S. Patent No. 7,541,331 will expire on January 6, 2026. European Patent No. 1841458B1 was revoked on December 11, 2018, following an unsuccessful appeal of a decision of the EPO Opposition Division.

In September 2007, we filed U.S. and international patent applications (U.S. 11/901,866 which is now U.S. Patent No. 8,221,772 and PCT US/2007/020260, now entered national phase) directed to surfactant compositions and methods of promoting mucus clearance and treating pulmonary disorders such as cystic fibrosis. U.S. Patent No. 8,221,772 will expire on September 19, 2027.

In March 2013, we filed international patent applications (PCT/US13/34364 and PCT/US13/34464, now entered national phase and commenced expedited examination in the U.S. and EPO) directed to lyophilized pulmonary surfactant and methods of manufacture. In this patent family, two U.S. Patents Nos. 8,748,396 and 8,748,397 were issued on June 10, 2014, European patent 2723323B1 issued on September 23, 2015, another U.S. Patent No. 9,554,999 B2 issued on January 31, 2017 and multiple foreign counterparts are pending or granted. U.S. Patents Nos. 8,748,396; 8,748,397 and 9,554,999 B2 and European Patent No. 2723323B1 will expire on March 28, 2033.

### *Aerosol-Conducting Airway Connector Technology Patents and Patent Rights*

In March 2009, we filed an international patent application (PCT US/2009/037409, now entered national phase) directed to aerosol-conducting airway connectors and improvements of an ADS using AFECTAIR®. The claims of this application are directed to a novel ventilation circuit adaptor (an aerosol-conducting airway connector) and related aerosol circuitry that are intended to (i) increase the efficiency of aerosol delivery to the patient by allowing more efficient delivery of aerosols to the patient, and (ii) reduce drug compound dilution and wastage and result in more precise aerosol dosing. In this patent family, U.S. Patent No. 8,701,658 was issued on April 22, 2014, European patent No. 2265309 was issued on December 16, 2015, U.S. Patent No. 9,352,114 was issued on May 31, 2016, U.S. Patent No. 9,592,361 was issued on March 14, 2017 and several foreign patents have issued during 2011 through 2017. U.S. Patent No. 8,701,658 and U.S. Patent No. 9,352,114 will expire on March 17, 2029. U.S. Patent No. 9,592,361 will expire on September 9, 2033. European Patent No. 2265309 will expire on March 17, 2029.

### *Trademarks*

AEROSURF®, AFECTAIR®, SURFAXIN®, SURFAXIN LS™, WINDTREE THERAPEUTICS® (logo), WINDTREE™ and WINDTREE THERAPEUTICS™ are our material registered and common law trademarks.

### *Trade Secrets*

In addition to our patent exclusivities, we rely on trade secrets to protect and maintain our competitive position. We take measures to protect and maintain our trade secrets and know-how licensed to us or developed by us by entering in confidentiality agreements with third parties. Our trade secrets and know-how include information related to manufacturing processes for our drug products and devices, analytical methods and procedures, research and development activities, provisional patent applications, as well as certain information provided to the FDA that was not made public which relates to our regulatory activities and clinical trials.

## Other Regulatory Designations

### *Orphan Drug and Orphan Medicinal Product Designations*

The FDA has granted Orphan Drug designation for (i) our KL4 surfactant (lucinactant) for the treatment of RDS in premature infants, (ii) our KL4 surfactant for the prevention and treatment of BPD in premature infants, (iii) our KL4 surfactant for the treatment of acute respiratory distress syndrome, or ARDS, in adults, and (iv) our KL4 surfactant for the treatment of CF. See the section titled “- Government Regulation - Drug Products - Orphan Drugs.”

The European Commission, or EC, grants Orphan Medicinal Product designation for pharmaceutical products for the diagnosis, prevention or treatment of a life-threatening or chronically debilitating condition affecting no more than 5 in 10,000 people which provides for exclusive marketing rights for indications in Europe for 10 years (subject to revision after six years) following marketing approval by the EMA. In addition, the designation would enable us to receive regulatory assistance in the further development process, and to access reduced regulatory fees throughout its marketing life. The EC has granted Orphan Medicinal Product designation for (i) our KL4 surfactant for the prevention of RDS in premature neonates of less than 32 weeks gestational age, (ii) our KL4 surfactant for the treatment of RDS in premature neonates of less than 37 weeks gestational age, (iii) our KL4 surfactant for the treatment of ALI (which in this circumstance encompasses ARDS), and (iv) our KL4 surfactant for the treatment of CF. In submitting the requests to the EMA for Orphan Medicinal Product designations, instead of listing the drug product under the USAN name (lucinactant) as we have in the U.S., we were required to submit our requests under the names of the four APIs in our KL4 surfactant (lucinactant) as follows: sinapultide (KL4), dipalmitoylphosphatidylcholine, palmitoyl-oleoyl phosphatidylglycerol and palmitic acid.

### *Fast Track Designations*

The FDA has granted Fast Track designation for (i) SURFAXIN for the prevention and treatment of BPD in premature neonates and the treatment of ARDS in adults, (ii) AEROSURF for the treatment of RDS in premature neonates, and (iii) istaroxime for the treatment of AHF. We believe that other of our products may qualify for Fast Track or breakthrough therapy designation or other expedited programs. These designations and programs are intended to facilitate and expedite development and review of a New Drug Application, or NDA, to address unmet medical needs in the treatment of serious or life-threatening conditions. See the section titled “- Government Regulation - Drug Products - Fast Track Designation.”

## **Competition**

The biotechnology industry is a highly competitive industry. As we work to gain marketing authorization for our product candidates, competition from numerous existing pharmaceutical companies and other companies entering our fields is expected to be intense and expected to increase. In fact, our future competitors are competing with us currently to secure access to development resources, including clinical sites and their patients to advance development programs. We expect that those companies that are successful at being the first to introduce new products and technologies to the market may gain significant advantages over their competitors in the establishment of a customer base and track record for the performance of their products and technologies. Moreover, there are also existing therapies that may compete with the products we are developing. Therefore, as a development stage biotechnology company, our competitors are comprised of other biotechnology firms and pharmaceutical companies that have existing products or are developing products for our primary markets -- respiratory and cardiovascular indications.

## **NIH Funding**

This prospectus includes information concerning our AEROSURF clinical and device development programs. The AEROSURF phase 2b clinical trial has been supported to date, in part, by a \$2.6 million Phase IIb award under a Small Business Innovation Research, or SBIR, grant from the National Heart, Lung, and Blood Institute of the NIH, under parent award number R44HL107000. In addition, we received funding under a Phase II SBIR grant from the National Institute of Allergy and Infectious Diseases under parent grant number R44AI102308. The content of this prospectus is solely our responsibility and does not necessarily represent the official views of the NIH.

## **Government Regulation**

In the U.S., drug products, medical devices, and drug/medical device combination products are subject to extensive regulation by the FDA. The Federal Food, Drug, and Cosmetic Act, or the FDC Act, and other federal and state statutes and regulations, govern, among other things, the research, development, testing, manufacture, storage, recordkeeping, approval, clearance, labeling, promotion, advertising and marketing, distribution, post-approval monitoring and reporting, sampling, and import and export of drug products, medical devices, and drug/medical device combination products. Failure to comply with applicable U.S. requirements may subject a company to a variety of administrative or judicial sanctions, such as FDA refusal to approve or clear pending new submissions to market drugs or devices warning or untitled letters, product recalls, product seizures, total or partial suspension of production or distribution, injunctions, fines, civil penalties, and criminal prosecution. Drug products, medical devices, and drug/medical device combination products must receive all relevant regulatory approvals or clearances before they may be marketed in the U.S. Drug products, medical devices, and drug/medical device combination products are subject to extensive regulation, including premarket review and marketing authorization, by similar agencies in other countries.

## *Drug Products*

Pharmaceutical product development for a new product or certain changes to an approved product in the U.S. typically involves preclinical laboratory and animal tests, the submission to the FDA of an investigational new drug application, or IND, which must become effective before clinical testing may commence, and adequate and well-controlled clinical trials to establish the safety and effectiveness of the drug for each indication for which the FDA approval is sought. Satisfaction of the FDA pre-market approval requirements typically takes many years and the actual time required may vary substantially based upon the type, complexity, and novelty of the product or disease.

Preclinical tests include laboratory evaluation of product chemistry, formulation, and toxicity, as well as animal trials to assess the characteristics and potential safety and efficacy of the product. The conduct of the preclinical tests must comply with federal regulations and requirements, including good laboratory practices. The results of preclinical testing are submitted to the FDA as part of an IND along with other information, including information about product chemistry, manufacturing and controls, and a proposed clinical trial protocol. Long-term preclinical tests, such as animal tests of reproductive toxicity and carcinogenicity, may continue after the IND is submitted.

A 30-day waiting period after the submission of each IND is required prior to the commencement of clinical testing in humans. If the FDA has neither commented on nor questioned the IND within this 30-day period, the clinical trial proposed in the IND may begin.

Clinical trials involve the administration of the investigational new drug to volunteers or patients under the supervision of a qualified investigator. Clinical trials must be conducted: (i) in compliance with federal regulations; (ii) in compliance with good clinical practice, or GCP, an international standard meant to protect the rights and health of patients and to define the roles of clinical trial sponsors, administrators, and monitors; as well as (iii) under protocols detailing the objectives of the trial, the parameters to be used in monitoring safety, and the effectiveness criteria to be evaluated. Each protocol involving testing on U.S. patients and subsequent protocol amendments must be submitted to the FDA as part of the IND.

The FDA may order the temporary, or permanent, discontinuation of a clinical trial at any time, or impose other sanctions, if it believes that the clinical trial either is not being conducted in accordance with the FDA requirements or presents an unacceptable risk to the clinical trial patients. The study protocol and informed consent information for patients in clinical trials must also be submitted to an institutional review board, or IRB, for approval. An IRB may also require the clinical trial at the site to be halted, either temporarily or permanently, for failure to comply with the IRB's requirements, or may impose other conditions.

Clinical trials to support NDAs for marketing approval are typically conducted in three sequential phases, but the phases may overlap. In phase 1, the initial introduction of the drug into human subjects or patients, the drug is tested to assess metabolism, pharmacokinetics, pharmacological actions, side effects associated with increasing doses, and, if possible, early evidence on effectiveness. Phase 2 usually involves trials in a limited patient population to determine the effectiveness of the drug for a particular indication, dosage tolerance, and optimum dosage, and to identify common adverse effects and safety risks. If a compound demonstrates evidence of effectiveness and an acceptable safety profile in phase 2 evaluations, phase 3 trials are undertaken to obtain the additional information about clinical efficacy and safety in a larger number of patients, typically at geographically dispersed clinical trial sites, to permit the FDA to evaluate the overall benefit- risk relationship of the drug and to provide adequate information for the labeling of the drug. In most cases the FDA requires two adequate and well-controlled phase 3 clinical trials to demonstrate the efficacy of the drug. A single phase 3 trial with other confirmatory evidence may be sufficient in rare instances where the study is a large multicenter trial demonstrating internal consistency and a statistically very persuasive finding of a clinically meaningful effect on mortality, irreversible morbidity or prevention of a disease with a potentially serious outcome and confirmation of the result in a second trial would be practically or ethically impossible.

The manufacturer of an investigational drug in a phase 2 or 3 clinical trial for a serious or life-threatening disease is required to make available, such as by posting on its website, its policy on evaluating and responding to requests for expanded access to such investigational drug.

After completion of the required clinical testing, an NDA is prepared and submitted to the FDA. The FDA approval of the NDA is required before marketing of the product may begin in the U.S. The NDA must include the results of all preclinical, clinical, and other testing and a compilation of data relating to the product's pharmacology, chemistry, manufacture, and controls. The cost of preparing and submitting an NDA is substantial. The submission of most NDAs is additionally subject to a substantial application user fee, currently exceeding \$2,942,000 for fiscal year 2020, and the applicant under an approved new drug application is also subject to an annual program fee, currently exceeding \$325,000 per product for fiscal year 2020. These fees are typically increased annually.

The FDA has 60 days from its receipt of an NDA to determine whether the application will be filed based on the agency's threshold determination that it is sufficiently complete to permit substantive review. If the NDA submission is filed, the FDA reviews the NDA to determine, among other things, whether the proposed product is safe and effective for its intended use. The FDA has agreed to certain performance goals in the review of NDAs. Most such applications for standard review drug products are reviewed within ten to twelve months; most applications for priority review drugs are reviewed in six to eight months. Priority review can be applied to drugs that the FDA determines offer major advances in treatment or provide a treatment where no adequate therapy exists. The review process for both standard and priority review may be extended by the FDA for three additional months to consider certain late-submitted information, or information intended to clarify information already provided in the submission.

The FDA may also refer applications for novel drug products, or drug products that present difficult questions of safety or efficacy, to an advisory committee - typically a panel that includes clinicians and other experts - for review, evaluation, and a recommendation as to whether the application should be approved. The FDA is not bound by the recommendation of an advisory committee, but it generally follows such recommendations. Before approving an NDA, the FDA will typically inspect one or more clinical sites to assure compliance with GCP. Additionally, the FDA will inspect the facility or the facilities at which the drug is manufactured. The FDA will not approve the product unless compliance with current good manufacturing practices, or cGMPs, is satisfactory and the NDA contains data that provide substantial evidence that the drug is safe and effective in the indication studied.

After the FDA evaluates the NDA and the manufacturing facilities, it issues either an approval letter or a complete response letter. A complete response letter generally outlines the deficiencies in the submission and may require substantial additional testing, or information, in order for the FDA to reconsider the application. If, or when, those deficiencies have been addressed to the FDA's satisfaction in a resubmission of the NDA, the FDA will issue an approval letter. The FDA has committed to reviewing such resubmissions in two or six months depending on the type of information included.

An approval letter authorizes commercial marketing of the drug with specific prescribing information for specific indications. As a condition of NDA approval, the FDA may require a Risk Evaluation and Mitigation Strategy, or REMS, to help ensure that the benefits of the drug outweigh the potential risks. REMS can include medication guides, communication plans for healthcare professionals, and elements to assure safe use, or ETASU. ETASU can include, but are not limited to, special training or certification for prescribing or dispensing, dispensing only under certain circumstances, special monitoring, and the use of patient registries. The requirement for a REMS can materially affect the potential market and profitability of the drug. Moreover, product approval may require substantial post-approval testing and surveillance to monitor the drug's safety or efficacy. Once granted, product approvals may be withdrawn if compliance with regulatory standards is not maintained or problems are identified following initial marketing.

Changes to some of the conditions established in an approved application, including changes in indications, labeling, or manufacturing processes or facilities, require submission and the FDA approval of a new NDA or NDA supplement before the change can be implemented. An NDA supplement for a new indication typically requires clinical data similar to that in the original application, and the FDA uses the same procedures and actions in reviewing NDA supplements as it does in reviewing NDAs.

### Orphan Drugs

Under the Orphan Drug Act, the FDA may grant Orphan Drug designation to drugs intended to treat a rare disease or condition - generally a disease or condition that affects fewer than 200,000 individuals in the U.S. Orphan drug designation must be requested before submitting an NDA. After the FDA grants Orphan Drug designation, the generic identity of the drug and its potential orphan use are disclosed publicly by the FDA. Orphan drug designation does not convey any advantage in, or shorten the duration of, the regulatory review and approval process. The first NDA applicant to receive FDA approval for a particular active moiety to treat a particular disease with FDA Orphan Drug designation is entitled to a seven- year exclusive marketing period in the U.S. for that product, for that indication. During the seven-year exclusivity period, the FDA may not approve any other applications to market the same drug for the same disease, except in limited circumstances, such as a showing of clinical superiority to the product with Orphan Drug exclusivity by means of greater effectiveness, greater safety, or providing a major contribution to patient care. Orphan drug exclusivity does not prevent the FDA from approving a different drug for the same disease or condition, or the same drug for a different disease or condition. Among the other benefits of Orphan Drug designation are tax credits for certain research and a waiver of the NDA application user fee.

### Fast Track Designation

The FDA is required to facilitate the development, and expedite the review, of drugs that are intended for the treatment of a serious or life-threatening disease and which demonstrate the potential to address unmet medical needs for the condition. Under the Fast Track program, the sponsor of a new drug candidate may request that the FDA designate the drug candidate for a specific indication as a Fast Track drug concurrent with, or after, the filing of the IND for the drug candidate. The FDA must determine if the drug candidate qualifies for Fast Track designation within 60 days of receipt of the sponsor's request.

Under the Fast Track program, sponsors have the opportunity to engage in more frequent interactions with the FDA. In addition, the FDA may initiate review of sections of a Fast Track drug's NDA before the application is complete. This rolling review is available if the applicant provides, and the FDA approves, a schedule for the submission of the remaining information and the applicant pays applicable user fees. However, the FDA's time period goal for reviewing an application does not begin until the last section of the NDA is submitted. Additionally, the Fast Track designation may be withdrawn by the FDA if the FDA believes that the designation is no longer supported by data emerging in the clinical trial process.

### Breakthrough Therapy Designation

FDA is also required to expedite the development and review of the application for approval of drugs that are intended to treat a serious or life-threatening disease or condition where preliminary clinical evidence indicates that the drug may demonstrate substantial improvement over existing therapies on one or more clinically significant endpoints. Under the breakthrough therapy program, the sponsor of a new drug candidate may request that FDA designate the drug candidate for a specific indication as a breakthrough therapy concurrent with, or after, the filing of the IND for the drug candidate. FDA must determine if the drug candidate qualifies for breakthrough therapy designation within 60 days of receipt of the sponsor's request.

### The Hatch-Waxman Act

#### *Orange Book Listing*

In seeking approval for a drug through an NDA, applicants are required to list with the FDA each patent with claims covering the applicant's product or method of using the product. Upon approval of a drug, each of the patents listed in the application for the drug is then published in the FDA's Approved Drug Products with Therapeutic Equivalence Evaluations, commonly known as the Orange Book. Drugs listed in the Orange Book can, in turn, be cited by potential generic competitors in support of approval of an abbreviated new drug application, or ANDA. An ANDA provides for marketing of a drug product that has the same active ingredients in the same strengths and dosage form as the listed drug and has been shown to be bioequivalent to the listed drug. Other than the requirement for bioequivalence testing, ANDA applicants are not required to conduct, or submit results of, preclinical or clinical tests to prove the safety or effectiveness of their drug product. Drugs approved in this way are commonly referred to as generic equivalents to the listed drug, and can often be substituted by pharmacists under prescriptions written for the original listed drug.

The ANDA applicant is required to certify to the FDA concerning any patents listed for the approved product in the FDA's Orange Book. Specifically, the applicant must certify that: (i) the required patent information has not been filed; (ii) the listed patent has expired; (iii) the listed patent has not expired, but will expire on a particular date and approval is sought after patent expiration; or (iv) the listed patent is invalid or will not be infringed by the new product. The ANDA applicant may also elect to submit a Section VIII statement certifying that its proposed ANDA labeling does not contain (or carves out) any language regarding the patented method-of-use rather than certify to a listed method-of-use patent. If the applicant does not challenge the listed patents, the ANDA application will not be approved until all the listed patents claiming the referenced product have expired.

A certification that the new product will not infringe the already approved product's listed patents, or that such patents are invalid, is called a Paragraph IV certification. If the ANDA applicant has provided a Paragraph IV certification to the FDA, the applicant must also send notice of the Paragraph IV certification to the NDA and patent holders once the ANDA has been received by the FDA. The NDA and patent holders may then initiate a patent infringement lawsuit in response to the notice of the Paragraph IV certification. The filing of a patent infringement lawsuit within 45 days of the receipt of a Paragraph IV certification automatically prevents the FDA from approving the ANDA until the earlier of 30 months, expiration of the patent, settlement of the lawsuit, or a decision in the infringement case that is favorable to the ANDA applicant.



An applicant submitting an NDA under Section 505(b)(2) of the FDC Act, which permits the filing of an NDA where at least some of the information required for approval comes from studies not conducted by, or for, the applicant and for which the applicant has not obtained a right of reference, is required to certify to the FDA regarding any patents listed in the Orange Book for the approved product it references to the same extent that an ANDA applicant would.

#### *Market Exclusivity*

Market exclusivity provisions under the FDC Act also can delay the submission or the approval of certain applications. The FDC Act provides a five-year period of non-patent exclusivity within the U.S. to the first applicant to gain approval of an NDA for a new chemical entity, or NCE. A drug is entitled to NCE exclusivity if it contains a drug substance no active moiety of which has been previously approved by the FDA. During the exclusivity period, the FDA may not receive for review an ANDA or file a 505(b)(2) NDA submitted by another company for another version of such drug where the applicant does not own or have a legal right of reference to all the data required for approval. However, an application may be submitted after four years if it contains a Paragraph IV certification. The FDC Act also provides three years of market exclusivity for an NDA, 505(b)(2) NDA or supplement to an existing NDA if new clinical investigations, other than bioavailability studies, that were conducted or sponsored by the applicant are deemed by the FDA to be essential to the approval of the application, for example, for new indications, dosages or strengths of an existing drug. This three-year exclusivity covers only the conditions for use associated with the new clinical investigations and does not prohibit the FDA from approving ANDAs for drugs for the original conditions of use, such as the originally approved indication. Five-year and three-year exclusivity will not delay the submission or approval of a full NDA; however, an applicant submitting a full NDA would be required to conduct or obtain a right of reference to all the non-clinical studies and adequate and well- controlled clinical trials necessary to demonstrate safety and effectiveness.

#### *Patent Term Extension*

After NDA approval, the owner of a relevant drug patent may apply for up to five years of patent term extension. Only one patent may be extended for each regulatory review period, which is composed of two parts: a testing phase, and an approval phase. The allowable patent term extension is calculated as half of the drug's testing phase - the time between the day the IND becomes effective and NDA submission - and all of the review phase - the time between NDA submission and approval - up to a maximum of five years. The time can be shortened if the FDA determines that the applicant did not pursue approval with due diligence. The total remaining patent term after the extension may not exceed 14 years.

For patents that might expire during the application phase, the patent owner may request an interim patent extension. An interim patent term extension increases the patent term by one year and may be renewed up to four times. For each interim patent term extension granted, the post-approval patent term extension is reduced by one year. The director of the United States Patent and Trademark Office, or USPTO, must determine that approval of the drug covered by the patent for which a patent extension is being sought is likely. Interim patent term extensions are not available for a drug for which an NDA has not been submitted.

#### *Post-Approval Requirements*

Once an NDA is approved, a product will be subject to certain post-approval requirements. For instance, the FDA closely regulates the post-approval marketing and promotion of drugs, including standards and regulations for direct-to- consumer advertising, off-label promotion, industry-sponsored scientific and educational activities and promotional activities involving the internet. Drugs may be marketed only for the approved indications and in accordance with the provisions of the approved labeling.

Adverse event reporting and submission of periodic reports is required following FDA approval of an NDA. The FDA also may require post-marketing testing, known as phase 4 testing, REMS, and surveillance to monitor the effects of an approved product, or the FDA may place conditions on an approval that could restrict the distribution or use of the product. In addition, quality-control, drug manufacture, packaging, and labeling procedures must continue to conform to cGMPs, after approval. Drug manufacturers and certain of their subcontractors are required to register their establishments with the FDA and certain state agencies. Registration with the FDA subjects entities to periodic unannounced inspections by the FDA, during which the agency inspects manufacturing facilities to assess compliance with cGMPs. Accordingly, manufacturers must continue to expend time, money, and effort in the areas of production and quality-control to maintain compliance with cGMPs. Regulatory authorities may withdraw product approvals or request product recalls if a company fails to comply with regulatory standards, if it encounters problems following initial marketing, or if previously unrecognized problems are subsequently discovered. In addition, prescription drug manufacturers in the U.S. must comply with applicable provisions of the Drug Supply Chain Security Act and provide and receive product tracing information, maintain appropriate licenses, ensure they only work with other properly licensed entities, and have procedures in place to identify and properly handle suspect and illegitimate products.

### *Pediatric Information*

Under the Pediatric Research Equity Act, or PREA, NDAs or supplements to NDAs must contain data to assess the safety and effectiveness of the drug for the claimed indications in all relevant pediatric subpopulations and to support dosing and administration for each pediatric subpopulation for which the drug is safe and effective. The FDA may grant full or partial waivers, or deferrals, for submission of data. Unless otherwise required by regulation, PREA does not apply to any drug for an indication for which orphan designation has been granted except a product with a new active ingredient that is a molecularly targeted cancer product intended for the treatment of an adult cancer and directed at a molecular target determined by the FDA to be substantially relevant to the growth or progression of a pediatric cancer that is subject to an NDA or BLA submitted on or after August 18, 2020.

The Best Pharmaceuticals for Children Act, or BPCA, provides NDA holders a six-month extension of any exclusivity—patent or non-patent—for a drug if certain conditions are met. Conditions for exclusivity include the FDA's determination that information relating to the use of a new drug in the pediatric population may produce health benefits in that population, the FDA making a written request for pediatric studies, and the applicant agreeing to perform, and reporting on, the requested studies within the statutory timeframe. Applications under the BPCA are treated as priority applications, with all of the benefits that designation confers.

### *Disclosure of Clinical Trial Information*

Sponsors of clinical trials of FDA-regulated products are required to register and disclose certain clinical trial information. Information related to the product, patient population, phase of investigation, trial sites and investigators, and other aspects of the clinical trial is then made public as part of the registration. Sponsors are also obligated to discuss the results of their clinical trials after completion. Disclosure of the results of these trials can be delayed in certain circumstances for up to two years after the date of completion of the trial. Competitors may use this publicly available information to gain knowledge regarding the progress of development programs.

### Regulation Outside the U.S.

In addition to regulations in the U.S., we are subject to a variety of regulations in other jurisdictions governing clinical studies, commercial sales, and distribution of our products. Most countries outside the U.S. require that clinical trial applications be submitted to and approved by the local regulatory authority for each clinical study. In addition, whether or not we obtain FDA approval for a product, we must obtain approval of a product by the comparable regulatory authorities of countries outside the U.S. before we can commence clinical studies or marketing of the product in those countries. The approval process varies from country to country, and the time may be longer or shorter than that required for FDA approval.

To obtain regulatory approval of an Orphan Drug under EU regulatory systems, we are mandated to submit marketing authorization applications, or MAAs, in centralized procedure. The centralized procedure, which came into operation in 1995, allows applicants to obtain a marketing authorization that is valid throughout the EU. It is compulsory for medicinal products manufactured using biotechnological processes, for orphan medicinal products and for human products containing a new active substance which was not authorized in the Community before May 20, 2004 (date of entry into force of Regulation (EC) No 726/2004) and which are intended for the treatment of AIDS, cancer, neurodegenerative disorder or diabetes. The centralized procedure is optional for any other products containing new active substances not authorized in the Community before May 20, 2004 or for products which constitute a significant therapeutic, scientific or technical innovation or for which a Community authorization is in the interests of patients at Community level. When a company wishes to place on the market a medicinal product that is eligible for the centralized procedure, it sends an application directly to the EMA, to be assessed by the Committee for Medicinal Products for Human Use, or CHMP. The procedure results in an EC decision, which is valid in all EU Member States. Centrally-authorized products may be marketed in all EU Member States.



In centralized procedure, full copies of the MAA are sent to a rapporteur and a co-rapporteur designated by the competent EMA scientific committee. They coordinate the EMA's assessment of the medicinal product and prepare draft reports. Once the draft reports are prepared (other experts might be called upon for this purpose), they are sent to the CHMP, whose comments or objections are communicated to the applicant. The rapporteur is therefore the privileged interlocutor of the applicant and continues to play this role, even after the MAA has been granted. The rapporteur and co-rapporteur then assess the applicant's replies, submit them for discussion to the CHMP and, taking into account the conclusions of this debate, prepare a final assessment report. Once the evaluation is completed, the CHMP gives a favorable or unfavorable opinion as to whether to grant the authorization. When the opinion is favorable, it shall include the draft summary of the product's characteristics, the package leaflet and the texts proposed for the various packaging materials. The time limit for the evaluation procedure is 210 days. The EMA then has fifteen days to forward its opinion to the EC. This is the start of the second phase of the procedure: the decision-making process.

The EMA sends to the EC its opinion and assessment report, together with annexes containing: the SmPC (Annex 1); the particulars of the Marketing Authorisation Holder, or MAH, responsible for batch release, the particulars of the manufacturer of the active substance and the conditions of the marketing authorization (Annex 2); and the labeling and the package leaflet (Annex 3). The annexes are translated into the 22 other official languages of the EU. During the decision-making process, the EC services verify that the marketing authorization complies with EU law. The EC has fifteen days to prepare a draft decision. The medicinal product is assigned a Community registration number, which will be placed on its packaging if the marketing authorization is granted. During this period, various EC directorates general are consulted on the draft marketing authorization decision. The draft decision is then sent to the Standing Committee on Medicinal Products for Human Use (EU Member States have one representative each in both of these committees) for their opinions.

The centralized procedure, which is compulsory for medicines produced by certain biotechnological processes and optional for those which are highly innovative, provides for the grant of a single marketing authorization that is valid for all EU member states. The decentralized procedure provides for approval by one or more other, or concerned, member states of an assessment of an application performed by one member state, known as the reference member state. Under this procedure, an applicant submits an application, or dossier, and related materials including a draft summary of product characteristics, and draft labeling and package leaflet, to the reference member state and concerned member states. The reference member state prepares a draft assessment and drafts of the related materials within 120 days after receipt of a valid application. Within 90 days of receiving the reference member state's assessment report, each concerned member state must decide whether to approve the assessment report and related materials. If a member state cannot approve the assessment report and related materials on the grounds of potential serious risk to the public health, the disputed points may eventually be referred to the EC, whose decision is binding on all member states.

Applications from persons or companies seeking "orphan medicinal product designation" for products they intend to develop for the diagnosis, prevention, or treatment of life-threatening or very serious conditions that affect not more than 5 in 10,000 persons in the EU are reviewed by the Committee for Orphan Medicinal Products, or COMP. In addition, Orphan Drug designation can be granted if the drug is intended for a life threatening, seriously debilitating, or serious and chronic condition in the EU and that without incentives it is unlikely that sales of the drug in the EU would be sufficient to justify developing the drug. Orphan drug designation is only available if there is no other satisfactory method approved in the EU of diagnosing, preventing, or treating the condition, or if such a method exists, the proposed Orphan Drug will be of significant benefit to patients. Orphan drug designation provides opportunities for fee reductions for protocol assistance and access to the centralized regulatory procedures before and during the first year after marketing approval, which reductions are not limited to the first year after marketing approval for small and medium enterprises. In addition, if a product which has an Orphan Drug designation subsequently receives EMA marketing approval for the indication for which it has such designation, the product is entitled to Orphan Drug exclusivity, which means the EMA may not approve any other application to market the same drug for the same indication for a period of 10 years. The exclusivity period may be reduced to six years if the designation criteria are no longer met, including where it is shown that the product is sufficiently profitable not to justify maintenance of market exclusivity. Competitors may receive marketing approval of different drugs or biologics for the indications for which the orphan product has exclusivity. In order to do so, however, they must demonstrate that the new drugs or biologics provide a significant benefit over the existing orphan product. This demonstration of significant benefit may be done at the time of initial approval or in post-approval studies, depending on the type of marketing authorization granted.

A pediatric investigation plan, or PIP, is a development plan aimed at ensuring that the necessary data are obtained to support the authorization of a medicine for children, through studies in children. All applications for marketing authorization for new medicines have to include the results of studies as described in an agreed PIP, unless the medicine is exempt because of a deferral or waiver. This requirement also applies when a marketing-authorization holder wants to add a new indication, pharmaceutical form, or route of administration for a medicine that is already authorized and covered by intellectual property rights. Several rewards and incentives for the development of pediatric medicines for children are available in the EU. Medicines authorized across the EU with the results of studies from a PIP included in the product information are eligible for an extension of their supplementary protection certificate by six months. This is the case even when the studies' results are negative. For orphan medicines, the incentive is an additional two years of market exclusivity. Scientific advice and protocol assistance at the EMA are free of charge for questions relating to the development of pediatric medicines. Medicines developed specifically for children that are already authorized but are not protected by a patent or supplementary protection certificate are eligible for a pediatric-use marketing authorization, or PUMA. If a PUMA is granted, the product will benefit from 10 years of market protection as an incentive.

In a referendum held in the United Kingdom, or UK, on June 23, 2016, a majority of those voting voted for the UK to leave the EU, commonly referred to as “Brexit”. The effective date of the UK’s withdrawal from the EU was January 31, 2020. The ultimate impact of the “leave” vote will depend on the terms that are negotiated in relation to the UK’s future relationship with the EU. Brexit could lead to legal uncertainty and potentially divergent national laws and regulations as the UK determines which EU laws to replicate or replace.

## Medical Device Products

A medical device is an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component part, or accessory which is: (i) recognized in the official National Formulary, or the US Pharmacopoeia, or any supplement to them; (ii) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals; or (iii) intended to affect the structure or any function of the body of man or other animals, and which does not achieve any of its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its primary intended purposes.

The FDC Act classifies medical devices into one of three categories based on the risks associated with the device and the level of control necessary to provide reasonable assurance of safety and effectiveness. Class I devices are deemed to be low risk and are subject to the fewest regulatory controls. Class III devices are generally the highest risk devices and are subject to the highest level of regulatory control to provide reasonable assurance of the device’s safety and effectiveness. Class III devices must typically be approved by the FDA before they are marketed.

Generally, establishments that manufacture and/or distribute devices, including manufacturers, contract manufacturers, sterilizers, repackagers and relabelers, specification developers, reproducers of single-use devices, remanufacturers, initial importers, manufacturers of accessories and components sold directly to the end user, and U.S. manufacturers of export-only devices, are required to register their establishments with the FDA and provide the FDA a list of the devices that they handle at their facilities.

### *Pre-market Authorization and Notification*

While most Class I and some Class II devices can be marketed without prior FDA authorization, most medical devices can be legally sold within the U.S. only if the FDA has: (i) approved a premarket approval application, or PMA, prior to marketing, generally applicable to Class III devices; or (ii) cleared the device in response to a premarket notification, or 510(k) submission, generally applicable to Class I and II devices. Some devices that have been classified as Class III are regulated pursuant to the 510(k) requirements because the FDA has not yet called for PMAs for these devices. Other less common regulatory pathways to market for certain devices include the de novo classification process, the humanitarian device exception, or HDE, or a product development protocol, or PDP.

### *The 510(k) Clearance Process*

Under the 510(k) process, the manufacturer must submit to the FDA a premarket notification, demonstrating that the device is “substantially equivalent,” as defined in the statute, to a legally marketed predicate device.

A predicate device is a legally marketed device that is not subject to premarket approval, i.e., a device that was legally marketed prior to May 28, 1976, often referred to as a preamendments device, and for which a PMA is not required, a device that has been reclassified from Class III to Class II or I, or a device that was previously found substantially equivalent through the 510(k) process. To be “substantially equivalent,” the proposed device must have the same intended use as the predicate device, and either have the same technological characteristics as the predicate device or have different technological characteristics and not raise different questions of safety or effectiveness than the predicate device. Clinical data is sometimes required to support substantial equivalence.

After a 510(k) premarket notification is submitted, the FDA determines whether to accept it for substantive review. If it lacks necessary information for substantive review, the FDA will refuse to accept the 510(k) notification. If it is accepted for filing, the FDA begins a substantive review. By statute, the FDA has a performance goal to complete its review of 95% of 510(k) submissions within 90 days of receipt. As a practical matter, clearance often takes longer, because the FDA can request additional data and information, which pauses the review clock for up to 180 days, and clearance is never assured. Although many 510(k) premarket notifications are cleared without clinical data, the FDA may require further information, including clinical data, to make a determination regarding substantial equivalence. If the FDA agrees that the device is substantially equivalent, it will grant clearance to commercially market the device.

If the FDA determines that the device is not “substantially equivalent” to a predicate device, or if the device is automatically classified into Class III, the device sponsor must then fulfill the much more rigorous premarketing requirements of the PMA approval process, or seek reclassification of the device through the de novo process. A manufacturer can also submit a petition for direct de novo review if the manufacturer is unable to identify an appropriate predicate device and the new device or new use of the device presents a moderate or low risk.

After a device receives 510(k) clearance, any modification that could significantly affect its safety or effectiveness, or that would constitute a new or major change in its intended use, will require a new 510(k) clearance or, depending on the modification, could require a PMA application or de novo classification. The FDA requires each manufacturer to determine whether the proposed change requires submission of a 510(k) or a PMA in the first instance, but the FDA can review any such decision and disagree with a manufacturer’s determination. Many minor modifications are accomplished by a letter-to-file in which the manufacturer documents the change in an internal letter-to-file. The letter-to-file is in lieu of submitting a new 510(k) to obtain clearance for such change. The FDA can always review these letters to file in an inspection. If the FDA disagrees with a manufacturer’s determination regarding whether a new premarket submission is required for the modification of an existing device, the FDA can require the manufacturer to cease marketing and/or recall the modified device until 510(k) clearance or approval of a PMA application is obtained. In addition, in these circumstances, the FDA can impose significant regulatory fines or penalties for failure to submit the requisite PMA application(s).

### *The PMA Approval Process*

Following receipt of a PMA application, the FDA conducts an administrative review to determine whether the application is sufficiently complete to permit a substantive review. If it is not, the agency will refuse to file the PMA. If it is, the FDA will accept the application for filing and begin the review. The FDA, by statute and by regulation, has a performance goal to review 90% of PMA applications within 180 days, if advisory committee input is not required, and within 320 days, if advisory committee input is required, although the review of an application more often occurs over a significantly longer period of time. During this review period, the FDA may request additional information or clarification of information already provided, and the FDA may issue a major deficiency letter to the applicant, requesting the applicant’s response to deficiencies communicated by the FDA. The FDA considers a PMA or PMA supplement to have been voluntarily withdrawn if an applicant fails to respond to an FDA request for information (e.g., major deficiency letter) within a total of 360 days. Before approving or denying a PMA, an FDA advisory committee may review the PMA at a public meeting and provide the FDA with the committee’s recommendation on whether the FDA should approve the submission, approve it with specific conditions, or not approve it. The FDA is not bound by the recommendations of an advisory committee, but it considers such recommendations carefully when making decisions.

Prior to approval of a PMA, the FDA may conduct inspections of the clinical trial data and clinical trial sites, as well as inspections of the manufacturing facility and processes. Overall, the FDA review of a PMA application generally takes between one and three years, but may take significantly longer. The FDA can delay, limit or deny approval of a PMA application for many reasons, including:

- the device may not be shown safe or effective to the FDA’s satisfaction;
- the data from preclinical studies and/or clinical trials may be found unreliable or insufficient to support approval;
- the manufacturing process or facilities may not meet applicable requirements; and
- changes in FDA approval policies or adoption of new regulations may require additional data.

If the FDA evaluation of a PMA is favorable, the FDA will issue either an approval letter, or an approvable letter, the latter of which usually contains a number of conditions that must be met in order to secure final approval of the PMA. When and if those conditions have been fulfilled to the satisfaction of the FDA, the agency will issue a PMA approval letter authorizing commercial marketing of the device, subject to the conditions of approval and the limitations established in the approval letter. If the FDA's evaluation of a PMA application or manufacturing facilities is not favorable, the FDA will deny approval of the PMA or issue a not approvable letter. The FDA also may determine that additional tests or clinical trials are necessary, in which case the PMA approval may be delayed for several months or years while the trials are conducted and data is submitted in an amendment to the PMA, or the PMA is withdrawn and resubmitted when the data are available. The PMA process can be expensive, uncertain and lengthy and a number of devices for which the FDA approval has been sought by other companies have never been approved by the FDA for marketing.

New PMA applications or PMA supplements are required for modification to the manufacturing process, equipment or facility, quality control procedures, sterilization, packaging, expiration date, labeling, device specifications, ingredients, materials or design of a device that has been approved through the PMA process. PMA supplements often require submission of the same type of information as an initial PMA application, except that the supplement is limited to information needed to support any changes from the device covered by the approved PMA application and may or may not require as extensive technical or clinical data or the convening of an advisory panel, depending on the nature of the proposed change. In approving a PMA application, as a condition of approval, the FDA may also require some form of post-approval study or post-market surveillance, whereby the applicant conducts a follow-up study or follows certain patient groups for a number of years and makes periodic reports to the FDA on the clinical status of those patients when necessary to protect the public health or to provide additional or longer term safety and effectiveness data for the device. The FDA may also require post-market surveillance for certain devices cleared under a 510(k) notification, such as implants or life-supporting or life-sustaining devices used outside a device user facility. The FDA may also approve a PMA application with other post-approval conditions intended to ensure the safety and effectiveness of the device, such as, among other things, restrictions on labeling, promotion, sale, distribution and use.

#### *Exempt Devices*

If a manufacturer's device falls into a generic category of Class I or Class II devices that the FDA has exempted by regulation, a premarket notification is not required before marketing the device in the U.S. Manufacturers of such devices are required to register their establishments and list the proprietary device name and the generic category or classification regulation into which the device fits. Some 510(k)-exempt devices are also exempt from Quality System Regulation, or QSR, requirements.

#### *Post-market Requirements*

After a device is placed on the market, numerous regulatory requirements apply. These include: the QSR, labeling regulations, the FDA's general prohibition against promoting products for unapproved or off-label uses, the Medical Device Reporting regulation (which requires that manufacturers report to the FDA if their device may have caused or contributed to a death or serious injury or malfunctioned in a way that would likely cause or contribute to a death or serious injury if it were to recur), and the Reports of Corrections and Removals regulation (which requires manufacturers to report recalls and field actions to the FDA if initiated to reduce a risk to health posed by the device or to remedy a violation of the FDC Act).

The FDA enforces these requirements by inspection and market surveillance. If the FDA finds a violation, it can institute a wide variety of enforcement actions, ranging from a public warning letter to more severe sanctions such as: fines, injunctions, and civil penalties; recall or seizure of products; operating restrictions, partial suspension or total shutdown of production; refusing requests for 510(k) clearance or PMA approval of new products; withdrawing 510(k) clearance or PMA approvals already granted; and criminal prosecution.

#### Combination Products

A combination product is a product comprised of (i) two or more regulated components, i.e., drug/medical device, biologic/medical device, drug/biologic, or drug/medical device/biologic, that are physically, chemically, or otherwise combined or mixed and produced as a single entity; (ii) two or more separate products packaged together in a single package or as a unit and comprised of drug and device products, device and biological products, or biological and drug products; (iii) a drug, device, or biological product packaged separately that according to its investigational plan or proposed labeling is intended for use only with an approved individually specified drug, device, or biological product where both are required to achieve the intended use, indication, or effect and where, upon approval of the proposed product, the labeling of the approved product would need to be changed, e.g., to reflect a change in intended use, dosage form, strength, route of administration, or significant change in dose; or (iv) any investigational drug, device, or biological product packaged separately that according to its proposed labeling is for use only with another individually specified investigational drug, device, or biological product where both are required to achieve the intended use, indication, or effect.

The FDA is divided into various branches, or Centers, by product type. Different Centers typically review drug, biologic, or device applications. In order to review an application for a combination product, the FDA must decide which Center should be responsible for the review. FDA regulations require that the FDA determine the combination product's primary mode of action, or PMOA, which is the single mode of a combination product that provides the most important therapeutic action of the combination product. The Center that regulates that portion of the product that generates the PMOA becomes the lead evaluator. If there are two independent modes of action, neither of which is subordinate to the other, the FDA makes a determination as to which Center to assign the product based on consistency with other combination products raising similar types of safety and effectiveness questions or to the Center with the most expertise in evaluating the most significant safety and effectiveness questions raised by the combination product. When evaluating an application, a lead Center may consult other Centers but still retain complete reviewing authority, or it may collaborate with another Center, by which the Center assigns review of a specific section of the application to another Center, delegating its review authority for that section. Typically, the FDA requires a single marketing application submitted to the Center selected to be the lead evaluator, although the agency has the discretion to require separate applications to more than one Center. One reason to submit multiple evaluations is if the applicant wishes to receive some benefit that accrues only from approval under a particular type of application, like new drug product exclusivity. If multiple applications are submitted, each may be evaluated by a different lead Center.

### International Approvals

Drug products, medical devices, and drug/medical device combination products are subject to extensive regulation, including premarket review and marketing authorization, by similar agencies in other countries. Regulatory requirements and approval processes are similar in approach to that of the U.S. but are not harmonized. International regulators are independent and not bound by the findings of the FDA and there is a risk that foreign regulators will not accept clinical trial design/results or may require additional data or other information not requested by the FDA. In addition, international regulators may require different manufacturing practices than the FDA's cGMPs.

The EU consists of member states residing in the EU and has a coordinated system for the authorization of medical devices. The European Union Medical Devices Directive, or MDD, sets out the basic regulatory framework for medical devices in the EU. This directive has been separately enacted in more detail in the national legislation of the individual member states of the EU.

The system of regulating medical devices operates by way of a certification for each medical device. Each certificated device is marked with CE mark which shows that the device has a Certificat de Conformité. There are national bodies known as Competent Authorities in each member state which oversee the implementation of the MDD within their jurisdiction. The means for achieving the requirements for CE mark varies according to the nature of the device. Devices are classified in accordance with their perceived risks, similarly to the U.S. system. The class of a product determines the requirements to be fulfilled before CE mark can be placed on a product, known as a conformity assessment. Conformity assessments for our products are carried out as required by the MDD. Each member state can appoint Notified Bodies within its jurisdiction. If a Notified Body of one member state has issued a Certificat de Conformité, the device can be sold throughout the EU without further conformance tests being required in other member states.

### Reimbursement

Potential sales of any of our product candidates, if approved, will depend, at least in part, on the extent to which such products will be covered by third-party payors, such as government health care programs, commercial insurance and managed healthcare organizations. These third-party payors are increasingly limiting coverage and/or reducing reimbursements for medical products and services. A third-party payor's decision to provide coverage for a drug product does not imply that an adequate reimbursement rate will be approved. Further, one payor's determination to provide coverage for a drug product does not assure that other payors will also provide coverage for the drug product. In addition, the U.S. government, state legislatures and foreign governments have continued implementing cost-containment programs, including price controls, restrictions on reimbursement and requirements for substitution of generic products. Adoption of price controls and cost-containment measures, and adoption of more restrictive policies in jurisdictions with existing controls and measures, could further limit our future revenues and results of operations. Decreases in third-party reimbursement or a decision by a third-party payor to not cover a product candidate, if approved, or any future approved products could reduce physician usage of our products, and have a material adverse effect on our sales, results of operations and financial condition.

In the U.S., the Medicare Part D program provides a voluntary outpatient drug benefit to Medicare beneficiaries for certain products. We do not know whether our product candidates, if approved, will be eligible for coverage under Medicare Part D, but individual Medicare Part D plans offer coverage subject to various factors such as those described above. Furthermore, private payors often follow Medicare coverage policies and payment limitations in setting their own coverage policies.

#### Anti-Kickback, False Claims Laws and Other Regulations

In addition to the FDA restrictions on marketing of pharmaceutical products, medical devices, and combination products, several other types of state and federal laws have been applied to restrict certain marketing practices in the medical product industry in recent years. These laws include anti-kickback statutes, false claims statutes, and other statutes pertaining to health care fraud and abuse. The federal healthcare program anti-kickback statute prohibits, among other things, knowingly and willfully offering, paying, soliciting or receiving remuneration to induce, or in return for, purchasing, leasing, ordering or arranging for the purchase, lease or order of any healthcare item or service reimbursable under Medicare, Medicaid, or other federally financed healthcare programs. The Patient Protection and Affordable Care Act, or PPACA, amended the intent element of the federal statute so that a person or entity no longer needs to have actual knowledge of the statute or specific intent to violate it. This statute has been interpreted to apply to arrangements between pharmaceutical manufacturers on the one hand and prescribers, purchasers, and formulary managers on the other. Violations of the anti-kickback statute are punishable by imprisonment, criminal fines, civil monetary penalties, and exclusion from participation in federal healthcare programs. Although there are a number of statutory exemptions and regulatory safe harbors protecting certain common activities from prosecution or other regulatory sanctions, the exemptions and safe harbors are drawn narrowly, and practices that involve remuneration intended to induce prescribing, purchases, or recommendations may be subject to scrutiny if they do not qualify for an exemption or safe harbor.

Federal false claims laws prohibit any person from knowingly presenting, or causing to be presented, a false claim for payment to the federal government, or knowingly making, or causing to be made, a false statement to have a false claim paid. This includes claims made to programs where the federal government reimburses, such as Medicaid, as well as programs where the federal government is a direct purchaser, such as when it purchases off the Federal Supply Schedule. Recently, several pharmaceutical and other healthcare companies have been prosecuted under these laws for allegedly inflating drug prices they report to pricing services, which in turn were used by the government to set Medicare and Medicaid reimbursement rates, and for allegedly providing free product to customers with the expectation that the customers would bill federal programs for the product. In addition, certain marketing practices, including off-label promotion, may also violate false claims laws. Additionally, PPACA amended the healthcare program anti-kickback statute such that a violation can serve as a basis for liability under the federal false claims law. The majority of states also have statutes or regulations similar to the federal anti-kickback law and false claims laws, which apply to items and services reimbursed under Medicaid and other state programs, or, in several states, apply regardless of the payor.

The U.S. federal Health Insurance Portability and Accountability Act of 1996, or HIPAA, created additional federal criminal statutes that prohibit among other actions, knowingly and willfully executing, or attempting to execute, a scheme to defraud any healthcare benefit program, including private third-party payors or making any false, fictitious or fraudulent statement in connection with the delivery of or payment for healthcare benefits, items or services. HIPAA, as amended by the Health Information Technology for Economic and Clinical Health Act of 2009, or HITECH, and their implementing regulations, impose obligations on certain types of individuals and entities regarding the electronic exchange of information in common healthcare transactions, as well as standards relating to the privacy and security of individually identifiable health information.

Other federal statutes pertaining to healthcare fraud and abuse include the civil monetary penalties statute, which prohibits the offer or payment of remuneration to a Medicaid or Medicare beneficiary that the offeror/payor knows or should know is likely to influence the beneficiary to order a reimbursable item or service from a particular supplier, and the healthcare fraud statute, which prohibits knowingly and willfully executing or attempting to execute a scheme to defraud any healthcare benefit program or obtain by means of false or fraudulent pretenses, representations, or promises any money or property owned by or under the control of any healthcare benefit program in connection with the delivery of or payment for healthcare benefits, items, or services.

Additionally, to the extent that our product is sold in a foreign country, we may be subject to similar foreign laws.



[Privacy and Security laws](#)

HIPAA, as amended by HITECH, and their respective implementing regulations, impose privacy, security transmission and breach reporting obligations with respect to individually identifiable health information, including protected health information, or PHI, upon entities subject to the law, such as health plans, healthcare clearinghouses and certain healthcare providers, and their respective business associates that perform services on their behalf that involve individually identifiable health information, including PHI. HITECH also created new tiers of civil monetary penalties, amended HIPAA to make civil and criminal penalties directly applicable to business associates, and gave state attorneys general new authority to file civil actions for damages or injunctions in federal courts to enforce the HIPAA laws and seek attorneys' fees and costs associated with pursuing federal civil actions. Although we are not directly subject to HIPAA, other than potentially with respect to providing certain employee benefits, we could be subject to criminal penalties if we knowingly obtain or disclose individually identifiable health information maintained by a HIPAA covered entity in a manner that is not authorized or permitted by HIPAA.

Federal and state laws that govern the privacy and security of health information or personally identifiable information in certain circumstances, including state health information privacy and data breach notification laws which govern the collection, use, disclosure, and protection of health-related and other personal information, many of which differ from each other in significant ways, and data privacy and security laws and regulations in foreign jurisdictions that may be more stringent than those in the U.S. (such as the General Data Protection Regulation in the European Union), may require us to undertake compliance efforts that could be costly and time consuming or subject us to liability for a failure to comply.

[Other Federal and State Regulatory Requirements](#)

Manufacturers of prescription drugs are required to collect and report information on certain payments or transfers of value to physicians and teaching hospitals, as well as investment interests held by physicians and their immediate family members. The reports must be submitted on an annual basis and the reported data are posted in searchable form on a public website on an annual basis. Failure to submit required information may result in civil monetary penalties. Effective January 1, 2022, transfers of value to physician assistants, nurse practitioners or clinical nurse specialists, certified registered nurse anesthetists, and certified nurse-midwives will also be required.

In addition, several states now require prescription drug companies to report certain expenses relating to the marketing and promotion of drug products and to report gifts and payments to individual healthcare practitioners in these states. Other states prohibit various marketing-related activities, such as the provision of certain kinds of gifts or meals. Still other states require the posting of information relating to clinical studies and their outcomes. Some states require the reporting of certain pricing information, including information pertaining to and justifying price increases, or prohibit prescription drug price gouging. In addition, states such as California, Connecticut, Nevada and Massachusetts require pharmaceutical companies to implement compliance programs and/or marketing codes. Additional jurisdictions, such as the City of Chicago and the District of Columbia, require pharmaceutical sales representatives to be licensed and meet continuing education requirements. Several additional states are considering similar proposals. Compliance with these laws is difficult and time-consuming, and companies that do not comply with these state laws face civil penalties.

[U.S. Healthcare Reform](#)

Changes in healthcare policy could increase our costs and subject us to additional regulatory requirements. By way of example, PPACA substantially changed the way healthcare is financed by both governmental and private insurers, and significantly impacted the medical device industry. There will continue to be proposals by legislators at both the federal and state levels, regulators and third-party payors to reduce costs while expanding individual healthcare benefits. Certain of these changes could impose additional limitations on the prices we will be able to charge and/or patients' willingness to pay for our products. While in general it is too early to predict what effect, if any, PPACA and its implementation, or any future healthcare reform legislation or policies will have on our business, current and future healthcare reform legislation and policies could have a material adverse effect on our business and financial condition.

[Foreign Corrupt Practices Act](#)

The Foreign Corrupt Practices Act, or FCPA, prohibits U.S. businesses and their representatives from offering to pay, paying, promising to pay or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business. The FCPA also obligates companies whose securities are listed in the U.S. to comply with accounting provisions requiring us to maintain books and records, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the corporation, including international subsidiaries, if any, and to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances regarding the reliability of financial reporting and the preparation of financial statements. The scope of the FCPA includes interactions with certain healthcare professionals in many countries.



## International laws

In Europe, and throughout the world, other countries have enacted anti-bribery laws and/or regulations similar to the FCPA. Violations of any of these antibribery laws, or allegations of such violations, could have a negative impact on our business, results of operations and reputation. There are also international privacy laws that impose restrictions on the access, use, and disclosure of health information. All of these laws may impact our business. Our failure to comply with these privacy laws or significant changes in the laws restricting our ability to obtain required patient information could significantly impact our business and our future business plans.

## **CVie Acquisition**

In December 2018, we acquired CVie Investments Limited, or CVie Investments, an exempted company with limited liability incorporated under the laws of the Cayman Islands, which we refer to herein as the CVie Acquisition. Since the CVie Acquisition, we have operated CVie Investments and its wholly-owned subsidiary, CVie Therapeutics, a Taiwan corporation organized under the laws of China, as a subsidiary focused on the development of drug product candidates for cardiovascular diseases. We undertook the merger as part of a strategic initiative to create stockholder value that resulted from a multi-year process focused on identifying strategic opportunities, including potential strategic alliances, collaborations (primarily outside the U.S.), joint development opportunities, acquisitions, technology licensing arrangements, as well as potential combinations (including by merger or acquisition) or other corporate transactions.

## **Employees**

As of April 1, 2020, we have 32 employees, including 31 full-time employees.

## **Properties**

We maintain our principal executive offices at 2600 Kelly Road, Suite 100, Warrington, Pennsylvania 18976-3622. Our premises include corporate administration, research and drug and device development, clinical operations, regulatory affairs, and quality, as well as our analytical and technical support laboratory, which conducts release testing of APIs and supportive research for our lyophilized and aerosolized KL4 surfactant. We also maintain a medical device development laboratory that is used by our engineering team to conduct development activities for AEROSURF and our aerosol delivery technologies. In February 2018, we reduced the size of our premises from 30,506 square feet to 21,189 square feet of leased space, which lowered our base rent and security deposit under the related lease agreement. We also maintain a location in Taipei, Taiwan, the former headquarters of CVie Therapeutics, consisting of approximately 1,317 square feet of office space, where we perform certain manufacturing development and preclinical activities related to our cardiovascular drug product candidates. We also have access to research laboratories in Milan, Italy under our collaboration agreement with Università degli Studi di Milano-Bicocca. We believe our current facilities are adequate for our needs in 2020.

## **Legal Proceedings**

We are not aware of any pending legal actions that would, if determined adversely to us, have a material adverse effect on our business and operations.

We may be subject to other legal proceedings and claims in the ordinary course of business. We cannot predict the results of any such disputes, and despite the potential outcomes, the existence thereof may have an adverse material impact on us due to diversion of management time and attention as well as the financial costs related to resolving such disputes.

## **Available Information**

We file annual, quarterly and current reports, proxy or stockholder information statements and other information with the Securities and Exchange Commission, or the SEC. The SEC maintains an Internet site that contains reports, proxy and information statements, certain and other information that we may file electronically with the SEC (<http://www.sec.gov>). We maintain our corporate website at <http://www.windtreetx.com>. Our website and the information contained therein or connected thereto are not incorporated into this prospectus.

**MANAGEMENT**

The following table sets forth information regarding our executive officers and directors, including their ages as of April 1, 2020:

<b>NAME</b>	<b>AGE</b>	<b>POSITION(S)</b>
<b>Executive Officers</b>		
Craig Fraser	55	President and Chief Executive Officer, Director
Steven G. Simonson, M.D.	61	Senior Vice President and Chief Medical Officer
John A. Tattory	54	Senior Vice President and Chief Financial Officer
Eric Curtis	52	Senior Vice President and Chief Operating Officer
Mary B. Templeton, Esq.	73	Senior Vice President, General Counsel and Corporate Secretary
<b>Non-Employee Directors</b>		
James Huang	54	Chairman of the Board of Directors
John R. Leone	72	Director
Joseph M. Mahady	66	Director
Bruce A. Peacock	68	Director
Brian D. Schreiber, M.D.	66	Director
Daniel E. Geffken	63	Director

**Executive Officers**

**Craig Fraser.** Mr. Fraser has served as President and Chief Executive Officer and a member of the Board of Directors, or the Board, since February 1, 2016. He brings over 29 years of experience as a leader in product development, fundraising, business development and commercial operations in building biopharmaceutical and device businesses for startups as well as larger companies. Prior to joining us, Mr. Fraser held executive positions at several biopharmaceutical companies, including Novellion as Chief Operating Officer and President from 2014 to 2015 and, prior to that, positions of increasing responsibility; as Vice President of Global Disease Areas at Pfizer from 2009 to 2011 and Vice President and Global Business Manager at Wyeth Pharmaceuticals from 2007 to 2009. Previously, Mr. Fraser served as Vice President, Sales & Marketing and Commercial Operations and as Vice President, Global Strategic Marketing at Johnson & Johnson; and as Gastroenterology Franchise Lead, National Sales Director - Immunology and Acute Cardiovasculars, and Marketing Director - Cardiovasculars and Diagnostics at Centocor and various sales and sales management positions prior to marketing roles. Mr. Fraser is a veteran of both the U.S. Marine Corps and the U.S. Army. Mr. Fraser does not serve on any other public company boards. Mr. Fraser received his B.S. degree in Public Administration from Slippery Rock University of Pennsylvania.

Mr. Fraser's knowledge of our business, as well as his extensive leadership and biopharmaceutical industry experience provide him with the qualifications and skills to serve on our Board.

**Steven G. Simonson.** Dr. Simonson has served as our Senior Vice President and Chief Medical Officer since April 2017, having previously served as our Senior Vice President and Chief Development Officer from October 2014 to April 2017, and our Vice President, Clinical Development, upon joining the Company in May of 2014. Dr. Simonson brings to us over 25 years of medical practice and pharmaceutical industry clinical trial experience with a significant background in pulmonary critical care and developing respiratory drugs, including preclinical, first time into man and phases 1-4, and IND, NDA and sNDA experience. Dr. Simonson spent 15 years at AstraZeneca Pharmaceuticals in areas of medical and clinical leadership primarily in the pulmonary and infection therapeutic areas. He has been involved in or led several successful IND and NDA filings. He spent the next two years as Vice President of Clinical Development at Agennix, Inc., a biopharmaceutical company primarily focused in oncology and sepsis, leading programs including studies of talactoferrin in necrotizing enterocolitis. Most recently, Dr. Simonson was an Executive Director in the Molecule Development Group at Covance, a biopharmaceutical development services company, where he applied his experience to developing clinical development programs for small and mid-size biotech and pharmaceutical companies. Dr. Simonson completed training in internal medicine followed by a fellowship in pulmonary and critical care medicine at Duke University Medical Center. He then held several faculty appointments at Duke in the departments of Anesthesiology and Medicine, including the divisions of Pulmonary and Critical Care Medicine. He is a Fellow of the American College of Chest Physicians, and author or co-author of multiple peer reviewed publications, abstracts, posters and chapters. Dr. Simonson received his medical degree from the Medical College of Wisconsin, and his Master of Health Sciences degree in Biometry from the Duke University School of Medicine.

**John A. Tattory.** Mr. Tattory has served as our Senior Vice President and Chief Financial Officer since March 2014, having previously served as our Vice President, Finance and Chief Accounting Officer from March 2013 to March 2014, and our Vice President, Finance, and Controller and the designated principal accounting officer from July 2010 to March 2013, and Vice President, Finance from January 2008 to July 2010. He brings more than 25 years of financial management and leadership experience, including directing U.S. and international financial operations, strategic transactions, licensing and collaboration arrangements, and equity and debt financings. Prior to joining us, Mr. Tattory held financial management positions at Tyco International, where he served as Director, Financial Planning & Analysis for Tyco Flow Control, an operating unit that included the majority of business operations in international markets; and Bristol-Myers Squibb, or BMS, where he held financial roles of increasing responsibility, most recently as Finance Director, U.S. Primary Care, with responsibility for the financial matters of various BMS pharmaceutical businesses, including international operations. Previously, Mr. Tattory served as an Audit Manager with Ernst & Young LLP. Mr. Tattory is a certified public accountant and holds a B.S. degree in Commerce from Rider University.

**Eric Curtis.** Mr. Curtis has served as our Senior Vice President and Chief Operating Officer since March 2020. Prior to joining us, he most recently served as CEO and President of Centurion BioPharma, a biopharmaceutical research and development focused company and a private subsidiary of CytRx Corporation. Mr. Curtis was primarily responsible for the company's corporate strategy, pipeline development plan and business development. Prior to that role, he was President and Chief Operating Officer of CytRx Corporation, a biopharmaceutical company focused in oncology. Mr. Curtis's responsibilities included corporate strategy, pipeline development and investor relations. Before that, Mr. Curtis was principal of Curtis Biopharm Consulting where he led his consulting business to work with the CEOs of several biopharmaceutical companies on refining their company's strategic product development, commercialization effectiveness and focusing resources. Before that, Mr. Curtis served as President, US Commercial of Aegerion Pharmaceuticals, a biopharmaceutical company. He led the commercial organization for US, represented commercial for global business development and was the lead of commercial for investor relations strategy and execution.

**Mary B. Templeton, Esq.** Ms. Templeton has served as Senior Vice President, General Counsel and Corporate Secretary since September 2011, having previously served as Senior Vice President and Deputy General Counsel since joining us in March 2006. Ms. Templeton brings to us 40 years of legal and executive experience. Ms. Templeton previously held senior executive positions in the financial services industry, including as Senior Vice President and General Counsel of The Charles Schwab Corporation and as Senior Vice President and General Counsel of The Sequor Group Inc. (owned by Security Pacific Corporation) and in private practice in Philadelphia and New York. Prior to that, at Charles Schwab & Co., Ms. Templeton led development of the first broker-operated mutual fund marketplace, and, at Bradford Trust Company (New York), the first for-profit clearing corporation registered with the SEC. Ms. Templeton received a B.A. degree from Chatham University, where she is a member of the Board of Trustees, and a J.D. with High Honors from Rutgers Law School, where she served as Editor-in-Chief of the Law Journal. She is a member of the Bar Associations of Pennsylvania and New York.

#### **Non-Employee Directors**

**James Huang.** Mr. Huang was elected as Chairman of the Board on December 21, 2018. Mr. Huang is a founding and Managing Partner to Panacea Venture. Panacea Venture is a venture capital firm that invests in early and growth stage healthcare and life sciences companies worldwide. Since 2011, Mr. Huang has served as a Managing Partner of Kleiner Perkins Caufield & Byers, or KPCB - China, an investment advisory firm, focusing on the firm's life sciences practice. Mr. Huang has made more than 15 investments in China since 2007. Prior to joining KPCB China, Mr. Huang was a Managing Partner at Vivo Ventures, a venture capital firm specializing in life sciences investments. Prior to joining Vivo in 2007, Mr. Huang was president of Anesiva, a biopharmaceutical company focused on pain-management treatments. During his 20-year career in the pharmaceutical and biotech industry, Mr. Huang also held senior roles in business development, sales, marketing and R&D with Tularik Inc. (subsequently acquired by Amgen), GlaxoSmithKline LLC, Bristol-Myers Squibb and ALZA Corp. (subsequently acquired by Johnson & Johnson). Mr. Huang is Chairman of the Board at Kindstar Global, JHL Biotech and XW Laboratory and Director at ChiralQuest, Zenesis, and CASI Pharmaceuticals. Mr. Huang received an M.B.A. from the Stanford Graduate School of Business and a B.S. degree in chemical engineering from the University of California, Berkeley.

Mr. Huang's insight into life sciences financing and experience in the biopharmaceutical industry provide him with the qualifications and skills to serve on our Board.

**John R. Leone.** Mr. Leone has served as a member of our Board since November 2012, acting as Chairman from January 2013 through December 20, 2018. He currently serves as Chairman of the Board's nominating and governance committee and as a member of the audit committee. Mr. Leone has over 30 years of experience in pharmaceutical operations, commercial portfolio management, and financing life science companies. His commercial experience includes significant domestic and international executive management roles and direct responsibility for the commercial launch of numerous pharmaceutical products. Since January 2017, Mr. Leone has served as an Operating Partner at Madryn Asset Management, an investment platform focused on providing capital to healthcare companies. Madryn Asset Management was spun out from Visium Asset Management, or Visium, where Mr. Leone was a Partner from May 2013 to January 2017. Prior to joining Visium, Mr. Leone was a Partner from 2007 to 2013 at Paul Capital Healthcare, a private equity firm that manages one of the largest dedicated healthcare funds globally. Previously, Mr. Leone served as President and Chief Executive Officer at Cambrex Corporation, and as Senior Vice President and Chief Operating Officer of U.S. Commercial Operations at Aventis Pharmaceuticals, or Aventis. While at Aventis, he played a key role in spearheading the successful integration of its predecessor companies, Rhone-Poulenc Rorer and Hoechst Marion Roussel, and had responsibility for all commercial business units, including oncology, metabolism, cardiovascular, dermatology, respiratory and anti-infective. Mr. Leone served on the Board of Pernix Therapeutics Holdings, Inc. from November 2017 until 2019 and served on the Board of ViroPharma Incorporated from January 2006 until its acquisition in March 2014. Mr. Leone received his B.S. degree in Engineering from the U.S. Military Academy at West Point and his M.B.A. from the University of Colorado.

Mr. Leone's extensive commercial experience and expertise in the financing of life sciences companies, along with his leadership experience provide him with the qualifications and skills to serve on our Board.

**Joseph M. Mahady.** Mr. Mahady has served as a member of our Board since January 2013. He also serves as Chairman of the Board's compensation committee and as a member of the audit committee. Mr. Mahady has extensive strategic and operational experience in the biopharmaceutical industry. He has broad international commercial experience, having served in a direct leadership role in more than 30 product launches, and has a successful record of developing profitable businesses based on transformational technologies in both the U.S. and international markets. Mr. Mahady held significant leadership positions during his 30-year career with Wyeth Corporation, including as President, Wyeth Pharmaceuticals from 2008 to 2009, and Senior Vice President, Wyeth Corporation from 2002 to 2009 with responsibility to direct the worldwide operations of that company's \$20 billion global pharmaceutical business. He retired from Wyeth Corporation in 2009. Since his retirement, Mr. Mahady served as Chairman of Lumara Health (formerly KV Pharmaceuticals) from 2013 to 2014, and as a member of the Boards of Directors of Albemarle from 2012 to 2015, EKR Therapeutics from 2011 to 2012 and Strongbridge Biopharma from 2012 to 2015. He currently serves on the Board of Advisors for Nevakar, Inc. Mr. Mahady received his B.S. degree in Pharmacy from St. John's University College of Pharmacy and his M.B.A. in Pharmaceutical Studies from Fairleigh Dickinson University.

Mr. Mahady's extensive insight into the biopharmaceutical industry provides him with the qualifications and skills to serve on our Board.

**Bruce A. Peacock.** Mr. Peacock has served as a member of our Board since September 2010 and is a member of the Board's nominating and governance committee. Mr. Peacock served as Executive Chairman at Carma Therapeutics, a pre-clinical stage biotechnology company, from November 2016 to June 2019. From August 2013 to September 2014, Mr. Peacock served as Chief Financial and Business Officer of Ophthotech Corporation, having served as Chief Business Officer since September 2010. Previously, he served as President and Chief Executive Officer of Alba Therapeutics; Chief Executive Officer and Director of The Little Clinic, a medical care services company; President and Chief Executive Officer and a Director of Adolor Corporation, a publicly-held biotechnology company; President, Chief Executive Officer and a Director of Orthovita Inc., a publicly-held orthopaedic biomaterials company; Executive Vice President, Chief Operating Officer and a Director of Cephalon Inc.; and Chief Financial Officer of Centocor Inc. Mr. Peacock serves as Co-Chairman of the Board of Alba Therapeutics and as a member of the board of directors, since July 2014, of Ocular Therapeutix, a publicly-held biopharmaceutical company. Mr. Peacock previously served as a member of the Board of Applied Genetic Technologies Corporation from March 2015 until August 2016. Since 2012, Mr. Peacock has served as a member of the Board of Invisible Sentinel, Inc., and from 2015 to 2019, a member of the Board of PanOptica, Inc. Mr. Peacock earned a bachelor's degree in Business Administration from Villanova University and is a certified public accountant.

Mr. Peacock brings to our Board extensive biotech and pharmaceutical experience, including financial expertise in debt, equity capital and alliance transactions. He also has significant experience in drug development, having led the effort to gain regulatory approval for several drug candidates in the U.S. and in other major markets worldwide. Mr. Peacock also has had responsibility for marketing, commercial and manufacturing operations.

Mr. Peacock's prior executive and leadership experience and his extensive experience in the biotech and pharmaceutical industry provide him with the qualifications and skills to serve on our Board.

**Brian Schreiber, M.D.** Dr. Schreiber has served as a member of our Board since December 21, 2018 and in March 2019 became a member of the Board's compensation committee and the nominating and governance committee. Dr. Schreiber is a Board-Certified Nephrologist and Internist with extensive industry and clinical experience, specializing in rare diseases. Dr. Schreiber is currently the Chief Medical Officer for Cerium Pharmaceuticals, a company who leverages the basic drug discovery work performed by others and moves drug candidates through the clinical and regulatory development processes. Since 2015, Dr. Schreiber has also served as President and Managing Partner for Metabolism Disease Consultants, focusing on drug development, clinical trial design and in-licensing clinical guidance. Dr. Schreiber also served as Vice President of Medical Development at Relypsa and spent 14 years at Sigma-Tau Pharmaceuticals as consultant medical director and Vice President of its Medical Affairs Department. Dr. Schreiber's clinical experience includes his role as Chief Medical Director of Dialysis Care Inc., a multi-center dialysis chain providing services in the Northeast and Central Wisconsin and Chairman of Nephrology at LaSalle Clinic, Affinity Medical System, serving as its first president until 2001. Dr. Schreiber has also continued his activities in academia as Assistant Clinical Professor of Medicine, Department of Medicine, Division of Nephrology, Medical College of Wisconsin since 2001, and has published numerous academic papers, given a variety of lectures, and ran various symposia.

Dr. Schreiber's extensive medical knowledge and experience with drug development and regulation provide him with the qualifications and skills to serve on our Board.

**Daniel E. Geffken.** Mr. Geffken has served as a member of our Board since April 24, 2019 and was also appointed Chairman of the Board's audit committee and as a member of the compensation committee. Since 2011, Mr. Geffken has been serving as the Founding Managing Partner of Danforth Advisors, a leading financial and strategy consulting firm to the life sciences industry. He has served as chief financial officer and strategic consultant to numerous companies, including Apellis Pharmaceuticals, Cidara Therapeutics, Cabaletta Bio, Homology Medicines, Stealth BioTherapeutics and Transkaryotic Therapies. Mr. Geffken has served on the Board of Elicio Bio, Alcobra Ltd. and Arcturus Inc., after its merger with Alcobra.

Mr. Geffken's deep understanding of the industry in which we operate, in corporate financial management and his overall business acumen and insights provide him with the qualifications and skills to serve on our Board.

### **Family Relationships**

There are no family relationships among our directors and executive officers.

### **Board Leadership Structure**

Our Board is currently composed of seven members. In accordance with our Amended and Restated By-Laws, or By-Laws, each director is elected at our Annual Meeting of Stockholders. Each director holds office until our next Annual Meeting of Stockholders and until his or her successors have been duly elected and qualified, or until such director's death, or until such director shall have resigned, or have been removed.

We believe that the Board should remain free to configure the leadership of the Board and the Company in a way that best serves the interests of the Company and its stockholders at the time and, accordingly, has no fixed policy with respect to combining or separating the offices of the Chairman of the Board and the Chief Executive Officer.

### **Role of Board in Risk Oversight**

One of the key functions of our Board is to oversee our risk management process. Our Board does not have a standing risk management committee, but rather administers this oversight function directly through our Board as a whole, as well as through various standing committees of our board of directors that address the risks inherent in their respective areas of oversight. In particular, our Board is responsible for monitoring and assessing strategic risk exposure and our audit committee has the responsibility to consider and discuss our major financial risk exposures and the steps our management has taken to monitor and control these exposures, including guidelines and policies to govern the process by which risk assessment and management is undertaken. While our Board maintains the ultimate oversight responsibility for the risk management process, its committees oversee risk in certain specified areas. For example:

- Our audit committee oversees management of financial reporting, compliance and litigation risks, including risks related to our insurance, information technology, human resources and regulatory matters, as well as the steps management has taken to monitor and control such exposures.
- Our compensation committee is responsible for overseeing the management of risks relating to our executive compensation policies, plans and arrangements and the extent to which those policies or practices increase or decrease risks for our company.
- Our nominating and corporate governance committee manages risks associated with the independence of our Board, potential conflicts of interest and the effectiveness of our Board.

## **Director Independence**

Our Board has undertaken a review of its composition, the composition of its committees and the independence of each director. Based upon information provided by each director, our Board has determined that each of our directors, with the exception of Mr. Fraser, do not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director and is independent under the listing rules of Nasdaq. In making these determinations, our Board considered the current and prior relationships that each non-employee director has with our company and all other facts and circumstances our Board deemed relevant in determining their independence, including the beneficial ownership of our capital stock by each non-employee director, and the transactions involving them described in the section titled “Certain Relationships and Related Party Transactions.”

## **Board Committees**

Our Board has established an audit committee, a compensation committee and a nominating and governance committee. The composition and responsibilities of each of the committees of our Board is described below. Members will serve on these committees until the resignation or until as otherwise determined by our Board.

### **Audit Committee**

Our audit committee consists of Messrs. Geffken, Mahady and Leone. The chair of our audit committee is Mr. Geffken. The primary purpose of the audit committee is to assist the Board in fulfilling its oversight responsibilities relating to our accounting, reporting and financial practices, and our compliance with all related legal and regulatory requirements, including oversight of:

- the maintenance by management of the reliability and integrity of the Company’s accounting policies, financial reporting and disclosure practices, and tax compliance;
- the establishment and maintenance by management of processes to ensure that an adequate system of internal control is functioning within the Company; and
- the establishment and maintenance by management of processes to ensure compliance by the Company with all applicable laws, regulations and Company policy.

In addition, the audit committee is responsible for, among other things, the appointment, compensation and oversight of the work of any registered public accounting firm engaged (including resolution of disagreements between management and the auditor regarding financial reporting), reviewing the range and cost of audit and non-audit services performed by our independent accountants, reviewing the adequacy of our systems of internal control, and reviewing all related party transactions. In discharging its role, the audit committee is empowered to investigate any matter brought to its attention and has full access to all our books, records, facilities and personnel. The audit committee also has the power to retain such legal, accounting and other advisors as it deems necessary to carry out its duties.

The Board has adopted a written Audit Committee Charter. The composition and responsibilities of the audit committee and the attributes of its members, as reflected in its Charter, are intended to be in accordance with certain listing requirements of Nasdaq and the rules of the SEC for corporate audit committees. The Audit Committee Charter may be found on our website at [www.windtrete.com](http://www.windtrete.com). All members of our audit committee are “independent” as defined in Rule 5605(a)(2) of the Nasdaq Listing Rules and the financial sophistication requirements of the SEC rules. The Board has determined that Mr. Geffken is an “audit committee financial expert” as defined under SEC rules.

## **Compensation Committee**

Our compensation committee consists of Messrs. Mahady and Geffken and Dr. Schreiber. Each member of this committee is a non-employee director, as defined by Rule 16b-3 promulgated under the Exchange Act and meets the requirements for independence under the current Nasdaq Listing Rules. The chair of our compensation committee is Mr. Mahady. The compensation committee is responsible for, among other things:

- reviewing management of the Company's policies regarding compensation policies relating to executive and general compensation;
- reviewing and approving corporate goals and objectives relating to the composition of our Chief Executive Officer, executive officers and other senior officers, evaluate performance of executive officers and other senior officers and determine the Chief Executive Officer's and other executive officers' compensation level based on the compensation committee's evaluation;
- reviewing, approving and establishing guidelines for the compensation of Board directors, including appropriate levels of compensation for service on Board committees; and
- overseeing the key employee benefits programs, policies and plans relating to the compensation, benefits and equity incentives of the Company's executives and, where deemed appropriate by the Committee, those programs, policies and plans relating to the Company's other employees.

The Board has adopted a written Compensation Committee Charter. The composition and responsibilities of the compensation committee, as reflected in its Charter, satisfy the applicable rules of the SEC and the listing requirements of Nasdaq. The Compensation Committee Charter may be found on our website at [www.windtreetx.com](http://www.windtreetx.com).

## **Nominating and Governance Committee**

Our nominating and governance committee consists of Messrs. Leone and Peacock and Dr. Schreiber. The chair of our nominating and governance committee is Mr. Leone. Each member of the nominating and governance committee meets the requirements for independence under the listing requirements of Nasdaq. The nominating and governance committee is responsible for, among other things:

- identifying, evaluating and approving a slate of nominees for election to the Board at the Annual Meeting of Stockholders or any other meetings of stockholders and reviewing the qualifications, experience and fitness for service on the Board of any potential directors;
- determining the criteria for selection by the Board of the Chairman of the Board, the individual directors and the members of the committees of the Board;
- reviewing, evaluating and approving all stockholder proposals submitted to the Company and the timeliness of the submission therefor and recommending to the Board appropriate action on each such proposal;
- evaluating and, if deemed necessary, recommending, the termination of membership of any director in accordance with the applicable code of conduct or ethics of the Company, if any, or any corporate governance principles adopted by the Company or the Board, for cause or for any other appropriate reason; and
- reviewing annually the performance of the Board and each committee of the Board.

The Board has adopted a written Nominating and Governance Committee Charter. The composition and responsibilities of the nominating and governance committee, as reflected in its Charter, satisfy the applicable rules of the SEC and the listing requirements of Nasdaq. The Nominating and Governance Committee Charter may be found on our website at [www.windtreetx.com](http://www.windtreetx.com).

## **Code of Business Conduct and Ethics**

We have adopted a Code of Business Conduct and Ethics that applies to our officers, including our principal executive, financial and accounting officers, and our directors and employees. We have posted the Code of Business Conduct and Ethics on our Internet website at "<http://www.windtreetx.com>" under the "Company" tab in the Corporate Governance section. We intend to make all required disclosures on our website concerning any amendments to, or waivers from, our Code of Business Conduct and Ethics with respect to our executive officers and directors.



## EXECUTIVE AND DIRECTOR COMPENSATION

**Named Executive Officers**

Our named executive officers for the year ended December 31, 2019, which consists of our principal executive officer and our two other most highly compensated executive officers, are:

- Craig Fraser, our President and Chief Executive Officer;
- Steven G. Simonson, M.D., our Senior Vice President and Chief Medical Officer; and
- John A. Tattory, our Senior Vice President, Chief Financial Officer and Treasurer.

The following table presents summary information regarding the total compensation that was awarded to, earned by or paid to our named executive officers for services rendered during the years ended December 31, 2018 and 2019.

**Summary Compensation Table**

Name and Principal Position	Year	Salary (\$)	Bonus \$(3)	Stock Awards \$(1)	Option Awards \$(1)	All Other Compensation \$(2)	Total (\$)
<b>Craig Fraser</b>							
President and Chief Executive Officer	2019	\$ 452,381	\$ 226,038	\$ 31,695	\$ 345,130	\$ 8,400	\$ 1,063,644
	2018	437,068	226,038	274,359	4,287,110	-	5,224,575
<b>Steven G. Simonson, M.D.</b>							
Senior Vice President and Chief Medical Officer	2019	377,437	149,420	15,085	172,565	8,400	722,907
	2018	346,704	149,420	130,581	2,500,814	-	3,127,519
<b>John A. Tattory</b>							
Senior Vice President, Chief Financial Officer and Treasurer	2019	336,944	151,522	14,164	172,565	8,400	683,595
	2018	325,538	151,522	122,609	2,500,814	-	3,100,483

- (1) The aggregate grant date fair value of such awards were computed in accordance with Financial Accounting Standards Board ASC Topic 718, Stock Compensation, or ASC Topic 718, and do not take into account estimated forfeitures related to service-based vesting conditions, if any. The valuation assumptions used in calculating these values are discussed in Note 15 of the Audited Consolidated Financial Statements appearing elsewhere herein. These amounts do not represent actual amounts paid or to be realized. Amounts shown are not necessarily indicative of values to be achieved, which may be more or less than the amounts shown as awards are subject to time-based vesting.
- (2) The reported amount reflects the Company match under our 401(k) Plan.
- (3) This amount represents the portion of each named executive officer's strategic and retention bonus the first installment of which was paid on December 31, 2018 and the second installment of which was paid on October 4, 2019. The strategic and retention bonus was the only cash bonus paid to the named executive officers in 2018 and 2019.

**Narrative Disclosure to Summary Compensation Table***Elements of Compensation*

The compensation of our named executive officers generally consists of base salary, annual cash bonus opportunities, long term incentive compensation in the form of equity awards and other benefits, as described below.

### *Base Salary*

The base salary payable to each named executive officer is intended to provide a fixed component of compensation reflecting the named executive officer's skill set, experience, role, responsibilities, and contributions. Effective February 1, 2019, the base salaries of Messrs. Fraser and Tattory and Dr. Simonson were increased from \$440,274 to \$453,482, from \$327,926 to \$337,764, and from \$349,247 to \$380,000, respectively.

### *Annual Cash Bonus Opportunities*

The performance-based cash bonus opportunity for each of our named executive officers is expressed as a percentage of the applicable named executive officer's base salary that can be achieved at a target level by meeting predetermined corporate and individual performance objectives. Each executive's target bonus for the year is set forth in their employment agreements, as may be amended by the compensation committee from time to time. On March 19, 2019, the compensation committee established that the 2019 annual target bonus amount for Mr. Fraser be targeted at 50% of his base salary and for each of Mr. Tattory and Dr. Simonson be targeted at 40% of their respective base salaries (representing an increase from the original annual target bonus amount of 30% of their respective base salaries, as originally set forth in each of the respective employment agreements for Mr. Tattory and Dr. Simonson).

### *Strategic and Retention Bonus*

On November 16, 2018, the compensation committee approved a Strategic and Retention Bonus Program, or the Strategic Bonus. The program provides for payment of a bonus to certain key employees, including our named executive officers, upon completion of an eligible transaction, which is defined under the program to include a (i) strategic transaction and (ii) one or more financings within a nine-month period that results in proceeds of at least \$30 million. The bonus amount for each executive varies under the program and is based on the following criteria: (x) to the extent that the amount raised in the financing(s) is less than \$45 million, then the amount of the bonus to be paid is reduced in a stepped-down fashion as outlined in the program; and (y) the individual bonus amount is determined by application of a multiplier to the executive's base salary. The individual multiplier varies based on (a) the executive's position and (b) the amount raised in a financing between \$30 million and \$45 million, which individual multiplier for Messrs. Fraser and Tattory and Dr. Simonson is between 0.2 and 1.5, 0.27 and 1.35, and 0.25 and 1.25, respectively. Once determined, the bonus is payable in two equal installments, the first within five business days of the closing of the strategic transaction, and the second on the nine-month anniversary of the closing of the strategic transaction, provided that the executive is actively employed with us at the time of the payment. With respect to the CVie Acquisition and 2018 Private Placement Financing, based on an aggregate raise of \$39 million, each of Messrs. Fraser and Tattory and Dr. Simonson became eligible to receive aggregate Strategic Bonuses equal to \$452,076, \$303,044 and \$298,840, respectively. On December 31, 2018, we paid the first installment of the Strategic Bonuses to Messrs. Fraser and Tattory and Dr. Simonson in the amounts of \$226,038, \$151,522 and \$149,420, respectively. On October 4, 2019, we paid the second installment to Messrs. Fraser and Tattory and Dr. Simonson in the amounts of \$226,038, \$151,522 and \$149,420, respectively.

### *Equity-Based Incentive Awards*

Our equity-based incentive awards are designed to align our interests and the interests of our stockholders with those of our employees and consultants, including our named executive officers. Our Board or compensation committee approves equity grants, which have historically been in the form of stock options or restricted stock units, or RSUs.

In February 2019, the compensation committee determined that issuance of certain of the RSUs granted in 2017 exceeded the limit that no more than 750,000 shares per person per year could be issued under our 2011 Long-Term Incentive Plan, or 2011 Plan. Accordingly, we issued replacement RSU grants as more fully described in "2017 Change of Control" below.

On March 19, 2019, the compensation committee approved grants of stock options to Messrs. Fraser and Tattory and Dr. Simonson to purchase 33,333, 16,667 and 16,667 shares of our common stock, respectively, each with a per-share exercise price of \$4.30. All options vest in equal annual installments on each of the first three anniversaries of the date of grant, subject to the named executive officer's continuous service through the relevant vesting dates; provided, however, that such stock options may be eligible to fully accelerate in vesting in connection with a termination of employment as further described in the section titled "— Narrative Disclosure to Summary Compensation Table — Executive Employment Agreements" below. See the section titled "— Outstanding Equity Awards at Fiscal Year-End" for more information regarding equity awards made to our named executive officers.

### *Other Benefits*

We currently provide broad-based welfare benefits that are available to all of our employees, including our named executive officers, including health, dental, life, vision and disability insurance.

In addition, we maintain, and the named executive officers participate in, our 401(k) savings plan, or 401(k) Plan, that is intended to be qualified under Section 401(a) of the Code and that provides eligible employees with an opportunity to save for retirement on a tax advantage basis and under which we are permitted to make discretionary employer contributions. Employees' pre-tax contributions are allocated to each participant's individual account and are then invested in selected investment alternatives according to the participants' directions. Since inception of the 401(k) Plan, we have not made any discretionary employer contributions. The 401(k) Plan also includes a company match to be made in cash, subject to there being sufficient cash resources as determined in the sole discretion of the compensation committee, in an amount per participant equal to 50% of each participant's contribution (up to a maximum of 6% of the participant's base salary) to the 401(k) Plan. The match was not made in 2018 but was reinstated in 2019.

We do not maintain any defined benefit pension plans or nonqualified deferred compensation plans.

### *Executive Employment Agreements*

We are party to executive employment agreements, as amended from time to time, or the Executive Agreements, with each of our named executive officers, the key terms of which are described below.

#### Mr. Fraser

We entered into an Executive Agreement with Mr. Fraser, effective February 1, 2016. Mr. Fraser's Executive Agreement provides for an initial base salary of \$415,000, which has subsequently been increased to \$453,482, and eligibility to receive an annual incentive-based cash bonus, which may be awarded at the discretion of the compensation committee, with a target amount equal to 50% of his base salary.

If Mr. Fraser's employment is terminated due to death or Disability (as such term is defined in the Executive Agreement), all equity awards held by Mr. Fraser shall accelerated and become fully vested.

If Mr. Fraser's employment is terminated by us without Cause or by Mr. Fraser for Good Reason prior to a Change in Control (as such term is defined in the Executive Agreement) or after the 2nd anniversary of a Change in Control, Mr. Fraser will be eligible to receive the following, in addition to any amounts or benefits that are due under any of our vested plans or other policies, and on the condition that he enters into a separation agreement containing a final and effective plenary release of claims in a form acceptable to us, provided that all of our obligations shall cease if Mr. Fraser engages in a material breach of the Executive Agreement and fails to cure such breach within five business days after receipt from us of notice of such breach:

- A pro rata bonus equal to a percentage of the named executive officer's target bonus amount determined by dividing the total actual bonuses paid to other contract executives for the year in which the termination occurs by the aggregate of such other contract executives' total target bonuses for that year, and further prorated for the number of days the named executive officer was employed in the year of termination, payable at the time that other contract executives are paid bonuses with respect to the year of termination;
- A severance amount equal to the sum of the named executive officer's base salary then in effect (determined without regard to any reduction constituting Good Reason) and the target bonus amount, payable in equal installments in accordance with our regular payroll schedule from the date of termination to the date that is 12 months after the date of termination, or the Severance Period;
- All vested stock options and other similar equity awards held by the named executive officer shall continue to be exercisable during the Severance Period; and
- During the Severance Period, if the named executive officer elects to continue medical benefits through the Consolidated Omnibus Budget Reconciliation Act of 1985, or COBRA, we will continue to pay our costs of the named executive officer's and the named executive officer's dependents' benefits as in effect on the date of termination as such benefits are provided to active employees.

If Mr. Fraser's employment is terminated by us without Cause or by Mr. Fraser for Good Reason upon a Change in Control or prior to the 2nd anniversary of a Change in Control, or the Change in Control Period, Mr. Fraser will be eligible to receive the following, in addition to any amounts or benefits that are due under any of our vested plans or other policies, and on the condition that he enters into a separation agreement containing a final and effective plenary release of claims in a form acceptable to us, provided that all of our obligations shall cease if Mr. Fraser engages in a material breach of the Executive Agreement and fails to cure such breach within five business days after receipt from us of notice of such breach:

- A pro rata bonus equal to the executive's target bonus amount and prorated for the number of days the named executive officer was employed in the year of termination, payable in a lump sum within 10 days after the date of termination;
- A severance amount equal to 1.5 times the sum of the named executive officer's base salary then in effect (determined without regard to any reduction constituting Good Reason) and the target bonus amount, payable in a lump sum within 10 days after the date of termination except in certain limited circumstances;
- All equity awards held by the named executive officer shall accelerate and become fully vested; and
- For a period of 18 months following the termination date, if the named executive officer elects to continue medical benefits through COBRA, we will continue to pay our costs of the named executive officer's and the named executive officer's dependents' benefits as in effect on the date of termination as such benefits are provided to active employees.

In addition, upon a Change of Control, for a period of 24 months after the date of the Change of Control and provided that Mr. Fraser is employed on the last day of a fiscal year ending in that period, Mr. Fraser will be entitled to an annual bonus at least equal to Mr. Fraser's target bonus amount, payable no later than March 15 in the next succeeding fiscal year.

Mr. Fraser's Executive Agreement includes 12-month post-employment non-competition and non-solicitation covenants and provide for confidentiality and the assignment to us of all intellectual property.

#### Mr. Tattory

We entered into an Executive Agreement with Mr. Tattory, effective March 21, 2014. Mr. Tattory's Executive Agreement provides for an initial base salary of \$260,000, which has subsequently been increased to \$337,764, and eligibility to receive an annual incentive-based cash bonus, which may be awarded at the discretion of the compensation committee, with a target amount equal to 30% of his base salary, which has subsequently been increased to 40% of his base salary.

If Mr. Tattory's employment is terminated by us without Cause or by Mr. Tattory for Good Reason (either during or not during the Change in Control Period) or due to death or Disability, Mr. Tattory will be eligible to receive severance benefits that are substantially similar to the severance benefits provided to Mr. Fraser under such circumstances.

In addition, upon a Change of Control, for a period of 24 months after the date of the Change of Control and provided that Mr. Tattory is employed on the last day of a fiscal year ending in that period, Mr. Tattory will be entitled to an annual bonus at least equal to Mr. Tattory's target bonus amount, payable no later than March 15 in the next succeeding fiscal year.

Mr. Tattory's Executive Agreement includes 12-month post-employment non-competition and non-solicitation covenants and provide for confidentiality and the assignment to us of all intellectual property.

#### Dr. Simonson

We entered into an Executive Agreement with Dr. Simonson, effective December 19, 2014. Dr. Simonson's Executive Agreement provides for an initial base salary of \$300,000, which has subsequently been increased to \$380,000, and eligibility to receive an annual incentive-based cash bonus, which may be awarded at the discretion of the compensation committee, with a target amount equal to 30% of his base salary, which has subsequently been increased to 40% of his base salary.

If Dr. Simonson's employment is terminated by us without Cause or by Dr. Simonson for Good Reason (either during or not during the Change in Control Period) or due to death or Disability, Dr. Simonson will be eligible to receive severance benefits that are substantially similar to the severance benefits provided to Mr. Fraser under such circumstances.

In addition, upon a Change of Control, for a period of 24 months after the date of the Change of Control and provided that Dr. Simonson is employed on the last day of a fiscal year ending in that period, Dr. Simonson will be entitled to an annual bonus at least equal to Dr. Simonson's target bonus amount, payable no later than March 15 in the next succeeding fiscal year.

Dr. Simonson's Executive Agreement includes 12-month post-employment non-competition and non-solicitation covenants and provide for confidentiality and the assignment to us of all intellectual property.

## 2017 Change of Control

Effective October 27, 2017, a subsidiary of Lee's invested \$10 million in us and acquired 73% of our issued and outstanding shares of common stock, which constituted a Change of Control under the Executive Agreements. The purchase agreement also amended our named executive officers' Executive Agreements to provide, solely with respect to Lee's purchase, Messrs. Fraser and Tattory and Dr. Simonson waived payment of the target annual bonus amounts that otherwise would have been payable in the 24-month period immediately following the closing. In addition, each executive was awarded RSUs, having a value when issued equal to the combined total value of such executive's waived 2017 and 2018 target annual bonus amounts, which were scheduled to vest in two equal tranches on December 28, 2018 and March 15, 2019. In February 2019, we determined that issuance of certain of the RSUs granted in 2017 exceeded the limit that no more than 750,000 shares per person per year could be issued under our 2011 Plan. Since the shares of common stock underlying the RSUs granted in 2017 had not yet been delivered to the named executive officers following the first originally scheduled December 28, 2018 vesting date, we canceled the first and second tranche of the RSUs granted to Mr. Fraser because each tranche exceeded the limit and we also canceled the second tranche of the RSUs granted to Mr. Tattory and Dr. Simonson because the total grant was in excess of the limit but the first tranche was within the limit. Concurrently with the cancellations, we issued equivalent replacement RSU grants for the first and second tranche of Mr. Fraser's cancelled RSU and the second tranche of Mr. Tattory's and Dr. Simonson's cancelled RSU, which, following our reverse stock split in December 2017, no longer exceeded the individual limit under the 2011 Plan. The replacement RSU grants were issued with a vesting date of March 15, 2019.

## Outstanding Equity Awards at Fiscal Year-End

The following table shows the number of shares of our common stock underlying outstanding equity awards held by the named executive officers as of December 31, 2019.

Name	Grant Date	Number of Securities Underlying Unexercised Options – Exercisable (#)(1)	Option Awards		
			Number of Securities Underlying Unexercised Options – Unexercisable (#)(1)	Option Exercise Price (\$)	Option Expiration Date
Craig Fraser	02/02/16	3,414		139.80	02/02/26
	07/28/16	667		106.20	07/28/26
	03/01/17	1,111	556	73.80	03/01/27
	12/24/18	140,635	281,270	12.66	12/24/28
	03/19/19		33,333	12.90	03/19/29
Steven G. Simonson, M.D.	05/19/14	143		1,428.00	05/19/24
	03/27/15	327		982.80	03/27/25
	02/02/16	595		139.80	02/02/26
	07/28/16	417		106.20	07/28/26
	03/01/17	611	306	73.80	03/01/27
	12/24/18	82,037	164,074	12.66	12/24/28
	03/19/19		16,667	12.90	03/19/29
John A. Tattory	10/07/11	89		1,537.20	10/07/21
	05/04/12	48		2,276.40	05/04/22
	03/26/13	95		1,982.40	03/26/23
	03/06/14	107		2,167.20	03/06/24
	03/27/15	179		982.80	03/27/25
	02/02/16	387		139.80	02/02/26
	07/28/16	417		106.20	07/28/26
	03/01/17	611	306	73.80	03/01/27
	12/24/18	82,037	164,074	12.66	12/24/28
	03/19/19		16,667	12.90	03/19/29

(1) All options vest and become exercisable in equal installments on each of the first three anniversaries of the applicable grant date, assuming that the named executive officer continues to be employed with us through each vesting date.

**Director Compensation**

Directors who are also employees are not compensated separately for serving on the Board or any of its committees. Each of our non-employee directors receives cash compensation for his services. Effective April 24, 2019, the compensation committee and Board approved cash compensation for non-employee directors as follows: (i) \$10,000 per quarter for all directors other than the Chairman of the Board, and \$16,250 per quarter for the Chairman of the Board; (ii) \$3,750 per quarter for the director who served as Chairman of the audit committee; (iii) \$2,500 per quarter for the director who served as Chairman of the compensation committee; (iv) \$1,875 per quarter for the director who served as Chairman of the nominating and governance committee; (v) \$1,750 per quarter for each director who served as a non-Chairman member of the audit committee; (vi) \$1,250 per quarter for each director who served as a non-Chairman member of the compensation committee; and (vii) \$1,000 per quarter for each director who served as a non-Chairman member of the nominating and governance committee. In addition, to better align the interests of our Board with our stockholders, the compensation committee considers and recommends to the Board long-term equity compensation.

The compensation committee periodically conducts reviews of peer company director compensation practices, including before considering changes to our director compensation policy and amounts.

On April 24, 2019, the compensation committee approved an initial director award to each of Messrs. Huang and Geffken and Dr. Schreiber of an option to purchase 20,000 shares of our common stock. The awards for Mr. Huang and Dr. Schreiber are eligible to vest in three equal annual installments as measured from the applicable director's appointment date to the Board, subject to the applicable director's continued service with us through the applicable vesting date. The award for Mr. Geffken is eligible to vest in three equal annual installments as measured from the grant date, subject to his continued service with us through the applicable vesting date.

On June 28, 2019, the compensation committee approved an award to each of Messrs. Leone, Mahady and Peacock of an option to purchase 13,333 shares of our common stock. The awards for Messrs. Leone, Mahady and Peacock are eligible to fully vest on the first anniversary of the grant date, subject to the applicable director's continued service with us through such date.

The foregoing option awards for our non-employee directors were issued pursuant to our 2011 Plan and approved after due consideration of the practices of other similarly situated biotechnology companies in providing equity compensation to their non-employee directors.

The following chart summarizes the cash and non-cash compensation earned or paid to our non-employee directors during the year ended December 31, 2019.

Name	Fees Earned or Paid		Option Awards \$(1)(2)	Total (\$)
		in Cash (\$)		
John R. Leone	\$	54,500	\$ 147,684	\$ 202,184
Joseph M. Mahady		56,687	147,684	204,371
Bruce A. Peacock		48,698	147,684	196,382
James Huang		63,434	208,044	271,478
Brian D. Schreiber, M.D.		44,615	208,044	252,659
Daniel E. Geffken		41,209	208,044	249,253

- (1) The aggregate grant date fair value of such awards were computed in accordance with ASC Topic 718 and do not take into account estimated forfeitures related to service-based vesting conditions, if any. The valuation assumptions used in calculating these values are discussed in Note 15 of the Audited Consolidated Financial Statements appearing elsewhere herein. These amounts do not represent actual amounts paid or to be realized. Amounts shown are not necessarily indicative of values to be achieved, which may be more or less than the amounts shown as awards are subject to time-based vesting.
- (2) As of December 31, 2019, Messrs. Leone and Mahady each held options to purchase 24,340 shares of our common stock, Mr. Peacock held options to purchase 24,379 shares of our common stock, and Messrs. Huang and Geffken and Dr. Schreiber each held options to purchase 20,000 shares of our common stock.

In addition to the items included in the foregoing chart, directors are entitled to reimbursements for their travel, lodging and other expenses incurred in connection with attendance at meetings of the Board, Board committee meetings and related activities.

## CERTAIN RELATIONSHIPS AND RELATED PARTY TRANSACTIONS

We describe below transactions and series of similar transactions, during our last three fiscal years or currently proposed, to which we were a party or will be a party, in which:

- the amounts involved exceeded \$120,000; and
- any of our directors, executive officers or beneficial holders of more than 5% of any class of our capital stock had or will have a direct or indirect material interest.

Other than as described below, there have not been, nor are there any currently proposed, transactions or series of similar transactions meeting this criteria to which we have been or will be a party other than compensation arrangements, which are described where required under the sections titled “Management—Board Leadership Structure” and “Executive Compensation.”

### Lee’s Pharmaceutical Holdings Limited and Affiliates

We have received substantial support from Lee’s, our largest shareholder. Lee’s is a company incorporated in the Cayman Islands with limited liability, whose common stock is listed on the Hong Kong Stock Exchange, and which along with its affiliates currently owns approximately 35% of our issued and outstanding common stock.

On March 18, 2020, we entered into a binding term sheet with Lee’s (HK), a wholly-owned subsidiary of Lee’s, that provides that in connection with the development of AEROSURF, Lee’s (HK) will make non-refundable payments to us of up to \$3.9 million prior to September 1, 2020 (subject to reduction to \$2.8 million in certain events) to fund the development of AEROSURF for the period of April 1, 2020 through September 30, 2020. The term sheet also provides that we and Lee’s (HK) will negotiate in good faith to determine the terms of definitive agreement prior to September 1, 2020, which will also set forth additional semi-annual non-refundable payments to fund the continued development of AEROSURF after September 30, 2020.

On December 6, 2019, in connection with the December 2019 Private Placement, we issued and sold 551,876 shares of our common stock to LPH II, a wholly-owned subsidiary of Lee’s, for an approximate aggregate purchase price of \$5 million, including the conversion of \$2.95 million of existing debt obligations on the same terms as the other select institutional investors. In addition, we also issued 275,938 Series I Warrants to purchase 275,938 shares of our common stock at an exercise price of \$12.09 per share to LPH II. Lee’s and its affiliate, LPH II, are beneficial owners of more than 5% of our capital stock.

On October 24, 2019, we entered into a Loan Agreement with LPH II, a Cayman Islands company. Under the Loan Agreement, LPH II agreed to lend us \$1,000,000, or the 2019 Loan, to support our operations while we sought to complete a strategic transaction (as defined in the Loan Agreement). The 2019 Loan, which was funded in a single installment by wire transfer on October 28, 2019, accrued interest at a rate of 6% per annum and matured upon the closing date of the December 2019 Private Placement, which qualified as the strategic transaction under terms defined in the Loan Agreement. We repaid the 2019 Loan in full upon consummation of the December 2019 Private Placement.

Lee’s also supported our development activities and operations with loans made through certain subsidiaries as follow: August 2017, \$3.9 million loaned by Lee’s (HK); January and March 2018, \$1.5 million and \$1 million, respectively, loaned by LPH; on August 14, August 29, September 12, September 27, October 19, November 2, and November 19, 2018, \$0.3 million, \$0.48 million, \$0.5 million, \$0.5 million, \$0.43 million, \$0.5 million, and \$0.35 million, respectively, loaned by LPH; and on December 5, 2018, \$0.6 million, loaned by LPH II, to support our development activities and operations while we pursued our potential strategic transaction with CVie Therapeutics. The loans accrued interest at a rate per annum of 6% and were collateralized by a security interest in substantially all our assets under the terms of a Security Agreement dated March 1, 2018. These loans were repaid in full and extinguished in connection with the 2018 Private Placement Financing.

During 2018, we engaged in active diligence and discussions with CVie Therapeutics, a Taiwan corporation organized under the laws of China, to potentially conclude a strategic transaction. At that time, Lee’s owned approximately 49% of the outstanding capital stock of CVie Therapeutics, but because of the potential conflict of interest, did not participate in the negotiations and agreed to be bound by the terms otherwise reached between ourselves and CVie Therapeutics, which was represented by James Huang, an independent director.



On December 21, 2018, we closed the CVie Acquisition with CVie Investments, an exempted company with limited liability incorporated under the laws of the Cayman Islands. Under the terms of the Acquisition Agreement, we issued shares of our common stock, to CVie Investments' former shareholders at an exchange ratio of 0.3512 share of common stock for each share of CVie Investments outstanding prior to the acquisition, resulting in the issuance of 5,418,686 shares of common stock in exchange for the outstanding shares of CVie Investments. The CVie Acquisition closed on December 21, 2018.

Lee's, through its wholly-owned subsidiary China Cardiovascular Focus Limited, or CCF, owned approximately 49% of the outstanding capital stock of CVie Therapeutics, but because of the potential conflict of interest, did not participate in the negotiations and agreed to be bound by the terms otherwise reached between ourselves and CVie Therapeutics, which was represented by James Huang, an independent director. To facilitate the transaction, Lee's committed to maintain in place collateral previously pledged to secure certain of CVie's debt and agreed to provide an indemnity agreement to protect our shareholders and holders of certain warrants, as discussed above.

In connection with the CVie Acquisition, CCF received 2,687,953 shares of our common stock, for an approximate aggregate purchase price of \$33.5 million, in exchange for its shares of CVie Therapeutics. In addition, LPH II, a wholly-owned subsidiary of Lee's, converted \$6 million of existing debt obligations in the CVie Acquisition on the same terms as the other investors party to the Securities Purchase Agreement dated December 21, 2018, whereby we issued to LPH II (i) 603,646 shares of our common stock, (ii) 102,620 Series F Warrants to purchase 102,620 shares of our common stock at an exercise price of \$11.04 per share, and (iii) 199,203 Series G Warrants to purchase 199,203 shares of our common stock at an exercise price of \$12.15 per share.

We are also party to a License, Development and Commercialization Agreement, as amended, with Lee's (HK), a company organized under the laws of Hong Kong and an affiliate of Lee's, whereby we have granted to Lee's (HK) an exclusive license to sublicense (i) develop, manufacture and commercialize our KL4 surfactant products, including SURFAXIN, which was approved by the FDA in 2012 for RDS in premature infants, SURFAXIN LS™, the lyophilized dosage form of SURFAXIN, and AEROSURE, and (ii) to register and manufacture SURFAXIN and SURFAXIN LS for use in the licensed territory, which includes China, Japan, Hong Kong, Thailand, Taiwan and 12 other countries. See the section titled "Business—Material Licenses and Collaborations" for a more detailed description.

### **Panacea Venture Healthcare Fund I L.P.**

On December 6, 2019, in connection with the December 2019 Private Placement, we issued and sold 551,876 shares of our common stock to Panacea Venture Healthcare Fund I L.P., or Panacea L.P., for an approximate aggregate purchase price of \$5.0 million. In addition, we also issued 275,938 Series I Warrants to purchase 275,938 shares of our common stock at an exercise price of \$12.09 to Panacea L.P. Panacea L.P. is a beneficial owner of more than 5% of our capital stock. In addition, our director, James Huang, is a director of Panacea L.P.

### **Other Transactions**

We have granted stock options to our named executive officers and certain of our directors. See the section titled "Executive Compensation — Outstanding Equity Awards at Fiscal Year-End" for a description of these stock options.

We have entered into change of control and severance agreements with certain of our executive officers that provide for certain severance and change in control benefits. See the section titled "Executive Compensation — Executive Employment Agreements."

### **Control by Officers and Directors**

Our officers and directors and their affiliates beneficially own, in the aggregate, approximately 23.98% of our outstanding common stock as of April 23, 2020. As a result, in certain circumstances, these stockholders acting together may be able to determine matters requiring approval of our stockholders, including the election of our directors, or they may delay, defer or prevent a change in control. See the section titled "Security Ownership of Certain Beneficial Owners and Management" for more information.

### **Indemnification Agreements**

We have entered into indemnification agreements with each of our directors and executive officers. The indemnification agreements, our Amended and Restated Certificate of Incorporation, or the Certificate of Incorporation, and our By-Laws require us to indemnify directors to the fullest extent permitted by Delaware law.

### **Participation in this Offering**

Certain of our officers, directors and existing stockholders, including certain stockholders affiliated with our directors or that beneficially own more than 5% of our outstanding common stock, have indicated an interest in purchasing an aggregate of \$2.0 million of our units in this offering, including (i) Panacea Venture Healthcare Fund I, L.P., which has indicated an interest in purchasing up to \$700,000 of such units on the same terms as those offered to the public and (ii) Bioengine Capital, which has indicated an interest in purchasing up to \$400,000 of such units on the same terms as those offered to the public. However, because indications of interest are not binding agreements or commitments to purchase, the underwriters may determine to sell more, fewer or no units in this offering to any of these officers, directors or stockholders, or any of these officers, directors or stockholders may determine to purchase more, fewer or no units in this offering. The underwriters will receive the same underwriting discounts and commissions on any units purchased by these officers, directors and stockholders as they will on any other shares sold to the public in this offering.

## SECURITY OWNERSHIP OF CERTAIN BENEFICIAL OWNERS AND MANAGEMENT

Based solely upon information made available to us, the following table sets forth information as of April 23, 2020, regarding the beneficial ownership of our common stock by:

- each person known by us to be the beneficial owner of more than 5% of the outstanding shares of our common stock;
- each of our named executive officers and directors; and
- all of our executive officers as a group.

Certain of our officers, directors and existing stockholders, including certain stockholders affiliated with our directors or that beneficially own more than 5% of our outstanding common stock, have indicated an interest in purchasing an aggregate of \$2.0 million of our units in this offering on the same terms as those offered to the public. However, because indications of interest are not binding agreements or commitments to purchase, the underwriters may determine to sell more, fewer or no units in this offering to any of these officers, directors or stockholders, or any of these officers, directors or stockholders may determine to purchase more, fewer or no units in this offering. The underwriters will receive the same underwriting discounts and commissions on any units purchased by these officers, directors and stockholders as they will on any other shares sold to the public in this offering. The below ownership percentage upon the closing of this offering does not reflect the potential purchase of any shares of common stock in this offering by these officers, directors or stockholders.

The percentage of common stock outstanding is based on 13,697,395 shares of our common stock outstanding as of April 23, 2020. For purposes of the table below, and in accordance with the rules of the SEC, we deem shares of common stock subject to options that are currently exercisable or exercisable within sixty days of April 23, 2020 to be outstanding and to be beneficially owned by the person holding the options for the purpose of computing the percentage ownership of that person, but we do not treat them as outstanding for the purpose of computing the percentage ownership of any other person. Except as otherwise noted, each of the persons or entities in this table has sole voting and investing power with respect to all of the shares of common stock beneficially owned by them, subject to community property laws, where applicable. Except as otherwise noted below, the street address of each beneficial owner is c/o Windtree Therapeutics, Inc. 2600 Kelly Road, Suite 100, Warrington, PA 18976.

<b>Name and Address of Beneficial Owner (1)</b>	<b>Shares Beneficially Owned Prior to Offering</b>		<b>Shares Beneficially Owned After Offering</b>	
	<b>Number of Shares</b>	<b>Percentage</b>	<b>Number of Shares</b>	<b>Percentage</b>
<b>Greater than 5% Stockholder</b>				
Lee's Pharmaceutical Holdings Limited (1)	5,462,065	38.08%	5,462,065	
Panacea Venture Healthcare Fund I L.P. (2)	3,153,987	21.32%	3,153,987	
Bioengine Capital (3)	1,561,195	11.09%	1,561,195	
Ivy Blue Holding Limited (4)	1,445,596	10.55%	1,445,596	
Hongtao Investment-I Ltd (5)	1,490,066	10.50%	1,490,066	
Tyrus-DA Global Healthcare No. 1 (6)	1,331,293	9.39%	1,331,293	
Class Edge Limited (7)	827,814	5.92%	827,814	
<b>Directors and Named Executive Officers</b>				
James Huang (8)	3,238,735	21.89%	3,238,735	
John R. Leone (9)	16,687	*	16,687	
Joseph M. Mahady (10)	16,675	*	16,675	
Bruce A. Peacock (11)	16,714	*	16,714	
Brian D. Schreiber, M.D.	6,667	*	6,667	
Daniel E. Geffken	6,667	*	6,667	
Craig Fraser (12)	178,954	1.29%	178,954	
Steven G. Simonson, M.D. (13)	100,358	*	100,358	
John A. Tattory (14)	98,720	*	98,720	
<b>Executive Officers and Directors as a group (11 persons)</b>	<b>3,733,461</b>	<b>25.47%</b>	<b>3,733,461</b>	

\* Less than 1%

- (1) Includes (i) 22,300 shares of common stock and 22,300 Series A-1 Warrants to purchase 22,300 shares of common stock held directly by Lee's Pharmaceutical Holdings Limited, or Lee's exercisable within 60 days of April 23, 2020, (ii) 1,336,078 shares of common stock, 102,620 Series F Warrants to purchase 102,620 shares of common stock exercisable within 60 days of April 23, 2020, 199,203 Series G Warrants to purchase 199,203 shares of common stock exercisable within 60 days of April 23, 2020, and 45,139 Series C warrants to purchase 45,139 shares of common stock exercisable within 60 days of April 23, 2020, held by LPH II Investments Limited, or LPH II, (iii) 2,687,953 shares of common stock held by China Cardiovascular Interest Limited, or China Cardiovascular, and (iv) 770,534 shares of common stock held by LPH Investments Ltd., or LPH. Lee's may be deemed to have beneficial ownership of the shares held by LPH II due to its ownership of 100% of LPH II and the shares of common stock held by China Cardiovascular may be deemed to be beneficially owned by Lee's by virtue of its 100% ownership of Pharmaceutical International Limited, which owns 100% of the equity interests of China Cardiovascular. Lee's holds a 74% interest in LPH and, accordingly, Lee's may be deemed to beneficially own the shares held by LPH. LPH II is currently unable to exercise the Series C, F and G warrants due to an ownership cap restriction and Lee's Series A-1 Warrants are subject to a 9.99% ownership cap. The Series I Warrants are subject to a 4.99% ownership cap (or such other percent as designated by each holder not to exceed 19.99%). Other than for purposes of Rule 13d-3 of the Act, Lee's disclaims beneficial ownership of the shares of common stock and warrants, as applicable, except to the extent of its pecuniary interest therein, as applicable. Mses. Lee Siu Fong and Leelertsuphakun Wanee are executive directors, Dr. Li Xiaoyi is an executive director and the chief executive officer, Mr. Simon Miles Ball is a non-executive director, and Drs. Chan Yau Ching (Bob) and Tsim Wah Keung (Carl) and Mr. Lam Yat Cheong are the independent directors, of Lee's, or the Lee's Directors. The Lee's Directors and the shareholders of Lee's have shared voting and investment power over the shares held by Lee's. The address for Lee's, LPH, LPH II and China Cardiovascular is 1/F, Building 20E, Phase 3, Hong Kong Science Park, Shatin, Hong Kong.
- (2) Includes 2,060,991 shares of common stock, 62,500 shares of common stock issuable upon exercise of Series D Warrants exercisable within 60 days of April 23, 2020, 256,500 shares of common stock issuable upon exercise of Series F Warrants exercisable within 60 days of April 23, 2020, 498,008 shares of common stock issuable upon exercise of Series G Warrants exercisable within 60 days of April 23, 2020 and 275,938 shares of common stock issuable upon exercise of Series I Warrants exercisable within 60 days of April 23, 2020 held by Panacea Venture Healthcare Fund I, L.P., or the Panacea Fund. Panacea Venture Healthcare Fund GP I, L.P. or the Immediate GP, is the general partner of the Panacea Fund, Panacea Venture Healthcare Fund GP Company, Ltd., or the Parent GP, is the general partner of the Immediate GP, and Panacea Venture Management Company Ltd., or the Management Company, is the management company of the Immediate GP. The Management Company, the Panacea Fund, the Immediate GP and the Parent GP are collectively referred to as the Panacea Entities. The Management Company together with the Parent GP and the Immediate GP may be deemed to have beneficial ownership over the shares of common stock held by the Panacea Fund. Each of the Series D Warrants, the Series F Warrants and the Series G Warrants are subject to a 18.0% beneficial ownership cap and are currently unable to be exercised due to such ownership cap. The Series I Warrants are subject to a 4.99% ownership cap (or such other percent as designated by each holder not to exceed 19.99%). The Panacea Entities may be deemed to constitute a "group" within the meaning of Section 13(d)(3) of the Exchange Act. Mr. Huang and Hai Mi serve as directors of the Parent GP and the Management Company. Mr. Huang, Hai Mi, and the shareholders of the Parent GP and Management Company have shared voting and investment power over the shares held by the Panacea Fund. Mr. Huang expressly disclaims beneficial ownership of the securities reported herein, except to the extent of his pecuniary interest therein, if any. The address of the Panacea Fund, Immediate GP, Parent GP and the Management Company is #6 Lane 1350 Middle Fuxing Rd., Xuhui District, Shanghai, China 200319.
- (3) Includes 1,183,916 shares of common stock, 128,275 shares of common stock issuable upon exercise of Series F Warrants exercisable within 60 days of April 23, 2020 and 249,004 shares of common stock issuable upon exercise of Series G Warrants exercisable within 60 days of April 23, 2020 held by Bioengine Capital Inc. Center Laboratories, Inc. may be deemed to beneficially own the shares held by Bioengine Capital, Inc. by virtue of its 58.6% equity interest in Bioengine Capital Inc. The Series F Warrants and Series G Warrants are subject to a 19.9% beneficial ownership cap. Center Laboratories, Inc. and all the other shareholders and directors of Bioengine Capital Inc. have shared voting and investment power over the shares held by Bioengine Capital Inc. The address of Bioengine Capital and Center Laboratories, Inc. is 7F, No. 3-2 Park St., Nangang District, Taipei City 114 Taiwan, Republic of China.

- (4) Includes 1,445,596 shares of common stock owned directly by Ivy Blue Holdings Limited, which is a wholly owned subsidiary of KPCB China Fund II, L.P. KPCB China Associates II, L.P. is the general partner of KPCB China Fund II, L.P. and KPCB China Holdings II, Ltd. is the general partner of KPCB China Associates II, L.P. The directors of KPCB China Holdings II, Ltd. are Brook Byers, Wen Hsieh, James Huang and Theodore Schlein, or the China Holdings Directors. By virtue of these relationships, Brook Byers, Wen Hsieh, James Huang and Theodore Schlein may be deemed to indirectly beneficially own the securities held by Ivy Blue Holdings Limited; however, each disclaims beneficial ownership of such securities except to the extent of his pecuniary interest therein. The China Holdings Directors and all the shareholders of China Holdings II, Ltd. have shared voting and investment power over the shares held by Ivy Blue Holdings Limited. The address of Ivy Blue Holdings Limited, KPCB China Fund II, L.P., KPCB China Associates II, L.P. and KPCB China Holdings II, Ltd. is No 6 Lane 1350 Middle Fuxing Rd., Xuhui District, Shanghai, China 200319.
- (5) Includes 993,377 shares of common stock and 496,689 shares of common stock issuable upon exercise of Series I Warrants exercisable within 60 days of April 23, 2020. The Series I Warrants are subject to a 4.99% ownership cap (or such other percent as designated by each holder not to exceed 19.99%). Zhao Xiaohong has voting and investment power over the shares held by Hongtao Investment Ltd. The address of Hongtao Investment Ltd. is Room B, 43/F, 2A Seymour Road, Azura, Hong Kong.
- (6) Includes 843,379 shares of common stock, 143,374 Series F Warrants to purchase 143,374 shares of common stock exercisable within 60 days of April 23, 2020, 278,315 Series G Warrants to purchase 278,315 shares of common stock exercisable within 60 days of April 23, 2020 and 66,225 shares of common stock issuable upon exercise of Series I Warrants exercisable within 60 days of April 23, 2020. The Series I Warrants are subject to a 4.99% ownership cap (or such other percent as designated by each holder not to exceed 19.99%). Yoon Eun Ae has voting and investment power over the shares held by Tyrus-DA Global Healthcare No. 1. The address of Tyrus-DA Global Healthcare No. 1 is #1901 Trade Tower, Yeongdongdaero 511 Gangam-Gu, Seoul, Korea 06164.
- (7) Includes 551,876 shares of common stock and 275,938 shares of common stock issuable upon exercise of Series I Warrants exercisable within 60 days of April 23, 2020. The Series I Warrants are subject to a 4.99% ownership cap (or such other percent as designated by each holder not to exceed 19.99%). Mak Siu Hang Viola has voting and investment power over the shares held by Class Action Limited. The address of Class Action Limited is c/o 49/F, One Exchange Square, 8 Connaught Place, Central, Hong Kong.
- (8) Includes 7,800 shares of common stock and options to purchase 6,667 shares of common stock exercisable within 60 days of April 23, 2020 held directly by Mr. Huang, 2,060,991 shares of common stock, 62,500 shares of common stock issuable upon exercise of Series D Warrants exercisable within 60 days of April 23, 2020, 256,500 shares of common stock issuable upon exercise of Series F Warrants exercisable within 60 days of April 23, 2020, 498,008 shares of common stock issuable upon exercise of Series G Warrants exercisable within 60 days of April 23, 2020 and 275,938 shares of common stock issuable upon exercise of Series I Warrants exercisable within 60 days of April 23, 2020 held by Panacea Venture Healthcare Fund I, L.P., or the Panacea Fund. Panacea Venture Healthcare Fund GP I, L.P. or the Immediate GP, is the general partner of the Panacea Fund, Panacea Venture Healthcare Fund GP Company, Ltd., or the Parent GP, is the general partner of the Immediate GP, and Panacea Venture Management Company Ltd., or the Management Company, is the management company of the Immediate GP. The Management Company, the Panacea Fund, the Immediate GP and the Parent GP are collectively referred to as the Panacea Entities. The Management Company together with the Parent GP and the Immediate GP may be deemed to have beneficial ownership over the shares of common stock held by the Panacea Fund. Each of the Series D Warrants, the Series F Warrants and the Series G Warrants are subject to a 18.0% beneficial ownership cap and are currently unable to be exercised due to such ownership cap. The Series I Warrants are subject to a 4.99% ownership cap (or such other percent as designated by each holder not to exceed 19.99%). The Panacea Entities may be deemed to constitute a “group” within the meaning of Section 13(d)(3) of the Exchange Act. Mr. Huang serves as a director of the Parent GP and the Management Company. Mr. Huang, Hai Mi, and the shareholders of the Parent GP and Management Company have shared voting and investment power over the shares held by the Panacea Fund. Mr. Huang serves as a director of the Immediate GP and may be deemed to beneficially own the shares held by the Panacea Fund. Also includes 70,281 shares of common stock held by Rui Jin (HK) Consulting Management Company Ltd., of which Mr. Huang is a director. Mr. Huang expressly disclaims beneficial ownership of the securities reported herein of the Panacea Entities and Rui Jin (HK) Consulting Management Company Ltd., except to the extent of his pecuniary interest therein, if any. The address of Mr. Huang is #6 Lane 1350 Middle Fuxing Rd., Xuhui District, Shanghai, China 200319.

- (9) Includes 5,404 shares of common stock, 60 Series A Warrants to purchase 60 shares of common stock exercisable within 60 days of April 23, 2020, 217 Series A-1 Warrants to purchase 217 shares of common stock exercisable within 60 days of April 23, 2020 and options to purchase 11,006 shares of common stock exercisable within 60 days of April 23, 2020.
- (10) Includes 5,386 shares of common stock, 283 Series A-1 Warrants to purchase 283 shares of common stock exercisable within 60 days of April 23, 2020, and options to purchase 11,006 shares of common stock exercisable within 60 days of April 23, 2020.
- (11) Includes 5,386 shares of common stock, 283 Series A-1 Warrants to purchase 283 shares of common stock exercisable within 60 days of April 23, 2020, and options to purchase 11,045 shares of common stock exercisable within 60 days of April 23, 2020.
- (12) Includes 21,343 shares of common stock, 117 Series A-1 Warrants to purchase 117 shares of common stock exercisable within 60 days of April 23, 2020, and options to purchase 157,494 shares of common stock exercisable within 60 days of April 23, 2020.
- (13) Includes 10,296 shares of common stock, 20 Series A Warrants to purchase 20 shares of common stock exercisable within 60 days of April 23, 2020, 50 Series A-1 Warrants to purchase 50 shares of common stock exercisable within 60 days of April 23, 2020 and options to purchase 89,992 shares of common stock exercisable within 60 days of April 23, 2020.
- (14) Includes 8,878 shares of common stock, 10 Series A Warrants to purchase 10 shares of common stock exercisable within 60 days of April 23, 2020, and options to purchase 89,832 shares of common stock exercisable within 60 days of April 23, 2020.

## DESCRIPTION OF SECURITIES

The following description of our capital stock and provisions of our Amended and Restated Certificate of Incorporation, or Certificate of Incorporation, or Amended and Restated By-Laws, or By-Laws, and the Delaware General Corporation Law, or DGCL, are summaries and are qualified in their entirety by reference to the Certificate of Incorporation and the By-Laws.

Pursuant to our Certificate of Incorporation, our authorized capital stock consists of 120,000,000 shares of common stock, par value \$0.001 per share, or common stock, and 5,000,000 shares of preferred stock, par value \$0.001 per share, or preferred stock, to be designated from time to time by our Board of Directors, or Board.

### **Common Stock**

As of April 23, 2020, there were 13,697,395 shares of our common stock issued and outstanding. Subject to any preferential rights of any preferred stock created by our Board, holders of our common stock are entitled to such dividends, if any, as our Board may declare from time to time out of funds that we can legally use to pay dividends.

Holders of our common stock are entitled to one vote for each share of common stock and do not have any right to cumulate votes in the election of directors. Upon our liquidation, dissolution or winding-up, holders of our common stock will be entitled to receive on a proportionate basis any assets remaining after provision for payment of creditors and after payment of any liquidation preferences to holders of preferred stock. Holders of our common stock have no preemptive rights and no conversion rights or other subscription rights. There are no redemption or sinking fund provisions applicable to our common stock. All the outstanding shares of common stock are, and the shares offered by this prospectus, when issued and paid for, will be, validly issued, fully paid and nonassessable. The rights and privileges of the holders of our common stock are subject to and may be adversely effected by the rights of the holders of shares of any series of preferred stock that we may issue.

### **Preferred Stock**

Our Board may divide the preferred stock into any number of series, fix the designation and number of shares of each such series, and determine or change the designation, relative rights, preferences and limitations of any series of preferred stock. The issuance of preferred stock, while providing flexibility in connection with possible acquisitions and other corporate purposes, could, among other things, have the effect of delaying, deferring or preventing a change in our control and may adversely affect the market price of the common stock and the voting and other rights of the holders of our common stock.

## Common Stock Warrants

### *December 2019 Private Placement Warrants*

On December 6, 2019, we completed a private placement offering with select institutional investors for the purchase of an aggregate of 2,916,666 shares of common stock and we issued Series I Warrants to purchase up to 1,458,333 shares of our common stock, at an exercise price equal to \$12.09 per share, or the Series I Warrant Shares. The Series I Warrants may be exercised on the six-month anniversary of the date of issuance and through the 5-year anniversary of the date of issuance. The Series I Warrants may be exercised for cash or on a cashless basis if there is no effective registration statement registering the resale of the Series I Warrant Shares and may not be exercised to the extent that the holder thereof would, following such exercise or conversion, beneficially own more than 4.99% (or such other percent as designated by each holder not to exceed 19.99%) of our outstanding shares of common stock. The Series I Warrants contain customary provisions that adjust the exercise price and the number of Series I Warrant Shares in the event of a corporate transaction. On May 6, 2020, we entered into an amendment with certain holders of our Series I Warrants pursuant to which the exercise price of the Series I Warrant was amended from \$12.09 to \$9.67 if the Series I Warrant is exercised, in whole or in part, prior to December 5, 2021. In addition, the certain holders of the Series I Warrants agreed to be bound by a lock-up provision with respect to any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock that are beneficially owned, held or acquired by such holders for a period of ninety (90) days following the earlier of (i) the closing date of our next public offering of securities, or (ii) December 24, 2020. During the applicable lock-up period, the certain holders of the Series I Warrants will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock.

### *December 2018 Private Placement Warrants*

On December 21, 2018, we completed a private placement offering with select institutional investors for the purchase of an aggregate of 3,928,513 shares of our common stock. In connection with this financing, we issued (i) Series F Warrants to purchase an aggregate of 667,847 shares of common stock, at an exercise price equal to \$11.04 per share, which are exercisable through the 18-month anniversary of the date of issuance, or the Series F Warrants, and (ii) Series G Warrants to purchase an aggregate of 1,296,410 shares of common stock, at an exercise price equal to \$12.15 per share, which are exercisable through the 5-year anniversary of the date of issuance, or the Series G Warrants and, together with the Series F Warrants, the December 2018 Warrants. The December 2018 Warrants (i) may not be exercised to the extent that, following such exercise, the holder would beneficially own more than 9.99% (or other percent as designated by each holder) of our outstanding shares of common stock, and (ii) otherwise contain customary provisions that adjust the exercise price and the number of shares of common stock into which they may be exercised in the event of a corporate transaction. On April 24, 2020, we entered into an amendment with the holders of our Series F Warrants whereby the expiration date of the Series F Warrant was extended from June 24, 2020 to December 24, 2020. In addition, the holders of the Series F Warrants agreed to be bound by a lock-up provision with respect to any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock that are beneficially owned, held or acquired by such holders for a period of ninety (90) days following the earlier of (i) the closing date of our next public offering of securities, or (ii) December 24, 2020. During the applicable lock-up period, the holders of the Series F Warrants will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock.

### *AEROSURF Warrants (December 2018)*

In connection with the CVie Acquisition, our Board declared a dividend to the holders of record of our outstanding shares of common stock, and holders of certain warrants to purchase common stock, that were outstanding on December 20, 2018 of 0.6148 Series H (AEROSURF) Warrant, for each share of common stock held by a shareholder or each warrant held by a warrant holder, as applicable, on the record date, or the AEROSURF Warrants. The Company expects to distribute AEROSURF Warrants that are exercisable for an aggregate of 987,722 shares of common stock. Each AEROSURF Warrant has a term of five years and provides for automatic exercise into one share of common stock, without any exercise price, upon the Company's public announcement of the dosing of the first human subject enrolled in the Company's phase 3 clinical trial for AEROSURF.

### *Battelle Collaboration Agreement Warrants (October 2014 and December 2018)*

We entered into the Battelle Collaboration Agreement with Battelle in October 2014, which was amended on August 2015 and March 2016, for the development of a new version, or NextGen, of our ADS. In connection with the Battelle Collaboration Agreement, on October 10, 2014, we issued to Battelle warrants to purchase 1,190 shares of common stock, exercisable at a price of \$4,200.00 per share, which expire on October 10, 2024. In December 2018, we and Battelle entered into the Battelle Payment Restructuring, which reflected the terms of an October 2017 nonbinding memorandum of understanding, in which we outlined terms to restructure approximately \$4.3 million then due to Battelle, under a Research and Development Services Agreement dated as of June 22, 2012 and the Battelle Collaboration Agreement. In connection with the Battelle Payment Restructuring, on December 11, 2018, we issued to Battelle warrants to purchase 25,000 shares of common stock, exercisable at a price of \$19.50 per share, which expire on December 7, 2023.



*Panacea Venture Management Company Ltd. Warrants (July 2018)*

On July 2, 2018, we issued to Panacea Venture Management Company Ltd., or Panacea, a Secured Convertible Promissory Note, or the Panacea Note, with respect to a loan facility in the aggregate amount of up to \$1.5 million, which was funded in two loans of, \$1.0 million on the date of the Panacea Note and \$0.5 million on July 23, 2018. In connection with the Panacea Note, we issued to Panacea warrants, or the Series D Warrants, to purchase 62,500 shares, or the Series D Warrant Shares, at an exercise price of \$12.00 per Series D Warrant Share, or the Exercise Price. The Series D Warrants may be exercised at any time beginning six months after the date of issuance and through the fifth anniversary of the date of issuance. The Series D Warrants may not be exercised to the extent that the holder thereof would, following such exercise, beneficially own more than 9.99% (or such other percent as designed by each holder) of the Company's outstanding shares of common stock, which percentage may be increased, decreased or waived by such holder upon sixty-one days' notice to us. The Series D Warrants also contain customary provisions that adjust the Exercise Price and the number of Series D Warrant Shares in the event of a corporate transaction.

*LPH II Warrants (April 2018)*

On March 30, 2018, LPH II invested \$2.6 million in us and acquired 180,555 shares of common stock and 45,139 Series C Warrants to purchase 45,139 shares of common stock, at an exercise price of \$16.56 per Series C Warrant Share. The Series C Warrants may be exercised at any time beginning six months after the date of issuance and through the seventh anniversary of the date of issuance. The Series C Warrants may be exercised for cash or on a cashless basis if there is no effective registration statement registering the resale of the Series C Warrant Shares and may not be exercised to the extent that the holder thereof would, following such exercise, beneficially own more than 9.99% (or such other percent as designated by each holder) of the Company's outstanding shares of common stock, which percentage may be increased, decreased or waived by such holder upon sixty-one days' notice to us. The Series C Warrants also contain customary provisions that adjust the Exercise Price and the number of Series C Warrant Shares in the event of a corporate transaction.

*February 2017 Private Placement Warrants*

On February 15, 2017, we completed a private placement offering of 2,349 Series A Convertible Preferred Stock units. Each unit consisted of: (i) one share of Series A Convertible Preferred Stock, par value \$0.001 per share, or Preferred Shares; and (ii) 117,485 Series A-1 Warrants to purchase one share of common stock at an exercise price equal to \$82.20 per share. The Series A-1 Warrants may be exercised at any time beginning six months after the date of issuance and through the seventh anniversary of the date of issuance. The Series A-1 Warrants may not be converted or exercised to the extent that the holder would, following such exercise or conversion, beneficially own more than 9.99% (or other lesser percent as designated by each holder) of our outstanding shares of common stock.

*July 2015 Warrants*

On July 22, 2015, we completed a registered public offering of 29,861 Series A units and 50,000 Series B units. Each Series A unit consisted of one share of common stock and a Series A warrant to purchase one share of common stock at an exercise price of \$588.00 per share. Each Series B unit consisted of a fully paid pre-funded Series B warrant to purchase one share of common stock at an exercise price of \$504.00 per share, and a Series B warrant to purchase one share of common stock at an exercise price of \$588.00 per share. As of December 31, 2017, all pre-funded Series B warrants were exercised. The Series A and Series B warrants, collectively the July 2015 Warrants, are exercisable immediately through the seventh anniversary of the date of issuance. The July 2015 Warrants may not be exercised to the extent that the holder would, following such exercise, beneficially own more than 9.99% (or 4.99% as may be elected by each holder) of our outstanding shares of common stock.

**Securities to be Issued in this Offering**

We are offering 510,725 units. The units consist of one share of our common stock and a warrant to purchase 0.50 of a share of our common stock at an exercise price per share of common stock equal to \$ \_\_\_\_\_, or 120% of the price of each unit sold in the offering, or the Offering Warrants. The shares of common stock and related warrant forming a unit are each immediately separable and will be issued separately in this offering.

*Common Stock to be Issued as Part of this Offering*

The material terms and provisions of our common stock and each other class of our securities which qualifies or limits our common stock are described above under the caption "— Common Stock", "— Preferred Stock" and "— Common Stock Warrants".

*Warrants to be Issued as Part of this Offering*

The Offering Warrants will be issued in a form filed as an exhibit to the registration statement of which this prospectus is a part. You should review a copy of the form of warrant for a complete description of the terms and conditions applicable to the Offering Warrants. Pursuant to a warrant agency agreement between us and Continental Stock Transfer and Trust Company, as warrant agent, the Offering Warrants will be issued in book-entry form and shall initially be represented only by one or more global warrants deposited with the warrant agent, as custodian on behalf of The Depository Trust Company, or DTC, and registered in the name of Cede & Co., a nominee of DTC, or as otherwise directed by DTC. The following is a brief summary of the Offering Warrants and is still subject in all respect to the provisions contained in the form of warrant.

## Duration and Exercise Price

Each Offering Warrant offered hereby will have an exercise price per share of \$ \_\_\_\_\_, or 120% of the price of each unit sold in the offering. The Offering Warrants will be exercisable upon issuance. The Offering Warrants will expire on the fifth anniversary of the original issuance date.

## Exercisability

The Offering Warrants will be exercisable, at the option of each holder, in whole or in part, by delivering to us a duly executed exercise notice accompanied by payment in full for the number of shares of our common stock purchased upon such exercise (except in the case of a cashless exercise as discussed below in “— Certain Adjustments”). A holder may not exercise any portion of the Offering Warrant to the extent that the holder would beneficially own more than 4.99% (or, at the election of the purchaser prior to the date of issuance, 9.99%) of the outstanding common stock after exercise, except that upon at least 61 days’ prior notice from the holder to us, the holder may increase the amount of ownership of outstanding stock after exercising the holder’s Offering Warrants up to 9.99% of the number of shares of our common stock outstanding immediately after giving effect to the exercise, as such percentage ownership is determined in accordance with the terms of the Offering Warrants.

## Certain Adjustments

The exercise price and the number of shares issuable upon exercise of the Offering Warrants is subject to appropriate adjustment in the event of stock splits, stock dividends, recapitalizations, reorganizations, schemes, arrangements or similar events affecting our common stock. The Offering Warrant holders must pay the exercise price in cash or wire transfer of immediately available funds upon exercise of the Offering Warrants, unless such holders are utilizing the cashless exercise provision of the Offering Warrants, which is only available in certain circumstances such as if the underlying shares are not registered with the SEC pursuant to an effective registration statement. We intend to use commercially reasonable best efforts to have the registration statement of which this prospectus forms a part, effective when the Offering Warrants are exercised.

## Fundamental Transactions

In the event we consummate a merger or consolidation with or into another person or other reorganization event in which our common shares are converted or exchanged for securities, cash or other property, or we sell, lease, license, assign, transfer, convey or otherwise dispose of all or substantially all of our assets or we or another person acquire 50% or more of our outstanding shares of common stock, then following such event, the holders of the warrants will be entitled to receive upon exercise of the warrants the same kind and amount of securities, cash or property which the holders would have received had they exercised the warrants immediately prior to such fundamental transaction. Any successor to us or surviving entity shall assume the obligations under the warrants.

## Transferability

Subject to applicable laws and the restriction on transfer set forth in the Offering Warrant, the Offering Warrant may be transferred at the option of the holder upon surrender of the Offering Warrant to us together with the appropriate instruments of transfer.

## Exchange Listing

There is no established trading market for the Offering Warrants. In addition, we do not intend to apply for the listing of the Offering Warrants on any national securities exchange. Without an active trading market, the liquidity of the Offering Warrants will be limited.

## Right as a Stockholder

Except as otherwise provided in the Offering Warrants or by virtue of such holder’s ownership of shares of our common stock, the holders of the Offering Warrants do not have the rights or privileges of holders of our common stock, including any voting rights, until they exercise their Offering Warrants.

## Waivers and Adjustments

Subject to certain exceptions, any terms of an Offering Warrant may be amended or waived with our written consent and the written consent of the holder.

## Call Feature

The Offering Warrants are callable by us in certain circumstances. Subject to certain exceptions, in the event that the Offering Warrants are outstanding, if, after the closing date, (i) the volume weighted average price of our common stock for 30 consecutive trading days, or the Measurement Period, which Measurement Period commences on the closing date, exceeds 300% of the exercise price (subject to adjustment for forward and reverse stock splits, recapitalizations, stock dividends and similar transactions after the initial exercise date), (ii) the average daily trading volume for such Measurement Period exceeds \$500,000 per trading day, and (iii) the warrant holder is not in possession of any information that constitutes or might constitute, material non-public information which was provided by the Company, and subject to the Beneficial Ownership Limitation, then we may, within one trading day of the end of such Measurement Period, upon notice, or a Call Notice, call for cancellation of all or any portion of the Offering Warrants for which a notice of exercise has not yet been delivered, or a Call, for consideration equal to \$0.001 per warrant share. Any portion of an Offering Warrant subject to such Call Notice for which a notice of exercise shall not have been received by the Call Date (as hereinafter defined) will be canceled at 6:30 p.m. (New York City time) on the tenth trading day after the date the Call Notice is received by the holder, such date and time, the Call Date. Our right to call the Offering Warrants shall be exercised ratably among the holders based on each holder’s initial purchase of Offering Warrants.

## **Anti-Takeover Effects of Delaware Law and our Certificate of Incorporation and By-Laws**

### *Certificate of Incorporation and By-Laws*

Because our stockholders do not have cumulative voting rights, our stockholders holding a majority of the voting power of our shares of common stock outstanding will be able to elect all of our directors. According to Section 242 of the DGCL and our By-Laws, the affirmative vote of holders of at

least a majority of the voting power of all of the then outstanding shares of voting stock, voting as a single class, is required to amend certain provisions of our Certificate of Incorporation. Further, our By-Laws provide that stockholder actions may be effected at a duly called meeting of stockholders or by written consent.

Our By-Laws further provide the Board with the exclusive right to increase or decrease the size of the Board (not less than three), and with the right to elect directors to fill a vacancy created by the expansion of the Board or the resignation, death or removal of a director.

#### *Section 203 of the Delaware General Corporation Law*

As a corporation organized under the laws of the State of Delaware, we are subject to Section 203 of the DGCL, which restricts our ability to enter into business combinations with an interested stockholder, the owner of 15% or more of the corporation's voting stock, or an interested stockholder's affiliates or associates, for a period of three years after such person became an interested stockholder. These restrictions do not apply if:

- before becoming an interested stockholder, our Board approves either the business combination or the transaction in which the stockholder becomes an interested stockholder;
- upon consummation of the transaction in which the stockholder becomes an interested stockholder, the interested stockholder owns at least 85% of our voting stock outstanding at the time the transaction commenced, subject to exceptions; or
- on or after the date a stockholder becomes an interested stockholder, the business combination is both approved by our Board and authorized at an annual or special meeting of our stockholders by the affirmative vote of at least two-thirds of the outstanding voting stock not owned by the interested stockholder.

#### *Choice of Forum*

Our Certificate of Incorporation provides that, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for: (i) any derivative action or proceeding brought on behalf of us; (ii) any action asserting a claim of breach of a fiduciary duty owed by any of our directors, officers to us or our stockholders; (iii) any action asserting a claim against us arising pursuant to any provision of the DGCL or Certificate of Incorporation or By-Laws; or (iv) any action asserting a claim against us governed by the internal affairs doctrine. The exclusive forum provision in our Certificate of Incorporation shall not apply to any actions or proceedings brought against us under the Securities Act or Exchange Act, whereby the U.S. District Court for the District of Delaware shall be the sole and exclusive forum.

#### **Limitations on Liability and Indemnification Matters**

Pursuant to our By-Laws, we indemnify our directors to the maximum extent permissible under the DGCL. In addition, we have entered into indemnity agreements with our officers and directors that provide, among other things, that we will indemnify them, under the circumstances and to the extent provided for therein, for expenses, damages, judgments, fines and settlements he or she may be required to pay in actions or proceedings to which he or she is or may be made a party by reason of his or her position as a director, officer, or other agent of ours, and otherwise to the fullest extent permitted under the DGCL and our By-Laws. These agreements were updated and re-executed in January 2016. In connection with the CVie Acquisition, our chairman, James Huang and one of our directors, Dr. Brian D. Schreiber entered into a revised version of our indemnification agreement in December 2018.

These provisions may be held not to be enforceable for violations of the federal securities laws of the U.S.

#### **Listing**

Our common stock trades on the OTCQB tier of OTC Markets Group, Inc., under the symbol "WINTD." We have applied to list our common stock on Nasdaq under the trading symbol "WINT" and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering. In addition, the closing sale price of our common stock as reported on the OTCQB may not be indicative of the market price of our common stock on Nasdaq and there can be no assurance given that a trading market will develop for our shares of common stock on Nasdaq.

#### **Transfer Agent and Registrar**

The transfer agent and registrar for common stock is Continental Stock Transfer and Trust Company. Continental Stock Transfer and Trust Company is also the warrant agent for the Offering Warrants.

## MATERIAL U.S. FEDERAL INCOME TAX CONSEQUENCES

The following discussion is a summary of the material U.S. federal income tax consequences of the purchase, ownership and disposition of our common stock and Offering Warrants issued pursuant to this offering, but does not purport to be a complete analysis of all potential tax effects. The effects of other U.S. federal tax laws, such as estate and gift tax laws, and any applicable state, local or non- U.S. tax laws are not discussed. This discussion is based on the U.S. Internal Revenue Code of 1986, as amended, or the Code, Treasury Regulations promulgated thereunder, judicial decisions, and published rulings and administrative pronouncements of the U.S. Internal Revenue Service, or the IRS, in each case in effect as of the date hereof. These authorities may change or be subject to differing interpretations. Any such change or differing interpretation may be applied retroactively in a manner that could adversely affect a holder of our common stock or Offering Warrants. We have not sought and will not seek any rulings from the IRS regarding the matters discussed below. There can be no assurance the IRS or a court will not take a contrary position to that discussed below regarding the tax consequences of the purchase, ownership and disposition of our common stock or Offering Warrants.

This discussion is limited to holders that hold our common stock or Offering Warrants as a “capital asset” within the meaning of Section 1221 of the Code (generally, property held for investment). This discussion does not address all U.S. federal income tax consequences relevant to a holder’s particular circumstances, including the impact of the Medicare contribution tax on net investment income. This discussion does not address Non-U.S. Holders (as defined below) for which gain or dividends with respect to our common stock or Offering Warrants is effectively connected with the Non-U.S. Holder’s conduct of a trade or business within the U.S. (and, if required by an applicable income tax treaty, the Non-U.S. Holder maintains a permanent establishment in the U.S. to which such gain is attributable). In addition, it does not address consequences relevant to holders that are subject to special rules, including, without limitation:

- U.S. expatriates and former citizens or long-term residents of the U.S.;
- persons subject to the alternative minimum tax;
- persons holding our common stock or Offering Warrants as part of a hedge, straddle or other risk reduction strategy or as part of a conversion transaction or other integrated investment;
- banks, insurance companies and other financial institutions;
- brokers, dealers or traders in securities;
- “controlled foreign corporations,” “passive foreign investment companies” and corporations that accumulate earnings to avoid U.S. federal income tax;
- partnerships or other entities or arrangements treated as partnerships for U.S. federal income tax purposes (and investors therein);
- tax-exempt organizations or governmental organizations;
- persons deemed to sell our common stock or Offering Warrants under the constructive sale provisions of the Code;
- persons that elect to apply Section 1400Z-2 of the Code to gains recognized with respect to shares of our common stock or Offering Warrants;
- persons who hold or receive our common stock or Offering Warrants pursuant to the exercise of any employee stock option or otherwise as compensation;
- tax-qualified retirement plans;
- “qualified foreign pension funds” and entities all of the interests of which are held by qualified foreign pension funds; and
- persons subject to special tax accounting rules as a result of any item of gross income with respect to our common stock or Offering Warrants being taken into account in an applicable financial statement.

If an entity or arrangement treated as a partnership for U.S. federal income tax purposes holds our common stock or Offering Warrants, the tax treatment of a partner in the partnership will depend on the status of the partner, the activities of the partnership and certain determinations made at the partner level. Accordingly, partnerships holding our common stock or Offering Warrants and the partners in such partnerships should consult their tax advisors regarding the U.S. federal income tax consequences to them.

**THIS DISCUSSION IS FOR INFORMATIONAL PURPOSES ONLY AND IS NOT TAX ADVICE. INVESTORS SHOULD CONSULT THEIR TAX ADVISORS WITH RESPECT TO THE APPLICATION OF THE U.S. FEDERAL INCOME TAX LAWS TO THEIR PARTICULAR SITUATIONS AS WELL AS ANY TAX CONSEQUENCES OF THE PURCHASE, OWNERSHIP AND DISPOSITION OF OUR COMMON STOCK OR OFFERING WARRANTS ARISING UNDER THE U.S. FEDERAL ESTATE OR GIFT TAX LAWS OR UNDER THE LAWS OF ANY STATE, LOCAL OR NON-U.S. TAXING JURISDICTION OR UNDER ANY APPLICABLE INCOME TAX TREATY.**

#### **Definition of a U.S. Holder and Non-U.S. Holder**

- For purposes of this discussion, a “Non-U.S. Holder” is any beneficial owner of our common stock or Offering Warrants that is neither a “U.S. Holder” nor an entity treated as a partnership for U.S. federal income tax purposes. A U.S. Holder is any person that, for U.S. federal income tax purposes, is or is treated as any of the following:
- an individual who is a citizen or resident of the U.S.;
- a corporation or entity treated as a corporation that is created or organized under the laws of the U.S., any state thereof, or the District of Columbia;
- an estate, the income of which is subject to U.S. federal income tax regardless of its source; or
- a trust that (i) is subject to the primary supervision of a U.S. court and the control of one or more “United States persons” (within the meaning of Section 7701(a)(30) of the Code), or (ii) has a valid election in effect to be treated as a U.S. person for U.S. federal income tax purposes.

#### **Purchase of Units**

For U.S. federal income tax purposes, the purchase of a unit by holders will be treated as the purchase of two components: a component consisting of one share of our common stock and a component consisting of one Offering Warrant to purchase one share of our common stock. The purchase price for each unit will be allocated between its two components in proportion to the relative fair market value of each at the time the unit is purchased by the holder. This allocation of the purchase price for each unit will establish a holder’s initial tax basis for U.S. federal income tax purposes in the shares and Offering Warrants that comprise each unit.

A holder’s allocation of the purchase price between the shares and the Offering Warrants is not binding on the IRS or the courts, and no assurance can be given that the IRS or the courts will agree with a holder’s allocation. Each holder should consult its own tax advisor regarding the allocation of the purchase price between the shares and Offering Warrants.

#### **Tax Considerations of Offering Warrants Applicable to U.S. Holders**

##### ***Gain on Sale or Other Taxable Disposition of Offering Warrants***

Upon the sale or other disposition of an Offering Warrant (other than by exercise), a U.S. Holder generally will recognize capital gain or loss equal to the difference between the amount realized on the sale or other disposition and the U.S. Holder’s tax basis in the Offering Warrant. This capital gain or loss will be long-term capital gain or loss if the U.S. Holder’s holding period in such Offering Warrant is more than one year at the time of the sale or other disposition. The deductibility of capital losses is subject to certain limitations.

### ***Exercise of Offering Warrants***

A U.S. Holder generally will not recognize gain or loss on the exercise of an Offering Warrant and the related receipt of shares of our common stock upon exercise thereof (unless cash is received in lieu of the issuance of a fractional share of common stock upon exercise). A U.S. Holder's initial tax basis in a share of our common stock received upon exercise of an Offering Warrant will be equal to the sum of (a) such U.S. Holder's tax basis in the Offering Warrant plus (2) the exercise price paid by such U.S. holder on the exercise of such Offering Warrant. A U.S. Holder's holding period in a share of common stock received exercise of an Offering Warrant should begin on the day after the date that such Offering Warrant is exercised by such U.S. Holder. Although there is no direct legal authority as to the U.S. federal income tax treatment of an exercise of an Offering Warrant on a cashless basis, we intend to take the position that such exercise will not be taxable, either because the exercise is not a gain realization event or because it qualifies as a tax-free recapitalization. In the former case, the holding period of the shares received upon exercise of the Offering Warrants should commence on the day after the Offering Warrant is exercised. In the latter case, the holding period of the shares received upon exercise of the Offering Warrants would include the holding period of the exercised Offering Warrant. However, our position is not binding on the IRS, and the IRS may treat a cashless exercise of an Offering Warrant as a taxable exchange. U.S. Holders are urged to consult their tax advisors as to the consequences of an exercise of an Offering Warrant on a cashless basis, including with respect to their holding period and tax basis in the shares received upon exercise of the Offering Warrants.

### ***Lapse of Offering Warrants***

If a U.S. Holder allows an Offering Warrant to expire unexercised, such U.S. Holder will recognize a capital loss in an amount equal to such holder's tax basis in the Offering Warrant. The deductibility of capital losses is subject to certain limitations.

### ***Constructive Dividends on Offering Warrants***

Under Section 305 of the Code, an adjustment to the number of shares of common stock that will be issued on the exercise of the Offering Warrants, or an adjustment to the exercise price of the Offering Warrants, may be treated as a constructive distribution to a U.S. Holder of the Offering Warrants if, and to the extent that, such adjustment has the effect of increasing such U.S. Holder's proportionate interest in our earnings and profits as determined under U.S. federal income tax principles or our assets, depending on the circumstances of such adjustment (for example, if such adjustment is to compensate for a distribution of cash or other property to our shareholders).

### ***Information Reporting and Backup Withholding***

A U.S. Holder may be subject to information reporting and backup withholding when such holder receives payments on our securities (including constructive dividends) or receives proceeds from the sale or other taxable disposition of our securities. Certain U.S. Holders are exempt from back-up withholding, including C corporations and certain tax-exempt organizations. A U.S. Holder will be subject to backup withholding if such holder is not otherwise exempt and such holder: (i) fails to furnish the holder's taxpayer identification number, which for an individual is ordinarily his or her social security number; (ii) furnishes an incorrect taxpayer identification number; (iii) is notified by the IRS that the holder previously failed to properly report payments of interest or dividends; or (iv) fails to certify under penalties of perjury that the holder has furnished a correct taxpayer identification number and that the IRS has not notified the holder that the holder is subject to backup withholding.

Backup withholding is not an additional tax. Any amounts withheld under the backup withholding rules may be allowed as a refund or a credit against U.S. Holder's U.S. federal income tax liability, provided the required information is timely furnished to the IRS.

### **Tax Considerations of Common Stock and Offering Warrants Applicable to Non-U.S. Holders**

#### ***Exercise of Offering Warrants***

A Non-U.S. Holder generally will not recognize gain or loss on the exercise of an Offering Warrant and related receipt of our shares of our common stock. To the extent a Non-U.S. Holder receives cash lieu of the issuance of a fractional share of our common stock, such Non-U.S. Holder generally will not recognize gain or loss on the receipt of such cash, unless certain other conditions are present, as discussed below under “-Gain on Sale or Other Taxable Disposition”. However, if a cashless exercise of Offering Warrants results in a taxable exchange as described in “-Tax Considerations of Offering Warrants Applicable to U.S. Holders – Exercise of Offering Warrants,” the rules described below under “Gain on Sale or Other Taxable Disposition” would apply.



### ***Constructive Dividends on Offering Warrants***

See the discussion of the rules applicable to constructive distributions on an Offering Warrant under the heading “-Tax Considerations of Offering Warrants Applicable to U.S. Holders – Constructive Dividends on Offering Warrants” above. If an adjustment to the number of shares that will be issued on the exercise of the Offering Warrants, or an adjustment to the exercise price of the Offering Warrants, results in a constructive distribution, as described in “-Tax Considerations of Offering Warrants Applicable to U.S. Holders – Constructive Dividends on Offering Warrants,” the rules described below under “-Distributions” would apply.

### ***Distributions***

As described in the section titled “Dividend Policy,” we do not currently intend to pay any cash dividends on our capital stock or Offering Warrants in the foreseeable future. However, if we make distributions (including constructive distributions as described above) of cash or other property on our common stock or Offering Warrants, such distributions will constitute dividends for U.S. federal income tax purposes to the extent paid from our current or accumulated earnings and profits, as determined under U.S. federal income tax principles. Amounts not treated as dividends for U.S. federal income tax purposes will constitute a return of capital and first be applied against and reduce a Non-U.S. Holder’s adjusted tax basis in its common stock or Offering Warrants, as applicable, but not below zero. Any excess will be treated as capital gain and will be treated as described below under “—Gain on Sale or Other Taxable Disposition.”

Subject to the discussions below on backup withholding and the Foreign Account Tax Compliance Act, or FATCA, dividends paid to a Non-U.S. Holder of our common stock or Offering Warrants will be subject to U.S. federal withholding tax at a rate of 30% of the gross amount of the dividends (or such lower rate specified by an applicable income tax treaty, provided the Non-U.S. Holder furnishes a valid IRS Form W-8BEN or W-8BEN-E (or other applicable documentation) certifying qualification for the lower treaty rate). A Non-U.S. Holder that does not timely furnish the required documentation, but that qualifies for a reduced treaty rate, may obtain a refund of any excess amounts withheld by timely filing an appropriate claim for refund with the IRS. Non-U.S. Holders should consult their tax advisors regarding their entitlement to benefits under any applicable income tax treaty.

Any documentation provided to an applicable withholding agent may need to be updated in certain circumstances. The certification requirements described above also may require a Non-U.S. Holder to provide its U.S. taxpayer identification number.

### ***Gain on Sale or Other Taxable Disposition***

Subject to the discussions below regarding backup withholding and FATCA, a Non-U.S. Holder will not be subject to U.S. federal income tax on any gain realized upon the sale or other taxable disposition of our common stock or Offering Warrants unless:

- the Non-U.S. Holder is a nonresident alien individual present in the U.S. for 183 days or more during the taxable year of the disposition and certain other requirements are met; or
- our common stock constitutes a U.S. real property interest, or USRPI, by reason of our status as a U.S. real property holding corporation, or USRPHC, for U.S. federal income tax purposes.

Gain described in the first bullet point above will be subject to U.S. federal income tax at a rate of 30% (or such lower rate specified by an applicable income tax treaty), which may be offset by U.S. source capital losses of the Non-U.S. Holder (even though the individual is not considered a resident of the U.S.), provided the Non-U.S. Holder has timely filed U.S. federal income tax returns with respect to such losses.

With respect to the second bullet point above, we believe we currently are not, and do not anticipate becoming, a USRPHC. However, because the determination of whether we are a USRPHC depends on the fair market value of our USRPIs relative to the fair market value of our non-U.S. real property interests and our other business assets, there can be no assurance we currently are not a USRPHC or will not become one in the future. Even if we are or were to become a USRPHC, gain arising from the sale or other taxable disposition by a Non-U.S. Holder of our common stock or Offering Warrants will not be subject to U.S. federal income tax if our common stock is “regularly traded,” as defined by applicable Treasury Regulations, on an established securities market, and such Non-U.S. Holder owned, actually and constructively, 5% or less of our common stock throughout the shorter of the five-year period ending on the date of the sale or other taxable disposition or the Non-U.S. Holder’s holding period. If we are a USRPHC and either our common stock is not regularly traded on an established securities market or a Non-U.S. Holder holds more than 5% of our common stock, actually or constructively, during the applicable testing period, such Non-U.S. Holder will generally be taxed on any gain in the same manner as gain that is effectively connected with the conduct of a U.S. trade or business, except that the branch profits tax generally will not apply.

Non-U.S. Holders should consult their tax advisors regarding any applicable income tax treaties that may provide for different rules.

### ***Information Reporting and Backup Withholding***

Payments of dividends on our common stock or Offering Warrants will not be subject to backup withholding, provided the holder either certifies its non-U.S. status by furnishing a valid IRS Form W-8BEN, W-8BEN-E or W-8ECI or otherwise establishes an exemption. However, information returns are required to be filed with the IRS in connection with any dividends on our common stock or Offering Warrants paid to the Non-U.S. Holder, regardless of whether any tax was actually withheld. In addition, proceeds of the sale or other taxable disposition of our common stock or Offering Warrants within the U.S. or conducted through certain U.S.-related brokers generally will not be subject to backup withholding or information reporting, if the applicable withholding agent receives the certification described above or the holder otherwise establishes an exemption. Proceeds of a disposition of our common stock or Offering Warrants conducted through a non-U.S. office of a non-U.S. broker that does not have certain enumerated relationships with the U.S. generally will not be subject to backup withholding or information reporting.

Copies of information returns that are filed with the IRS also may be made available under the provisions of an applicable treaty or agreement to the tax authorities of the country in which the Non-U.S. Holder resides or is established.

Backup withholding is not an additional tax. Any amounts withheld under the backup withholding rules may be allowed as a refund or a credit against a Non-U.S. Holder’s U.S. federal income tax liability, provided the required information is timely furnished to the IRS.

### ***Additional Withholding Tax on Payments Made to Foreign Accounts***

Payments of dividends to a Non-U.S. Holder will be subject to a 30% withholding tax if the Non-U.S. Holder fails to provide the applicable withholding agent with documentation sufficient to show that it is compliant with FATCA. Generally such documentation is provided on an executed IRS Form W-8BEN or W-8BEN-E, as applicable. If dividends are subject to the 30% withholding tax under FATCA, they will not be subject to the 30% withholding described above under “Distributions.”

While withholding under FATCA would have applied also to payments of gross proceeds from the sale or other disposition of our common stock on or after January 1, 2019, proposed Treasury Regulations eliminate FATCA withholding on payments of gross proceeds entirely. Taxpayers generally may rely on these proposed Treasury Regulations until final Treasury Regulations are issued.

Prospective investors should consult their tax advisors regarding the potential application of withholding under FATCA to their investment in our common stock or Offering Warrants.

## UNDERWRITING

We have entered into an underwriting agreement dated \_\_\_\_\_, 2020, with Ladenburg Thalmann & Co. Inc., as the representative of the underwriters, named below and the sole book-running manager of this offering. Subject to the terms and conditions of the underwriting agreement, the underwriters have agreed to purchase the number of units set forth opposite their name below.

Underwriter	Units
Ladenburg Thalmann & Co. Inc.	
National Securities Corporation	
Total	

A copy of the underwriting agreement will be filed as an exhibit to the registration statement of which this prospectus is part.

We have been advised by the underwriters that they proposes to offer the units directly to the public at the public offering price set forth on the cover page of this prospectus. Any units sold by the underwriter to securities dealers will be sold at the public offering price less a selling concession not in excess of \$ \_\_\_\_\_ per share and \$ \_\_\_\_\_ warrant.

The underwriting agreement provides that the underwriter's obligation to purchase the units we are offering is subject to conditions contained in the underwriting agreement.

Certain of our officers, directors and existing stockholders, including certain stockholders affiliated with our directors or that beneficially own more than 5% of our outstanding common stock, have indicated an interest in purchasing an aggregate of \$2.0 million of our units in this offering on the same terms as those offered to the public. However, because indications of interest are not binding agreements or commitments to purchase, the underwriters may determine to sell more, fewer or no units in this offering to any of these officers, directors or stockholders, or any of these officers, directors or stockholders may determine to purchase more, fewer or no units in this offering. The underwriters will receive the same underwriting discounts and commissions on any units purchased by these officers, directors and stockholders as they will on any other shares sold to the public in this offering.

No action has been taken by us or the underwriters that would permit a public offering of the units in any jurisdiction where action for that purpose is required. None of our securities included in this offering may be offered or sold, directly or indirectly, nor may this prospectus or any other offering material or advertisements in connection with the offer and sales of any of the securities offering hereby be distributed or published in any jurisdiction, except under circumstances that will result in compliance with the applicable rules and regulations of that jurisdiction. Persons who receive this prospectus are advised to inform themselves about and to observe any restrictions relating to this offering of securities and the distribution of this prospectus. This prospectus is neither an offer to sell nor a solicitation of any offer to buy the units in any jurisdiction where that would not be permitted or legal.

The underwriters have advised us that they do not intend to confirm sales to any accounts over which they exercise discretionary authority.

### Underwriting Discount and Expenses

The following table summarizes the underwriting discount and commission to be paid to the underwriters by us.

	Per Unit	Total Without Exercise of Over-Allotment	Total With Full Exercise of Over-Allotment
Public offering price	\$	\$	\$
Underwriting discount	\$	\$	\$
Proceeds, before expenses, to us	\$	\$	\$

We estimate the total expenses payable by us for this offering to be approximately \$ \_\_\_\_\_, which amount includes: (i) the underwriting discount of \_\_\_\_\_; (ii) reimbursement of the accountable expenses of the underwriter up to \$100,000, including the legal fees of the underwriters being paid by us; and (iii) other estimated company expenses of approximately \$485,000 which includes legal, accounting, printing costs and various fees associated with the registration and listing of our shares.

The underwriting discount and commission will vary depending on the gross proceeds of the offering and the underwriting discount and commission will be 8.0% if the gross proceeds of the offering are less than \$5.5 million, 8.5% if the gross proceeds of the offering are at least \$5.5 million but less than \$7.0 million, 9.0% if the gross proceeds of the offering are at least \$7 million but less than \$8.5 million, 9.5% if the gross proceeds of the offering are at least \$8.5 million but less than \$10.0 million, 10.0% if the gross proceeds of the offering are at least \$10.0 million but less than \$12.5 million and 11.0% if the gross proceeds are at least \$12.5 million.

## **Over-allotment Option**

We have granted the underwriters an option exercisable not later than 45 days after the date of this prospectus to purchase up to a number of additional shares of common stock and/or warrants equal to 15% of the number of shares of common stock sold in the primary offering and/or 15% of the warrants sold in the primary offering at the public offering price per share of common stock and the public offering price per warrant set forth on the cover page hereto less the underwriting discounts and commissions.

## **Determination of Offering Price**

Our common stock is currently traded on the OTCQB under the symbol "WINTD." On May 5, 2020, the closing price of our common stock was \$9.79 per share. We have applied to list our common stock on Nasdaq under the trading symbol "WINT" and our common stock has been approved for listing contingent on the completion of this offering. There is no assurance that this offering will be completed, or as to the terms of this offering. In addition, the closing sale price of our common stock as reported on the OTCQB may not be indicative of the market price of our common stock on Nasdaq and there can be no assurance given that a trading market will develop for our shares of common stock on Nasdaq. The Offering Warrants are not and will not be listed for trading on Nasdaq, or any other securities exchange. The public offering price of the securities offered by this prospectus will be determined by negotiation between us and the underwriters. Among the factors considered in determining the public offering price of the shares were:

- our history and our prospects;
- the industry in which we operate;
- our past and present operating results
- the previous experience of our executive officers; and
- the general condition of the securities markets at the time of this offering.

The offering price stated on the cover page of this prospectus should not be considered an indication of the actual value of the shares. That price is subject to change as a result of market conditions and other factors, and we cannot assure you that the shares can be resold at or above the public offering price.

## **Other Relationships**

Upon completion of this offering, we have granted the representative a right of first refusal to act as lead bookrunner or lead placement agent in connection with any subsequent public or private offering of debt or equity securities by us. This right of first refusal extends for 18 months from the closing date of this offering. The terms of any such engagement of the representative will be determined by separate agreement. The underwriters and their respective affiliates may in the future engage in investment banking and other commercial dealings in the ordinary course of business with us or our affiliates. The underwriter may in the future receive customary fees and commission for these transactions.

## **Lock-up Agreements**

Our officers and directors have agreed with the underwriters to be subject to a lock-up period of 90 days following the date of this prospectus. This means that, during the applicable lock-up period, such persons may not offer for sale, contract to sell, sell, distribute, grant any option, right or warrant to purchase, pledge, hypothecate or otherwise dispose of, directly or indirectly, any shares of our common stock or any securities convertible into, or exercisable or exchangeable for, shares of our common stock. Certain limited transfers are permitted during the lock-up period if the transferee agrees to these lock-up restrictions. We have also agreed, in the underwriting agreement, to similar lock-up restrictions on the issuance and sale of our securities for 90 days following the closing of this offering, although we will be permitted to issue stock options or stock awards to directors, officers and employees under our existing plans. The underwriters may, in their sole discretion and without notice, waive the terms of any of these lock-up agreements.

In addition, certain of our existing stockholders beneficially owning approximately 71% of our outstanding shares of common stock have agreed with us to be bound by a lock-up whereas such stockholders will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of shares of our common stock for 90 days following the closing of this offering.

## **Stabilization**

In connection with this offering, the underwriters may engage in stabilizing transactions and syndicate covering transactions and purchases to cover positions created by short sales.

- Stabilizing transactions permit bids to purchase shares of common stock so long as the stabilizing bids do not exceed a specified maximum, and are engaged in for the purpose of preventing or retarding a decline in the market price of the common stock while the offering is in progress.
- Syndicate covering transactions involve purchases of common stock in the open market after the distribution has been completed in order to cover syndicate short positions. Since there is no over-allotment option, if the underwriters would have a naked short position, it can be closed out only by buying shares in the open market. A naked short position is more likely to be created if the underwriters are concerned that after pricing there could be downward pressure on the price of the shares in the open market that could adversely affect investors who purchase in the offering.
- Penalty bids permit the underwriters to reclaim a selling concession from a syndicate member when the security originally sold by the syndicate member is purchased in a stabilizing or syndicate covering transaction to cover syndicate short positions.

These stabilizing transactions, syndicate covering transactions and penalty bids may have the effect of raising or maintaining the market price of our common stock or preventing or retarding a decline in the market price of our common stock. As a result, the price of our common stock in the open market may be higher than it would otherwise be in the absence of these transactions. Neither we nor the underwriters make any representation or prediction as to the effect that the transactions described above may have on the price of our common stock. These transactions may be effected on Nasdaq, in the over-the-counter market or otherwise and, if commenced, may be discontinued at any time.

## **Indemnification**

We have agreed to indemnify the underwriters and selected dealers against certain liabilities, including certain liabilities arising under the Securities Act, or to contribute to payments that the underwriters or selected dealers may be required to make for these liabilities.

## **EXPERTS**

Ernst & Young LLP, independent registered public accounting firm, has audited our consolidated financial statements at December 31, 2019 and 2018, and for each of the two years in the period ended December 31, 2019, as set forth in their report. We've included our financial statements in the prospectus and elsewhere in the registration statement in reliance on Ernst & Young LLP's report, given on their authority as experts in accounting and auditing.

## **LEGAL MATTERS**

Certain legal matters will be passed upon for us by Pepper Hamilton LLP, Philadelphia, Pennsylvania. Certain legal matters will be passed upon for the underwriters by Ellenoff Grossman & Schole LLP, New York, New York.

## **WHERE YOU CAN FIND MORE INFORMATION**

We have filed with the SEC a registration statement on Form S-1 (including the exhibits, schedules and amendments thereto) under the Securities Act to the units being offered in this offering. This prospectus does not contain all of the information set forth in the registration statement and the exhibits and schedules thereto. For further information with respect to us and the common stock offered by this prospectus, we refer you to the registration statement and the exhibits and schedules filed therewith. Where we make statements in this prospectus as to the contents of any contract or any other document, for the complete text of that document, we refer you to the copy of the contract or other document filed as an exhibit to the registration statement. Each of these statements is qualified in all respects by this reference.

A copy of the registration statement, and the exhibits and schedules thereto, may be inspected without charge at the public reference facilities maintained by the SEC at 100 F Street NE, Washington, D.C. 20549. Copies of these materials may be obtained, upon payment of a duplicating fee, from the Public Reference Section of the SEC at 100 F Street NE, Washington, D.C. 20549. Please call the SEC at 1-800-SEC-0330 for further information on the operation of the public reference facility. The SEC maintains a website that contains reports, proxy and information statements and other information regarding registrants that file electronically with the SEC. The address of the SEC's website is [www.sec.gov](http://www.sec.gov).

We also make available free of charge on our website at [www.windtreetx.com](http://www.windtreetx.com) our Annual Reports on Form 10-K, our Quarterly Reports on Form 10-Q, our Current Reports on Form 8-K and any amendments to those reports, as soon as reasonably practicable after we electronically file such material with, or furnish it to, the SEC. Information contained on our website is not incorporated by reference into this prospectus and you should not consider information contained on our website as part of this prospectus.

**WINDTREE THERAPEUTICS, INC.  
INDEX TO CONSOLIDATED FINANCIAL STATEMENTS**

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

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**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

**Report of Independent Registered Public Accounting Firm**

To the Shareholders and the Board of Directors of Windtree Therapeutics, Inc.

**Opinion on the Financial Statements**

We have audited the accompanying consolidated balance sheets of Windtree Therapeutics, Inc. and subsidiaries (the Company) as of December 31, 2019 and 2018, the related consolidated statements of operations, changes in stockholders' equity and cash flows for each of the two years in the period ended December 31, 2019, and the related notes (collectively referred to as the "consolidated financial statements"). In our opinion, the consolidated financial statements present fairly, in all material respects, the financial position of the Company at December 31, 2019 and 2018, and the results of its operations and its cash flows for each of the two years in the period ended December 31, 2019, in conformity with U.S. generally accepted accounting principles.

**Adoption of ASU No. 2016-02, *Leases***

As discussed in Note 5 to the consolidated financial statements, the Company changed its method of accounting for leases in 2019 due to the adoption of Accounting Standards Update (ASU) No. 2016-02, *Leases* (Topic 842), and the related amendments.

**Basis for Opinion**

These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on the Company's financial statements based on our audits. We are a public accounting firm registered with the Public Company Accounting Oversight Board (United States) (PCAOB) and are required to be independent with respect to the Company in accordance with the U.S. federal securities laws and the applicable rules and regulations of the Securities and Exchange Commission and the PCAOB.

We conducted our audits in accordance with the standards of the PCAOB. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether due to error or fraud. The Company is not required to have, nor were we engaged to perform, an audit of its internal control over financial reporting. As part of our audits we are required to obtain an understanding of internal control over financial reporting but not for the purpose of expressing an opinion on the effectiveness of the Company's internal control over financial reporting. Accordingly, we express no such opinion.

Our audits included performing procedures to assess the risks of material misstatement of the financial statements, whether due to error or fraud, and performing procedures that respond to those risks. Such procedures included examining, on a test basis, evidence regarding the amounts and disclosures in the financial statements. Our audits also included evaluating the accounting principles used and significant estimates made by management, as well as evaluating the overall presentation of the financial statements. We believe that our audits provide a reasonable basis for our opinion.

/s/ Ernst & Young LLP

We have served as the Company's auditor since 2000.

Philadelphia, Pennsylvania

April 2, 2020, except for the second paragraph of Note 2, as to which the date is May 6, 2020

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES****Consolidated Balance Sheets***(in thousands, except share and per share data)*

	<u>December 31, 2019</u>	<u>December 31, 2018</u>
<b>ASSETS</b>		
Current Assets:		
Cash and cash equivalents	\$ 22,578	\$ 11,187
Available-for-sale marketable securities	-	13,959
Prepaid expenses and other current assets	1,283	507
Total current assets	<u>23,861</u>	<u>25,653</u>
Property and equipment, net	798	802
Restricted cash	154	171
Operating lease right-of-use assets	1,390	-
Intangible assets	77,090	77,090
Goodwill	15,682	15,682
Total assets	<u>\$ 118,975</u>	<u>\$ 119,398</u>
<b>LIABILITIES &amp; STOCKHOLDERS' EQUITY</b>		
Current Liabilities:		
Accounts payable	\$ 1,708	\$ 3,420
Collaboration and device development payable, net	1,972	2,576
Accrued expenses	3,226	6,465
Operating lease liabilities - current portion	750	-
Deferred revenue - current portion	-	198
Loans payable - current portion	161	7,974
Total current liabilities	<u>7,817</u>	<u>20,633</u>
Operating lease liabilities - non-current portion	794	-
Loans payable - non-current portion	4,608	-
Restructured debt liability - contingent milestone payments	15,000	15,000
Deferred tax liabilities	15,821	15,476
Other liabilities	-	175
Total liabilities	<u>44,040</u>	<u>51,284</u>
Stockholders' Equity:		
Preferred stock, \$0.001 par value; 5,000,000 shares authorized; 0 shares issued and outstanding at December 31, 2019 and December 31, 2018	-	-
Common stock, \$0.001 par value; 120,000,000 shares authorized at December 31, 2019 and December 31, 2018; 13,697,420 and 10,711,088 shares issued at December 31, 2019 and December 31, 2018, respectively; 13,697,395 shares and 10,711,063 shares outstanding at December 31, 2019 and December 31, 2018, respectively	14	11
Additional paid-in capital	763,097	728,804
Accumulated deficit	(685,122)	(657,647)
Treasury stock (at cost); 25 shares	(3,054)	(3,054)
Total stockholders' equity	<u>74,935</u>	<u>68,114</u>
Total liabilities & stockholders' equity	<u>\$ 118,975</u>	<u>\$ 119,398</u>

*See notes to consolidated financial statements*

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES****Consolidated Statements of Operations***(in thousands, except per share data)*

	<b>Year Ended December 31,</b>	
	<b>2019</b>	<b>2018</b>
<b>Revenues:</b>		
Grant revenue	\$ -	\$ 765
License revenue with affiliate	198	1,023
Total revenues	198	1,788
<b>Expenses:</b>		
Research and development	12,687	10,562
General and administrative	12,404	7,421
Total operating expense	25,091	17,983
Operating loss	(24,893)	(16,195)
<b>Other income / (expense):</b>		
Net loss on debt extinguishment	(1,794)	(3,345)
Interest income	153	15
Interest expense	(495)	(1,409)
Other (expense) / income, net	(446)	401
Other expense, net	(2,582)	(4,338)
Net loss	<u>\$ (27,475)</u>	<u>\$ (20,533)</u>
AEROSURF warrant dividend	-	(12,505)
Deemed dividend on Series A preferred stock	-	(1,718)
Net loss attributable to common shareholders	<u>\$ (27,475)</u>	<u>\$ (34,756)</u>
<b>Net loss per common share</b>		
Basic and diluted	\$ (2.51)	\$ (23.20)
<b>Weighted average number of common shares outstanding</b>		
Basic and diluted	10,928	1,498

*See notes to consolidated financial statements*

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**
**Consolidated Statements of Changes in Stockholders' Equity**  
*(in thousands)*

	<u>Preferred Stock</u>		<u>Common Stock</u>		<u>Additional Paid-in Capital</u>	<u>Accumulated Deficit</u>	<u>Treasury Stock</u>		<u>Total</u>
	<u>Shares</u>	<u>Amount</u>	<u>Shares</u>	<u>Amount</u>			<u>Shares</u>	<u>Amount</u>	
<b>Balance - December 31, 2017</b>	<b>3</b>	<b>\$ -</b>	<b>1,075</b>	<b>\$ 1</b>	<b>\$ 616,247</b>	<b>\$ (637,114)</b>	<b>-</b>	<b>\$ (3,054)</b>	<b>\$ (23,920)</b>
Net Loss	-	-	-	-	-	(20,533)	-	-	(20,533)
Preferred stock conversions	(3)	-	45	-	-	-	-	-	-
Issuance of common stock, Share Purchase Agreement, April 2018	-	-	181	-	2,541	-	-	-	2,541
Issuance of common stock and warrants, Share Purchase Agreement, December 2018, net of issuance costs	-	-	3,929	4	41,109	-	-	-	41,113
Issuance of common stock, placement agent	-	-	38	-	-	-	-	-	-
Issuance of common stock, CVie Acquisition	-	-	5,421	6	67,494	-	-	-	67,500
Vesting of restricted stock units	-	-	32	-	-	-	-	-	-
Withholding tax payments related to net share settlements of restricted stock units	-	-	(10)	-	(155)	-	-	-	(155)
Issuance of warrants, equity consideration in debt issuance	-	-	-	-	417	-	-	-	417
Issuance of warrants, equity consideration in payable restructuring	-	-	-	-	196	-	-	-	196
Stock-based compensation expense	-	-	-	-	955	-	-	-	955
<b>Balance - December 31, 2018</b>	<b>-</b>	<b>\$ -</b>	<b>10,711</b>	<b>\$ 11</b>	<b>\$ 728,804</b>	<b>\$ (657,647)</b>	<b>-</b>	<b>\$ (3,054)</b>	<b>\$ 68,114</b>
Net Loss	-	-	-	-	-	(27,475)	-	-	(27,475)
Issuance of common stock and warrants, Share Purchase Agreement, December 2019, net of issuance costs	-	-	2,917	3	27,723	-	-	-	27,726
Issuance of common stock, placement agent	-	-	32	-	-	-	-	-	-
Vesting of restricted stock units	-	-	37	-	-	-	-	-	-
Withholding tax payments related to net share settlements of restricted stock units	-	-	-	-	(151)	-	-	-	(151)
Stock-based compensation expense	-	-	-	-	6,721	-	-	-	6,721
<b>Balance - December 31, 2019</b>	<b>-</b>	<b>\$ -</b>	<b>13,697</b>	<b>\$ 14</b>	<b>\$ 763,097</b>	<b>\$ (685,122)</b>	<b>-</b>	<b>\$ (3,054)</b>	<b>\$ 74,935</b>

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES****Consolidated Statements of Cash Flows***(in thousands)*

	<b>Year Ended December 31,</b>	
	<b>2019</b>	<b>2018</b>
<b>Cash flows from operating activities:</b>		
Net loss	\$ (27,475)	\$ (20,533)
Adjustments to reconcile net loss to net cash used in operating activities:		
Net loss on extinguishment of debt	1,794	3,345
Recognition of deferred revenue	(198)	(1,093)
Depreciation	195	160
Amortization of debt discount	163	863
Stock-based compensation	6,721	955
Non-cash lease expense	917	-
Net realized gain on sale of marketable securities	(75)	-
Gain on sale of equipment	-	(9)
Changes in:		
Prepaid expenses and other current assets	688	302
Accounts payable	(2,468)	997
Collaboration and device development payable	(767)	(510)
Accrued expenses	(3,191)	(276)
Operating lease liabilities	(974)	-
Other liabilities	7	18
Net cash used in operating activities	<u>(24,663)</u>	<u>(15,781)</u>
<b>Cash flows from investing activities:</b>		
Sale of marketable securities	13,988	-
Purchase of marketable securities	-	(13,959)
Cash acquired in CVie acquisition	-	223
Purchase of property and equipment	(191)	-
Proceeds from sale of property and equipment	-	9
Net cash used in investing activities	<u>13,797</u>	<u>(13,727)</u>
<b>Cash flows from financing activities:</b>		
Proceeds from private placement issuance of securities, net of expenses	22,982	32,893
Proceeds from loan payable, net of expenses	1,000	6,160
Repayment of loan payable	(2,063)	(160)
Proceeds from convertible note payable	-	1,500
Repayment of convertible note payable	-	(1,500)
Payments for taxes related to net share settlements of restricted stock units	(151)	(155)
Net cash provided by financing activities	<u>21,768</u>	<u>38,738</u>
Effect of exchange rates on cash and cash equivalents	472	88
Net increase/(decrease) in cash and cash equivalents	<u>11,374</u>	<u>9,318</u>
Cash, cash equivalents and restricted cash - beginning of year	<u>11,358</u>	<u>2,040</u>
Cash, cash equivalents and restricted cash - end of year	<u>\$ 22,732</u>	<u>\$ 11,358</u>
<b>Supplementary disclosure of non-cash activity:</b>		
Prepayment of insurance through third-party financing	\$ 708	\$ -

*See notes to consolidated financial statements*

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES****Note 1 - The Company and Description of Business**

We are a clinical-stage, biopharmaceutical and medical device company focused on the development of novel therapeutics intended to address significant unmet medical needs in important acute care markets. Our development programs are primarily focused in the treatment of acute cardiovascular and pulmonary diseases. Our lead cardiovascular product candidate is istaroxime, a first-in-class, dual-acting agent being developed to improve cardiac function in patients with acute heart failure (AHF) and cardiogenic shock with a potentially differentiated safety profile from existing treatments. Istaroxime demonstrated significant improvement in diastolic and systolic function in phase 2 clinical trials and has been granted Fast Track designation for the treatment of AHF by the U.S. Food and Drug Administration (FDA). Our lead pulmonary product candidate is AEROSURF® (lucinactant for inhalation), a novel drug/medical device combination for non-invasive delivery of our proprietary aerosolized KL4 surfactant, using our proprietary Aerosol Delivery System (ADS), technology for the treatment of respiratory distress syndrome (RDS), in premature infants. AEROSURF has been granted Fast Track designation by the FDA for the treatment of RDS. We are also developing plans to study our proprietary KL4 surfactant for the treatment of lung injury resulting from severe COVID-19 infection if we are able to secure the required additional capital resources necessary to initiate and complete the study. Our other drug product candidates include rostafuroxin, a novel medicine for the treatment of hypertension in patients with a specific genetic profile. We also have a number of pipeline preclinical product candidates that we are evaluating for progression into clinical development. We are pursuing a number of early exploratory research programs to identify potential product candidates, including oral (and intravenous) SERCA 2a heart failure compounds and other product candidates utilizing our KL4 surfactant and ADS technologies.

**Note 2 - Basis of Presentation**

The consolidated financial statements are prepared in accordance with accounting principles generally accepted in the US (US GAAP) and include accounts of Windtree Therapeutics, Inc. and its wholly-owned subsidiaries (or the Company). Intercompany balances and transactions have been eliminated in consolidation. All adjustments (consisting of normally recurring accruals) considered for fair presentation have been included. When necessary, prior year's consolidated financial statements have been reclassified to conform to the current year presentation.

The consolidated financial statements reflect a 1-for-3 reverse split of our common stock that was approved by our Board of Directors and controlling stockholders and made effective on April 29, 2020. All share and per share information data herein that relates to our common stock prior to the effective date has been retroactively restated to reflect the reverse stock split.

**Note 3 - Business Combination**

On December 21, 2018 (the Acquisition Date), we completed the acquisition of all the capital stock of CVie Investments Limited (CVie Investments), an exempted company with limited liability incorporated under the laws of the Cayman Islands, by issuing 5,418,686 shares of its common stock (CVie Acquisition). The purchase price for the CVie Acquisition was approximately \$67.5 million. We operate CVie and its wholly-owned subsidiary, CVie Therapeutics Limited (CVie Therapeutics, and together with CVie Investments, CVie), a Taiwan corporation organized under the laws of the Republic of China and CVie Investments' operating company, as a subsidiary focused on development of drug product candidates in cardiovascular diseases. The CVie Acquisition was undertaken as part of a strategic initiative to create stockholder value and resulted from a multi-year process focused on identifying strategic opportunities, including potential strategic alliances, collaborations (primarily outside the United States), joint development opportunities, acquisitions, technology licensing arrangements, as well as potential combinations (including by merger or acquisition) or other corporate transactions.

In connection with the CVie Acquisition, our board of directors declared a dividend to the holders of record of outstanding shares of common stock, and holders of certain warrants to purchase common stock, that were outstanding on December 20, 2018 of 0.6148 Series H AEROSURF Warrant, for each share of common stock held by a shareholder or each warrant held by a warrant holder, as applicable, on the record date (AEROSURF Warrants). The AEROSURF Warrants are exercisable for an aggregate of 987,722 shares of common stock. Each AEROSURF Warrant has a term of five years and provides for automatic exercise into one share of common stock, without any exercise price, upon our public announcement of the dosing of the first human subject enrolled in our phase 3 clinical trial for AEROSURF. The AEROSURF Warrants are derivatives that qualify for an exemption from liability accounting as provided for in ASC Topic 815, *Derivatives and Hedging - Contracts in Entity's own Equity*, and have been classified as equity. The \$12.5 million fair value at issuance of the AEROSURF Warrants was determined using the Black-Scholes option-pricing model. The input assumptions used in the valuation are the historical volatility of our common stock price, the expected term of the warrants of two and a half years based on the expected date of the first human subject enrollment in our phase 3 clinical trial for AEROSURF, and the risk-free interest rate based on the average two-year and three-year treasury bill rate in effect at the measurement date.

## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

## Significant Input Assumptions of Warrant Valuation

Historical volatility	116%
Expected term (in years)	2.5
Risk-free interest rate	2.62%

On the Acquisition Date, we entered into an indemnification letter agreement (the Indemnification Letter Agreement) with Lee's Pharmaceutical Holdings Limited (Lee's), pursuant to which Lee's agreed to indemnify the holders of issued and outstanding shares of common stock on December 20, 2018 (the Indemnitees) for any loss, liability, damage or expense, including reasonable attorney's fees and expenses incurred by us in connection with or, as a result of, any material inaccuracy in any representation or warranty made by CVie in the Merger Agreement (notwithstanding that the representations and warranties made by CVie do not survive after the closing of the merger). To secure Lee's performance of this indemnity obligation, 328,000 of the shares issued to Lee's affiliate in the Merger were placed in escrow with our transfer agent, Continental Stock Transfer & Trust Company for one year. The shares were released from escrow as of December 31, 2019.

The aggregate purchase price has been allocated based on the fair value of assets acquired and liabilities assumed as of the acquisition date. The excess of the \$67.5 million acquisition consideration over the acquired net assets was recorded as goodwill. The goodwill recorded is not deductible for tax purposes. The following table summarizes the allocation of the purchase price to the estimated fair value of the net assets acquired and liabilities assumed.

<i>(in thousands)</i>	
Cash and cash equivalents	\$ 193
Restricted cash	31
Prepaid expenses and other current assets	387
Property and equipment, net	76
Intangible assets	77,090
Total identifiable assets acquired	\$ 77,777
Current liabilities	\$ (2,590)
Loans payable, current	(7,944)
Deferred tax liabilities, noncurrent	(15,418)
Other liabilities, noncurrent	(7)
Net identifiable assets acquired	51,818
Goodwill	15,682
<b>Net assets acquired</b>	<b>\$ 67,500</b>

The acquired identifiable intangible assets consist of in-process research and development ("IPR&D") of approximately \$77.1 million with an indefinite useful life. See, Note 5 for further discussion.

From the Acquisition Date to December 31, 2018, we recorded net loss from the CVie Acquisition of approximately \$0.5 million.



**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

The following table presents unaudited consolidated pro forma results of operations based on our historical financial statements and adjusted for the acquisition of CVie as if it occurred on January 1, 2018. The unaudited pro forma amounts were prepared for comparative purposes only and are not indicative of what actual consolidated results of our operations would have been, nor are they indicative of the consolidated results of operations in the future.

	<b>Year Ended December 31, 2018</b>
<i>(in thousands, except per share data)</i>	
Pro forma net loss attributable to common shareholders	\$ (38,082)
Pro forma EPS - basic and diluted	\$ (3.60)

For the year ended December 31, 2018, net loss excludes the impact of transaction costs related to the CVie Acquisition and the impact of interest expense related to liabilities that were converted into common stock as part of the private placement.

**Note 4 - Liquidity Risks and Management's Plans**

We are subject to risks common to companies in the biotechnology industry, including but not limited to, the need for additional capital, risks of failure of preclinical and clinical studies, the need to obtain marketing approval and reimbursement for any drug product candidate that we may identify and develop, the need to successfully commercialize and gain market acceptance of our product candidates, dependence on key personnel, protection of proprietary technology, compliance with government regulations, development of technological innovations by competitors, reliance on third party manufacturers.

We have incurred net losses since inception. Our net loss was \$27.5 million and \$20.5 million for the years ended December 31, 2019 and 2018 respectively. We expect to continue to incur operating losses for at least the next several years. As of December 31, 2019, we had an accumulated deficit of \$685.1 million. Our future success is dependent on our ability to identify and develop our product candidates, and ultimately upon our ability to attain profitable operations. We have devoted substantially all of our financial resources and efforts to research and development and general and administrative expense to support such research and development. Net losses and negative cash flows have had, and will continue to have, an adverse effect on our stockholders' equity and working capital, and accordingly, our ability to execute our future operating plans.

In the future, we will need to raise additional capital to continue funding our operations. We plan to obtain funding through a combination of public or private equity offerings, or strategic transactions including collaborations, licensing arrangements or other strategic partnerships. There is inherent uncertainty associated with these fundraising activities and, other than the funding recently committed by Lee's Pharmaceutical (HK) Ltd. (Lee's (HK)) as discussed below, they are not considered probable. In the absence of such funding, we plan to strategically manage our uncommitted spend to execute our priorities and implement cost saving measures to reduce research and development expenditures which would include limiting or delaying or terminating preclinical and clinical studies or other development activities for our AEROSURF product candidates.

We recently entered into a binding commitment with Lee's (HK), pursuant to which Lee's HK will provide financing for the development of AEROSURF beginning April 1, 2020 through September 30, 2020. We are in the process of negotiating a definitive agreement with Lee's HK to set forth additional funding beyond September 30, 2020 through study completion. If we are unsuccessful at finalizing a definitive agreement with Lee's HK or if we are successful but Lee's HK subsequently terminates the agreement beyond September 30, 2020, our board of directors has approved a plan to suspend or terminate AEROSURF development until such time as we are able to secure the capital required to fund the program.

Management considers the successful implementation of these plans and efforts to manage uncommitted spending, including AEROSURF development, and to carry out necessary cost saving measures to be probable. Therefore, we expect our plans will enable our cash and cash equivalents as of the filing of our Annual Report on Form 10-K to be sufficient to fund operations through at least the next twelve months.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

Our funding requirements, however, are based on estimates that are subject to risks and uncertainties and may change as a result of many factors currently unknown. Although management continues to pursue the plans described above, there is no assurance that we will be successful in obtaining sufficient funding on terms acceptable to us to fund continuing operations, if at all, including as a result of market volatility following the COVID-19 outbreak. Until such time as we can generate substantial product revenues, if ever, we expect to finance our cash needs through a combination of equity offerings, strategic partnerships and licensing arrangements. The terms of any future financing may adversely affect the holdings or the rights of our existing stockholders.

**Note 5 - Accounting Policies and Recent Accounting Pronouncements****Principles of Consolidation**

The consolidated financial statements are prepared in accordance with accounting principles generally accepted in the US (US GAAP) and include accounts of Windtree Therapeutics, Inc. and its wholly-owned subsidiaries, CVie Investments Limited and its wholly-owned subsidiary, CVie Therapeutics Limited; and a presently inactive subsidiary, Discovery Laboratories, Inc. (formerly known as Acute Therapeutics, Inc.).

**Business Combinations**

We follow the acquisition method for an acquisition of a business where the purchase price is allocated to the assets acquired and liabilities assumed based on their estimated fair values at the dates of acquisition. The excess of the fair value of purchase consideration over the fair value of the assets acquired and liabilities assumed is recorded as goodwill. Such valuations require management to make significant estimates and assumptions, especially with respect to intangible assets. Management's estimate of fair value is based upon assumptions believed to be reasonable, but which are inherently uncertain and unpredictable and as such, actual results may differ materially from estimates.

**Goodwill and Intangible Assets**

We record acquired identified intangibles, which includes intangible assets (such as goodwill and other intangibles), based on estimated fair value. The acquired in-process research and development (IPR&D) assets are considered indefinite-lived intangible assets until completion or abandonment of the associated research and development efforts. IPR&D is not amortized but reviewed for impairment at least annually, or when events or changes in the business environment indicate the carrying value may be impaired. The following table represents identifiable intangible assets as of December 31, 2019 and 2018:

<i>(in thousands)</i>	<u>Carrying Value</u>
Istaroxime drug candidate	\$ 22,340
Rostafuroxin drug candidate	54,750
<b>Total</b>	<b>\$ 77,090</b>

Goodwill represents the excess of the purchase price over the fair value of assets acquired and liabilities assumed in a business combination and is not amortized. It is reviewed for impairment at least annually or when events or changes in the business environment indicate its carrying value may be impaired.

When testing our goodwill and indefinite-lived intangible assets for impairment, we can elect to perform a qualitative assessment to determine if it is more likely than not that the fair values of our reporting unit and indefinite-lived intangible assets are less than the respective carrying values. Such qualitative factors can include, among others, industry and market conditions, overall financial performance, and relevant entity-specific events. If we conclude based on our qualitative assessments that it is more likely than not that the fair value of our reporting unit or indefinite-lived intangible assets are less than their respective carrying values, we perform a quantitative analysis. When conducting our annual impairment test of goodwill and indefinite-lived intangible assets as of December 1, 2019, we elected to perform quantitative assessments.

The Company consists of one reporting unit. In order to perform the quantitative goodwill impairment test, we compare the estimated fair value of our reporting unit to its carrying value. If the fair value exceeds the carrying value, no further evaluation is required, and no impairment exists. If the carrying amount exceeds the fair value, the difference between the carrying value and the fair value is recorded as an impairment loss, the amount of which may not exceed the total amount of goodwill. When performing our annual goodwill impairment assessment as of December 1, 2019, we determined the fair value of our reporting unit based upon the quoted market price and related market capitalization of the Company's common stock, adjusted for an estimated control premium. Based on the quantitative test performed, the fair value of our reporting unit exceeded its carrying value and no impairment loss was recognized.

When performing the quantitative impairment assessment for our indefinite-lived IPR&D intangible assets, we estimate the fair values of the assets using the multi-period excess earnings method ("MPEEM"). MPEEM is a variation of the income approach which estimates the fair value of an intangible asset based on the present value of the incremental after-tax cash flows attributable to the intangible asset. Significant factors considered in the calculation of IPR&D intangible assets include the risks inherent in the development process, including the likelihood of achieving commercial success and the cost and related time to complete the remaining development. Future cash flows for each project were estimated based on forecasted revenue and costs, taking into account the expected product life cycles, market penetration, and growth rates. Other significant estimates and assumptions inherent in this approach include: 1) the amount and timing of the projected net cash flows associated with the IPR&D assets, 2) the long-term growth rate, 3) the discount rate, which seeks to reflect the various risks inherent in the projected cash flows; and 4) the tax rate, which considers geographic diversity of the projected cash flows. While we use the best available information to prepare our cash flows and discount rate assumptions, actual future cash flows could differ significantly based on the commercial success of the related drug candidates and market conditions resulting in future impairment charges related to our indefinite-lived intangible asset balances.

Based on our annual quantitative impairment assessment of our indefinite-lived IPR&D intangible assets on December 1, 2019, we concluded that the assets were not impaired.



## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

### Foreign Currency Transactions

The functional currency for our foreign subsidiaries is US Dollars. We remeasure monetary assets and liabilities that are not denominated in the functional currency at exchange rates in effect at the end of each period. Gains and losses from the remeasurement of foreign currency transactions are recognized in other income (expense). Foreign currency transactions resulted in losses of approximately \$0.5 million and \$0.1 million, respectively, for the years ended December 31, 2019 and 2018.

### Use of Estimates

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

### Cash and Cash Equivalents

Cash and cash equivalents are held at domestic and foreign financial institutions and consist of liquid investments, money market funds, and US Treasury notes with a maturity from date of purchase of 90 days or less that are readily convertible into cash.

### Marketable Securities

Marketable securities consist of investments in US Treasury securities. Management determines the appropriate classification of these securities at the time they are acquired and evaluates the appropriateness of such classifications at each balance sheet date. We classify investments as available-for-sale pursuant to Financial Accounting Standards Board (FASB) Accounting Standard Codification (ASC) 320, *Investments—Debt and Equity Securities*. Investments are recorded at fair value, with unrealized gains and losses included as a component of accumulated other comprehensive loss in stockholders' equity and a component of total comprehensive loss in the consolidated statements of comprehensive loss, until realized. Realized gains and losses are included in other income (expense) on a specific-identification basis. For the year ended December 31, 2019, we recognized \$75,000 in realized gains and our unrealized gains and losses on marketable securities netted to zero. There were no realized or unrealized gains or losses on investments for the year ended December 31, 2018.

We review investments for other-than-temporary impairment whenever the fair value of an investment is less than the amortized cost and evidence indicates that an investment's carrying amount is not recoverable within a reasonable period of time. Other-than-temporary impairments of investments are recognized in the consolidated statements of operations if we have experienced a credit loss, have the intent to sell the investment, or if it is more likely than not that we will be required to sell the investment before recovery of the amortized cost basis. Evidence considered in this assessment includes reasons for the impairment, compliance with our investment policy, the severity and the duration of the impairment and changes in value subsequent to the end of the period.

Available-for-sale marketable securities are classified as marketable securities, current or marketable securities, non-current depending on the contractual maturity date of the individual available-for-sale security.

### Fair Value of Financial Instruments

Our financial instruments consist principally of cash and cash equivalents and restricted cash. The fair values of our cash equivalents are based on quoted market prices. The carrying amount of cash equivalents is equal to their respective fair values at December 31, 2019 and 2018, respectively. We determine the fair value of marketable securities on quoted market prices or other relevant information generated by market transactions involving identical or comparable assets. Accounts payable and accrued expenses are carried at cost, which approximates fair value because of their short maturity. The carrying amount of loans payable (including current installments) approximates fair value based on a comparison of interest rates on the loan to current market rates considering our credit risk.

### Property and Equipment

Property and equipment are recorded at cost and depreciated using the straight-line method over the estimated useful lives of the assets (generally three to ten years). Leasehold improvements are amortized over the shorter of the estimated useful lives or the remaining term of the lease. Repairs and maintenance costs are charged to expense as incurred.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES****Restricted Cash**

Restricted cash consists principally of a \$140,000 certificate of deposit held by our bank as collateral for a letter of credit in the same notional amount held by our landlord to secure our obligations under our Lease Agreement dated May 26, 2004 for our headquarters location in Warrington, Pennsylvania and \$14,000 in deposits held by our landlord for our offices in Taipei, Taiwan, the former headquarters of CVie Therapeutics (*see*, - Note 18 - Commitments, for further discussion on our leases).

**Leases**

Effective January 1, 2019, we adopted ASC Topic 842, *Leases* (ASC 842), using the modified retrospective transition approach and utilizing the effective date as the date of initial application. Consequently, prior period balances and disclosures have not been restated and are presented in accordance with the previous guidance in ASC Topic 840, *Leases*.

At the inception of an arrangement, we determine whether an arrangement is, or contains, a lease based on the unique facts and circumstances present in the arrangement. An arrangement is, or contains, a lease if the arrangement conveys the right to control the use of an identified asset for a period of time in exchange for consideration. Leases with a term greater than one year are generally recognized on the balance sheet as operating lease right-of-use assets and current and non-current operating lease liabilities, as applicable. We elected not to recognize on the balance sheet leases with terms of 12 months or less. We typically only include the initial lease term in our assessment of a lease arrangement. Options to extend a lease are not included in our assessment unless there is reasonable certainty that we will renew.

Operating lease liabilities and their corresponding operating lease right-of-use assets are recorded based on the present value of lease payments over the expected remaining lease term. Certain adjustments to the right-of-use asset may be required for items such as incentives received. The interest rate implicit in our leases is typically not readily determinable. As a result, we utilize our incremental borrowing rate, which reflects the fixed rate at which we could borrow on a collateralized basis the amount of the lease payments in the same currency, for a similar term, in a similar economic environment. In transition to ASC 842, we utilized the remaining lease term of our leases in determining the appropriate incremental borrowing rates.

For contracts entered into on or after the effective date of ASC 842, at the inception of a contract, we assess whether the contract is, or contains, a lease. The assessment is based on: (1) whether the contract involves the use of a distinct identified asset, (2) whether we obtain the right to substantially all the economic benefit from the use of the asset throughout the period, and (3) whether we have the right to direct the use of the asset.

We evaluate the classification of our leases as either finance leases or operating leases. A lease is classified as a finance lease if any one of the following criteria are met: the lease transfers ownership of the asset by the end of the lease term, the lease contains an option to purchase the asset that is reasonably certain to be exercised, the lease term is for a major part of the remaining useful life of the asset, the present value of the lease payments equals or exceeds substantially all of the fair value of the asset, or the leased asset is of such a specialized nature that it is expected to have no alternative use to the lessor at the end of the lease. A lease is classified as an operating lease if it does not meet any of these criteria. Currently, all of our leases are classified as operating leases.

Lease cost for our operating leases is recognized on a straight-line basis over the lease term. Included in lease cost are any variable lease payments incurred in the period that are not included in the initial lease liability and lease payments incurred in the period for any leases with an initial term of 12 months or less.

## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

### Long-lived Assets

Our long-lived assets, primarily consisting of intangible assets, are reviewed for impairment when events or changes in circumstances indicate the carrying amount of an asset may not be recoverable, or its estimated useful life has changed significantly. When the undiscounted cash flows of an asset are less than its carrying value, an impairment is recorded and the asset is written down to estimated value. No impairment was recorded during the years ended December 31, 2019 and 2018 as management believes there are no circumstances that indicate the carrying amount of the assets will not be recoverable.

### Collaborative Arrangements

We account for collaborative arrangements in accordance with applicable accounting guidance provided in ASC Topic 808, *Collaborative Arrangements*. See, - Note 16 - Collaboration, Licensing and Research Funding Agreements.

### Restructured Debt Liability - Contingent Milestone Payment

In conjunction with the November 2017 restructuring and retirement of long-term debt (*see*, - Note 13 - Restructured debt liability), we have established a \$15.0 million long-term liability for contingent milestone payments potentially due under the Exchange and Termination Agreement dated as of October 27, 2017 (Exchange and Termination Agreement), between ourselves and affiliates of Deerfield Management Company L.P. (Deerfield). The liability has been recorded at full value of the contingent milestones and will continue to be carried at full value until the milestones are achieved and paid or milestones are not achieved and the liability is written off as a gain on debt restructuring.

### Deferred Revenue

Deferred revenue represents amounts received prior to satisfying the revenue recognition criteria (*see*, Revenue recognition) and are recognized as deferred revenue in our balance sheet. Amounts expected to be recognized as revenue within the 12 months following the balance sheet date are classified as Deferred revenue - current portion. Amounts not expected to be recognized as revenue within the 12 months following the balance sheet date are classified as Deferred revenue - noncurrent portion.

Deferred revenue primarily consists of amounts related to an upfront license fee received in July 2017 in connection with the License Agreement with Lee's. The revenue was recognized as our performance obligations under the contract were met (*see*, Note 16 - Collaboration and Device Development Payment Restructuring, Licensing and Research Funding Agreements).

### Revenue Recognition

Effective January 1, 2018, we adopted Accounting Standards Codification ("ASC") Topic 606, *Revenue from Contracts with Customers*, using the modified retrospective transition method. Under this method, we recognize the cumulative effect of initially adopting ASC Topic 606, if any, as an adjustment to the opening balance of retained earnings. Additionally, under this method of adoption, we apply the guidance to all incomplete contracts in scope as of the date of initial application. This standard applies to all contracts with customers, except for contracts that are within the scope of other standards, such as leases, insurance, collaboration arrangements and financial instruments.

In accordance with ASC Topic 606, we recognize revenue when the customer obtains control of promised goods or services, in an amount that reflects the consideration which we expect to receive in exchange for those goods or services. To determine revenue recognition for arrangements that we determine are within the scope of ASC Topic 606, we perform the following five steps:

- (i) identify the contract(s) with a customer;

## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

- (ii) identify the performance obligations in the contract;
- (iii) determine the transaction price;
- (iv) allocate the transaction price to the performance obligations in the contract; and
- (v) recognize revenue when (or as) the entity satisfies a performance obligation.

We only apply the five-step model to contracts when we determine that it is probable that we will collect the consideration we are entitled to in exchange for the goods or services we transfer to the customer. At contract inception, once the contract is determined to be within the scope of ASC Topic 606, we assess the goods or services promised within a contract and determine those that are performance obligations, and assesses whether each promised good or service is distinct. We then recognize as revenue the amount of the transaction price that is allocated to the respective performance obligation when (or as) the performance obligation is satisfied.

We have concluded that our government grants are not within the scope of ASC Topic 606 as they do not meet the definition of a contract with a customer. We have concluded that the grants meet the definition of a contribution and are non-reciprocal transactions, and have also concluded that Subtopic 958-605, *Not-for-Profit-Entities-Revenue Recognition* does not apply, as we are a business entity and the grants are with governmental agencies.

In the absence of applicable guidance under US GAAP, effective January 1, 2018, we developed a policy for the recognition of grant revenue when the related costs are incurred and the right to payment is realized.

We believe this policy is consistent with the overarching premise in ASC Topic 606, to ensure that revenue recognition reflects the transfer of promised goods or services to customers in an amount that reflects the consideration that we expect to be entitled to in exchange for those goods or services, even though there is no exchange as defined in ASC Topic 606.

We believe the recognition of revenue as costs are incurred and amounts become realizable is analogous to the concept of transfer of control of a service over time under ASC Topic 606.

### Research and Development

We account for research and development expense by the following categories: (a) product development and manufacturing, (b) medical and regulatory operations, and (c) direct preclinical and clinical development programs. Research and development expense includes personnel, facilities, manufacturing and quality operations, pharmaceutical and device development, research, clinical, regulatory, other preclinical and clinical activities and medical affairs. Research and development costs are charged to operations as incurred in accordance with ASC Topic 730, *Research and Development*.

### Stock-based Compensation

Stock-based compensation is accounted for under the fair value recognition provisions of ASC Topic 718, *Stock Compensation* (ASC Topic 718). See, - Note 15 - Stock Options and Stock-based Employee Compensation, for a detailed description of our recognition of stock-based compensation expense. The fair value of stock option grants is recognized evenly over the vesting period of the options or over the period between the grant date and the time the option becomes non-forfeitable by the employee, whichever is shorter.



## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

### Warrant Accounting

We account for common stock warrants in accordance with applicable accounting guidance provided in ASC Topic 815, *Derivatives and Hedging - Contracts in Entity's Own Equity* (ASC Topic 815), as either derivative liabilities or equity instruments depending on the specific terms of the warrant agreement.

### Income Taxes

We account for income taxes in accordance with ASC Topic 740, *Accounting for Income Taxes*, which requires the recognition of deferred tax liabilities and assets for the expected future tax consequences of temporary differences between financial statement carrying amounts and the tax basis of assets and liabilities.

We use a recognition threshold and measurement attribute for the financial statement recognition and measurement of a tax position taken or expected to be taken in a tax return. Because we have never realized a profit, management has fully reserved the net deferred tax asset since realization is not assured.

### Beneficial Conversion Feature

A beneficial conversion feature arises when a debt or equity security is issued with an embedded conversion option that is beneficial to the investor (or in the money) at inception due to the conversion option having an effective conversion price that is less than the fair value of the underlying stock at the commitment date.

#### *Preferred Stock*

The issuance of Series A Convertible Preferred Stock (Preferred Shares) in the first quarter of 2017 resulted in a beneficial conversion feature. We recognized this feature by allocating the intrinsic value of the beneficial conversion feature, which is the number of shares of common stock available upon conversion multiplied by the difference between the effective conversion price per share and the fair value of common stock per share on the commitment date, to additional paid-in capital, resulting in a discount on the Preferred Shares. As the Preferred Shares are immediately convertible by the holders, the discount allocated to the beneficial conversion feature was immediately accreted and recognized as a \$3.6 million one-time, non-cash deemed dividend to the preferred shareholders during the first quarter of 2017.

An additional discount to the Preferred Shares of \$4.5 million was created due to the allocation of proceeds to the Warrants which were issued with the Preferred Shares. This discount is amortized proportionately as the Preferred Shares are converted. For the year ended December 31, 2018, we recognized a non-cash deemed dividend to the preferred shareholders of \$1.7 million related to the Preferred Shares converted during the period. As of December 31, 2018, there were no Preferred Shares remaining to be converted.

#### *Convertible Note*

The issuance on July 2, 2018 of a Secured Convertible Promissory Note (the Note) to Panacea Venture Management Company Ltd. (Panacea) with respect to a loan facility in the aggregate amount of \$1.5 million resulted in a beneficial conversion feature. We recognized this feature by allocating the relative fair value of the conversion option, which is the number of shares of common stock available upon conversion multiplied by the difference between the effective conversion price per share and the fair value of common stock per share on the commitment date, resulting in a discount on the Note. We recorded the Note as current debt at its face value of \$1.5 million less debt discount consisting of (i) \$0.4 million related to the beneficial conversion feature and (ii) \$0.4 million in fair value of the warrants issued in connection with the Note. The discount was accreted to the \$1.5 million loan over its term using the effective interest method (*see*, Note 11 - Loans Payable - Current Portion and Non-current Portion). On December 27, 2018, we repaid the Note in its entirety in cash of \$1.5 million. As part of the extinguishment of debt, we recorded a gain on extinguishment of debt of approximately \$0.4 million, relating to the reacquisition of the beneficial conversion option. The gain was calculated using the intrinsic value of the beneficial conversion option, which is the product of: (i) the difference between the common stock price on the date of extinguishment of \$15.33 and the conversion price of \$12.00, and (ii) 125,000 shares convertible into common stock.

## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

### Net Loss per Common Share

Basic net loss per share is computed by dividing net loss by the weighted average number of common shares outstanding for the period. Diluted net loss per common share is computed by giving effect to all potentially dilutive securities outstanding for the period. For the years ended December 31, 2019 and 2018, the number of shares of common stock potentially issuable upon the exercise of certain stock options and warrants was 6.5 million and 4.8 million shares, respectively. As of December 31, 2019 and 2018, all potentially dilutive securities were anti-dilutive and therefore have been excluded from the computation of diluted net loss per share.

We do not have any components of other comprehensive income (loss).

### Concentration of Suppliers

We currently obtain the active pharmaceutical ingredients (APIs) of our KL4 surfactant drug products from single-source suppliers. In addition, we rely on a number of third-party institutions and laboratories that perform various studies as well as quality control release and stability testing and other activities related to our KL4 surfactant development and manufacturing activities. At the present time, several of these laboratories are single-source providers. The loss of one or more of our single-source suppliers or testing laboratories could have a material adverse effect upon our operations.

### Segment and Geographic Information

We currently operate in one operating segment, which is the research and development of products focused on acute pulmonary and cardiovascular diseases, and the manufacture and commercial sales of approved products. We are managed and operated as one business. A single management team that reports to the Chief Executive Officer comprehensively manages the entire business. We do not operate separate lines of business with respect to our product candidates. We operate primarily in the US and Asia. License revenue with affiliate and grant revenue for the years ended December 31, 2019 and 2018 are generated in the US. Long-lived assets, consisting of intangible assets and goodwill of \$77.1 million and \$15.7 million, respectively, were located outside the US at December 31, 2019 and 2018.

### Recent Accounting Pronouncements

#### *Recently Adopted Accounting Standards*

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

In February 2016, the FASB issued ASU 2016-02, *Leases* (ASU 2016-02). ASU 2016-02 establishes ASC 842 which amends ASC 840, *Leases*, by introducing a lessee model that requires balance sheet recognition for most leases and the disclosure of key information about leasing arrangements. ASC 842 was subsequently amended during 2018. Leases are classified as finance or operating, with classification affecting the pattern and classification of expense recognition in the income statement. We adopted the new standard using the required modified retrospective approach on January 1, 2019 and used the effective date as its date of initial application. Consequently, financial information is not updated and the disclosures required under the new standard are not provided for dates and periods prior to January 1, 2019. Instead, the requirements of ASC 840 are presented for these prior periods. ASC 842 provides several optional practical expedients in transition. We elected the package of practical expedients which allowed us to not reassess our existing conclusions on lease identification, classification, and initial direct costs. Further, we elected to utilize the short-term lease exemption for all leases with an original term of 12 months or less, for purposes of applying the recognition and measurement requirements of the new standard. We also elected the practical expedient to not separate lease and non-lease components for all our leases. The adoption of this standard resulted in the recognition of operating lease liabilities and related right-of-use assets on our consolidated balance sheets of \$2.2 million and \$2.0 million, respectively, related to our operating leases. The adoption of ASC 842 also resulted in the elimination of deferred rent of approximately \$72,000 and \$139,000 in accrued expenses and other long-term liabilities, respectively, in our consolidated balance sheets. The adoption of the standard did not have a material impact on our consolidated statements of operations and consolidated statements of cash flows. Refer to Note 21 – Leases, for our current lease commitments.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

In January 2017, the FASB issued ASU 2017-04, *Intangibles-Goodwill and Other (Topic 350): Simplifying the Test for Goodwill Impairment*. The new standard simplifies the subsequent measurement of goodwill by eliminating the second step of the goodwill impairment test. This ASU will be applied prospectively and is effective for annual or interim goodwill impairment tests in fiscal years beginning after December 15, 2019 with early adoption permitted. We adopted this guidance on January 1, 2019 and applied it to our annual impairment test, and any interim impairment tests, during the year ending December 31, 2019.

*Recent Accounting Pronouncements*

In August 2018, the FASB issued ASU 2018-13, *Fair Value Measurement (Topic 820): Disclosure Framework—Changes to the Disclosure Requirements for Fair Value Measurement* (ASU 2018-13), which removes, adds and modifies certain disclosure requirements for fair value measurements in Topic 820. Companies will no longer be required to disclose the amount of and reasons for transfers between Level 1 and Level 2 of the fair value hierarchy as well as the valuation processes of Level 3 fair value measurements. However, companies will be required to additionally disclose the changes in unrealized gains and losses included in other comprehensive income for recurring Level 3 fair value measurements and the range and weighted average of assumptions used to develop significant unobservable inputs for Level 3 fair value measurements. ASU 2018-13 is effective for fiscal years, and interim periods within those fiscal years, beginning after December 15, 2019. The amendments relating to additional disclosure requirements will be applied prospectively for only the most recent interim or annual period presented in the initial year of adoption. All other amendments will be applied retrospectively to all periods presented upon their effective date. We are currently evaluating the impact that the adoption of ASU 2018-13 will have on our consolidated financial statements.

In December 2019, the FASB issued ASU 2019-12, *Income Taxes (Topic 740): Simplifying the Accounting for Income Taxes*. ASU 2019-12 simplifies the accounting for income taxes by removing exceptions within the general principles of Topic 740 regarding the calculation of deferred tax liabilities, the incremental approach for intra-period tax allocation, and calculating income taxes in an interim period. In addition, the ASU adds clarifications to the accounting for franchise tax (or similar tax), which is partially based on income, evaluating tax basis of goodwill recognized from a business combination, and reflecting the effect of any enacted changes in tax laws or rates in the annual effective tax rate computation in the interim period that includes the enactment date. The ASU is effective for fiscal years beginning after December 15, 2020 and will be applied either retrospectively or prospectively based upon the applicable amendments. Early adoption is permitted. We are still evaluating the impact this standard will have on our consolidated financial statements and related disclosures, but do not believe there will be a material impact upon adoption.

**Note 6 - License Revenue with Affiliate**

<i>(in thousands)</i>	<b>Year Ended December 31,</b>	
	<b>2019</b>	<b>2018</b>
License revenue with affiliate	<u>\$ 198</u>	<u>\$ 1,023</u>

License revenue with affiliate for the years ended December 31, 2019 and 2018 represents revenue from a License Agreement with Lee's (HK) and constitutes a contract with a customer accounted for in accordance with ASC Topic 606, which we adopted effective January 1, 2018 (*see*, Note 5 - Accounting Policies and Recent Accounting Pronouncements, and Note 16 - Collaboration, Licensing and Research Funding Agreements). There was no impact to License revenue with affiliate previously recognized as a result of the adoption of ASC Topic 606. All revenue related to the License Agreement was recognized as of the second quarter of 2019 and no future material performance obligations are due.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES****Note 7 - Fair Value Measurements**

Fair value is defined as the exchange price that would be received for an asset or paid to transfer a liability in the principal or most advantageous market for the asset or liability in an orderly transaction between market participants on the measurement date.

Valuation techniques used to measure fair value must maximize the use of observable inputs and minimize the use of unobservable inputs. The fair value hierarchy is based on three levels of inputs, of which the first two are considered observable and the last unobservable, as follows:

- Level 1 - Quoted prices in active markets for identical assets and liabilities.
- Level 2 - Inputs other than Level 1 that are observable, either directly or indirectly, such as quoted prices for similar assets or liabilities, quoted prices in markets that are not active, or other inputs that are observable or can be corroborated by observable market data for substantially the full term of the assets or liabilities.
- Level 3 - Unobservable inputs that are supported by little or no market activity and that are significant to the fair value of the assets or liabilities.

*Fair Value on a Recurring Basis*

Assets measured at fair value on a recurring basis are categorized in the table below as of December 31, 2019 and 2018:

<i>(in thousands)</i>	<u>Fair Value</u> <u>December 31,</u> <u>2019</u>	<u>Fair value measurement using</u>		
		<u>Level 1</u>	<u>Level 2</u>	<u>Level 3</u>
<b>Cash equivalents:</b>				
Money market funds	\$ 1,819	\$ 1,819	\$ -	\$ -
U.S. Treasury notes	18,230	18,230	-	-
Total Assets	<u>\$ 20,049</u>	<u>\$ 20,049</u>	<u>\$ -</u>	<u>\$ -</u>
	<u>Fair Value</u> <u>December 31,</u> <u>2018</u>	<u>Fair value measurement using</u>		
<i>(in thousands)</i>		<u>Level 1</u>	<u>Level 2</u>	<u>Level 3</u>
<b>Cash equivalents:</b>				
Money market funds	\$ 103	\$ 103	\$ -	\$ -
U.S. Treasury notes	6,018	6,018	-	-
<b>Available-for-sale marketable securities:</b>				
U.S. Treasury notes	13,959	13,959	-	-
Total Assets	<u>\$ 20,080</u>	<u>\$ 20,080</u>	<u>\$ -</u>	<u>\$ -</u>

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES****Note 8 – Property and Equipment**

Property and equipment is comprised of the following:

<i>(in thousands)</i>	December 31,	
	2019	2018
Manufacturing, laboratory & office equipment	\$ 4,313	\$ 4,359
Furniture & fixtures	390	390
Leasehold improvements	2,469	2,469
Subtotal	7,172	7,218
Accumulated depreciation and amortization	(6,374)	(6,416)
Property and equipment, net	\$ 798	\$ 802

Depreciation expense on property and equipment was \$0.2 million in for each of the years ended December 31, 2019 and 2018.

**Note 9 - Collaboration and Device Development Payable**

Collaboration and device development payable represents amounts due to Battelle under a collaboration agreement related to the development of our phase 3 ADS (see, Note 16 - Collaboration, Licensing and Research Funding Agreements) and a Research and Development Services Agreement (RDSA) dated June 2012 for our prototype phase 2 ADS. As of December 31, 2019 and 2018, collaboration and device development payable was \$2.0 million and \$2.6 million, respectively, including accrued interest.

*Restructuring of the Battelle Payables*

On December 7, 2018, we entered into a payment restructuring agreement with Battelle Memorial Institute (Battelle) in which we agreed to the following: (i) the outstanding amounts owing under the Collaboration Agreement and RDSA (such amounts, the Battelle Payables) will continue to accrue interest at a rate of 6.0% per annum and shall be payable on a monthly basis or any unpaid interest shall be added to the balance of the Battelle Payables, (ii) we and Battelle will continue the development activities relating to AEROSURF under the RDSA, and we will prepay for services to be provided by Battelle until we have repaid \$3.0 million of the Battelle Payables, after which time, services incurred shall be payable upon 30 days of receipt of the invoice, (iii) Battelle participated in the December 2018 Private Placement Financing for \$1.0 million in a debt-equity exchange for a like amount of Battelle Payables (see, Note 14 - Stockholders' Equity), (iv) upon the closing of the Private Placement Financing, we paid Battelle cash in the amount of \$1.0 million and thereafter initiated payments totaling an aggregate \$1.25 million payable in five equal, consecutive monthly installments of \$0.25 million, and (v) increased the royalty cap previously set forth in the collaboration agreement from \$25.0 million to \$35.0 million. In addition, under the terms of the Battelle Payment Restructuring, we agreed to make two milestone payments to Battelle as follows: (i) upon enrollment of the first patient in the next AEROSURF clinical study (First Milestone), an amount equal to one half of the then-outstanding Battelle Payables (including unpaid interest), and (ii) when we complete the device technology transfer for the phase 3 ADS to Mack (Second Milestone), an amount equal to the then-outstanding Battelle Payables, including unpaid interest. If any amounts of the Battelle Payables remained unpaid by December 31, 2019, then all unpaid Battelle Payables would be due on January 7, 2020. Neither milestone was achieved as of December 31, 2019. On March 30, 2020, we and Battelle entered into an amendment to the Battelle Payment Restructuring such that the First Milestone would be payable no later than April 15, 2020 and the Second Milestone would be payable no later than September 1, 2020.

Management determined the payment restructuring agreement of the Battelle Payables does not represent a troubled debt restructuring as Battelle did not grant us a concession. Further, the payment restructuring agreement constitutes a debt modification as the restructured terms do not result in a substantially different instrument.

In connection with the payment restructuring agreement, we also issued to Battelle Series E Warrants (Series E Warrants) to purchase 25,000 shares of common stock, at an exercise price equal to \$19.50 per share (the Exercise Price). The Series E Warrants may be exercised after the date of issuance through the 5-year anniversary of the date of issuance on December 11, 2023. The Series E Warrants may not be exercised to the extent that the holder thereof would, following such exercise or conversion, beneficially own more than 9.99% (or other percent as designated by each holder) of our outstanding shares of common stock. The Series E Warrants contain customary provisions that adjust the Exercise Price and the number of shares of common stock into which the Series E Warrants are exercisable in the event of a corporate transaction.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

The Series E Warrants are derivatives that qualify for an exemption from liability accounting as provided for in ASC Topic 815, Derivatives and Hedging - Contracts in Entity's own Equity, and have been classified as equity. The fair value at issuance of the Series E Warrants was determined using the Black-Scholes option-pricing model. The input assumptions used in the valuation are the historical volatility of our common stock price, the expected term of the warrants, and the risk-free interest rate based on the five-year treasury bill rate in effect at the measurement date.

**Significant Input Assumptions of Warrant Valuation**

Historical volatility	103%
Expected term (in years)	5
Risk-free interest rate	2.70%

As of December 31, 2019, we had accrued interest expense relating to the Battelle Payables of \$0.4 million.

*Extinguishment of Collaboration and Device Development Payable*

On December 21, 2018, as part of the Private Placement Financing, we converted \$1.0 million of existing Battelle Payables on the same terms as the Investors of the Private Placement Financing. In connection with the conversion of the Battelle Payables, we issued: (i) 100,607 shares of common stock based at \$9.9396 per share, (ii) Series F Warrants to purchase 17,103 shares of common stock, at an exercise price equal to \$11.04 per share, and (iii) Series G Warrants to purchase 33,201 shares common stock, at an exercise price equal to \$12.15 per share. The Series F Warrants are exercisable at any time after the date of issuance and through the 18-month anniversary of the date of issuance and the Series G Warrants may be exercised through the 5-year anniversary of the date of issuance.

The conversion of the Battelle Payables is treated as an extinguishment of outstanding liabilities. We recorded a loss on extinguishment of debt of approximately \$0.5 million. The loss was calculated as the difference between: (i) the aggregate fair value of approximately \$1.5 million, based on the fair value of the common stock and Warrants on December 21, 2018 and (ii) the carrying value of the Battelle Payables of \$1.0 million.

**Note 10 - Accrued Expenses**

Accrued expenses are comprised of the following:

<i>(in thousands)</i>	December 31,	
	2019	2018
Research and development	\$ 1,415	2,361
Professional fees	543	\$ 2,473
Salaries, bonus & benefits	696	815
Manufacturing operations	183	212
Other	389	604
Total accrued expenses	<u>\$ 3,226</u>	<u>\$ 6,465</u>

**Note 11 - Loans Payable - Current Portion and Non-current Portion**Loans Payable – Current Portion*2019 Loan*

On October 24, 2019, we entered into a loan agreement with LPH II. Under the loan agreement, LPH II agreed to lend us \$1.0 million, the 2019 Loan, to support our operations while we sought to complete a strategic transaction (as defined in the loan agreement). The 2019 Loan, which was funded in a single installment by wire transfer on October 28, 2019, accrued interest at a rate of 6% per annum and matured upon the closing date of the December 2019 private placement, which qualified as the strategic transaction under terms defined in the loan agreement. We repaid the 2019 Loan and related accrued interest in full upon consummation of the December 2019 Private Placement.



**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES***2018 Loans*

In January 2018 and March 2018, LPH Investments Limited (LPH), an affiliate of Lee's, agreed to lend us \$1.5 million and \$1.0 million, respectively, or the First Quarter 2018 Loans, to support our AEROSURF development activities and sustain our operations while we sought to identify and advance one or more potential strategic initiatives as defined in the related loan agreements, or the Funding Event. The loans accrued interest at a rate of 6% per annum and would mature upon the earlier of the closing date of the Funding Event or December 31, 2018. To secure our obligations under these loans, we granted LPH a security interest in substantially all our assets pursuant to the terms of a security agreement dated March 1, 2018, or the LPH Security Agreement.

During the third and fourth quarters of 2018, LPH agreed to lend us funds, or the Third and Fourth Quarter 2018 Loans, to sustain our operations while we continued to work on a strategic transaction. Of the Third and Fourth Quarter 2018 Loans, the initial loan was funded on August 14, 2018 in the amount of \$0.3 million, and subsequent Third and Fourth Quarter 2018 Loans were funded on the following dates and in the following amounts: August 29, 2018, in the amount of \$0.48 million, September 12, 2018 in the amount of \$0.5 million; September 27, 2018 in the amount of \$0.5 million; October 19, 2018 in the amount of \$0.43 million; November 2, 2018 in the amount of \$0.5 million; November 19, 2018 in the amount of \$0.35 million; and December 5, 2018 in the amount of \$0.6 million. The loans accrued interest at a rate of 6% per annum and matured upon the earlier of (i) the closing date for the strategic transaction (as defined in the related loan agreements), provided that we were able to raise a minimum of \$30 million in connection with such transaction, or (ii) March 31, 2019. In each case, we granted to LPH a security interest in substantially all of our assets pursuant to the terms of the LPH Security Agreement. Effective December 5, 2018, LPH assigned all outstanding loans to us to LPH II.

On December 21, 2018, as part of the December 2018 Private Placement Financing (see, "Private Placement Offerings"), we converted \$6.0 million of existing loan payable obligations comprised of \$2.5 million of the First Quarter 2018 Loans and \$3.5 million of the Third and Fourth Quarter 2018 Loans into equity securities on the same terms as those of the investors in the December 2018 Private Placement Financing. The conversion of the loan payable to LPH II was treated as an extinguishment of debt and does not represent a capital transaction as the December 2018 private placement financing included third-party investors and all investors received identical terms. We recorded a loss on extinguishment of debt approximately \$3.2 million. The loss was calculated as the difference between the aggregate fair value of the common stock and Series F and Series G Warrants on December 21, 2018 and the carrying value of the debt liabilities. The balance of the loans payable to LPH II of \$160,000 was paid along with accrued interest of \$182,000 on December 27, 2018. Following this conversion of the First Quarter 2018 Loans and the conversion and payoff of the Third and Fourth Quarter 2018 Loans into equity securities, the security interest granted under the LPH Security Agreement was discharged.

*Assumption of LPH II debt as part of the CVie Acquisition*

As part of the CVie Acquisition, we assumed approximately \$3.5 million of debt payable to LPH II.

From April 24, 2018 to November 16, 2018, CVie entered into four separate agreements to borrow an aggregate of approximately \$3.5 million from LPH II on the following dates and in the following amounts \$0.5 million in April 2018, or the April 2018 Loan; \$0.3 million in September 2018, or the September 2018 Loan; \$0.15 million in October 2018, or the October 2018 Loan; and \$2.5 million in November 2018, or the November 2018 Loan. The April 2018 Loan, the September 2018 Loan, the October 2018 Loan and the November 2018 Loan were subsequently assigned to LPH II. The terms of the loan agreements are identical with interest, payable in cash upon maturity, at a rate of 4% per annum and maturing one year from the effective date of the respective loan agreement.

During the quarter ended March 31, 2019, we made payments of \$0.45 million against the April 2018 Loan and paid the remaining \$50,000 balance plus accrued interest in April 2019. In December 2019, as part of the December 2019 Private Placement Financing (see, "Private Placement Offerings"), we converted the remaining \$2.95 million related to the September 2018 Loan, October 2018 Loan, and November 2018 Loan on the same terms as the Investors of the December 2019 Private Placement Financing. In connection with the conversion of the LPH II debt, we issued: 325,607 shares of common stock based at \$9.06 per share and Series I Warrants to purchase 162,804 shares of common stock, at an exercise price equal to \$12.09 per share. The Series I Warrants are exercisable at any time after the sixth-month anniversary of the date of issuance and through the 5-year anniversary of the date of issuance. The conversion of the loan payable to LPH II is treated as an extinguishment of debt and does not represent a capital transaction as the December 2019 Private Placement Financing included third-party investors and all investors received identical terms. We recorded a loss on extinguishment of debt of approximately \$1.8 million. The loss was calculated as the difference between the aggregate fair value of the common stock and Series I Warrants on December 6, 2019 and the carrying value of the debt liabilities. The accrued interest of \$127,000 was paid in December 2019 and as of December 31, 2019 there are no remaining amounts outstanding.

## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

### *Loan payable to Bank Direct Capital Finance*

In May 2019, we entered into an insurance premium financing and security agreement with Bank Direct Capital Finance, or Bank Direct. Under the agreement, we have financed \$0.7 million of certain premiums at a 5.35% annual interest rate. As of December 31, 2019, the outstanding principal of the loan was \$0.2 million. The remaining payments were made during the first quarter of 2020.

### Loans Payable – Non-current Portion

#### *Assumption of bank debt as part of the CVie Acquisition*

As part of the CVie Acquisition, we assumed approximately \$4.5 million in a bank credit facility.

In September 2016, CVie entered into a 12-month revolving credit facility of approximately \$2.9 million with O-Bank Co., Ltd., or O-Bank, to finance operating activities, or the O-Bank Facility. The O-Bank Facility was later renewed and increased to approximately \$5.8 million in September 2017. The O-Bank Facility was guaranteed by Lee's, which pledged bank deposits in the amount of 110% of the actual borrowing amount. The guaranty was part of the O-Bank Facility; however, we do not have a written commitment from Lee's to maintain the collateral. Interest, payable in cash on a monthly basis, is determined based on 90-day TAIBOR (the Taipei Interbank Offer Rate) plus 0.91%. The O-Bank Facility expired on September 11, 2019 and the loans were set to mature six months after the expiration date, on March 11, 2020. In March 2020, the O-Bank Facility was amended including the extension of the maturity date to March 2022. In addition to the extension of the maturity date, the total amount of the O-Bank Facility was decreased to approximately \$5.0 million, and the interest rate was changed to the TAIBOR plus 1.17% and the term was changed to 24-month non-revolving. All amounts due under the O-Bank Facility will be payable upon the earlier of (i) six months after the expiration date or (ii) two years after the drawdown date.

As of December 31, 2019, the outstanding principal of the O-Bank Facility was approximately \$4.6 million, and has subsequently been refinanced to mature in March 2022, therefore, the outstanding principal has been classified in Loans Payable - Non-current Portion.

### **Note 12 - Convertible Note Payable**

On July 2, 2018, we issued to Panacea Venture Management Company Ltd. (Panacea) a Secured Convertible Promissory Note (the Note) with respect to a loan facility in the aggregate amount of up to \$1.5 million, which was funded in two loans of, \$1.0 million on the date of the Note and \$0.5 million on July 23, 2018. The Note had a maturity date of December 31, 2018 and accrued interest at a rate of 15% per annum until the Note was paid in full or converted into shares of our common stock at a price per share of \$4.00. In addition, in lieu of converting the Note, Panacea could deliver the Note into a private placement in which Panacea Venture Healthcare Fund I L.P., an affiliate of Panacea, participated. In connection with these loans, we granted to Panacea a security interest in substantially all our assets.

In connection with the Note, we issued to Panacea warrants (the "Series D Warrants") to purchase 62,500 shares (the "Warrant Shares") at an exercise price of \$12.00 per Warrant Share (the "Exercise Price"). The Warrants may be exercised at any time beginning six months after the date of issuance and through the fifth anniversary of the date of issuance. The Warrants may not be exercised to the extent that the holder would, following such exercise, beneficially own more than 9.99% of our outstanding shares of common stock, which percentage may be increased, decreased or waived by such holder upon sixty-one days' notice to us. The Warrants also contain customary provisions that adjust the Exercise Price and the number of Warrant Shares in the event of a corporate transaction.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

We recorded the Note as current debt at its face value of \$1.5 million less debt discounts consisting of (i) \$0.4 million fair value of the warrants issued in connection with the Note and (ii) a \$0.4 million beneficial conversion feature related to an embedded conversion option that had an effective conversion price that was less than the fair value of the underlying stock at the commitment date. The discount was being accreted to the \$1.5 million loan over its term using the effective interest method. The Panacea Warrants were derivatives that qualified for an exemption from liability accounting as provided for in ASC Topic 815, *Derivatives and Hedging - Contracts in Entity's Own Equity*, and have been classified as equity.

The fair value at issuance of the Panacea Warrants was determined using the Black-Scholes option-pricing model. The input assumptions used in the valuation are the historical volatility of our common stock price, the expected term of the warrants, and the risk-free interest rate based on the five-year treasury bill rate in effect at the measurement date.

**Significant Input Assumptions of Warrant Valuation**

Historical volatility	103%
Expected term (in years)	5
Risk-free interest rate	2.75%

*Extinguishment of Panacea Convertible Promissory Note*

On December 27, 2018, we repaid the Note in its entirety in cash of \$1.5 million. As part of the extinguishment of debt, we recorded a gain on extinguishment of debt of approximately \$0.4 million, relating to the reacquisition of the beneficial conversion option. The gain was calculated using the intrinsic value of the beneficial conversion option, which is the product of: (i) the difference between the common stock price on the date of extinguishment of \$15.33 and the conversion price of \$12.00, and (ii) 125,000 shares convertible into common stock.

**Note 13 - Restructured Debt Liability***(in thousands)*

	<b>December 31, 2019</b>	<b>December 31, 2018</b>
Restructured debt liability - contingent milestone payments	\$ 15,000	\$ 15,000

On November 1, 2017, we and Deerfield entered into an Exchange and Termination Agreement pursuant to which (i) promissory notes evidencing a loan with affiliates of Deerfield Management Company L.P. (Deerfield Loan) in the aggregate principal amount of \$25 million and (ii) warrants to purchase up to 8,333 shares of our common stock at an exercise price of \$2,360.40 per share held by Deerfield were cancelled in consideration for (i) a cash payment in the aggregate amount of \$2.5 million, (ii) 23,703 shares of common stock, representing 2% of fully-diluted shares outstanding (as defined in the Exchange and Termination Agreement) on the closing date, and (iii) the right to receive certain milestone payments based on achievement of specified AEROSURF development and commercial milestones, which, if achieved, could potentially total up to \$15.0 million. In addition, a related security agreement, pursuant to which Deerfield held a security interest in substantially all of our assets, was terminated. We established a \$15.0 million long-term liability for the contingent milestone payments potentially due to Deerfield under the Exchange and Termination Agreement (*see*, Note 5 - Accounting Policies and Recent Accounting Pronouncements). The liability has been recorded at full value of the contingent milestones and will continue to be carried at full value until the milestones are achieved and paid or milestones are not achieved and the liability is written off as a gain on debt restructuring.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES****Note 14 - Stockholders' Equity****Private Placement Offerings***December 2019 Private Placement Financing*

On December 6, 2019 we completed the December 2019 Private Placement Financing with select institutional investors, in which we issued and sold an aggregate of 2,916,666 shares of common stock at a price per share of \$9.06, for an aggregate purchase price of approximately \$26.4 million. Included in the purchase price, LPH II converted \$2.95 million of existing debt obligations on the same terms as the other select institutional investors. In connection with this offering, we issued warrants, or the Series I Warrants, to purchase up to an aggregate of 1,458,333 shares of common stock at an exercise price equal to \$12.09 per share, which are exercisable on the six-month anniversary of date of issuance and through the five-year anniversary of the date of issuance. The Series I Warrants (i) may be exercised for cash or on a cashless basis if there is no effective registration statement registering the resale of the warrant shares, (ii) may not be exercised to the extent that following such exercise, the holder would beneficially own more than 4.99% (or such other percent as designated by each holder not to exceed 19.99%) of our outstanding shares of common stock, and (iii) contain customary provisions that adjust the exercise price and the number of shares of common stock into which the Series I Warrants are exercisable in the event of a corporate transaction. Our Registration Statement on Form S-1, filed with the SEC on January 21, 2020, registered the 2,916,666 shares of common stock sold and 1,458,333 shares of common stock underlying the Series I Warrants.

*December 2018 Private Placement Financing*

On December 21, 2018, we completed a private placement offering with select institutional investors for the purchase of an aggregate of 3,928,513 shares of common stock at a price per share of \$9.9396, for an aggregate purchase price of approximately \$39.0 million, or the 2018 Private Placement Financing. Included in the purchase price, each of LPH II, an affiliate of Lee's, and Battelle converted \$6.0 million and \$1.0 million, respectively, of existing debt obligations on the same terms as the other select institutional investors. In connection with this offering, we issued (i) Series F Warrants to purchase an aggregate of 667,847 shares of common stock at an exercise price equal to \$11.04 per share, which are exercisable through the 18-month anniversary of the date of issuance, or the Series F Warrants, and (ii) Series G Warrants to purchase an aggregate of 1,296,410 shares of common stock at an exercise price equal to \$12.15 per share, which are exercisable through the 5-year anniversary of the date of issuance, or the Series G Warrants and, together with the Series F Warrants, the December 2018 Warrants. The December 2018 Warrants (i) may not be exercised to the extent that following such exercise, the holder would beneficially own more than 9.99% (or other percent as designated by each holder) of our outstanding shares of common stock, and (ii) contain customary provisions that adjust the exercise price and the number of shares of common stock into which the December 2018 Warrants are exercisable in the event of a corporate transaction.

*April 2018 Private Placement Financing*

In April 2018, we completed a private placement with LPH II for the purchase of \$2.6 million of our common stock and warrants to purchase our common stock at a purchase price per share of \$14.40. In connection with this offering, we issued 180,555 shares of common stock and warrants to purchase 45,139 shares of common stock at an exercise price of \$16.56 per share. The warrants are exercisable after 6 months and through the seventh anniversary of the issue date.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES****Common Shares Reserved for Future Issuance**

*Common shares reserved for potential future issuance upon exercise of warrants*

The chart below summarizes shares of our common stock reserved for future issuance upon the exercise of warrants:

<i>(in thousands, except price per share data)</i>	<b>December 31,</b>		<b>Exercise Price</b>	<b>Expiration Date</b>
	<b>2019</b>	<b>2018</b>		
Investors - December 2019 financing	1,458	-	\$ 12.09	12/06/24
Investors - AEROSURF	988	988	\$ -	02/14/24
Investors - December 2018 financing - long-term	1,296	1,296	\$ 12.15	12/04/23
Investors - December 2018 financing - short-term	668	668	\$ 11.04	06/24/20
Battelle - 2018 payables restructuring agreement (1)	25	25	\$ 19.50	12/07/23
Panacea Venture Management Company Ltd.	63	63	\$ 12.00	07/02/23
LPH II Investments Limited	45	45	\$ 16.56	04/04/25
Investors - February 2017 financing	117	117	\$ 82.20	02/15/24
Investors - July 2015 financing	80	80	\$ 588.00	07/22/22
Battelle - 2014 collaboration agreement	1	1	\$ 4,200.00	10/10/24
<b>Total</b>	<b>4,741</b>	<b>3,283</b>		

(1) See, - Note 16 - Collaboration, Licensing and Research Funding Agreements, for further details on the Battelle collaboration agreement.

*Common shares reserved for potential future issuance upon exercise of stock options or granting of additional equity incentive awards*

On December 24, 2018, the Compensation Committee of our Board of Directors approved an increase in the number of shares available for issuance under the Plan by approximately 1.4 million shares, which increase was also approved by an action by written consent without a meeting of holders of a majority of our outstanding shares of common stock.

As of December 31, 2019 and 2018, we had 0.1 million and 0.5 million shares, respectively, available for potential future issuance under the 2011 Plan.

**Note 15 - Stock Options and Stock-based Employee Compensation****Long-Term Incentive Plans**

We have the 2011 Plan that provides for the grant of long-term equity and cash incentive compensation awards and replaced a 2007 Long-Term Incentive Plan.

There are 2.0 million shares of our common stock authorized under the 2011 Plan, of which 0.1 million shares remain available for issuance. Awards under the Plan may include stock options, stock appreciation rights (SARs), restricted stock awards (RSAs), restricted stock units, other performance and stock-based awards, and dividend equivalents.

An administrative committee (the Committee - currently the Compensation Committee of the Board of Directors) or Committee delegates may determine the types, the number of shares covered by, and the terms and conditions of, such awards. Eligible participants may include any of our employees, directors, advisors or consultants.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

Stock options and restricted stock units (RSUs) outstanding and available for future issuance are as follows:

<i>(in thousands)</i>	<b>December 31,</b>	
	<b>2019</b>	<b>2018</b>
<b>Stock Options and RSUs Outstanding</b>		
2011 Plan	1,804	1,519
Non-Plan	3	3
<b>Total Outstanding</b>	<b>1,807</b>	<b>1,522</b>
Available for Future Grants under 2011 Plan	149	484

No SARs, RSAs, other performance and stock-based awards, or dividend equivalents have been granted under the 2011 Plan. Although individual grants may vary, option awards generally are exercisable upon vesting, vest in a series of three successive, equal installments beginning with the first anniversary of the grant date, and have a 10-year term. Non-Plan stock options outstanding are in connection with the hiring of our Chief Executive Officer, Mr. Fraser, on February 1, 2016. Mr. Fraser was awarded an inducement grant in accordance with Nasdaq Listing Rule 5635(c)(4) and this inducement grant vested in a series of three successive, equal installments beginning with the first anniversary of the grant date, and has a 10-year term.

A summary of activity under our long-term incentive plans is presented below:

<i>(in thousands, except for weighted-average data)</i>	<b>Shares</b>	<b>Weighted-Average Exercise Price</b>	<b>Weighted-Average Remaining Contractual Term (In Yrs)</b>
<b>Stock Options</b>			
Outstanding at January 1, 2019	1,472	\$ 20.19	
Granted	382	9.99	
Forfeited or expired	(82)	40.74	
Outstanding at December 31, 2019	<u>1,772</u>	\$ 17.61	9.0
Vested and exercisable at December 31, 2019	<u>521</u>	\$ 29.34	8.9
Vested and expected to vest at December 31, 2019	<u>1,692</u>	\$ 17.55	9.0

*(in thousands, except for weighted-average data)*

<b>Restricted Stock Units</b>	<b>Shares</b>	<b>Weighted-Average Grant Date Fair Value</b>
Unvested at January 1, 2019	50	\$ 12.87
Awarded	83	11.85
Cancelled	(48)	12.99
Vested	(50)	12.87
Unvested at December 31, 2019	<u>35</u>	\$ 11.85

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

Based upon application of the Black-Scholes option-pricing formula described below, the weighted-average grant-date fair value of options granted during the years ended December 31, 2019 and 2018 was \$10.02 and \$10.17, respectively. The weighted-average grant-date fair value of RSUs granted during the years ended December 31, 2019 and 2018 was \$11.85 and \$12.66, respectively. The total intrinsic value of options outstanding, vested, and exercisable as of December 31, 2019 are each \$0.

**Stock-Based Compensation**

We recognized stock-based compensation expense in accordance with ASC Topic 718 of \$6.7 million and \$1.0 million, respectively, for each of the years ended December 31, 2019 and 2018.

Stock-based compensation expense was classified as follows:

	<b>Year Ended December 31,</b>	
	<b>2019</b>	<b>2018</b>
<i>(in thousands)</i>		
Research and development	\$ 1,932	\$ 232
Selling, general and administrative	4,789	723
Total	<u>\$ 6,721</u>	<u>\$ 955</u>

The fair value of each option award is estimated on the date of grant using the Black-Scholes option-pricing formula that uses assumptions noted in the following table. Expected volatilities are based upon the historical volatility of our common stock and other factors. We also use historical data and other factors to estimate option exercises, employee terminations and forfeiture rates. The risk-free interest rates are based upon the US Treasury yield curve in effect at the time of the grant.

	<b>Year Ended December 31,</b>	
	<b>2019</b>	<b>2018</b>
Weighted average expected volatility	95%	93%
Weighted average expected term (years)	6.6	7.0
Weighted average risk-free interest rate	2.6%	2.7%
Expected dividends	-	-

The total fair value of the underlying shares of the options vested during 2019 and 2018 equals \$5.6 million and \$0.6 million, respectively. As of December 31, 2019, there was \$10.7 million of total unrecognized compensation cost related to non-vested share-based compensation arrangements granted under the 2011 Plan. That cost is expected to be recognized over a weighted-average vesting period of 1.9 years.

**Note 16 - Collaboration, Licensing and Research Funding Agreements****Collaboration Agreement***Battelle Memorial Institute*

In October 2014, we entered into a Collaboration Agreement with Battelle Memorial Institute (Battelle) for the development of our phase 3 ADS. We had previously worked with Battelle, which has expertise in developing and integrating aerosol devices using innovative and advanced technologies, in connection with development of our prototype phase 2 ADS used in the AEROSURF phase 2b clinical trial. Under the Collaboration Agreement, we and Battelle shared the costs of development for a three-stage development plan that included (i) defining the requirements and a detailed project plan for a phase 3 ADS, (ii) executing the project plan, and (iii) completing required testing, verification and documentation, putting us in a position to manufacture a phase 3 ADS for use in the remaining AEROSURF development activities and, if approved, the initial commercial activities. We retained final decision-making authority over all matters related to the design, registration, manufacture, packaging, marketing, distribution and sale of the phase 3 ADS. We and Battelle shared equally the costs of the first stage and the planned costs of the remaining two stages. Battelle agreed to bear the cost of any cost overruns associated with the project plan and we agreed to bear the cost of any increase in cost resulting from changes in the scope of the product requirements. We also agreed that, if Battelle successfully completed the project plan in a timely manner, we would pay Battelle royalties equal to a low single-digit percentage of the worldwide net sales and license royalties on sales of AEROSURF for the treatment of RDS in premature infants, up to an initial aggregate limit of \$25 million, which under the Battelle Payment Restructuring (discussed below) was increased to \$35 million. The Collaboration Agreement will end at the time we fulfill our payment obligations to Battelle, unless sooner terminated by a party as provided therein.



## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

In December 2018, we and Battelle entered into a Payment Restructuring Agreement which was subsequently amended in March 2020. See, Note 9 - Collaboration and Device Development Payable.

### Licensing and Research Funding Agreements

#### *Lee's Pharmaceutical (HK) Ltd.*

In June 2017, we entered into a License, Development and Commercialization Agreement (License Agreement) with Lee's Pharmaceutical (HK) Ltd., a company organized under the laws of Hong Kong (Lee's (HK)) and an affiliate of Lee's. Under the License Agreement, we granted to Lee's (HK) an exclusive license with a right to sublicense (i) to develop and commercialize our KL4 surfactant products, including SURFAXIN, which was approved by the FDA in 2012 for respiratory distress syndrome (RDS) in premature infants, SURFAXIN LS™, the lyophilized dosage form of SURFAXIN, and AEROSURE, and (ii) to register and manufacture SURFAXIN and SURFAXIN LS for use in the licensed territory, which includes the People's Republic of China ("PRC"), Hong Kong, Thailand, Taiwan and 12 other countries. In addition, we granted Lee's (HK) options to potentially add Japan to the Licensed Territory, which was made effective in an August 2017 amendment (License Amendment, discussed below) and to manufacture our ADS in the licensed territory, in each case subject to conditions set forth in the License Agreement.

Under the License Agreement, Lee's made an upfront payment to us of \$1 million. We also may receive up to \$37.5 million in potential clinical, regulatory and commercial milestone payments and will share in any sublicense income Lee's may receive at a rate equal to low double digits. In addition, Lee's will be responsible for all costs and expenses in and for the Licensed Territory related to development activities, including a planned AEROSURE phase 3 clinical trial, regulatory activities, and commercialization activities.

In August 2017, we entered into a Loan Agreement, pursuant to which Lee's (HK) agreed to lend us up to \$3.9 million to support our activities through October 31, 2017, while we and Lee's worked to complete a \$10 million securities purchase agreement (Lee's SPA) pursuant to which Lee's acquired a controlling interest in our common stock on November 1, 2017. In connection with Lee's SPA, we amended the License Agreement to expand certain of Lee's (HK) rights, including by immediately adding Japan to the licensed territory, accelerating the right to manufacture the ADS in and for the licensed territory, reducing or eliminating certain of the milestone and royalty payments and adding an affiliate of Lee's (HK) as a party to the License Agreement. As a result, the additional amounts for potential clinical, regulatory and commercial milestone were reduced to \$35.8 million.

We will be eligible to receive tiered royalties based on a percent of Net Sales, depending on the product, in the range of high single to low-to-mid double-digit percentages. Royalties are payable on a country-by-country basis until the latest of (A) the expiration of the last valid patent claim covering the product in the country of sale, (B) the expiration or revocation of any applicable regulatory exclusivity in the country of sale, and (C) ten (10) years after the first commercial sale in the country of sale. Thereafter, in consideration of licensed rights other than patent rights, royalties shall continue for the commercial life of each product and, for the initial three years, shall be in the range of low-to-mid single digits. In addition, in the event that one or more generic products are introduced, the royalty rates will be reduced, subject to certain minimums if we are subject to continuing obligations at the time to pay royalties under our in-license agreements.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

Under the License Agreement, Lee's will be responsible for all activities related to development, regulatory approval and commercialization of KL4 surfactant and combination drug / device products in the Licensed Territory. Lee's will hold the product licenses for all non-aerosolized products in the Licensed Territory and will seek regulatory approval initially for SURFAXIN and SURFAXIN LS for RDS. We will hold the product license in the Licensed Territory (except where prohibited by law) for all aerosolized products and will designate Lee's its exclusive agent and representative to develop and register AEROSURF and other aerosolized products in our name and on our behalf. Lee's also has agreed that, except as provided in the License Agreement, for a period of ten (10) years beginning with the later of the first commercial sale of the first aerosolized product and the first commercial sale of the first non-aerosolized product in the PRC, it will not develop, register, manufacture, or commercialize any product for the prevention and/or treatment of RDS in premature infants or other diseases and conditions in humans, in either case that administers, utilizes or contains pulmonary surfactant without our prior written consent.

*Accounting Analysis under ASC 606*

In evaluating the License Agreement in accordance with ASC Topic 606, we concluded that the contract counterparty, Lee's (HK), is a customer. We identified the following performance obligations: (i) a bundled performance obligation consisting of licensing rights to develop and commercialize our KL4 surfactant products and a technology transfer process for the manufacture of SURFAXIN and SURFAXIN LS; and (ii) a technology transfer process for the manufacture of our ADS. We determined that participation in the Joint Steering Committee (and other committees under its authority) and our ongoing product development, regulatory, and commercialization activities under the License Agreement were deemed immaterial in the context of the contract. Consistent with the guidance under ASC 606-10-25-16A, we disregarded immaterial promised goods and services when determining performance obligations.

We concluded that the licensing rights were not distinct within the context of the contract (i.e. separately identifiable) because the licensing rights do not have stand-alone value from other promised goods and services as Lee's (HK) could not benefit from the licensing rights without the completion of the technology transfer process for the manufacture of SURFAXIN and SURFAXIN LS. The ADS manufacturing right and the technology transfer process for the manufacture of our ADS are distinct within the context of the contract because each has stand-alone value from other promised goods and services as Lee's (HK) could benefit from each of these rights on a stand-alone basis. However, we determined that the ADS manufacturing right and the ADS technology transfer process have nominal stand-alone selling prices as the ADS is not yet verified and there is uncertainty with regard to the commercial value of the ADS given that the AEROSURF combination drug/device product is currently in clinical development.

With respect to Amendment No. 1, we elected to use the practical expedient for contract modifications that occur prior to the adoption of ASU 2014-09, and we determined that the impact was immaterial. Allocable arrangement consideration under the practical expedient comprised the upfront payment of \$1.0 million and \$0.3 million related to reductions in royalties and milestones in connection with Amendment No. 1. The \$1.3 million was attributed in its entirety to the bundled performance obligation of licensing rights to develop and commercialize our KL4 surfactant products and a technology transfer process for the manufacture of SURFAXIN and SURFAXIN LS. Revenue associated with the bundled performance obligation was recognized beginning in November 2017 with the initiation of the technology transfer process for the manufacture of SURFAXIN and SURFAXIN LS and was recognized over time as services are performed and based on the input method related to the level of effort expended. All revenue related to the License Agreement was recognized as of the second quarter of 2019 and no future material performance obligations are due.

Regulatory and commercialization milestones were excluded from the transaction price, as all milestone amounts were fully constrained under the guidance. As part of our evaluation of the constraint, we considered a number of factors in determining whether there is significant uncertainty associated with the future events that would result in the milestone payments. Those factors include: our financial position; ongoing delays in our development activities and with initiating our phase 3 clinical trial; our limited experience with successful drug development; our limited experience with clinical trials; our recent failure to achieve primary endpoints in our phase 2b clinical trial; our limited experience with commercialization; our decision in 2015 to cease manufacturing and commercializing of SURFAXIN; and the fact that the uncertainty about the related consideration is not expected to be resolved for a long period of time (*see*, Item 1A - Risk Factors).

## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

Consideration related to sales-based milestones and royalties will be recognized when the related sales occur, provided that the reported sales are reliably measurable and that we have no remaining performance obligations, as such sales were determined to relate predominantly to the license granted to Lee's (HK) and therefore have also been excluded from the transaction price. We will re-evaluate the transaction price in each reporting period and as uncertain events are resolved or other changes in circumstances occur.

### *Philip Morris USA Inc. and Philip Morris Products S.A.*

Under license agreements with Philip Morris USA Inc. (PMUSA) and Philip Morris Products S.A. (PMPSA), we hold exclusive worldwide licenses to the ADS technology for use with pulmonary surfactants (alone or in combination with any other pharmaceutical compound(s)) for all respiratory diseases and conditions (the foregoing uses in each territory, the Exclusive Field), and an exclusive license in the US for use with certain non-surfactant drugs to treat a wide range of pediatric and adult respiratory indications in hospitals and other health care institutions. We generally are obligated to pay royalties at a rate equal to a low single-digit percent of sales of products sold in the Exclusive Field (as defined in the license agreements) in the territories, including sales of aerosol devices that are not based on the capillary aerosolization technology (unless we exercise our right to terminate the license with respect to a specific indication). We also agreed to pay minimum royalties quarterly beginning in 2014 but are entitled to a reduction of future royalties in an amount equal to the excess of any minimum royalty paid over royalties actually earned in prior periods. For 2018 and 2019, we paid the minimum royalty of \$400,000 to each of PMUSA and to PMPSA.

### *Johnson & Johnson and Ortho Pharmaceutical Corporation*

We, Johnson & Johnson (J&J) and its wholly-owned subsidiary, Ortho Pharmaceutical Corporation, are parties to a license agreement granting to us an exclusive worldwide license to the J&J proprietary KL4 surfactant technology. Under the license agreement, we are obligated to pay fees of up to \$2.5 million in the aggregate upon our achievement of certain milestones, primarily upon receipt of marketing regulatory approvals for certain designated products. We have paid \$1.0 million to date for milestones that have been achieved including a \$0.5 million milestone payment in 2012 that became due as a result of the FDA's approval of SURFAXIN. In addition, we are required to make royalty payments at different rates, depending upon type of revenue and country, in amounts in the range of a high single-digit percent of net sales (as defined in the license agreement) of licensed products sold by us or sublicensees, or, if greater, a percentage of royalty income from sublicensees in the low double digits.

### *Laboratorios del Dr. Esteve, S.A.*

We have a strategic alliance with Laboratorios del Dr. Esteve, S.A. (Esteve) for the development, marketing and sales of a broad portfolio of potential KL4 surfactant products in Andorra, Greece, Italy, Portugal, and Spain. Antonio Esteve, Ph.D., a principal of Esteve, served as a member of our Board of Directors from May 2002 until January 2013. Esteve will pay us a transfer price on sales of our KL4 surfactant products. We will be responsible for the manufacture and supply of all of the covered products and Esteve will be responsible for all sales and marketing in the territory. Esteve is obligated to make stipulated cash payments to us upon our achievement of certain milestones, primarily upon receipt of marketing regulatory approvals for the covered products. In addition, Esteve has agreed to contribute to phase 3 clinical trials for the covered products by conducting and funding development performed in the territory. As part of a 2004 restructuring in which Esteve returned certain rights to us in certain territories (Former Esteve Territories), we agreed to pay Esteve 10% of any cash up front and milestone fees (up to a maximum aggregate of \$20 million) that we receive in connection with any strategic collaborations for the development and/or commercialization of certain of our KL4 surfactant products in the Former Esteve Territories.

### *Universita degli Studi di Milano-Bicocca*

Effective April 13, 2015, CVie Therapeutics, entered into an Agreement for Scientific Collaboration with the Universita degli Studi di Milano-Bicocca (Bicocca) in Milan, Italy, focused on defining the role of sarco (endo) plasmic reticulum Ca<sup>2+</sup> -ATPase 2a (SERCA2a) and phospholamban (PLN) in modulating cardiac contraction, and discovering new small molecules to modulate SERCA2a activity or new drugs for treating chronic and acute human heart failure. The term of the collaboration agreement would have expired after three years but was extended for approximately an additional year, with option for further renewal. We are currently in discussions potentially to extend this agreement, although there can be no assurance that we will be able to achieve an extension on acceptable terms, if at all.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

Under the collaboration agreement, intellectual property resulting from the collaboration, including patents and know-how, will be jointly owned by the parties. For the development of any new SERCA2a compounds and diagnostic products suitable for further clinical development, we have the option to purchase Bicocca's interest for up to 12 months after the filing of a patent application. If the option is not exercised, then the parties shall remain joint owners and each can use the intellectual property with consent of the other on terms to be defined. If we exercise an option, we have agreed to pay Bicocca (corresponding to stage of development): (i) € 0.1 million (approximately \$0.1 million) upon completion and the proof of concept of biological efficacy for new compounds modulating the SERCA2a activity caused by PLN mutations; and (ii) € 1.5 million (approximately \$1.7 million) upon obtaining marketing authorization in the US, EU, or China of new compounds with the corresponding companion diagnostic assay. We have also agreed to pay royalties for any purchased intellectual property arising out of the collaboration in the range of a low- to mid-single digit percent of net sales for any products sold in any country for a period of ten years from the date of the first commercial sale.

Also, under the collaboration agreement, we have provided funds aggregating € 0.2 million (approximately \$0.2 million) to date to upgrade equipment and pay laboratory expenses for the renewal term expiring in 2019. We also funded several related research contracts for the period covered by the collaboration agreement. In connection with our research activities, Bicocca agreed to provide us exclusive use of a research laboratory for the collaboration, and nonexclusive access to a physiology laboratory within the university. Bicocca serves as our primary location in Milan.

**Note 17 - Related Party Transactions***Lee's Pharmaceutical Holdings Limited*

As of December 31, 2019 and 2018, Lee's beneficial ownership of our issued and outstanding shares of common stock was 35% and 40%, respectively.

We entered into the following transactions with Lee's during 2018 and 2019:

- During 2018, we entered into multiple loan agreements with an affiliate of Lee's (see, Note 11 - Loans Payable - Current Portion and Non-current Portion);
- In April 2018, we completed a \$2.6 million private placement with an affiliate of Lee's (see, Note 14 - Stockholders Equity);
- In conjunction with the CVie Acquisition in December 2018, we issued shares of common stock to Lee's as a 49% shareholder in CVie Investments and entered into an indemnification letter agreement with Lee's (see, Note 3 - Business Combination);
- In December 2018, as part of the Private Placement Financing, we converted \$6.0 million of existing loan payable obligations to the Lee's affiliate on the same economic terms as those of the other investors (see, Note 11 - Loans Payable - Current Portion and Non-current Portion);
- In October 2019, we entered into a loan agreement with an affiliate of Lee's (see, Note 11 - Loans Payable - Current Portion and Non-current Portion);
- In December 2019, an affiliate of Lee's was an investor in the Private Placement Financing (see, Note 14 - Stockholders Equity);
- In December 2019, as part of the Private Placement Financing, we converted \$2.95 million of existing loan payable obligations to the Lee's affiliate on the same economic terms as those of the other investors (see, Note 11 - Loans Payable - Current Portion and Non-current Portion);
- Our \$4.6 million bank credit facility is guaranteed by Lee's (see, Note 11 - Loans Payable - Current Portion and Non-current Portion); and
- As of December 31, 2018 and 2019, we had approximately \$0.5 million in accounts payable due to Lee's for services provided by a Lee's affiliate to our wholly-owned subsidiary, CVie Therapeutics; and, as of December 31, 2019 we had \$0.8 million due from Lee's for purchases of KL4 surfactant raw materials that we purchased from our supplier on behalf of Lee's.

## WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES

### *Panacea Venture and KPCB-China*

Mr. James Huang, who in connection with the CVie Acquisition in December 2018 was appointed as a director and Chairman of our Board, is a founding and Managing Partner to Panacea Venture (Panacea) and, since 2011, has served as a Managing Partner of Kleiner Perkins Caufield & Byers (KPCB) - China. During 2018 and 2019 we entered into the following transactions with Panacea and KPCB:

- In July 2018, we issued a \$1.5 million secured convertible promissory note (Note) to an affiliate of Panacea. The Note was paid in full in December 2018 (*see*, Note 12 - Convertible Note Payable);
- In December 2018, we issued 38,138 shares of our common stock to Rui Jin (HK) Consulting Management Company Limited, an affiliate of Panacea, for services rendered before Panacea and Mr. Huang became related parties to us;
- In December 2018, in conjunction with the CVie Acquisition, we issued shares of common stock to an investment fund managed by KPCB that was a 27% shareholder in CVie (*see*, Note 3 - Business Combination). Mr. Huang disclaims any beneficial interest in this KPCB investment fund;
- In December 2018 and December 2019, Panacea was an investor in a Private Placement Financing (*see*, Note 14 - Stockholders Equity); and
- In December 2019, we issued 32,143 shares of our common stock to Rui Jin (HK) Consulting Management Company Limited, an affiliate of Panacea, for services rendered.

As of December 31, 2019, Panacea and KPCB beneficially owned 15% and 11%, respectively, of our issued and outstanding shares of common stock. As of December 31, 2018, Panacea and KPCB each beneficially owned 14% of our issued and outstanding shares of common stock.

### **Note 18 - Commitments**

We have no commitments other than the minimum lease payments commitment as disclosed in Note 21, Leases.

### **Note 19 - Litigation**

We are not aware of any pending or threatened legal actions that would, if determined adversely to us, have a material adverse effect on our business and operations.

We have from time to time been involved in disputes and proceedings arising in the ordinary course of business, including in connection with the conduct of our clinical trials. In addition, as a public company, we are also potentially susceptible to litigation, such as claims asserting violations of securities laws. Any such claims, with or without merit, if not resolved, could be time-consuming and result in costly litigation. There can be no assurance that an adverse result in any future proceeding would not have a potentially material adverse effect on our business, results of operations and financial condition.

### **Note 20 - Income Taxes**

Since our inception, we have never recorded a provision or benefit for federal and state income taxes.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

The reconciliation of the income tax benefit computed at the federal statutory rates to our recorded tax benefit for the years ended December 31, 2019 and 2018 is as follows:

<i>(in thousands)</i>	<b>December 31,</b>	
	<b>2019</b>	<b>2018</b>
Income tax benefit, statutory rates	\$ (5,770)	\$ (4,312)
State taxes on income, net of federal benefit	(1,182)	(535)
Impact of tax reform	-	5
Research and development tax credit	(934)	(351)
Foreign rate differential	22	24
Employee related and other	1,983	2,875
Interest related	79	186
Income tax expense / (benefit), statutory rates	(5,802)	(2,108)
Valuation allowance	5,802	2,108
Income tax benefit, net	<u>\$ -</u>	<u>\$ -</u>

The tax effects of temporary differences that give rise to deferred tax assets and deferred tax liabilities, at December 31, 2019 and 2018, are as follows:

<i>(in thousands)</i>	<b>December 31,</b>	
	<b>2019</b>	<b>2018</b>
<b>Long-term deferred assets:</b>		
Net operating loss carryforwards (federal and state)	\$ 180,979	\$ 176,759
Research and development tax credit	17,599	16,718
Compensation expense on stock	2,142	1,121
Charitable contribution carryforward	-	-
Other accrued	934	1,016
Deferred revenue	-	57
Depreciation	128	309
Total long-term deferred tax assets	<u>201,782</u>	<u>195,980</u>
<b>Long-term deferred liabilities:</b>		
IPRD	(15,419)	(15,476)
Total long-term deferred tax liabilities	<u>(15,419)</u>	<u>(15,476)</u>
Valuation allowance	(201,782)	(195,980)
Deferred tax liabilities, net	<u>\$ (15,419)</u>	<u>\$ (15,476)</u>

We are in a net deferred tax liability position at December 31, 2019 and 2018. Because we have never realized a profit, management has fully reserved the net deferred tax asset since realization is not assured. It is our policy to classify interest and penalties recognized on uncertain tax positions as a component of income tax expense. There was neither interest nor penalties accrued as of December 31, 2019 or 2018, nor were any incurred in 2019 or 2018.

At December 31, 2019 and 2018, we had available carryforward net operating losses for federal tax purposes of \$618.9 million and \$606.6 million, respectively, research and development tax credit carryforward of \$16.9 million and \$16.7 million, respectively and orphan drug tax credit carryforwards of \$0.1 million. Of the of \$618.9 million of federal net operating loss carryforwards, \$35.9 million can be carried forward indefinitely. The remaining Federal net operating loss, research and development tax credit carryforwards and orphan drug credit carryforward will continue to expire through 2038.

At December 31, 2019 and 2018, we had available carryforward losses of approximately \$597.1 million and \$584.8 million, respectively, for state tax purposes. Of the \$597.1 million state tax carryforward losses, \$582.7 million is associated with the state of Pennsylvania, with the remainder associated with the other 6 states within which we have established tax nexus.

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

Utilization of net operating loss (NOL) and research and development (R&D) credit carryforwards may be subject to a substantial annual limitation under Section 382 of the Internal Revenue Code of 1986 due to ownership change limitations that have occurred previously or that could occur in the future. These ownership changes may limit the amount of NOL and R&D credit carryforwards that can be utilized annually to offset future taxable income and tax, respectively. There also could be additional ownership changes in the future, which may result in additional limitations in the utilization of the carryforward NOLs and credits.

A full valuation allowance has been provided against our deferred tax assets and, if a future assessment requires an adjustment, an adjustment would be offset by an adjustment to the valuation allowance. Thus, there would be no impact to the consolidated balance sheet or statement of operations if an adjustment were required.

**Note 21 - Leases**

Our operating leases consist primarily of facility leases for our operations in Warrington, Pennsylvania and Taipei, Taiwan.

We maintain our corporate headquarters and operations in Warrington, Pennsylvania. The facility serves as the main operating facility for drug and device development, regulatory, analytical technical services, research and development, and administration. We also maintain offices in Taipei, Taiwan, the former headquarters of CVie Therapeutics, where we perform certain manufacturing development and preclinical activities related to our cardiovascular drug product candidates.

In February 2018, we amended our Warrington, Pennsylvania lease to (i) reduce the leased space from 30,506 square feet to 21,189 square feet and (ii) reduce the security deposit under the lease in the form of a letter of credit from \$225,000 to \$140,000. In April 2019, we terminated our Taipei Taiwan lease and entered into a new lease to reduce the leased space from 2,635 square feet to 1,317 square feet. The total aggregate base rental payments remaining under the leases as of December 31, 2019 are approximately \$1.5 million.

Throughout the term of our leases, we are responsible for paying certain variable lease costs, in addition to the rent, as specified in the lease, including a proportionate share of applicable taxes, operating expenses and utilities.

The following table contains a summary of the lease costs recognized under ASC 842 and other information pertaining to our operating leases for twelve months ended December 31, 2019:

<i>(in thousands)</i>	<b>Twelve Months Ended December 31, 2019</b>
Operating lease cost	\$ 889
Variable lease cost	22
Total lease cost	<u>\$ 911</u>
<b>Other Information</b>	
Operating cash flows used for operating leases	\$ 951
Operating lease liabilities arising from obtaining right-of-use assets	\$ 364
Weighted average remaining lease term (in years)	2.2
Weighted average incremental borrowing rate	9.00%



**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**

Rent expense under ASC 840 was \$0.8 million for the year ended December 31, 2018.

Future minimum lease payments under our non-cancelable operating leases as of December 31, 2019, are as follows:

<i>(in thousands)</i>	<b>As of December 31, 2019</b>
2020	850
2021	640
2022	180
2023	23
Thereafter	-
Total lease payments	1,693
Less imputed interest	(149)
Total operating lease liabilities at December 31, 2019	<u>1,544</u>

**Note 22 - Selected Quarterly Financial Data (Unaudited)**

The following tables contain unaudited statement of operations information for each quarter of 2019 and 2018. The operating results for any quarter are not necessarily indicative of results for any future period.

**2019 Quarters Ended:**

<i>(in thousands, except per share data)</i>	<b>Mar. 31</b>	<b>June 30</b>	<b>Sept. 30</b>	<b>Dec. 31</b>	<b>Total Year</b>
<b>Revenues:</b>					
Grant revenue	\$ -	\$ -	\$ -	\$ -	\$ -
License revenue with affiliate	40	158	-	-	198
Total revenues	40	158	-	-	198
<b>Expenses:</b>					
Research and development	3,342	3,413	3,792	2,140	12,687
Selling, general and administrative	3,355	3,240	3,395	2,414	12,404
Total expenses	6,697	6,653	7,187	4,554	25,091
Operating loss	(6,657)	(6,495)	(7,187)	(4,554)	(24,893)
Other income / (expense), net	120	58	61	(2,821)	(2,582)
Net (loss) / income	\$ (6,537)	\$ (6,437)	\$ (7,126)	\$ (7,375)	\$ (27,475)
Net (loss) / income per common share - basic and diluted	\$ (0.61)	\$ (0.60)	\$ (0.66)	\$ (0.64)	\$ (2.51)
Weighted average number of common shares outstanding - basic and diluted	10,714	10,730	10,730	11,532	10,928

**WINDTREE THERAPEUTICS, INC. AND SUBSIDIARIES**
**2018 Quarters Ended:**

<i>(in thousands, except per share data)</i>	<b>Mar. 31</b>	<b>June 30</b>	<b>Sept. 30</b>	<b>Dec. 31</b>	<b>Total Year</b>
<b>Revenues:</b>					
Grant revenue	\$ -	\$ 695	\$ 70	\$ -	\$ 765
License revenue with affiliate	204	356	159	304	1,023
Total revenues	204	1,051	229	304	1,788
<b>Expenses:</b>					
Research and development	3,118	2,879	2,197	2,368	10,562
Selling, general and administrative	1,926	1,208	1,500	2,787	7,421
Total expenses	5,044	4,087	3,697	5,155	17,983
Operating loss	(4,840)	(3,036)	(3,468)	(4,851)	(16,195)
Other income / (expense), net	328	(16)	(459)	(4,191)	(4,338)
Net (loss) / income	\$ (4,512)	\$ (3,052)	\$ (3,927)	\$ (9,042)	\$ (20,533)
AEROSURF warrant dividend	-	-	-	(12,505)	(12,505)
Deemed dividend on preferred stock	-	-	-	(1,718)	(1,718)
Net (loss) / income attributable to common shareholders	\$ (4,512)	\$ (3,052)	\$ (3,927)	\$ (23,265)	\$ (34,756)
Net (loss) / income per common share - basic and diluted	\$ (4.19)	\$ (2.44)	\$ (3.13)	\$ (9.71)	\$ (23.20)
Weighted average number of common shares outstanding - basic and diluted	1,076	1,250	1,256	2,397	1,498

**Note 23 – Subsequent Events**
*AEROSURF Funding Term Sheet*

On March 18, 2020, we entered into a binding term sheet (the “Term Sheet”) with Lee’s, pursuant to which the parties agreed that Lee’s would provide financing for the continued development of our product candidate, AEROSURF.

The Term Sheet provides that in connection with the development of AEROSURF, Lee’s will make non-refundable payments to us in the amount of (i) \$1.0 million no later than April 1, 2020; (ii) \$1.4 million no later than July 1, 2020; and (iii) \$1.5 million no later than September 1, 2020; provided, however, that the amount of the last payment will be reduced to \$0.4 million if on or prior to August 31, 2020, (i) we receive net proceeds from the sale of our equity securities of at least \$4.5 million and (ii) our common stock becomes listed on the Nasdaq National Market or the Nasdaq Global Market. The parties have agreed that they will negotiate in good faith to determine the terms of a definitive agreement prior to September 1, 2020. The definitive agreement will set forth additional semi-annual, non-refundable payments to fund the continued development of AEROSURF after September 30, 2020.

The Term Sheet provides that, until such time as we have repaid 125% of the amounts funded by Lee’s for the development of AEROSURF, we will pay to Lee’s 50% of all revenue amounts and payments received by us for any sale, divestiture, license or other development and/or commercialization of the KL4/AEROSURF patent portfolio, excluding (i) payments for bona fide research and development services; (ii) reimbursement of patent expenses; and (iii) all amounts paid to us under the License, Development and Commercialization Agreement between us and Lee’s (HK) dated as of June 12, 2017 (as amended, the “License Agreement”), and subject to reduction for any payments made by us with respect to third-party intellectual property not previously funded by Lee’s.

The Term Sheet also provides that Lee’s and we will amend existing provisions of the License Agreement to reduce future royalty payments payable to us from Lee’s on net sales of certain licensed products, reducing the range of such royalty payment percentage from a range of high single to low mid-double digits to a range of mid-single to low-double digits.

*O-Bank Facility*

In March 2020, the O-Bank Facility was amended including the extension of the maturity date to March 2022. In addition to the extension of the maturity date, the total amount of the O-Bank Facility was decreased to approximately \$5.0 million, and the interest rate was changed to the TAIBOR plus 1.17% and the term was changed to 24-month non-revolving. All amounts due under the O-Bank Facility will be payable upon the earlier of (i) six months after the expiration date or (ii) two years after the drawdown date.

As of December 31, 2019, the outstanding principal of the O-Bank Facility was approximately \$4.6 million, and has subsequently been refinanced to mature in March 2022, therefore, the outstanding principal has been classified in Loans Payable - Non-current Portion.

*Coronavirus Outbreak*

In December 2019, a novel strain of coronavirus, or COVID-19, was reported to have surfaced in Wuhan, China. As of March 2020, COVID-19 has spread to other countries, including Europe and the United States, and has been declared to be a pandemic by the World Health Organization. Efforts to contain the spread of COVID-19 have intensified and the U.S., Europe and Asia have implemented severe travel restrictions, social distancing and delays or cancellations of elective surgeries. As of April 1, 2020, our operations have not been significantly impacted by the COVID-19 outbreak. However, we cannot at this time predict the specific extent, duration, or full impact that the COVID-19 outbreak will have on our financial condition, operations, and business plans for 2020, including ongoing and planned clinical trials. Our clinical trials and next expected milestones of our product candidates may be impacted and we may experience delays in anticipated timelines and milestones.

Units

Consisting of One Share of Common Stock and

A Warrant to Purchase      of a Share of Common Stock



**PROSPECTUS**

*Sole Book-Running Manager*

**Ladenburg Thalmann**

*Lead Manager*

**National Securities Corporation**

Prospectus dated      , 2020

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**PART II****INFORMATION NOT REQUIRED IN PROSPECTUS****Item 13. Other Expenses of Issuance and Distribution.**

The following table sets forth the expenses payable by the Registrant expected to be incurred in connection with the issuance and distribution of Common Stock being registered hereby (other than underwriting discounts and commissions), in connection with this offering. All amounts shown are estimates except for the U.S. Securities and Exchange Commission (SEC) registration fee, the FINRA filing fee and the Nasdaq Capital Market initial listing fee.

	<b>Amount</b>
SEC Registration Fee	\$ 1,194.16
FINRA filing fee	1,250.00
Nasdaq Fee	56,500.00
Accounting Fees and Expenses	100,000.00
Legal Fees and Expenses	295,000.00
Miscellaneous Fees and Expenses (including reimbursement of the accountable expenses of the underwriter and transfer agent and registrar fees and expenses)	130,000.00
<b>Total Expenses</b>	<b>583,944.16</b>

\* To be filed by amendment.

**Item 14. Indemnification of Directors and Officers.**

Article Eight of our Amended and Restated Certificate of Incorporation, as amended, or Certificate of Incorporation, limits the liability of directors to the maximum extent permitted by Delaware law. Delaware law provides that directors of a corporation will not be personally liable for monetary damages for breach of their fiduciary duties as directors, except for liability for (i) any breach of their duty of loyalty to the corporation or its stockholders, (ii) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, (iii) unlawful payments of dividends or unlawful stock repurchases or redemptions as provided in Section 174 of the General Corporation Law of the State of Delaware or (iv) any transaction from which the director derives an improper personal benefit.

Our Amended and Restated By-Laws, or By-Laws, provide that we shall indemnify our directors and officers, the directors and officers of any of our subsidiaries and any other individuals acting as directors or officers of any other corporation at our request, to the fullest extent permitted by law.

We have entered into indemnification agreements with our executive officers and directors containing provisions that may require us, among other things, to indemnify them against liabilities that may arise by reason of their status or service as officers or directors, as applicable, other than liabilities arising from willful misconduct of a culpable nature and to advance certain expenses incurred as a result of any proceeding against them as to which they could be indemnified. We have obtained limited directors' and officers' liability insurance.

These provisions in our Certificate of Incorporation and our By-Laws do not eliminate the officers' and directors' fiduciary duty, and in appropriate circumstances, equitable remedies such as injunctive or other forms of non-monetary relief will remain available under Delaware law. In addition, each officer and director will continue to be subject to liability for breach of their duty of loyalty to us for acts or omissions not in good faith or involving intentional misconduct, for knowing violations of law, for actions leading to improper personal benefit to the officer or director and for payment of dividends or approval of stock repurchases or redemptions that are unlawful under Delaware law. The provisions also do not affect an officer's or director's responsibilities under any other law, such as the federal securities laws or state or federal environmental laws.

## **Item 15. Recent Sales of Unregistered Securities.**

Set forth below is information regarding shares of our common stock and shares of our preferred stock issued, warrants issued, and stock options granted, by us within the past three years which were not registered under the Securities Act. All of the sales listed below were made pursuant to an exemption from registration afforded by Section 4(a)(2) of the Securities Act and Regulation D thereunder, as the securities were issued to accredited investors, without a view to distribution, and were not issued through any general solicitation or advertisement.

### ***December 2019 Securities Purchase Agreement***

On December 6, 2019, we entered into a Securities Purchase Agreement, or the SPA, and a Registration Rights Agreement, or the Registration Rights Agreement, with select institutional investors, or Investors, whereby we agreed to issued and sell to the Investors an aggregate of 2,916,666 shares of common stock at a price per share of \$9.06, for an aggregate purchase price of approximately \$26.4 million, or the Financing. Included in the purchase price, LPH II Investments Limited, or LPH II, an affiliate of Lee's Pharmaceuticals Holdings Limited, or Lee's, converted \$2.95 million of existing debt obligations on the same terms as the other select institutional investors. In connection with the Financing, we issued Series I Warrants to the Investors to purchase up to an aggregate of 1,458,333 shares of common stock, or the Series I Warrant Shares, at an exercise price equal to \$12.09 per share. The Series I Warrants may be exercised on the six-month anniversary of the date of issuance and through the 5-year anniversary of the date of issuance. The Series I Warrants may be exercised for cash or on a cashless basis if there is no effective registration statement registering the resale of the Series I Warrant Shares and may not be exercised to the extent that the holder thereof would, following such exercise or conversion, beneficially own more than 4.99% (or such other percent as designated by each holder not to exceed 19.99%) of our outstanding shares of common stock. The Series I Warrants contain customary provisions that adjust the exercise price and the number of Warrant Shares in the event of a corporate transaction. On May 6, 2020, we entered into an amendment with certain holders of our Series I Warrants pursuant to which the exercise price of the Series I Warrant was amended from \$12.09 to \$9.67 if the Series I Warrant is exercised, in whole or in part, prior to December 5, 2021. In addition, the certain holders of the Series I Warrants agreed to be bound by a lock-up provision with respect to any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock that are beneficially owned, held or acquired by such holders for a period of ninety (90) days following the earlier of (i) the closing date of our next public offering of securities, or (ii) December 24, 2020. During the applicable lock-up period, the certain holders of the Series I Warrants will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock.

Pursuant to the Registration Rights Agreement, we filed a Registration Statement on Form S-1 with the SEC on January 21, 2020 to register the 2,916,666 shares of common stock and 1,458,333 shares of common stock underlying the Series I Warrants.

### ***December 2018 Private Placement Financing***

On December 21, 2018, we completed a private placement offering and entered into a Registration Rights Agreement, or December 2018 Registration Rights Agreement, with select institutional investors for the purchase of an aggregate of 3,928,513 shares of common stock at a price per share of \$9.9396, for an aggregate purchase price of approximately \$39.0 million, or the 2018 Private Placement Financing. Included in the purchase price, each of LPH II, an affiliate of Lee's, and Battelle Memorial Institute, or Battelle, converted \$6.0 million and \$1.0 million, respectively, of existing debt obligations on the same terms as the other select institutional investors. In connection with this offering, we issued (i) Series F Warrants to purchase an aggregate of 667,847 shares of common stock at an exercise price equal to \$11.04 per share, which are exercisable through the 18-month anniversary of the date of issuance, or the Series F Warrants, and (ii) Series G Warrants to purchase an aggregate of 1,296,410 shares of common stock at an exercise price equal to \$12.15 per share, which are exercisable through the 5-year anniversary of the date of issuance, or the Series G Warrants and, together with the Series F Warrants, the December 2018 Warrants. The December 2018 Warrants (i) may not be exercised to the extent that following such exercise, the holder would beneficially own more than 9.99% (or other percent as designated by each holder) of our outstanding shares of common stock, and (ii) contain customary provisions that adjust the exercise price and the number of shares of common stock into which the December 2018 Warrants are exercisable in the event of a corporate transaction. On April 24, 2020, we entered into an amendment with the holders of our Series F Warrants whereby the expiration date of the Series F Warrant was extended from June 24, 2020 to December 24, 2020. In addition, the holders of the Series F Warrants agreed to be bound by a lock-up provision with respect to any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock that are beneficially owned, held or acquired by such holders for a period of ninety (90) days following the earlier of (i) the closing date of our next public offering of securities, or (ii) December 24, 2020. During the applicable lock-up period, the holders of the Series F Warrants will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of any shares of our common stock or securities convertible, exchangeable or exercisable into shares of our common stock.

Under the December 2018 Registration Rights Agreement, we filed on April 30, 2019 a resale registration statement with the SEC to register for subsequent resale the shares of common stock issued in the 2018 Private Placement Financing and the shares of common stock to be issued upon exercise of the December 2018 Warrants.

### ***April 2018 Private Placement***

In April 2018, we completed a private placement with LPH II for the purchase of \$2.6 million of our common stock and warrants to purchase our common stock at a purchase price per share of \$14.40. In connection with this offering, we issued 180,555 shares of common stock and warrants to purchase 45,139 shares of common stock at an exercise price of \$16.56 per share. The warrants are exercisable after 6 months and through the seventh anniversary of the issue date. In addition, we entered into a registration rights agreement with LPH II whereby we agreed to file an initial resale registration statement with the SEC to register for subsequent resale the shares of common stock sold in this private placement and the warrant shares. We are required to seek registration of 25% of the shares and warrant shares on such initial resale registration statement. From time to time, following the 180th day from March 30, 2018, LPH II or a majority of the holders of the shares and warrant shares may require us to file additional registration statement(s) to register the resale of the balance of the shares and warrant shares, subject to certain limitations

### ***LPH Share Purchase Agreement***

In October 2017, we entered into a Share Purchase Agreement, or LPH SPA, with LPH Investments Limited, or LPH, a company incorporated in the Cayman Islands with limited liability and an affiliate of Lee's, for the purchase of approximately \$10 million of our common stock at a price of \$12.978 per share, which represented a 15% premium over the average of the daily volume-weighted average price per share, or the VWAP, over the 10-day trading period ending on and including the date of the related agreement, and resulted in the issuance of 770,534 shares of our common stock to LPH. Following the transaction, Lee's beneficially owned 73% of our issued and outstanding shares of common stock. The investment included a cancellation of \$3.9 million in outstanding loans that we had borrowed from Lee's Pharmaceutical (HK) Ltd., or Lee's (HK), a Hong Kong company organized and existing under the laws of Hong Kong under a Loan Agreement dated August 14, 2017, between ourselves and Lee's (HK). Although the LPH SPA granted LPH the right to appoint up to two individuals to serve on our Board of Directors, and LPH was permitted to designate such individuals on or prior to the 30th day following the closing of the transactions contemplated by the LPH SPA, no such appointments were made. In addition, the LPH SPA also amended the executive employment agreement of each of our President and Chief Executive Officer (Craig Fraser), Senior Vice President and Chief Financial Officer (John A. Tattory) and Senior Vice President and Chief Medical Officer (Steven G. Simonson, M.D.), such that the executives agreed to waive the guaranteed Annual Bonuses (as defined in each executive's employment agreement) that otherwise would have been payable to the executives during the 24-month period following the change of control to Lee's. Also under the LPH SPA, each executive was awarded restricted stock units under our 2011 Long-Term Incentive Plan, as amended, having a value when issued equal to the combined total value of the 2017 and 2018 Target Bonus Amounts (as defined in each executive's employment agreement) and initially vesting in two equal installments on March 15, 2018 and March 15, 2019. Under the terms of the LPH SPA, we also granted to LPH a preemptive right to purchase in future offerings of equity securities up to that number of shares of our equity securities needed to maintain LPH's percentage of beneficial ownership of our outstanding voting stock immediately prior to each such offering, subject to certain limitations and exclusions.

Contemporaneously with the execution of the LPH SPA, we and LPH entered into a registration rights agreement pursuant to which we agreed to provide certain registration rights with respect to the common stock issued under the LPH SPA, which rights are limited to registration of up to 25% of the shares of our common stock issued under the LPH SPA during the initial 18-month period following the closing of the LPH SPA. We sold and issued common stock to LPH pursuant to Rule 506(b) of Regulation D and Regulation S under, and Section 4(a)(2) of, the Securities Act of 1933, as amended.

### ***February 2017 Securities Purchase Agreement***

On February 15, 2017, we completed a private placement offering of 2,349 Series A Convertible Preferred Stock units at a price per unit of \$4,485, for an aggregate purchase price of approximately \$10.5 million, including \$1.6 million of non-cash consideration representing a reduction in amounts due and accrued as of December 31, 2016 for current development services that otherwise would have become payable in cash in the first and second quarters of 2017. Each unit consists of (i) one share of Series A Convertible Preferred Stock, par value \$0.001 per share, or the Preferred Shares, and (ii) 117,485 Series A-1 Warrants, or the A-1 Warrants, to purchase one share of common stock, par value \$0.001 per share, at an exercise price equal to \$82.20. The A-1 Warrants may be exercised beginning August 15, 2017 and through February 15, 2024. The Preferred Shares and the A-1 Warrants may not be converted or exercised to the extent that the holder would, following such exercise or conversion, beneficially own more than 9.99% (or other lesser percent as designated by each holder) of our outstanding shares of common stock. In the event of a liquidation, including without limitation, the sale of substantially all of our assets and certain mergers and other corporate transactions (as defined in the Certificate of Designation of Preferences, Rights and Limitations relating to the Preferred Shares), the holder of Preferred Shares had a liquidation preference that could result in the holder receiving a return of its initial investment before any payments were made to holders of common stock, and then participating with other equity holders until it had received in the aggregate up to three times its original investment. All outstanding Preferred Shares were converted in accordance with their terms in advance of the merger with CVie Investments Limited in December 2018.

### ***Collaboration Agreement with Battelle***

We entered into a Collaboration Agreement with Battelle in October 2014, which was amended on August 2015 and March 2016, for the development of a NextGen of our aerosol delivery system.

In December 2018, we and Battelle entered into the Battelle Payment Restructuring, which reflected the terms of an October 2017 nonbinding memorandum of understanding, in which we outlined terms to restructure approximately \$4.3 million then due to Battelle, under a Research and Development Services Agreement dated as of June 22, 2012 and the Collaboration Agreement. In connection with the Battelle Payment Restructuring, on December 11, 2018, we issued to Battelle warrants to purchase 25,000 shares of common stock, exercisable at a price of \$19.50 per share, which expire on the fifth anniversary of the Effective Date.

### ***AEROSURF Warrants***

In connection with the CVie Acquisition, our Board of Directors declared a dividend to the holders of record of our outstanding shares of common stock, and holders of certain warrants to purchase common stock, that were outstanding on December 20, 2018 of 0.6148 Series H (AEROSURF) Warrant, for each share of common stock held by a shareholder or each warrant held by a warrant holder, as applicable, on the record date, or the AEROSURF Warrants. The Company expects to distribute AEROSURF Warrants that are exercisable for an aggregate of 987,722 shares of common stock. Each AEROSURF Warrant has a term of five years and provides for automatic exercise into one share of common stock, without any exercise price, upon the Company's public announcement of the dosing of the first human subject enrolled in the Company's phase 3 clinical trial for AEROSURF.

### ***Deerfield***

In October 2017, we entered into an Exchange and Termination Agreement, or the Exchange and Termination Agreement, with affiliates of Deerfield Management Company, L.P., or Deerfield. Under the Exchange and Termination Agreement, (i) promissory notes evidencing an aggregate principal amount of \$25.0 million owed to Deerfield under that certain Facility Agreement dated as of February 13, 2013, or the Facility Agreement, as amended from time to time, and (ii) warrants to purchase up to 8,333 shares of the Company's common stock at an exercise price of \$2,360.40 per share held by Deerfield, or the Deerfield Warrants, were cancelled in consideration for (i) a cash payment in the aggregate amount of 2.5 million, (ii) an aggregate of 23,703 shares of common stock and (iii) the right to receive certain milestone payments, or Milestone Payments, based on achievement of specified development and commercial milestones related to the Company's AEROSURF® development program, which, if achieved, could potentially total up to \$15.0 million.



**Item 16. Exhibits and Financial Statement Schedules.**

<b>Exhibit Number</b>	<b>Exhibit Title</b>
1.1*	<a href="#">Form of Underwriting Agreement.</a>
3.1	<a href="#">Amended and Restated Certificate of Incorporation (incorporated by reference to Exhibit 3.1 to Windtree’s Annual Report on Form 10-K, as filed with the SEC on April 17, 2018).</a>
3.2	<a href="#">Certificate of Amendment to the Amended and Restated Certificate of Incorporation (incorporated by reference to Exhibit 3.1 to Windtree’s Form 8-K filed on April 29, 2020).</a>
3.3	<a href="#">Amended and Restated By-Laws (incorporated by reference to Exhibit 3.2 to Windtree’s Form 8-K filed on April 18, 2016).</a>
4.1	<a href="#">Form of Warrant dated October 10, 2014 (incorporated by reference to Exhibit 4.11 to Windtree’s Quarterly Report on Form 10-Q, as filed with the SEC on November 7, 2014).</a>
4.2	<a href="#">Form of Series A Warrant dated July 22, 2015 (incorporated by reference to Exhibit 4.1 to Windtree’s Current Report on Form 8-K, as filed with the SEC on July 17, 2015).</a>
4.3	<a href="#">Form of Series B Warrant dated July 22, 2015 (incorporated by reference to Exhibit 4.3 to Windtree’s Current Report on Form 8-K, as filed with the SEC on July 17, 2015).</a>
4.4	<a href="#">Form of Series A-1 Warrant dated February 13, 2017 (incorporated by reference to Exhibit 4.1 to Windtree’s Current Report on Form 8-K, as filed with the SEC on February 15, 2017).</a>
4.5	<a href="#">Form of Series C Warrant dated April 4, 2018 (incorporated by reference to Exhibit 4.1 to Windtree’s Current Report on Form 8-K, as filed with the SEC on April 4, 2018).</a>
4.6	<a href="#">Form of Series D Warrant dated July 2, 2018 (incorporated by reference to Exhibit 4.1 to Windtree’s Current Report on Form 8-K, as filed with the SEC on July 6, 2018).</a>
4.7	<a href="#">Form of Series E Warrant dated December 11, 2018 (incorporated by reference to Exhibit 4.7 to Windtree’s Annual Report on Form 10-K, as filed with the SEC on April 16, 2019).</a>
4.8	<a href="#">Form of Series F Warrant dated December 24, 2018 (incorporated by reference to Exhibit 4.2 to Windtree’s Current Report on Form 8-K, as filed with the SEC on December 21, 2018).</a>
4.9	<a href="#">Form of Series G Warrant dated December 24, 2018 (incorporated by reference to Exhibit 4.3 to Windtree’s Current Report on Form 8-K, as filed with the SEC on December 21, 2018).</a>
4.10	<a href="#">Form of Series H Warrant dated February 14, 2019 (incorporated by reference to Exhibit 4.1 to Windtree’s Current Report on Form 8-K, as filed with the SEC on December 21, 2018).</a>
4.11	<a href="#">Form of Series I Warrant dated December 6, 2019 (incorporated by reference to Exhibit 4.1 to Windtree’s Current Report on Form 8-K, as filed with the SEC on December 9, 2019).</a>
4.12	<a href="#">Form of Series F Warrant Amendment dated April 24, 2020 (incorporated by reference to Exhibit 4.1 to Windtree’s Current Report on Form 8-K, as filed with the SEC on April 29, 2020).</a>
4.13*	<a href="#">Form of Warrant to be issued to purchasers of units and the underwriters pursuant to this Registration Statement on Form S-1.</a>
4.14*	<a href="#">Form of Warrant Agreement between Windtree Therapeutics, Inc. and Continental Stock Transfer and Trust Company.</a>
4.15*	<a href="#">Form of Series I Warrant Amendment dated May 6, 2020 to the Series I Warrant dated December 6, 2019.</a>
5.1*	<a href="#">Opinion of Pepper Hamilton LLP.</a>

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- 10.1† [Sublicense Agreement dated October 28, 1996 between Johnson & Johnson, Ortho Pharmaceutical Corporation and Acute Therapeutics, Inc. \(incorporated by reference to Exhibit 10.6 to Windtree's Registration Statement on Form SB-2/A, as filed with the SEC on April 18, 1997 \(Commission File Number 333-19375\)\).](#)
- 10.2† [Amended and Restated License Agreement dated March 28, 2008, between Windtree and Philip Morris USA Inc. \(incorporated by reference to Exhibit 10.4 to Windtree's Quarterly Report on Form 10-Q for the quarter ended March 31, 2008, as filed with the SEC on May 9, 2008\).](#)
- 10.3† [License Agreement dated March 28, 2008, between Windtree and Philip Morris Products S.A. \(incorporated by reference to Exhibit 10.5 to Windtree's Quarterly Report on Form 10-Q for the quarter ended March 31, 2008, as filed with the SEC on May 9, 2008\).](#)
- 10.4† [Amended and Restated Sublicense and Collaboration Agreement dated December 3, 2004, between Windtree and Laboratorios del Dr. Esteve, S.A. \(incorporated by reference to Exhibit 10.28 to Windtree's Annual Report on Form 10-K for the year ended December 31, 2004, as filed with the SEC on March 16, 2005\).](#)
- 10.5† [Amended and Restated Supply Agreement dated December 3, 2004, between Windtree and Laboratorios del Dr. Esteve, S.A. \(incorporated by reference to Exhibit 10.29 to Windtree's Annual Report on Form 10-K for the year ended December 31, 2004, as filed with the SEC on March 16, 2005\).](#)
- 10.6† [License, Development and Commercialization Agreement dated June 12, 2017, between Windtree and Lee's Pharmaceutical \(HK\) Ltd. \(incorporated by reference to Exhibit 10.1 to Windtree's Quarterly Report on Form 10-Q for the quarter ended June 30, 2017, as filed with the SEC on August 21, 2017\).](#)
- 10.7† [Amendment No. 1 dated August 14, 2017 to the License Development and Commercialization Agreement between Windtree and Lee's Pharmaceutical \(HK\) Ltd. dated June 12, 2017 \(incorporated by reference to Exhibit 10.1 to Windtree's Quarterly Report on Form 10-Q for the quarter ended September 30, 2017, as filed with the SEC on November 14, 2017\).](#)
- 10.8# [Windtree's 2011 Long-Term Incentive Plan, as amended \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on December 31, 2018\).](#)
- 10.9# [Form of Employee Option Agreement under Windtree's 2011 Long-Term Incentive Plan \(incorporated by reference to Exhibit 10.2 to Windtree's Quarterly Report on Form 10-Q for the quarter ended March 31, 2012, as filed with the SEC on May 15, 2012\).](#)
- 10.10# [Form of Non-Employee Director Option Agreement under Windtree's 2011 Long-Term Incentive Plan \(incorporated by reference to Exhibit 10.10 to Windtree's Annual Report on Form 10-K for the year ended December 31, 2019, as filed with the SEC on April 3, 2020\).](#)
- 10.11# [Form of Restricted Stock Unit Award Agreement for Non-Employee Directors under Windtree's 2011 Long-Term Incentive Plan \(incorporated by reference to Exhibit 10.11 to Windtree's Annual Report on Form 10-K for the year ended December 31, 2014, as filed with the SEC on March 16, 2015\).](#)
- 10.12# [Form of Restricted Stock Unit Award Agreement for Employees under Windtree's 2011 Long-Term Incentive Plan \(incorporated by reference to Exhibit 10.14 to Windtree's Annual Report on Form 10-K for the year ended December 31, 2017, as filed with the SEC on April 17, 2018\).](#)
- 10.13# [Employment Agreement dated February 1, 2016, between Windtree and Craig Fraser \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on February 3, 2016\).](#)
- 10.14# [Inducement Stock Option Award Agreement dated February 1, 2016, between Windtree and Craig Fraser \(incorporated by reference to Exhibit 10.3 to Windtree's Current Report on Form 8-K, as filed with the SEC on February 3, 2016\).](#)

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- 10.15# [Amendment dated March 13, 2018, to Employment Agreement dated February 1, 2016, between Windtree and Craig Fraser \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on March 16, 2018\).](#)
- 10.16# [Employment Agreement dated December 19, 2014, between Windtree and Steven G. Simonson, M.D. \(incorporated by reference to Exhibit 10.4 to Windtree's Quarterly Report on Form 10-Q, as filed with the SEC on May 11, 2015\).](#)
- 10.17# [Amendment dated December 29, 2014 to Employment Agreement dated December 19, 2014, effective as of April 1, 2015, between Windtree and Steven G. Simonson, M.D. \(incorporated by reference to Exhibit 10.5 to Windtree's Quarterly Report on Form 10-Q, as filed with the SEC on May 11, 2015\).](#)
- 10.18# [Amendment dated March 13, 2018, to Employment Agreement dated December 19, 2014 between Windtree and Steven G. Simonson, M.D. \(incorporated by reference to Exhibit 10.3 to Windtree's Current Report on Form 8-K, as filed with the SEC on March 16, 2018\).](#)
- 10.19# [Employment Agreement dated March 21, 2014, between Windtree and John A. Tattory \(incorporated by reference to Exhibit 10.1 to Windtree's Quarterly Report on Form 10-Q, as filed with the SEC on May 12, 2014\).](#)
- 10.20# [Amendment dated December 29, 2014 to Employment Agreement dated March 21, 2014, effective as of April 1, 2015, between Windtree and John A. Tattory \(incorporated by reference to Exhibit 10.19 to Windtree's Annual Report on Form 10-K for the year ended December 31, 2014, as filed with the SEC on March 16, 2015\).](#)
- 10.21# [Amendment dated March 13, 2018 to Employment Agreement dated March 21, 2014 between John A. Tattory \(incorporated by reference to Exhibit 10.2 to Windtree's Current Report on Form 8-K, as filed with the SEC on March 16, 2018\).](#)
- 10.22# [Form of Indemnification Agreement between Windtree and certain named executive officers and directors \(incorporated by reference to Exhibit 10.4 to Windtree's Current Report on Form 8-K, as filed with the SEC on February 3, 2016\).](#)
- 10.23 [Form of Indemnification Agreement between Windtree and certain named directors \(incorporated by reference to Exhibit 10.23 to Windtree's Annual Report on Form 10-K, as filed with the SEC on April 16, 2019\).](#)
- 10.24 Lease Agreement dated May 26, 2004, and First Amendment to Lease Agreement, dated April 2, 2007, between TR Stone Manor Corp. and Windtree (incorporated by reference to Exhibits [10.1](#) and [10.2](#) to Windtree's Current Report on Form 8-K, as filed with the SEC on April 6, 2007).
- 10.25 [Second Amendment to Lease Agreement dated January 3, 2013 between TR Stone Manor Corp. and Windtree \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on January 8, 2013\).](#)
- 10.26 [Fourth Amendment to Lease Agreement dated April 29, 2016, between PH Stone Manor LP and Windtree \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on May 31, 2016\).](#)
- 10.27 [Fifth Amendment to Lease Agreement dated February 23, 2018, between PH Stone Manor LP and Windtree \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on March 1, 2018\).](#)
- 10.28† [Master Services Agreement dated October 24, 2013 between Windtree and DSM Pharmaceuticals, Inc. \(now known as Patheon Manufacturing Services LLC\) \(incorporated by reference to Exhibit 10.3 to Windtree's Quarterly Report on Form 10-Q, as filed with the SEC on November 12, 2013\).](#)
- 10.29† [Supply Agreement dated December 22, 2010 between Corden Pharma \(formerly Genzyme Pharmaceuticals LLC, now known as Corden Pharma\) and Windtree \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on December 29, 2010\).](#)

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- 10.30 [Exchange and Termination Agreement dated October 27, 2017, between Windtree and Deerfield \(incorporated by reference to Exhibit 10.2 to Windtree's Current Report on Form 8-K, as filed with the SEC on November 1, 2017\).](#)
- 10.31 [Registration Rights Agreement dated October 27, 2017, between Windtree and LPH Investments Limited \(incorporated by reference to Exhibit 99.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on November 1, 2017\).](#)
- 10.32 [Registration Rights Agreement dated March 30, 2018, between Windtree and LPH II Investments Limited \(incorporated by reference to Exhibit 10.2 to Windtree's Current Report on Form 8-K, as filed with the SEC on April 4, 2018\).](#)
- 10.33 [Payment Restructuring Agreement effective December 7, 2018, between Windtree and Battelle Memorial Institute \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on December 7, 2018\).](#)
- 10.34 [Loan Agreement dated October 25, 2018, between CVie Therapeutics, Lee's Pharmaceutical Holdings Limited, and O-Bank Co., Ltd. \(incorporated by reference to Exhibit 10.34 to Windtree's Annual Report on Form 10-K, as filed with the SEC on April 16, 2019\).](#)
- 10.35 [Shareholder Loan Agreement dated April 24, 2018, between Lee's Pharmaceutical International Limited and CVie Therapeutics \(incorporated by reference to Exhibit 10.35 to Windtree's Annual Report on Form 10-K, as filed with the SEC on April 16, 2019\).](#)
- 10.36 [Shareholder Loan Agreement dated September 20, 2018, between Lee's Pharmaceutical International Limited and CVie Therapeutics \(incorporated by reference to Exhibit 10.36 to Windtree's Annual Report on Form 10-K, as filed with the SEC on April 16, 2019\).](#)
- 10.37 [Shareholder Loan Agreement dated October 26, 2018, between Lee's Pharmaceutical International Limited and CVie Therapeutics \(incorporated by reference to Exhibit 10.37 to Windtree's Annual Report on Form 10-K, as filed with the SEC on April 16, 2019\).](#)
- 10.38 [Shareholder Loan Agreement dated November 16, 2018, between Lee's Pharmaceutical International Limited and CVie Therapeutics \(incorporated by reference to Exhibit 10.38 to Windtree's Annual Report on Form 10-K, as filed with the SEC on April 16, 2019\).](#)
- 10.39 [Merger Agreement dated December 21, 2018, between Windtree, WT Acquisition Corp., and CVie Investments Limited \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on December 21, 2018\).](#)
- 10.40 [Indemnification Letter Agreement dated December 21, 2018, between Windtree and Lee's Pharmaceutical Holdings Limited \(incorporated by reference to Exhibit 10.2 to Windtree's Current Report on Form 8-K, as filed with the SEC on December 21, 2018\).](#)
- 10.41 [Securities Purchase Agreement dated December 21, 2018 between Windtree and certain purchasers party thereto \(incorporated by reference to Exhibit 10.3 to Windtree's Current Report on Form 8-K, as filed with the SEC on December 21, 2018\).](#)
- 10.42 [Registration Rights Agreement dated December 21, 2018 between Windtree and certain purchasers party thereto \(incorporated by reference to Exhibit 10.4 to Windtree's Current Report on Form 8-K, as filed with the SEC on December 21, 2018\).](#)
- 10.43 [Loan Agreement dated October 24, 2019 between Windtree and LPH II Investments Ltd. \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on October 28, 2019\).](#)
- 10.44 [Form of Securities Purchase Agreement dated December 6, 2019 by and among Windtree and the purchasers party thereto \(incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on December 9, 2019\).](#)

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10.45	<a href="#">Form of Registration Rights Agreement dated December 6, 2019 by and among Windtree and the purchasers party thereto (incorporated by reference to Exhibit 10.2 to Windtree's Current Report on Form 8-K, as filed with the SEC on December 9, 2019).</a>
10.46#	<a href="#">Employment Agreement dated March 1, 2020, between Windtree and Eric Curtis (incorporated by reference to Exhibit 10.46 to Windtree's Annual Report on Form 10-K for the year ended December 31, 2019, as filed with the SEC on April 3, 2020)</a>
10.47	<a href="#">Amendment No. 1 dated February 20, 2020 to the Securities Purchase Agreement dated December 6, 2019 by and among Windtree and the purchasers party thereto (incorporated by reference to Exhibit 10.47 to Windtree's Annual Report on Form 10-K for the year ended December 31, 2019, as filed with the SEC on April 3, 2020)</a>
10.48*	<a href="#">Amendment No. 1 to Payment Restructuring Agreement effective December 7, 2018, between Windtree and Battelle Memorial Institute.</a>
10.49†*	<a href="#">Binding Term Sheet dated March 18, 2020, between Windtree and Lee's Pharmaceutical (HK) LTD</a>
10.50*	<a href="#">Loan Agreement dated March 17, 2020, between CVie Therapeutics, Lee's Pharmaceutical Holdings Limited, and O-Bank Co., Ltd.</a>
10.51	<a href="#">Note dated April 20, 2020, between Windtree Therapeutics, Inc. and Newtek Small Business Finance, LLC (incorporated by reference to Exhibit 10.1 to Windtree's Current Report on Form 8-K, as filed with the SEC on April 24, 2020.)</a>
21.1	<a href="#">Subsidiaries of Windtree (incorporated by reference to Exhibit 21.1 to Windtree's Annual Report on Form 10-K, as filed with the SEC on April 16, 2019).</a>
23.1*	<a href="#">Consent of Ernst &amp; Young LLP, independent registered public accounting firm.</a>
23.2*	<a href="#">Consent of Pepper Hamilton LLP (included in Exhibit 5.1).</a>
24.1**	<a href="#">Power of Attorney.</a>
101.INS*	Instance Document
101.SCH*	XBRL Taxonomy Extension Schema Document
101.CAL*	XBRL Taxonomy Extension Calculation Linkbase Document
101.DEF*	XBRL Taxonomy Extension Definition Linkbase Document
101.LAB*	XBRL Taxonomy Extension Label Linkbase Document
101.PRE*	XBRL Taxonomy Extension Presentation Linkbase Document

\* Filed herewith.

\*\* Previously filed

\*\*\* To be filed by amendment

# Compensation Related Contract.

† Confidential treatment received for certain portions of this exhibit.

**Item 17. Undertakings.**

The undersigned registrant hereby undertakes:

1. For purposes of determining any liability under the Securities Act, the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the registrant pursuant to Rule 424(b)(1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this registration statement as of the time it was declared effective.
2. For the purpose of determining any liability under the Securities Act, each post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the Registrant pursuant to the foregoing provisions, or otherwise, the Registrant has been advised that in the opinion of the SEC such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer or controlling person of the Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

**SIGNATURES**

Pursuant to the requirements of the Securities Act of 1933, as amended, the Registrant has duly caused this amendment to be signed on its behalf by the undersigned, thereunto duly authorized on May 6, 2020.

**WINDTREE THERAPEUTIC, INC.**By: /s/ Craig E. Fraser

Name: Craig E. Fraser

Title: President and Chief Executive Officer

Pursuant to the requirements of the Securities Act of 1933, as amended, this amendment has been signed below by the following persons in the capacities and on the dates indicated.

<b>Signature</b>	<b>Title</b>	<b>Date</b>
<u>/s/ Craig E. Fraser</u> Craig E. Fraser	Director, President and Chief Executive Officer (Principal Executive Officer)	May 6, 2020
<u>/s/ John A. Tattory</u> John A. Tattory	Senior Vice President and Chief Financial Officer (Principal Financial Officer and Accounting Officer)	May 6, 2020
<u>/s/ *</u> James Huang	Director (Chairman of the Board)	May 6, 2020
<u>/s/ *</u> Daniel E. Geffken	Director	May 6, 2020
<u>/s/ *</u> John R. Leone	Director	May 6, 2020
<u>/s/ *</u> Joseph M. Mahady	Director	May 6, 2020
<u>/s/ *</u> Bruce A. Peacock	Director	May 6, 2020
<u>/s/ *</u> Brian D. Schreiber, M.D.	Director	May 6, 2020
<u>* By: /s/ Craig E. Fraser</u> Craig E. Fraser Attorney-in-Fact		May 6, 2020

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[●] SHARES of Common Stock and  
[●] Warrants EXERCISABLE INTO [●] SHARES OF COMMON STOCK  
OF  
WINDTREE THERAPEUTICS, INC.  
UNDERWRITING AGREEMENT

[●], 2020

Ladenburg Thalmann & Co. Inc.  
As the Representative of the

Several underwriters, if any, named in Schedule I hereto  
4400 Biscayne Boulevard, 14th Floor  
Miami, Florida 33137

Ladies and Gentlemen:

The undersigned, Windtree Therapeutics, Inc., a company incorporated under the laws of Delaware (the "Company"), hereby confirms its agreement (this "Agreement") with the several underwriters (such underwriters, including the Representative (as defined below), the "Underwriters" and each an "Underwriter") named in Schedule I hereto for which Ladenburg Thalmann & Co. Inc. is acting as representative to the several Underwriters (the "Representative" and if there are no Underwriters other than the Representative, references to multiple Underwriters shall be disregarded and the term Representative as used herein shall have the same meaning as Underwriter) on the terms and conditions set forth herein.

It is understood that the several Underwriters are to make a public offering of the Public Securities as soon as the Representative deems it advisable to do so. The Public Securities are to be initially offered to the public at the public offering price set forth in the Prospectus.

It is further understood that you will act as the Representative for the other Underwriters, if any, in the offering and sale of the Closing Securities and, if any, the Option Securities in accordance with this Agreement.

**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:

"Action" shall have the meaning ascribed to such term in Section 3.1(k).

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

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

“Business Day” means any day other than Saturday, Sunday or other day on which commercial banks in The City of New York are authorized or required by law to remain closed; provided, however, for clarification, commercial banks shall not be deemed to be authorized or required by law to remain closed due to “stay at home”, “shelter-in-place”, “non-essential employee” or any other similar orders or restrictions or the closure of any physical branch locations at the direction of any governmental authority so long as the electronic funds transfer systems (including for wire transfers) of commercial banks in The City of New York are generally open for use by customers on such day.

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

“Closing Date” means the hour and the date on the Trading Day on which all conditions precedent to (i) the Underwriters’ obligations to pay the Closing Purchase Price and (ii) the Company’s obligations to deliver the Closing Securities, in each case, have been satisfied or waived, but in no event later than 10:00 a.m. (New York City time) on the second (2<sup>nd</sup>) Trading Day following the date hereof or at such earlier time as shall be agreed upon by the Representative and the Company.

“Closing Purchase Price” shall have the meaning ascribed to such term in Section 2.1(b), which aggregate purchase price shall be net of the underwriting discounts and commissions.

“Closing Securities” shall have the meaning ascribed to such term in Section 2.1(a)(ii).

“Closing Shares” shall have the meaning ascribed to such term in Section 2.1(a)(i).

“Closing Warrants” shall have the meaning ascribed to such term in Section 2.1(a)(ii).

“Combined Purchase Price” shall have the meaning ascribed to such term in Section 2.1(b).

“Commission” means the United States Securities and Exchange Commission.

“Common Stock” means the common stock of the Company, par value \$0.001 per share, and any other class of securities into which such securities may hereafter be reclassified or changed.

“Common Stock Equivalents” means any securities of the Company or the Subsidiaries which would entitle the holder thereof to acquire at any time Common Stock, including, without limitation, any debt, preferred stock, right, option, warrant or other instrument that is at any time convertible into or exercisable or exchangeable for, or otherwise entitles the holder thereof to receive, Common Stock.

“Company Auditor” means Ernst & Young LLP, with offices located at One Commerce Square, 2005 Market Street, Suite 700, Philadelphia, Pennsylvania 19103.

“Company Counsel” means Pepper Hamilton LLP, with offices located at 3000 Two Logan Square, Eighteenth and Arch Streets, Philadelphia, Pennsylvania 19103-2799.

“Effective Date” shall have the meaning ascribed to such term in Section 3.1(f).

“EGS” means Ellenoff Grossman & Schole LLP, with offices located at 1345 Avenue of the Americas, New York, New York 10105.

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

“Execution Date” shall mean the date on which the parties execute and enter into this Agreement.

“Exempt Issuance” means the issuance of (a) shares of Common Stock, options, restricted stock units or other equity awards to employees, officers, directors or consultants of the Company pursuant to the Company’s benefit plans existing on the date hereof, as such plans may be amended, or pursuant to any other stock or option plan duly adopted for such purpose by a majority of the non-employee members of the Board of Directors or a majority of the members of a committee of non-employee directors established for such purpose for services rendered to the Company, (b) securities upon the exercise or exchange of or conversion of any Securities issued hereunder and/or other securities exercisable or exchangeable for or convertible into shares of Common Stock issued and outstanding on the date of this Agreement, provided that such securities have not been amended since the date of this Agreement to increase the number of such securities or to decrease the exercise price, exchange price or conversion price of such securities or to extend the term of such securities, (c) securities issued pursuant to acquisitions or strategic transactions, including without limitation, joint venture, co-marketing, co-development or other collaboration arrangements, which issuance are approved by a majority of the disinterested directors of the Company, provided that such securities are issued as “restricted securities” (as defined in Rule 144) and carry no registration rights that require or permit the filing of any registration statement in connection therewith within 90 days following the Closing Date, and provided that any such issuance shall only be to a Person (or to the equity holders of a Person) which is, itself or through its subsidiaries, an operating company or an owner of an asset in a business synergistic with the business of the Company and shall provide to the Company additional benefits in addition to the investment of funds, but shall not include a transaction in which the Company is issuing securities primarily for the purpose of raising capital or to an entity whose primary business is investing in securities, and (d) securities issued as inducement grants under the Nasdaq inducement grant exception.

“FCPA” means the Foreign Corrupt Practices Act of 1977, as amended.

“FINRA” means the Financial Industry Regulatory Authority.

“GAAP” shall have the meaning ascribed to such term in Section 3.1(i).

“Indebtedness” means (a) any liabilities for borrowed money or amounts owed in excess of \$50,000 (other than trade accounts payable incurred in the ordinary course of business), (b) all guaranties, endorsements and other contingent obligations in respect of indebtedness of others, whether or not the same are or should be reflected in the Company’s consolidated balance sheet (or the notes thereto), except guaranties by endorsement of negotiable instruments for deposit or collection or similar transactions in the ordinary course of business; and (c) the present value of any lease payments in excess of \$50,000 due under leases required to be capitalized in accordance with GAAP.

“IP Company Counsel” means Potter Anderson & Corroon LLP, with offices located at 1313 N. Market Street, 6th Floor, Wilmington, DE 19801-6108.

“Liens” means a lien, charge, pledge, security interest, encumbrance, right of first refusal, preemptive right or other restriction.

“Lock-Up Agreements” means the lock-up agreements that are delivered on the date hereof by each of the Company’s officers and directors in the form of Exhibit D 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 results of operations, assets, business, prospects or condition (financial or otherwise) of the Company and the Subsidiaries, taken as a whole or (iii) a material adverse effect on the Company’s ability to perform in any material respect on a timely basis its obligations under any Transaction Document.

“Offering” shall have the meaning ascribed to such term in Section 2.1(c).

“Option Closing” means each closing of the purchase and sale of the Option Securities pursuant to Section 2.2.

“Option Closing Date” shall have the meaning ascribed to such term in Section 2.2(c).

“Option Closing Purchase Price” shall have the meaning ascribed to such term in Section 2.2(b), which aggregate purchase price shall be net of the underwriting discounts and commissions.

“Option Securities” shall have the meaning ascribed to such term in Section 2.2(a).

“Option Shares” shall have the meaning ascribed to such term in Section 2.2(a)(i).

“Option Warrants” shall have the meaning ascribed to such term in Section 2.2(a).

“Over-Allotment Option” shall have the meaning ascribed to such term in Section 2.2.

“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.

“Preliminary Prospectus” means, if any, any preliminary prospectus relating to the Securities included in the Registration Statement or filed with the Commission pursuant to Rule 424(b).

“Proceeding” means an action, claim, suit, investigation or proceeding (including, without limitation, an informal investigation or partial proceeding, such as a deposition), whether commenced or, to the Company’s knowledge, threatened.

“Prospectus” means the final prospectus filed for the Registration Statement.

“Public Securities” means, collectively, the Closing Securities and, if any, the Option Securities.

“Registration Statement” means, collectively, the various parts of the registration statement prepared by the Company on Form S-1 (File No. 333-236085) with respect to the Securities, each as amended as of the date hereof, including the Prospectus and the Preliminary Prospectus, if any, and all exhibits filed with or incorporated by reference into such registration statement.

“Required Approvals” shall have the meaning ascribed to such term in Section 3.1(e).

“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(i).

“Securities” means the Closing Securities, the Option Securities and the Warrant Shares.

“Securities Act” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

“Share Purchase Price” shall have the meaning ascribed to such term in Section 2.1(b).

“Shares” means, collectively, the shares of Common Stock delivered to the Underwriters in accordance with Section 2.1(a)(i) and Section 2.2(a).

“Subsidiary” means any significant subsidiary (as such term is defined in Rule 1-02 of Regulation S-X promulgated by the Commission) of the Company and shall, where applicable, also include any direct or indirect subsidiary of the Company formed or acquired after the date hereof.

“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 American, the Nasdaq Capital Market, the Nasdaq Global Market, the Nasdaq Global Select Market, the New York Stock Exchange, the OTCQX or the OTCQB (or any successors to any of the foregoing).

“Transaction Documents” means this Agreement, the Warrants, the Warrant Agency Agreement, the Lock-Up Agreements, and any other documents or agreements executed in connection with the transactions contemplated hereunder.

“Transfer Agent” means Continental Stock Transfer and Trust Company, the current transfer agent of the Company, with offices located at 1 State Street, 30 Floor, New York, NY 10004-1561 and any successor transfer agent of the Company.

“Warrant Agency Agreement” means the warrant agency agreement dated on or about the Closing Date, among the Company and the Transfer Agent pursuant to which the Transfer Agent will act as warrant agent for the Warrants, substantially in the form of Exhibit C attached hereto.

“Warrant Purchase Price” shall have the meaning ascribed to such term in Section 2.1(b).

“Warrant Shares” means the shares of Common Stock issuable upon exercise of the Warrants.

“Warrants” means, the Common Stock purchase warrants delivered to the Underwriters in accordance with Section 2.1(a)(ii) and Section 2.2, which Warrants shall be exercisable immediately on the Closing Date and have a term of exercise equal to five (5) years, in the form of Exhibit D attached hereto.

## **ARTICLE II. PURCHASE AND SALE**

### 2.1 Closing.

(a) Upon the terms and subject to the conditions set forth herein, the Company agrees to sell in the aggregate [●] shares of Common Stock and Warrants exercisable for an aggregate of [●] shares of Common Stock, and each Underwriter agrees to purchase, severally and not jointly, at the Closing, the following securities of the Company:

(i) the number of shares of Common Stock (the “Closing Shares”) set forth opposite the name of such Underwriter on Schedule I hereof; and

(ii) the number of Warrants to purchase [●] Warrant Shares set forth opposite the name of such Underwriter on Schedule I hereof (the “Closing Warrants” and, collectively with the Closing Shares, the “Closing Securities”), which Warrants shall have an exercise price of \$[●], subject to adjustment as provided therein.

(b) The aggregate purchase price for the Closing Securities shall equal the amount set forth opposite the name of such Underwriter on Schedule I hereto (the “Closing Purchase Price”). The combined purchase price for one Share and one Warrant to purchase [●] Warrant Share shall be \$[●] (the “Combined Purchase Price”) which shall be allocated as \$[●] per Share (the “Share Purchase Price”) and \$[●] per Warrant (the “Warrant Purchase Price”); and

(c) On the Closing Date, each Underwriter shall deliver or cause to be delivered to the Company, via wire transfer, immediately available funds equal to such Underwriter’s Closing Purchase Price and the Company shall deliver to, or as directed by, such Underwriter its respective Closing Securities and the Company shall deliver the other items required pursuant to Section 2.3 deliverable at the Closing. Upon satisfaction of the covenants and conditions set forth in Sections 2.3 and 2.4, the Closing shall occur at the offices of EGS or such other location as the Company and Representative shall mutually agree. The Public Securities are to be offered initially to the public at the offering price set forth on the cover page of the Prospectus (the “Offering”).

## 2.2 Over-Allotment Option.

(a) For the purposes of covering any over-allotments in connection with the distribution and sale of the Closing Securities, the Representative is hereby granted an option (the “Over-Allotment Option”) to purchase, in the aggregate, up to [●] shares of Common Stock (the “Option Shares”) and Warrants to purchase up to [●] Warrant Shares (the “Option Warrants” and, collectively with the Option Shares, the “Option Securities”) <sup>1</sup> which may be purchased in any combination of Option Shares and/or Option Warrants at the Share Purchase Price and/or Warrant Purchase Price, respectively.

(b) In connection with an exercise of the Over-Allotment Option, (a) the purchase price to be paid for the Option Shares is equal to the product of the Share Purchase Price multiplied by the number of Option Shares to be purchased and (b) the purchase price to be paid for the Option Warrants is equal to the product of the Warrant Purchase Price multiplied by the number of Option Warrants to be purchased (the aggregate purchase price to be paid on an Option Closing Date, the “Option Closing Purchase Price”).

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<sup>1</sup> 15% of the Closing Shares and the Closing Warrants.



(c) The Over-Allotment Option granted pursuant to this Section 2.2 may be exercised by the Representative as to all (at any time) or any part (from time to time) of the Option Securities within forty-five (45) days after the Execution Date. An Underwriter will not be under any obligation to purchase any Option Securities prior to the exercise of the Over-Allotment Option by the Representative. The Over-Allotment Option granted hereby may be exercised by the giving of oral notice to the Company from the Representative, which must be confirmed in writing by overnight mail or facsimile or other electronic transmission setting forth the number of Option Shares and/or Option Warrants to be purchased and the date and time for delivery of and payment for the Option Securities (each, an “Option Closing Date”), which will not be later than two (2) full Business Days after the date of the notice or such other time as shall be agreed upon by the Company and the Representative, at the offices of EGS or at such other place (including remotely by facsimile or other electronic transmission) as shall be agreed upon by the Company and the Representative. If such delivery and payment for the Option Securities does not occur on the Closing Date, each Option Closing Date will be as set forth in the notice. Upon exercise of the Over-Allotment Option, the Company will become obligated to convey to the Underwriters, and, subject to the terms and conditions set forth herein, the Underwriters will become obligated to purchase, the number of Option Shares and/or Option Warrants specified in such notice. The Representative may cancel the Over-Allotment Option at any time prior to the expiration of the Over-Allotment Option by written notice to the Company. On each Option Closing Date, if any, each Underwriter shall deliver or cause to be delivered to the Company, via wire transfer, immediately available funds equal to such Underwriter’s Option Closing Purchase Price and the Company shall deliver to, or as directed by, such Underwriter its respective Option Securities and the Company shall deliver the other items required pursuant to Section 2.3 at the Option Closing. Upon satisfaction of the covenants and conditions set forth in Sections 2.3 and 2.4, the Option Closing shall occur at the offices of EGS or such other location as the Company and Representative shall mutually agree.

2.3 Deliveries. The Company shall deliver or cause to be delivered to each Underwriter (if applicable) the following:

(i) At the Closing Date, the Closing Shares and, as to each Option Closing Date, if any, the applicable Option Shares, which shares shall be delivered via The Depository Trust Company Deposit or Withdrawal at Custodian system for the accounts of the several Underwriters;

(ii) At the Closing Date, the Closing Warrants and, as to each Option Closing Date, if any, the applicable Option Warrants via The Depository Trust Company Deposit or Withdrawal at Custodian system for the accounts of the several Underwriters;

(iii) At the Closing Date, the Warrant Agency Agreement duly executed by the parties thereto;

(iv) At the Closing Date, (i) a legal opinion of Company Counsel addressed to the Underwriters, including, without limitation, a negative assurance letter, in form and substance reasonably satisfactory to the Representative and as to each Option Closing Date, if any, a bring-down opinion from Company Counsel in form and substance reasonably satisfactory to the Representative, including, without limitation, a negative assurance letter, in form and substance reasonably satisfactory to the Representative and (ii) a legal opinion of IP Company Counsel including, without limitation, a negative assurance letter, in form and substance reasonably satisfactory to the Representative and as to each Option Closing Date, if any, a bring-down opinion from IP Company Counsel in form and substance reasonably satisfactory to the Representative, including, without limitation, a negative assurance letter, in form and substance reasonably satisfactory to the Representative;

(v) Contemporaneously herewith, a cold comfort letter, addressed to the Underwriters and in form and substance satisfactory in all respects to the Representative from the Company Auditor dated, respectively, as of the date of this Agreement and a bring-down letter dated as of the Closing Date and each Option Closing Date, if any;

(vi) At the Closing Date and on each Option Closing Date, if any, the duly executed and delivered Officer's Certificate, substantially in the form required by Exhibit A attached hereto;

(vii) At the Closing Date and on each Option Closing Date, if any, the duly executed and delivered Secretary's Certificate, substantially in the form required by Exhibit B attached hereto; and

(viii) Contemporaneously herewith, the duly executed and delivered Lock-Up Agreements.

2.4 Closing Conditions. The respective obligations of each Underwriter hereunder in connection with the Closing and each Option Closing are subject to the following conditions being met:

(i) the accuracy in all material respects when made and on the date in question (other than representations and warranties of the Company already qualified by materiality, which shall be true and correct in all respects) of the representations and warranties of the Company contained herein (unless as of a specific date therein);

(ii) all obligations, covenants and agreements of the Company required to be performed at or prior to the date in question shall have been performed in all material respects;

(iii) the delivery by the Company of the items set forth in Section 2.3 of this Agreement;

(iv) the Registration Statement shall be effective on the date of this Agreement and at each of the Closing Date and each Option Closing Date, if any, no stop order suspending the effectiveness of the Registration Statement shall have been issued and no proceedings for that purpose shall have been instituted or shall, to the Company's knowledge, be pending or contemplated by the Commission and any request on the part of the Commission for additional information shall have been complied with to the reasonable satisfaction of the Representative;

(v) by the Execution Date, if required by FINRA, the Underwriters shall have received clearance from FINRA as to the amount of compensation allowable or payable to the Underwriters as described in the Registration Statement;

(vi) the Closing Shares, the Option Shares and the Warrant Shares have been approved for listing on the Trading Market; and

(vii) prior to and on each of the Closing Date and each Option Closing Date, if any: (i) there shall have been no material adverse change or development involving a prospective material adverse change in the condition or prospects or the business activities, financial or otherwise, of the Company from the latest dates as of which such condition is set forth in the Registration Statement and Prospectus; (ii) no action suit or proceeding, at law or in equity, shall have been pending or threatened against the Company or any Affiliate of the Company before or by any court or federal or state commission, board or other administrative agency wherein an unfavorable decision, ruling or finding may materially adversely affect the business, operations, prospects or financial condition or income of the Company, except as set forth in the Registration Statement and Prospectus; (iii) no stop order shall have been issued under the Securities Act and no proceedings therefor shall have been initiated or threatened by the Commission; and (iv) the Registration Statement and the Prospectus and any amendments or supplements thereto shall contain all material statements which are required to be stated therein in accordance with the Securities Act and the rules and regulations thereunder and shall conform in all material respects to the requirements of the Securities Act and the rules and regulations thereunder, and neither the Registration Statement nor the Prospectus nor any amendment or supplement thereto shall 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, in light of the circumstances under which they were made, not misleading.

### **ARTICLE III. REPRESENTATIONS AND WARRANTIES**

3.1 Representations and Warranties of the Company. The Company represents and warrants to the Underwriters as of the Execution Date, as of the Closing Date and as of each Option Closing Date, if any, as follows:

(a) Subsidiaries. The Company owns, directly or indirectly, all of the capital stock or other equity interests of each Subsidiary free and clear of any Liens, and all of the issued and outstanding shares of capital stock of each Subsidiary are validly issued and are fully paid, non-assessable and free of preemptive and similar rights to subscribe for or purchase securities. If the Company has no Subsidiaries, all other references to the Subsidiaries or any of them in the Transaction Documents shall be disregarded. The Company does not own or control, directly or indirectly, any subsidiary other than the subsidiaries listed in Exhibit 21.1 to the Registration Statement.

(b) Organization and Qualification. The Company and each of the Subsidiaries is an entity duly incorporated or otherwise organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation or organization, with the requisite power and authority to own and use its properties and assets and to carry on its business as currently conducted. Neither the Company nor any Subsidiary is in violation nor default of any of the provisions of its respective certificate or articles of incorporation, bylaws or other organizational or charter documents. Each of the Company and the Subsidiaries is duly qualified to conduct business and is in good standing as a foreign corporation or other entity in each jurisdiction in which the nature of the business conducted or property owned by it makes such qualification necessary, except where the failure to be so qualified or in good standing, as the case may be, could not have or reasonably be expected to result in a Material Adverse Effect and no Proceeding has been instituted in any such jurisdiction revoking, limiting or curtailing or seeking to revoke, limit or curtail such power and authority or qualification.

(c) Authorization; Enforcement. The Company has the requisite corporate power and authority to enter into and to consummate the transactions contemplated by this Agreement and each of the other Transaction Documents to which the Company is a party and otherwise to carry out its obligations hereunder and thereunder. The execution and delivery of this Agreement and each of the other Transaction Documents by the Company and the consummation by it of the transactions contemplated hereby and thereby have been duly authorized by all necessary action on the part of the Company and no further action is required by the Company, the Board of Directors or the Company's stockholders in connection herewith or therewith other than in connection with the Required Approvals. This Agreement and each other Transaction Document to which the Company is a party 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 valid and binding obligation of the Company enforceable against the Company in accordance with its terms, except (i) as limited by general equitable principles and applicable bankruptcy, insolvency, reorganization, moratorium and other laws of general application affecting enforcement of creditors' rights generally, (ii) as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies and (iii) insofar as indemnification and contribution provisions may be limited by applicable law.

(d) No Conflicts. The execution, delivery and performance by the Company of this Agreement and the other Transaction Documents to which it is a party, the issuance and sale of the Securities and the consummation by it of the transactions contemplated hereby and thereby do not and will not (i) conflict with or violate any provision of the Company's or any Subsidiary's certificate or articles of incorporation, bylaws or other organizational or charter documents, or (ii) conflict with, or constitute a default (or an event that 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 any Subsidiary, or give to others any rights of termination, amendment, anti-dilution or similar adjustments, acceleration or cancellation (with or without notice, lapse of time or both) of, any agreement, credit facility, debt or other instrument (evidencing a Company or Subsidiary debt or otherwise) or other understanding to which the Company or any Subsidiary is a party or by which any property or asset of the Company or any Subsidiary is bound or affected, or (iii) subject to the Required Approvals, 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 or a Subsidiary is subject (including federal and state securities laws and regulations), or by which any property or asset of the Company or a Subsidiary is bound or affected; except in the case of each of clauses (ii) and (iii), such as could not have or reasonably be expected to result in a Material Adverse Effect.

(e) 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, other than: (i) the filing with the Commission of the Registration Statement and Prospectus, (ii) the application to the Trading Market for the listing of the Shares and the Warrant Shares for trading thereon and (iii) such filings as are required to be made under applicable state securities laws or blue sky laws or the rules of FINRA (collectively, the “Required Approvals”).

(f) Registration Statement. The Company has filed with the Commission the Registration Statement, including any related Prospectus or Prospectuses, for the registration of the Securities under the Securities Act, which Registration Statement has been prepared by the Company in all material respects in conformity with the requirements of the Securities Act and the rules and regulations of the Commission under the Securities Act. The Registration Statement has been declared effective by the Commission on the date hereof (the “Effective Date”). Any reference in this Agreement to the Registration Statement or the Prospectus shall be deemed to refer to and include the documents incorporated by reference therein, if any, which were filed under the Exchange Act, on or before the date of this Agreement, or the issue date of the Prospectus, as the case may be; and any reference in this Agreement to the terms “amend,” “amendment” or “supplement” with respect to the Registration Statement or the Prospectus shall be deemed to refer to and include the filing of any document under the Exchange Act after the date of this Agreement, or the issue date of the Prospectus, deemed to be incorporated therein by reference. All references in this Agreement to financial statements and schedules and other information which is “contained,” “included,” “described,” “referenced,” “set forth” or “stated” in the Registration Statement or the Prospectus (and all other references of like import) shall be deemed to mean and include all such financial statements and schedules and other information, if any, that is or is deemed to be incorporated by reference in the Registration Statement, or the Prospectus, as the case may be. No stop order suspending the effectiveness of the Registration Statement or the use of the Prospectus has been issued, and no proceeding for any such purpose is pending or has been initiated or, to the Company’s knowledge, is threatened by the Commission. For purposes of this Agreement, “free writing prospectus” has the meaning set forth in Rule 405 under the Securities Act. The Company will not, without the prior consent of the Representative, prepare, use or refer to, any free writing prospectus.

(g) Issuance of Securities. The Securities are duly authorized. The Closing Securities and the Option Securities, 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 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 Company has reserved from its duly authorized capital stock the maximum number of shares of Common Stock issuable pursuant to this Agreement and the Warrants. The holder of the Securities will not be subject to personal liability by reason of being such holders. The Securities are not and will not be subject to the preemptive rights of any holders of any security of the Company or similar contractual rights granted by the Company. All corporate action required to be taken for the authorization, issuance and sale of the Securities has been duly and validly taken. The Securities conform in all material respects to all statements with respect thereto contained in the Registration Statement.

(h) Capitalization. The capitalization of the Company is as set forth in the Registration Statement and the Prospectus. The Company has not issued any capital stock since its most recently filed periodic or current report under the Exchange Act, other than pursuant to the exercise of employee stock options under the Company's stock option plans, the issuance of shares of Common Stock to employees pursuant to the Company's employee stock purchase plans and pursuant to the conversion and/or exercise of Common Stock Equivalents outstanding as of the date of the most recently filed periodic report under the Exchange Act. Except as set forth in the Registration Statement and the Prospectus, no Person has any right of first refusal, preemptive right, right of participation, or any similar right to participate in the transactions contemplated by the Transaction Documents. Except as a result of the purchase and sale of the Securities, or as set forth in the Registration Statement or the Prospectus, there are no outstanding options, warrants, scrip rights to subscribe to, calls or commitments of any character whatsoever relating to, or securities, rights or obligations convertible into or exercisable or exchangeable for, or giving any Person any right to subscribe for or acquire, any shares of Common Stock, or contracts, commitments, understandings or arrangements by which the Company is or may become bound to issue additional shares of Common Stock or Common Stock Equivalents. The issuance and sale of the Securities will not obligate the Company to issue shares of Common Stock or other securities to any Person (other than the Underwriters). Except as a result of the purchase and sale of the Securities, or as set forth in the Registration Statement or the Prospectus, there are no outstanding securities or instruments of the Company with any provision that adjusts the exercise, conversion, exchange or reset price of such security or instrument upon an issuance of securities by the Company. Except as a result of the purchase and sale of the Securities, or as set forth in the Registration Statement or the Prospectus, there are no outstanding securities or instruments of the Company that contain any redemption or similar provisions, and there are no contracts, commitments, understandings or arrangements by which the Company is or may become bound to redeem a security of the Company. The Company does not have any stock appreciation rights or "phantom stock" plans or agreements or any similar plan or agreement. All of the outstanding shares of capital stock of the Company are duly authorized, validly issued, fully paid and nonassessable, have been issued in compliance with all federal and state securities laws, and none of such outstanding shares was issued in violation of any preemptive rights or similar rights to subscribe for or purchase securities. The authorized shares of the Company conform in all material respects to all statements relating thereto contained in the Registration Statement and the Prospectus. The offers and sales of the Company's securities were at all relevant times either registered under the Securities Act and the applicable state securities or Blue Sky laws or, based in part on the representations and warranties of the purchasers, exempt from such registration requirements. No further approval or authorization of any stockholder, the Board of Directors or others is required for the issuance and sale of the Securities. Except as set forth in the Registration Statement and the Prospectus, there are no stockholders agreements, voting agreements or other similar agreements with respect to the Company's capital stock to which the Company is a party or, to the knowledge of the Company, between or among any of the Company's stockholders.

(i) 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 Exchange Act, including pursuant to Section 13(a) or 15(d) thereof, for the twelve months preceding the date hereof (or such shorter period as the Company was required by law or regulation to file such material) (the foregoing materials, including the exhibits thereto and documents incorporated by reference therein, being collectively referred to herein 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, except as could not have or reasonably be expected to result in a Material Adverse Effect. As of their respective dates, the SEC Reports complied in all material respects with the requirements of the Exchange Act, as applicable, and none of the SEC Reports, when filed, 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 light of the circumstances under which they were made, not misleading. The financial statements of the Company included in the Registration Statement, the Prospectus and the SEC Reports comply 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 present in all material respects the financial position of the Company and its consolidated subsidiaries 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. The agreements and documents described in the Registration Statement, the Prospectus, and the SEC Reports conform to the descriptions thereof contained therein and there are no agreements or other documents required by the Securities Act and the rules and regulations thereunder to be described in the Registration Statement, the Prospectus, or the SEC Reports or to be filed with the Commission as exhibits to the Registration Statement, that have not been so described or filed. Each agreement or other instrument (however characterized or described) to which the Company is a party or by which it is or may be bound or affected and (i) that is referred to in the Registration Statement, the Prospectus or the SEC Reports, or (ii) is material to the Company’s business, has been duly authorized and validly executed by the Company, is in full force and effect in all material respects and is enforceable against the Company and, to the Company’s knowledge, the other parties thereto, in accordance with its terms, except (x) as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors’ rights generally, (y) as enforceability of any indemnification or contribution provision may be limited under the federal and state securities laws, and (z) that the remedy of specific performance and injunctive and other forms of equitable relief may be subject to the equitable defenses and to the discretion of the court before which any proceeding therefore may be brought. None of such agreements or instruments has been assigned by the Company, and neither the Company nor, to the best of the Company’s knowledge, any other party is in default thereunder and, to the best of the Company’s knowledge, no event has occurred that, with the lapse of time or the giving of notice, or both, would constitute a default thereunder. To the best of the Company’s knowledge, performance by the Company of the material provisions of such agreements or instruments will not result in a violation of any existing applicable law, rule, regulation, judgment, order or decree of any governmental agency or court, domestic or foreign, having jurisdiction over the Company or any of its assets or businesses, including, without limitation, those relating to environmental laws and regulations.

(j) Material Changes; Undisclosed Events, Liabilities or Developments. Since the date of the latest audited financial statements included within the Registration Statement and Prospectus, 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 could reasonably be expected to result in a Material Adverse Effect, (ii) the Company has not incurred any material liabilities (contingent or otherwise) other than (A) trade payables and accrued expenses incurred in the ordinary course of business consistent with past practice and (B) liabilities not required to be reflected in the Company's financial statements pursuant to GAAP or disclosed in filings made with the Commission, (iii) the Company has not altered its method of accounting, (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, (v) the Company has not issued any equity securities to any officer, director or Affiliate, except pursuant to existing Company stock option plans and (vi) no officer or director of the Company has resigned from any position with the Company. The Company does not have pending before the Commission any request for confidential treatment of information. Except for the issuance of the Securities contemplated by this Agreement, no event, liability, fact, circumstance, occurrence or development has occurred or exists or is reasonably expected to occur or exist with respect to the Company or its Subsidiaries or their respective businesses, prospects, properties, operations, assets or financial condition that would be required to be disclosed by the Company under applicable securities laws at the time this representation is made or deemed made that has not been publicly disclosed at least 1 Trading Day prior to the date that this representation is made. Unless otherwise disclosed in an SEC Report filed prior to the date hereof, the Company has not: (i) issued any securities or incurred any liability or obligation, direct or contingent, for borrowed money; or (ii) declared or paid any dividend or made any other distribution on or in respect to its capital stock.



(k) Litigation. There is no action, suit, inquiry, notice of violation, proceeding or investigation pending or, to the knowledge of the Company, threatened against or affecting the Company, any Subsidiary or any of their respective properties before or by any court, arbitrator, governmental or administrative agency or regulatory authority (federal, state, county, local or foreign) (collectively, an “Action”) which (i) adversely affects or challenges the legality, validity or enforceability of any of the Transaction Documents or the Securities or (ii) could, if there were an unfavorable decision, have or reasonably be expected to result in a Material Adverse Effect. Neither the Company nor any Subsidiary, nor any director or officer thereof, is or has been the subject of any Action involving a claim of violation of or liability under federal or state securities laws or a claim of breach of fiduciary duty. There has not been, and to the knowledge of the Company, there is not pending or contemplated, any investigation by the Commission involving the Company or any current or former director or officer of the Company. The Commission has not issued any stop order or other order suspending the effectiveness of any registration statement filed by the Company or any Subsidiary under the Exchange Act or the Securities Act.

(l) Labor Relations. No labor dispute exists or, to the knowledge of the Company, is imminent with respect to any of the employees of the Company, which could reasonably be expected to result in a Material Adverse Effect. None of the Company’s or its Subsidiaries’ employees is a member of a union that relates to such employee’s relationship with the Company or such Subsidiary, and neither the Company nor any of its Subsidiaries is a party to a collective bargaining agreement, and the Company and its Subsidiaries believe that their relationships with their employees are good. To the knowledge of the Company, no executive officer of the Company or any Subsidiary, is, or is now expected to be, in violation of any material term of any employment contract, confidentiality, disclosure or proprietary information agreement or non-competition agreement, or any other contract or agreement or any restrictive covenant in favor of any third party, and the continued employment of each such executive officer does not subject the Company or any of its Subsidiaries to any liability with respect to any of the foregoing matters. The Company and its Subsidiaries are in compliance with all U.S. federal, state, local and foreign laws and regulations relating to employment and employment practices, terms and conditions of employment and wages and hours, except where the failure to be in compliance could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(m) Compliance. Neither the Company nor any Subsidiary: (i) is in default under or in violation of (and no event has occurred that has not been waived that, with notice or lapse of time or both, would result in a default by the Company or any Subsidiary under), nor has the Company or any Subsidiary received notice of a claim that it is in default under or that it is in violation of, any indenture, loan or credit agreement or any other agreement or instrument to which it is a party or by which it or any of its properties is bound (whether or not such default or violation has been waived), (ii) is in violation of any judgment, decree or order of any court, arbitrator or other governmental authority or (iii) is or has been in violation of any statute, rule, ordinance or regulation of any governmental authority, including without limitation all foreign, federal, state and local laws relating to taxes, environmental protection, occupational health and safety, product quality and safety and employment and labor matters, except in each case as could not have or reasonably be expected to result in a Material Adverse Effect.

(n) Regulatory Permits. The Company and the Subsidiaries possess all certificates, authorizations and permits issued by the appropriate federal, state, local or foreign regulatory authorities necessary to conduct their respective businesses as described in the Registration Statement and the Prospectus, except where the failure to possess such permits could not reasonably be expected to result in a Material Adverse Effect (each, a “Material Permit”), and neither the Company nor any Subsidiary has received any notice of proceedings relating to the revocation or modification of any Material Permit. The disclosures in the Registration Statement concerning the effects of Federal, State, local and all foreign regulation on the Company’s business as currently contemplated are correct in all material respects.

(o) Title to Assets. The Company and the Subsidiaries have good and marketable title in fee simple to, or have valid and marketable rights to lease or otherwise use, all real property and all personal property that is material to the business of the Company and the Subsidiaries, in each case free and clear of all Liens, except for (i) Liens as do not materially affect the value of such property and do not materially interfere with the use made and proposed to be made of such property by the Company and the Subsidiaries and (ii) Liens for the payment of federal, state or other taxes, for which appropriate reserves have been made therefor in accordance with GAAP, and the payment of which is neither delinquent nor subject to penalties. Any real property and facilities held under lease by the Company and the Subsidiaries are held by them under valid, subsisting and enforceable leases with which the Company and the Subsidiaries are in compliance, except where failure to be in compliance could not reasonably be expected to have a Material Adverse Effect.

(p) Intellectual Property. To their knowledge, the Company and the Subsidiaries have, or have 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 necessary or required for use in connection with their respective businesses as described in the Registration Statement and the Prospectus and which the failure to do so could have a Material Adverse Effect (collectively, the “Intellectual Property Rights”). None of, and neither the Company nor any Subsidiary has received a notice (written or otherwise) 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 from the date of this Agreement, with the exception of certain non-core patents in-licensed from Philip Morris USA, Inc. or Philip Morris Products S.A., which have expired or will expire within two (2) years from the date of this Agreement. Neither the Company nor any Subsidiary has received, since the date of the latest audited financial statements included within the Registration Statement and Prospectus, a written notice of a claim or otherwise has any knowledge that the Intellectual Property Rights violate or infringe upon the rights of any Person, except as could not have or reasonably be expected to have 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 and its Subsidiaries have taken reasonable security measures to protect the secrecy, confidentiality and value of all of their intellectual properties, except where failure to do so could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(q) Insurance. The Company and the Subsidiaries are insured by insurers of recognized financial responsibility against such losses and risks and in such amounts as are prudent and customary in the businesses in which the Company and the Subsidiaries are engaged, including, but not limited to, directors and officers insurance coverage. Neither the Company nor any Subsidiary has any reason to believe that it will not be able to renew its existing insurance coverage as and when such coverage expires or to obtain similar coverage from similar insurers as may be necessary to continue its business without a significant increase in cost.

(r) Transactions With Affiliates and Employees. Except as set forth in the Registration Statement and the Prospectus, none of the officers or directors of the Company or any Subsidiary and, to the knowledge of the Company, none of the employees of the Company or any Subsidiary is presently a party to any transaction with the Company or any Subsidiary (other than for services as employees, officers and directors), including any contract, agreement or other arrangement providing for the furnishing of services to or by, providing for rental of real or personal property to or from, providing for the borrowing of money from or lending of money to or otherwise requiring payments to or from, any officer, director or such employee or, to the knowledge of the Company, any entity in which any officer, director, or any such employee has a substantial interest or is an officer, director, trustee, stockholder, member or partner, in each case in excess of \$120,000 other than for (i) payment of salary or consulting fees for services rendered, (ii) reimbursement for expenses incurred on behalf of the Company and (iii) other employee benefits, including stock option agreements under any stock option plan of the Company.

(s) Sarbanes-Oxley; Internal Accounting Controls. The Company and the Subsidiaries are in compliance in all material respects 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. The Company and the Subsidiaries maintain a system of internal accounting controls sufficient to provide reasonable assurance that: (i) transactions are executed in accordance with management's general or specific authorizations, (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP and to maintain asset accountability, (iii) access to assets is permitted only in accordance with management's general or specific authorization, and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. The Company and the Subsidiaries have established disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) for the Company and the Subsidiaries and designed such disclosure controls and procedures to ensure that information required to be disclosed by the Company in the reports it files or submits under the Exchange Act is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms. The Company's certifying officers have evaluated the effectiveness of the disclosure controls and procedures of the Company and the Subsidiaries as of the end of the period covered by the most recently filed periodic report under the Exchange Act (such date, the "Evaluation Date"). The Company presented in its most recently filed periodic report under the Exchange Act the conclusions of the certifying officers about the effectiveness of the disclosure controls and procedures based on their evaluations as of the Evaluation Date. Since the Evaluation Date, there have been no changes in the internal control over financial reporting (as such term is defined in the Exchange Act) of the Company and its Subsidiaries that have materially affected, or is reasonably likely to materially affect, the internal control over financial reporting of the Company and its Subsidiaries.

(t) Certain Fees. Except as set forth in the Registration Statement and Prospectus, no brokerage or finder's fees or commissions are or will be payable by the Company, any Subsidiary or Affiliate of 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. To the Company's knowledge, there are no other arrangements, agreements or understandings of the Company or, to the Company's knowledge, any of its stockholders that may affect the Underwriters' compensation, as determined by FINRA. Other than the placement agent fee paid in connection with the December 2019 private placement transaction, the Company has not made any direct or indirect payments (in cash, securities or otherwise) to: (i) any person, as a finder's fee, consulting fee or otherwise, in consideration of such person raising capital for the Company or introducing to the Company persons who raised or provided capital to the Company; (ii) any FINRA member; or (iii) any person or entity that has any direct or indirect affiliation or association with any FINRA member, within the twelve months prior to the Execution Date. None of the net proceeds of the Offering will be paid by the Company to any participating FINRA member or its affiliates, except as specifically authorized herein.

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

(v) Registration Rights. Except as set forth in the Registration Statement and Prospectus, no Person has any right to cause the Company or any Subsidiary to effect the registration under the Securities Act of any securities of the Company or any Subsidiary.

(w) Listing and Maintenance Requirements. The Common Stock is registered pursuant to Section 12(b) of the Exchange Act, and the Company has taken no action designed to, or which to its knowledge is likely to have the effect of, terminating the registration of the Common Stock under the Exchange Act nor has the Company received any notification that the Commission is contemplating terminating such registration. The Company has not, in the 12 months preceding the date hereof, received notice from any Trading Market on which the Common Stock is or has been listed or quoted to the effect that the Company is not in compliance with the listing or maintenance requirements of such Trading Market. The Company is, and has no reason to believe that it will not in the foreseeable future continue to be, in compliance with all such listing and maintenance requirements. The Common Stock is currently eligible for electronic transfer through the Depository Trust Company or another established clearing corporation and the Company is current in payment of the fees of the Depository Trust Company (or such other established clearing corporation) in connection with such electronic transfer.

(x) Application of Takeover Protections. The Company and the Board of Directors have taken all necessary action, if any, in order to render inapplicable any control share acquisition, business combination, poison pill (including any distribution under a rights agreement) or other similar anti-takeover provision under the Company's certificate of incorporation (or similar charter documents) or the laws of its state of incorporation that is or could become applicable as a result of the Underwriters and the Company fulfilling their obligations or exercising their rights under the Transaction Documents.

(y) Disclosure; 10b-5. The Registration Statement (and any further documents to be filed with the Commission in connection with the Offering) contains all exhibits and schedules as required by the Securities Act. Each of the Registration Statement and any post-effective amendment thereto, if any, at the time it became effective, complied in all material respects with the Securities Act and the Exchange Act and the applicable rules and regulations under the Securities Act and did not and, as amended or supplemented, if applicable, will not, contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. Each of the Preliminary Prospectus and the Prospectus, each as of its respective date, did or will as of the date thereof, comply in all material respects with the Securities Act and the Exchange Act and the applicable rules and regulations. Each of the Preliminary Prospectus and the Prospectus, as amended or supplemented, did not and will not contain as of the date thereof any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. No post-effective amendment to the Registration Statement reflecting any facts or events arising after the date thereof which represent, individually or in the aggregate, a fundamental change in the information set forth therein is required to be filed with the Commission as of the date hereof. Notwithstanding any of the foregoing, the Company makes no representation or warranty with respect to any underwriter information provided for use in the Registration Statement, the Preliminary Prospectus or the Prospectus. There are no documents required to be filed with the Commission in connection with the transaction contemplated hereby that (x) have not been filed as required pursuant to the Securities Act or (y) will not be filed within the requisite time period. There are no contracts or other documents required to be described in the Preliminary Prospectus or Prospectus, or to be filed as exhibits or schedules to the Registration Statement, which have not been described or filed as required.

(z) No Integrated Offering. Neither the Company, nor any of its Affiliates, nor any Person acting on its or their behalf has, directly or indirectly, made any offers or sales of any security or solicited any offers to buy any security, under circumstances that would cause this offering of the Securities to be integrated with prior offerings by the Company for purposes of any applicable shareholder approval provisions of any Trading Market on which any of the securities of the Company are listed or designated.

(aa) Solvency. Based on the consolidated financial condition of the Company as of the Closing Date, after giving effect to the receipt by the Company of the proceeds from the sale of the Securities hereunder, (i) the fair saleable value of the Company's assets exceeds the amount that will be required to be paid on or in respect of the Company's existing debts and other liabilities (including known contingent liabilities) as they mature, (ii) the Company's assets do not constitute unreasonably small capital to carry on its business as now conducted and as proposed to be conducted including its capital needs taking into account the particular capital requirements of the business conducted by the Company, consolidated and projected capital requirements and capital availability thereof, and (iii) the current cash flow of the Company, together with the proceeds the Company would receive, were it to liquidate all of its assets, after taking into account all anticipated uses of the cash, would be sufficient to pay all amounts on or in respect of its liabilities when such amounts are required to be paid. The Company does not intend to incur debts beyond its ability to pay such debts as they mature (taking into account the timing and amounts of cash to be payable on or in respect of its debt). The Company has no knowledge of any facts or circumstances which lead it to believe that it will file for reorganization or liquidation under the bankruptcy or reorganization laws of any jurisdiction within one year from the Closing Date. Each of the Registration Statement and the Prospectus sets forth as of the date hereof all outstanding secured and unsecured Indebtedness of the Company or any Subsidiary, or for which the Company or any Subsidiary has commitments. Neither the Company nor any Subsidiary is in default with respect to any Indebtedness.

(bb) Tax Status. Except for matters that would not, individually or in the aggregate, have or reasonably be expected to result in a Material Adverse Effect, the Company and its Subsidiaries each (i) has made or filed all United States federal, state and local income and all foreign income and franchise tax returns, reports and declarations required by any jurisdiction to which it is subject, (ii) has paid all taxes and other governmental assessments and charges that are material in amount, shown or determined to be due on such returns, reports and declarations and (iii) has set aside on its books provision reasonably adequate for the payment of all material taxes for periods subsequent to the periods to which such returns, reports or declarations apply. There are no unpaid taxes in any material amount claimed to be due by the taxing authority of any jurisdiction and none of the Company or its Subsidiaries has received a written notice of an intention to audit the Company or Subsidiaries with respect to Taxes. The provisions for taxes payable, if any, shown on the financial statements filed with or as part of the Registration Statement are sufficient for all material accrued and unpaid taxes, whether or not disputed, and for all periods to and including the dates of such consolidated financial statements. The term "taxes" mean all federal, state, local, foreign, and other net income, gross income, gross receipts, sales, use, ad valorem, transfer, franchise, profits, license, lease, service, service use, withholding, payroll, employment, excise, severance, stamp, occupation, premium, property, windfall profits, customs, duties or other taxes, fees, assessments, or charges of any kind whatsoever, together with any interest and any penalties, additions to tax, or additional amounts with respect thereto. The term "returns" means all returns, declarations, reports, statements, and other documents required to be filed in respect to taxes.

(cc) Foreign Corrupt Practices. Neither the Company nor any Subsidiary, nor to the knowledge of the Company, any agent or other person acting on behalf of the Company, has (i) directly or indirectly, used any funds for unlawful contributions, gifts, entertainment or other unlawful expenses related to foreign or domestic political activity, (ii) 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) failed to disclose fully any contribution made by the Company or any Subsidiary (or made by any person acting on its behalf of which the Company is aware) which is in violation of law, or (iv) violated in any material respect any provision of FCPA. The Company has taken reasonable steps to ensure that its accounting controls and procedures are sufficient to cause the Company to comply in all material respects with the FCPA.

(dd) Accountants. To the knowledge and belief of the Company, the Company Auditor (i) is an independent registered public accounting firm as required by the Exchange Act and (ii) shall express its opinion with respect to the financial statements to be included in the Company's Annual Report for the fiscal year ended December 31, 2020. The Company Auditor has not, during the periods covered by the financial statements included in the Prospectus, provided to the Company any non-audit services, as such term is used in Section 10A(g) of the Exchange Act.

(ee) FDA. As to each product subject to the jurisdiction of the U.S. Food and Drug Administration ("FDA") under the Federal Food, Drug and Cosmetic Act, as amended, and the regulations thereunder ("FDCA") that is manufactured, packaged, labeled, tested, distributed, sold, and/or marketed by the Company or any of its Subsidiaries (each such product, a "Pharmaceutical Product"), such Pharmaceutical Product is being manufactured, packaged, labeled, tested, distributed, sold and/or marketed by the Company in compliance with all applicable requirements under FDCA and similar laws, rules and regulations relating to registration, investigational use, premarket clearance, licensure, or application approval, good manufacturing practices, good laboratory practices, good clinical practices, product listing, quotas, labeling, advertising, record keeping and filing of reports, except where the failure to be in compliance would not have a Material Adverse Effect. There is no pending, completed or, to the Company's knowledge, threatened, action (including any lawsuit, arbitration, or legal or administrative or regulatory proceeding, charge, complaint, or investigation) against the Company or any of its Subsidiaries, and none of the Company or any of its Subsidiaries has received any notice, warning letter or other communication from the FDA or any other governmental entity, which (i) contests the premarket clearance, licensure, registration, or approval of, the uses of, the distribution of, the manufacturing or packaging of, the testing of, the sale of, or the labeling and promotion of any Pharmaceutical Product, (ii) withdraws its approval of, requests the recall, suspension, or seizure of, or withdraws or orders the withdrawal of advertising or sales promotional materials relating to, any Pharmaceutical Product, (iii) imposes a clinical hold on any clinical investigation by the Company or any of its Subsidiaries, (iv) enjoins production at any facility of the Company or any of its Subsidiaries, (v) enters or proposes to enter into a consent decree of permanent injunction with the Company or any of its Subsidiaries, or (vi) otherwise alleges any violation of any laws, rules or regulations by the Company or any of its Subsidiaries, and which, either individually or in the aggregate, would 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. The Company has not been informed by the FDA that the FDA will prohibit the marketing, sale, license or use in the United States of any product proposed to be developed, produced or marketed by the Company nor, to the knowledge of the Company, has the FDA expressed any concern as to approving or clearing for marketing any product being developed or proposed to be developed by the Company.

(ff) Stock Option Plans. Each stock option granted by the Company under the Company's stock option plan was granted (i) in accordance with the terms of the Company's stock option plan and (ii) with an exercise price at least equal to the fair market value of the Common Stock on the date such stock option would be considered granted under GAAP and applicable law. No stock option granted under the Company's stock option plan has been backdated. The Company has not knowingly granted, and there is no and has been no Company policy or practice to knowingly grant, stock options prior to, or otherwise knowingly coordinate the grant of stock options with, the release or other public announcement of material information regarding the Company or its Subsidiaries or their financial results or prospects.

(gg) Office of Foreign Assets Control. Neither the Company nor any Subsidiary nor, to the Company's knowledge, any director, officer, agent or employee of the Company is currently subject to any U.S. sanctions administered by the Office of Foreign Assets Control of the U.S. Treasury Department.

(hh) U.S. Real Property Holding Corporation. The Company is not and has never been a U.S. real property holding corporation within the meaning of Section 897 of the Internal Revenue Code of 1986, as amended, and the Company shall so certify upon the Representative's request.

(ii) Bank Holding Company Act. Neither the Company nor any of its Subsidiaries is subject to the Bank Holding Company Act of 1956, as amended (the "BHCA") and to regulation by the Board of Governors of the Federal Reserve System (the "Federal Reserve"). Neither the Company nor any of its Subsidiaries owns or controls, directly or indirectly, five percent (5%) or more of the outstanding shares of any class of voting securities or twenty-five percent (25%) or more of the total equity of a bank or any entity that is subject to the BHCA and to regulation by the Federal Reserve. Neither the Company nor any of its Subsidiaries exercises a controlling influence over the management or policies of a bank or any entity that is subject to the BHCA and to regulation by the Federal Reserve.

(jj) Money Laundering. To the extent the Company and its Subsidiaries are subject to such requirements, the operations of the Company and its Subsidiaries 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 applicable rules and regulations thereunder (collectively, the "Money Laundering Laws"), and no Action or Proceeding by or before any court or governmental agency, authority or body or any arbitrator involving the Company or any Subsidiary with respect to the Money Laundering Laws is pending or, to the knowledge of the Company, threatened.



(kk) D&O Questionnaires. To the Company's knowledge, all information contained in the questionnaires completed by each of the Company's directors and officers immediately prior to the Offering and in the Lock-Up Agreement provided to the Underwriters is true and correct in all material respects and the Company has not become aware of any information which would cause the information disclosed in such questionnaires become inaccurate and incorrect.

(ll) FINRA Affiliation. To the Company's knowledge, no officer, director or any beneficial owner of 5% or more of the Company's unregistered securities has any direct or indirect affiliation or association with any FINRA member (as determined in accordance with the rules and regulations of FINRA) that is participating in the Offering. The Company will advise the Representative and EGS if it learns that any officer, director or owner of 5% or more of the Company's outstanding shares of Common Stock or Common Stock Equivalents is or becomes an affiliate or associated person of a FINRA member firm.

(mm) Officers' Certificate. Any certificate signed by any duly authorized officer of the Company and delivered to the Representative or EGS shall be deemed a representation and warranty by the Company to the Underwriters as to the matters covered thereby.

(nn) Board of Directors. The Board of Directors is comprised of the persons set forth under the heading of the Prospectus captioned "Management." The qualifications of the persons serving as board members and the overall composition of the Board of Directors comply with the Sarbanes-Oxley Act of 2002 and the rules promulgated thereunder applicable to the Company and the rules of the Trading Market. At least one member of the Board of Directors qualifies as a "financial expert" as such term is defined under the Sarbanes-Oxley Act of 2002 and the rules promulgated thereunder and the rules of the Trading Market. In addition, at least a majority of the persons serving on the Board of Directors qualify as "independent" as defined under the rules of the Trading Market.

(oo) Environmental Laws. The Company and its Subsidiaries (i) are in compliance with all federal, state, local and foreign laws relating to pollution or protection of human health or the environment (including ambient air, surface water, groundwater, land surface or subsurface strata), including laws relating to emissions, discharges, releases or threatened releases of chemicals, pollutants, contaminants, or toxic or hazardous substances or wastes (collectively, "Hazardous Materials") into the environment, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of Hazardous Materials, as well as all authorizations, codes, decrees, demands, or demand letters, injunctions, judgments, licenses, notices or notice letters, orders, permits, plans or regulations, issued, entered, promulgated or approved thereunder ("Environmental Laws"); (ii) have received all permits licenses or other approvals required of them under applicable Environmental Laws to conduct their respective businesses; and (iii) are in compliance with all terms and conditions of any such permit, license or approval where in each clause (i), (ii) and (iii), the failure to so comply could be reasonably expected to have, individually or in the aggregate, a Material Adverse Effect.

**ARTICLE IV.  
OTHER AGREEMENTS OF THE PARTIES**

4.1 Amendments to Registration Statement. The Company has delivered, or will as promptly as practicable deliver, to the Underwriters complete conformed copies of the Registration Statement and of each consent and certificate of experts, as applicable, filed as a part thereof, and conformed copies of the Registration Statement (without exhibits) and the Prospectus, as amended or supplemented, in such quantities and at such places as an Underwriter reasonably requests. Neither the Company nor any of its directors and officers has distributed and none of them will distribute, prior to the Closing Date, any offering material in connection with the offering and sale of the Securities other than the Prospectus and the Registration Statement, and copies of the documents incorporated by reference therein. The Company shall not file any such amendment or supplement to which the Representative shall reasonably object in writing.

4.2 Federal Securities Laws.

(a) Compliance. During the time when a Prospectus is required to be delivered under the Securities Act, the Company will use its reasonable best efforts to comply with all requirements imposed upon it by the Securities Act and the rules and regulations thereunder and the Exchange Act and the rules and regulations thereunder, as from time to time in force, so far as necessary to permit the continuance of sales of or dealings in the Securities in accordance with the provisions hereof and the Prospectus. If at any time when a Prospectus relating to the Securities is required to be delivered under the Securities Act, any event shall have occurred as a result of which, in the opinion of counsel for the Company or counsel for the Underwriters, the Prospectus, as then amended or supplemented, includes an untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading, or if it is necessary at any time to amend the Prospectus to comply with the Securities Act, the Company will notify the Underwriters promptly and prepare and file with the Commission, subject to Section 4.1 hereof, an appropriate amendment or supplement in accordance with Section 10 of the Securities Act.

(b) Filing of Final Prospectus. The Company will file the Prospectus (in form and substance satisfactory to the Representative) with the Commission pursuant to the requirements of Rule 424.

(c) Exchange Act Registration. For a period of three years from the Execution Date (except in connection with a going private transaction that is approved by a majority of disinterested members of the board of directors and shareholders), (i) the Company will use its reasonable best efforts to maintain the registration of the Common Stock under the Exchange Act, and (ii) the Company will not deregister the Common Stock under the Exchange Act without the prior written consent of the Representative.

(d) Free Writing Prospectuses. The Company represents and agrees that it has not made and will not make any offer relating to the Securities that would constitute an issuer free writing prospectus, as defined in Rule 433 of the rules and regulations under the Securities Act, without the prior written consent of the Representative. Any such free writing prospectus consented to by the Representative is herein referred to as a “Permitted Free Writing Prospectus.” The Company represents that it will treat each Permitted Free Writing Prospectus as an “issuer free writing prospectus” as defined in rule and regulations under the Securities Act, and has complied and will comply with the applicable requirements of Rule 433 of the Securities Act, including timely Commission filing where required, legending and record keeping.

4.3 Delivery to the Underwriters of Prospectuses. The Company will deliver to the Underwriters, without charge, from time to time during the period when the Prospectus is required to be delivered under the Securities Act or the Exchange Act such number of copies of each Prospectus as the Underwriters may reasonably request.

4.4 Effectiveness and Events Requiring Notice to the Underwriters. The Company will use its reasonable best efforts to cause the Registration Statement to remain effective with a current prospectus until the later of nine (9) months from the Execution Date and the date on which the Warrants are no longer outstanding, and will notify the Underwriters and holders of the Warrants promptly and confirm the notice in writing: (i) of the effectiveness of the Registration Statement and any amendment thereto; (ii) of the issuance by the Commission of any stop order or of the initiation, or the threatening, of any proceeding for that purpose; (iii) of the issuance by any state securities commission of any proceedings for the suspension of the qualification of the Securities for offering or sale in any jurisdiction or of the initiation, or the threatening, of any proceeding for that purpose; (iv) of the mailing and delivery to the Commission for filing of any amendment or supplement to the Registration Statement or Prospectus; (v) of the receipt of any comments or request for any additional information from the Commission; and (vi) of the happening of any event during the period described in this Section 4.4 that, in the judgment of the Company, makes any statement of a material fact made in the Registration Statement or the Prospectus untrue or that requires the making of any changes in the Registration Statement or the Prospectus in order to make the statements therein, in light of the circumstances under which they were made, not misleading. If the Commission or any state securities commission shall enter a stop order or suspend such qualification at any time, the Company will make every reasonable effort to obtain promptly the lifting of such order.

#### 4.5 Expenses of the Offering.

(a) General Expenses Related to the Offering. The Company hereby agrees to pay on each of the Closing Date and each Option Closing Date, if any, to the extent not paid at the Closing Date, all expenses incident to the performance of the obligations of the Company under this Agreement, including, but not limited to: (a) all filing fees and communication expenses relating to the registration of the Securities to be sold in the Offering (including the Option Securities) with the Commission; (b) all FINRA Public Offering Filing System fees associated with the review of the Offering by FINRA; all fees and expenses relating to the listing of such Closing Shares, Option Shares and Warrant Shares on the Trading Market and such other stock exchanges as the Company and the Representative together determine; (c) all fees, expenses and disbursements relating to the registration or qualification of such Securities under the “blue sky” securities laws of such states and other foreign jurisdictions as the Representative may reasonably designate (including, without limitation, all filing and registration fees, and the fees and expenses of Blue Sky counsel in an amount not to exceed \$15,000), (d) the costs of all mailing and printing of the underwriting documents (including, without limitation, the Underwriting Agreement, any Blue Sky Surveys and, if appropriate, any Agreement Among Underwriters, Selected Dealers’ Agreement, Underwriters’ Questionnaire and Power of Attorney), Registration Statements, Prospectuses and all amendments, supplements and exhibits thereto and as many preliminary and final Prospectuses as the Representative may reasonably deem necessary; (e) the costs and expenses of the Company’s public relations firm; (f) the costs of preparing, printing and delivering the Securities; (g) fees and expenses of the Transfer Agent for the Securities (including, without limitation, any fees required for same-day processing of any instruction letter delivered by the Company); (h) stock transfer and/or stamp taxes, if any, payable upon the transfer of securities from the Company to the Underwriters; (i) the fees and expenses of the Company’s accountants; and (j) the fees and expenses of the Company’s legal counsel and other agents and representatives. The Underwriters may also deduct from the net proceeds of the Offering payable to the Company on the Closing Date, or each Option Closing Date, if any, the documented expenses set forth herein to be paid by the Company to the Underwriters.

(b) Expenses of the Representative. The Company further agrees that, in addition to the expenses payable pursuant to Section 4.5(a), on the Closing Date it will reimburse the Representative for its reasonable and documented out-of-pocket expenses related to the Offering in an amount up to \$100,000 in the aggregate, which shall be paid by deduction from the proceeds of the Offering contemplated herein.

4.6 Application of Net Proceeds. The Company will apply the net proceeds from the Offering received by it in a manner consistent with the application described under the caption "Use of Proceeds" in the Prospectus.

4.7 Delivery of Earnings Statements to Security Holders. The Company will make generally available to its security holders as soon as practicable, but not later than the first day of the fifteenth full calendar month following the Execution Date, an earnings statement (which need not be certified by independent public or independent certified public accountants unless required by the Securities Act or the Rules and Regulations under the Securities Act, but which shall satisfy the provisions of Rule 158(a) under Section 11(a) of the Securities Act) covering a period of at least twelve consecutive months beginning after the Execution Date.

4.8 Stabilization. Neither the Company, nor, to its knowledge, any of its employees, directors or shareholders (without the consent of the Representative) has taken or will take, directly or indirectly, any action designed to or that has constituted or that might reasonably be expected to cause or result in, under the Exchange Act, or otherwise, stabilization or manipulation of the price of any security of the Company to facilitate the sale or resale of the Securities.

4.9 Internal Controls. The Company will maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary in order to permit preparation of financial statements in accordance with GAAP and to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

4.10 Accountants. The Company shall continue to retain a nationally recognized independent certified public accounting firm for a period of at least three years after the Execution Date. The Underwriters acknowledge that the Company Auditor is acceptable to the Underwriters.

4.11 FINRA. The Company shall advise the Underwriters (who shall make an appropriate filing with FINRA) if it is aware that any 5% or greater shareholder of the Company becomes an affiliate or associated person of an Underwriter.

4.12 No Fiduciary Duties. The Company acknowledges and agrees that the Underwriters' responsibility to the Company is solely contractual and commercial in nature, based on arms-length negotiations and that neither the Underwriters nor their affiliates or any selected dealer shall be deemed to be acting in a fiduciary capacity, or otherwise owes any fiduciary duty to the Company or any of its affiliates in connection with the Offering and the other transactions contemplated by this Agreement. Notwithstanding anything in this Agreement to the contrary, the Company acknowledges that the Underwriters may have financial interests in the success of the Offering that are not limited to the difference between the price to the public and the purchase price paid to the Company by the Underwriters for the shares and the Underwriters have no obligation to disclose, or account to the Company for, any of such additional financial interests. The Company hereby waives and releases, to the fullest extent permitted by law, any claims that the Company may have against the Underwriters with respect to any breach or alleged breach of fiduciary duty.

4.13 Warrant Shares. If all or any portion of a Warrant is exercised at a time when there is an effective registration statement to cover the issuance of the Warrant Shares or if the Warrant is exercised via cashless exercise, the Warrant Shares issued pursuant to any such exercise shall be issued free of all restrictive legends. If at any time following the date hereof the Registration Statement (or any subsequent registration statement registering the sale or resale of the Warrant Shares) is not effective or is not otherwise available for the sale of the Warrant Shares, the Company shall promptly notify the holders of the Warrants in writing that such registration statement is not then effective and thereafter shall promptly notify such holders when the registration statement is effective again and available for the sale of the Warrant Shares (it being understood and agreed that the foregoing shall not limit the ability of the Company to issue, or any holder thereof to sell, any of the Warrant Shares in compliance with applicable federal and state securities laws).

4.14 Board Composition and Board Designations. The Company shall ensure that: (i) the qualifications of the persons serving as board members and the overall composition of the Board of Directors comply with the Sarbanes-Oxley Act of 2002 and the rules promulgated thereunder and with the listing requirements of the Trading Market and (ii) if applicable, at least one member of the Board of Directors qualifies as a "financial expert" as such term is defined under the Sarbanes-Oxley Act of 2002 and the rules promulgated thereunder.

4.15 Securities Laws Disclosure; Publicity. At the request of the Representative, by 9:00 a.m. (New York City time) [on the date hereof], the Company shall issue a press release disclosing the material terms of the Offering. The Company and the Representative shall consult with each other in issuing any other press releases with respect to the Offering, and neither the Company nor any Underwriter shall issue any such press release nor otherwise make any such public statement without the prior consent of the Company, with respect to any press release of such Underwriter, or without the prior consent of such Underwriter, with respect to any press release of the Company, which consent shall not unreasonably be withheld or delayed, except if such disclosure is required by law, in which case the disclosing party shall promptly provide the other party with prior notice of such public statement or communication. The Company will not issue press releases or engage in any other publicity, without the Representative's prior written consent, for a period ending at 5:00 p.m. (New York City time) on the first business day following the 45th day following the Closing Date, other than normal and customary releases issued in the ordinary course of the Company's business.

4.16 Shareholder Rights Plan. No claim will be made or enforced by the Company or, with the consent of the Company, any other Person, that any Underwriter of the Securities is an "Acquiring Person" under any control share acquisition, business combination, poison pill (including any distribution under a rights agreement) or similar anti-takeover plan or arrangement in effect or hereafter adopted by the Company, or that any Underwriter of Securities could be deemed to trigger the provisions of any such plan or arrangement, by virtue of receiving Securities.

4.17 Reservation of Common Stock. As of the date hereof, the Company has reserved and the Company shall continue to reserve and keep available at all times, free of preemptive rights, a sufficient number of shares of Common Stock for the purpose of enabling the Company to issue Option Shares pursuant to the Over-Allotment Option and Warrant Shares pursuant to any exercise of the Warrants.

4.18 Listing of Common Stock. The Company hereby agrees to use reasonable best efforts to maintain the listing or quotation of the Common Stock on the Trading Market on which it is currently listed, and concurrently with the Closing, the Company shall apply to list or quote all of the Closing Shares, Option Shares, and Warrant Shares on such Trading Market or the Nasdaq Capital Market and promptly secure the listing of all of the Closing Shares, Option Shares, and Warrant Shares on such Trading Market. The Company further agrees, if the Company applies to have the Common Stock traded on any other Trading Market, it will then include in such application all of the Closing Shares, Option Shares, and Warrant Shares, and will take such other action as is necessary to cause all of the Closing Shares, Option Shares, and Warrant Shares to be listed or quoted on such other Trading Market as promptly as possible. The Company will then take all action reasonably necessary to continue the listing and trading of its Common Stock on a Trading Market and will comply in all material respects with the Company's reporting, filing and other obligations under the bylaws or rules of the Trading Market. The Company agrees to maintain the eligibility of the Common Stock and Warrants for electronic transfer through the Depository Trust Company or another established clearing corporation, including, without limitation, by timely payment of fees to the Depository Trust Company or such other established clearing corporation in connection with such electronic transfer.

4.19 Subsequent Equity Sales.

(a) From the date hereof until 90 days following the Closing Date, neither the Company nor any Subsidiary shall issue, enter into any agreement to issue or announce the issuance or proposed issuance of any shares of Common Stock or Common Stock Equivalents.

(b) From the date hereof until 90 days following the Closing Date, the Company shall be prohibited from effecting or entering into an agreement to effect any issuance by the Company or any of its Subsidiaries of Common Stock or Common Stock Equivalents (or a combination of units thereof) involving a Variable Rate Transaction. “Variable Rate Transaction” means a transaction in which the Company (i) issues or sells any debt or equity securities that are convertible into, exchangeable or exercisable for, or include the right to receive, additional shares of Common Stock either (A) at a conversion price, exercise price or exchange rate or other price that is based upon, and/or varies with, the trading prices of or quotations for the shares of Common Stock at any time after the initial issuance of such debt or equity securities or (B) with a conversion, exercise or exchange price that is subject to being reset at some future date after the initial issuance of such debt or equity security or upon the occurrence of specified or contingent events directly or indirectly related to the business of the Company or the market for the Common Stock or (ii) enters into, or effects a transaction under, any agreement, including, but not limited to, an equity line of credit, whereby the Company may issue securities at a future determined price. Any Underwriter shall be entitled to obtain injunctive relief against the Company to preclude any such issuance, which remedy shall be in addition to any right to collect damages.

(c) Notwithstanding the foregoing, this Section 4.19 shall not apply in respect of an Exempt Issuance, except that no Variable Rate Transaction shall be an Exempt Issuance.

4.20 Research Independence. The Company acknowledges that each Underwriter’s research analysts and research departments, if any, are required to be independent from their respective investment banking divisions and are subject to certain regulations and internal policies, and that such Underwriter’s research analysts may hold and make statements or investment recommendations and/or publish research reports with respect to the Company and/or the offering that differ from the views of its investment bankers. The Company hereby waives and releases, to the fullest extent permitted by law, any claims that the Company may have against such Underwriter with respect to any conflict of interest that may arise from the fact that the views expressed by their independent research analysts and research departments may be different from or inconsistent with the views or advice communicated to the Company by such Underwriter’s investment banking divisions. The Company acknowledges that the Representative is a full service securities firm and as such from time to time, subject to applicable securities laws, may effect transactions for its own account or the account of its customers and hold long or short position in debt or equity securities of the Company.

4.21 Enforcement of Lock-Up Agreements. The Company hereby agrees it will not amend or waive the terms of the lock-up agreements between the Company each of the holders of the Series F warrants without the prior written consent of the Representative.

**ARTICLE V.  
DEFAULT BY UNDERWRITERS**

If on the Closing Date or any Option Closing Date, if any, any Underwriter shall fail to purchase and pay for the portion of the Closing Securities or Option Securities, as the case may be, which such Underwriter has agreed to purchase and pay for on such date (otherwise than by reason of any default on the part of the Company), the Representative, or if the Representative is the defaulting Underwriter, the non-defaulting Underwriters, shall use their reasonable best efforts to procure within 36 hours thereafter one or more of the other Underwriters, or any others, to purchase from the Company such amounts as may be agreed upon and upon the terms set forth herein, the Closing Securities or Option Securities, as the case may be, which the defaulting Underwriter or Underwriters failed to purchase. If during such 36 hours the Representative shall not have procured such other Underwriters, or any others, to purchase the Closing Securities or Option Securities, as the case may be, agreed to be purchased by the defaulting Underwriter or Underwriters, then (a) if the aggregate number of Closing Securities or Option Securities, as the case may be, with respect to which such default shall occur does not exceed 10% of the Closing Securities or Option Securities, as the case may be, covered hereby, the other Underwriters shall be obligated, severally, in proportion to the respective numbers of Closing Securities or Option Securities, as the case may be, which they are obligated to purchase hereunder, to purchase the Closing Securities or Option Securities, as the case may be, which such defaulting Underwriter or Underwriters failed to purchase, or (b) if the aggregate number of Closing Securities or Option Securities, as the case may be, with respect to which such default shall occur exceeds 10% of the Closing Securities or Option Securities, as the case may be, covered hereby, the Company or the Representative will have the right to terminate this Agreement without liability on the part of the non-defaulting Underwriters or of the Company except to the extent provided in Article VI hereof. In the event of a default by any Underwriter or Underwriters, as set forth in this Article V, the applicable Closing Date may be postponed for such period, not exceeding seven days, as the Representative, or if the Representative is the defaulting Underwriter, the non-defaulting Underwriters, may determine in order that the required changes in the Prospectus or in any other documents or arrangements may be effected. The term "Underwriter" includes any Person substituted for a defaulting Underwriter. Any action taken under this Section shall not relieve any defaulting Underwriter from liability in respect of any default of such Underwriter under this Agreement.

**ARTICLE VI.  
INDEMNIFICATION**

6.1 Indemnification of the Underwriters. Subject to the conditions set forth below, the Company agrees to indemnify and hold harmless the Underwriters, and each dealer selected by each Underwriter that participates in the offer and sale of the Securities (each a "Selected Dealer") and each of their respective directors, officers and employees and each Person, if any, who controls such Underwriter or any Selected Dealer ("Controlling Person") within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, against any and all loss, liability, claim, damage and expense whatsoever (including but not limited to any and all legal or other expenses reasonably incurred in investigating, preparing or defending against any litigation, commenced or threatened, or any claim whatsoever, whether arising out of any action between such Underwriter and the Company or between such Underwriter and any third party or otherwise) to which they or any of them may become subject under the Securities Act, the Exchange Act or any other statute or at common law or otherwise or under the laws of foreign countries, arising out of or based upon any untrue statement or alleged untrue statement of a material fact contained in (i) any Preliminary Prospectus, if any, the Registration Statement or the Prospectus (as from time to time each may be amended and supplemented); (ii) any materials or information provided to investors by, or with the approval of, the Company in connection with the marketing of the offering of the Securities, including any "road show" or investor presentations made to investors by the Company (whether in person or electronically); or (iii) any application or other document or written communication (in this Article VI, collectively called "application") executed by the Company or based upon written information furnished by the Company in any jurisdiction in order to qualify the Securities under the securities laws thereof or filed with the Commission, any state securities commission or agency, Trading Market or any securities exchange; or the omission or alleged omission therefrom of a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading, unless such statement or omission was made in reliance upon and in conformity with written information furnished to the Company with respect to the applicable Underwriter by or on behalf of such Underwriter expressly for use in any Preliminary Prospectus, if any, the Registration Statement or Prospectus, or any amendment or supplement thereto, or in any application, as the case may be. With respect to any untrue statement or omission or alleged untrue statement or omission made in the Preliminary Prospectus, if any, the indemnity agreement contained in this Section 6.1 shall not inure to the benefit of an Underwriter to the extent that any loss, liability, claim, damage or expense of such Underwriter results from the fact that a copy of the Prospectus was not given or sent to the Person asserting any such loss, liability, claim or damage at or prior to the written confirmation of sale of the Securities to such Person as required by the Securities Act and the rules and regulations thereunder, and if the untrue statement or omission has been corrected in the Prospectus, unless such failure to deliver the Prospectus was a result of non-compliance by the Company with its obligations under this Agreement. The Company agrees promptly to notify each Underwriter of the commencement of any litigation or proceedings against the Company or any of its officers, directors or Controlling Persons in connection with the issue and sale of the Public Securities or in connection with the Registration Statement or Prospectus.



6.2 Procedure. If any action is brought against an Underwriter, a Selected Dealer or a Controlling Person in respect of which indemnity may be sought against the Company pursuant to Section 6.1, such Underwriter, such Selected Dealer or Controlling Person, as the case may be, shall promptly notify the Company in writing of the institution of such action and the Company shall assume the defense of such action, including the employment and fees of counsel (subject to the reasonable approval of such Underwriter or such Selected Dealer, as the case may be) and payment of actual expenses. Such Underwriter, such Selected Dealer or Controlling Person shall have the right to employ its or their own counsel in any such case, but the fees and expenses of such counsel shall be at the expense of such Underwriter, such Selected Dealer or Controlling Person unless (i) the employment of such counsel at the expense of the Company shall have been authorized in writing by the Company in connection with the defense of such action, or (ii) the Company shall not have employed counsel to have charge of the defense of such action, or (iii) such indemnified party or parties shall have reasonably concluded that there may be defenses available to it or them which are different from or additional to those available to the Company (in which case the Company shall not have the right to direct the defense of such action on behalf of the indemnified party or parties), in any of which events the reasonable and documented fees and expenses of not more than one additional firm of attorneys selected by such Underwriter (in addition to local counsel), Selected Dealer and/or Controlling Person shall be borne by the Company. Notwithstanding anything to the contrary contained herein, if any Underwriter, Selected Dealer or Controlling Person shall assume the defense of such action as provided above, the Company shall have the right to approve in writing the terms of any settlement of such action which approval shall not be unreasonably withheld.

6.3 Indemnification of the Company. Each Underwriter, severally and not jointly, agrees to indemnify and hold harmless the Company, its directors, officers and employees and agents who control the Company within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act against any and all loss, liability, claim, damage and expense described in the foregoing indemnity from the Company to such Underwriter, as incurred, but only with respect to untrue statements or omissions, or alleged untrue statements or omissions made in any Preliminary Prospectus, if any, the Registration Statement or Prospectus or any amendment or supplement thereto or in any application, in reliance upon, and in strict conformity with, written information furnished to the Company with respect to such Underwriter by or on behalf of such Underwriter expressly for use in such Preliminary Prospectus, if any, the Registration Statement or Prospectus or any amendment or supplement thereto or in any such application. In case any action shall be brought against the Company or any other Person so indemnified based on any Preliminary Prospectus, if any, the Registration Statement or Prospectus or any amendment or supplement thereto or any application, and in respect of which indemnity may be sought against such Underwriter, such Underwriter shall have the rights and duties given to the Company, and the Company and each other Person so indemnified shall have the rights and duties given to such Underwriter by the provisions of this Article VI. Notwithstanding the provisions of this Section 6.3, no Underwriter shall be required to indemnify the Company for any amount in excess of the underwriting discounts and commissions applicable to the Securities purchased by such Underwriter. The Underwriters' obligations in this Section 6.3 to indemnify the Company are several in proportion to their respective underwriting obligations and not joint.

6.4 Contribution.

(a) Contribution Rights. In order to provide for just and equitable contribution under the Securities Act in any case in which (i) any Person entitled to indemnification under this Article VI makes a claim for indemnification pursuant hereto but it is judicially determined (by the entry of a final judgment or decree by a court of competent jurisdiction and the expiration of time to appeal or the denial of the last right of appeal) that such indemnification may not be enforced in such case notwithstanding the fact that this Article VI provides for indemnification in such case, or (ii) contribution under the Securities Act, the Exchange Act or otherwise may be required on the part of any such Person in circumstances for which indemnification is provided under this Article VI, then, and in each such case, the Company and each Underwriter, severally and not jointly, shall contribute to the aggregate losses, liabilities, claims, damages and expenses of the nature contemplated by said indemnity agreement incurred by the Company and such Underwriter, as incurred, in such proportions that such Underwriter is responsible for that portion represented by the percentage that the underwriting discount appearing on the cover page of the Prospectus bears to the initial offering price appearing thereon and the Company is responsible for the balance; provided, that, no Person guilty of a fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentation. For purposes of this Section, each director, officer and employee of such Underwriter or the Company, as applicable, and each Person, if any, who controls such Underwriter or the Company, as applicable, within the meaning of Section 15 of the Securities Act shall have the same rights to contribution as such Underwriter or the Company, as applicable. Notwithstanding the provisions of this Section 6.4, no Underwriter shall be required to contribute any amount in excess of the underwriting discounts and commissions applicable to the Securities purchased by such Underwriter. The Underwriters' obligations in this Section 6.4 to contribute are several in proportion to their respective underwriting obligations and not joint.

(b) Contribution Procedure. Within fifteen days after receipt by any party to this Agreement (or its representative) of notice of the commencement of any action, suit or proceeding, such party will, if a claim for contribution in respect thereof is to be made against another party (“contributing party”), notify the contributing party of the commencement thereof, but the failure to so notify the contributing party will not relieve it from any liability which it may have to any other party other than for contribution hereunder. In case any such action, suit or proceeding is brought against any party, and such party notifies a contributing party or its representative of the commencement thereof within the aforesaid fifteen days, the contributing party will be entitled to participate therein with the notifying party and any other contributing party similarly notified. Any such contributing party shall not be liable to any party seeking contribution on account of any settlement of any claim, action or proceeding affected by such party seeking contribution without the written consent of such contributing party. The contribution provisions contained in this Section 6.4 are intended to supersede, to the extent permitted by law, any right to contribution under the Securities Act, the Exchange Act or otherwise available.

## **ARTICLE VII. MISCELLANEOUS**

### 7.1 Termination.

(a) Termination Right. The Representative shall have the right to terminate this Agreement at any time prior to any Closing Date, (i) if any domestic or international event or act or occurrence has materially disrupted, or in its opinion will in the immediate future materially disrupt, general securities markets in the United States; or (ii) if trading on any Trading Market shall have been suspended or materially limited, or minimum or maximum prices for trading shall have been fixed, or maximum ranges for prices for securities shall have been required by FINRA or by order of the Commission or any other government authority having jurisdiction, or (iii) if the United States shall have become involved in a new war or an increase in major hostilities that materially adversely impacts the United States securities markets, or (iv) if a banking moratorium has been declared by a New York State or federal authority, or (v) if a moratorium on foreign exchange trading has been declared which materially adversely impacts the United States securities markets, or (vi) if the Company shall have sustained a material loss by fire, flood, accident, hurricane, earthquake, theft, sabotage or other calamity or malicious act which, whether or not such loss shall have been insured, will, in the Representative’s opinion, make it inadvisable to proceed with the delivery of the Securities, or (vii) if the Company is in material breach of any of its representations, warranties or covenants hereunder, or (viii) if the Representative shall have become aware after the date hereof of such a material adverse change in the conditions or prospects of the Company, or such adverse material change in general market conditions as in the Representative’s reasonable judgment would make it impracticable to proceed with the offering, sale and/or delivery of the Securities or to enforce contracts made by the Underwriters for the sale of the Securities.

(b) Expenses. In the event this Agreement shall be terminated pursuant to Section 7.1(a), within the time specified herein or any extensions thereof pursuant to the terms herein, the Company shall be obligated to pay to the Representative its actual and accountable reasonable and documented out of pocket expenses related to the transactions contemplated herein then due and payable, including the fees and disbursements of EGS; provided, however, that such expenses shall not exceed \$25,000 in the aggregate (provided, further, however, that such expense cap in no way limits or impairs the indemnification and contribution provisions of this Agreement).

(c) Indemnification. Notwithstanding any contrary provision contained in this Agreement, any election hereunder or any termination of this Agreement, and whether or not this Agreement is otherwise carried out, the provisions of Article VI shall not be in any way effected by such election or termination or failure to carry out the terms of this Agreement or any part hereof.

7.2 Entire Agreement. The Transaction Documents, together with the exhibits and schedules thereto, and the Prospectus, contain the entire understanding of the parties with respect to the subject matter hereof and thereof and supersede all prior agreements and understandings, oral or written, with respect to such matters, which the parties acknowledge have been merged into such documents, exhibits and schedules. Notwithstanding anything herein to the contrary, the Engagement Agreement, dated January 10, 2020 ("Engagement Agreement"), by and between the Company and the Representative, shall continue to be effective and the terms therein, including, without limitation, Section 4(iii) and Section 5 with respect to any future offerings, shall continue to survive and be enforceable by the Representative in accordance with its terms, provided that, in the event of a conflict between the terms of the Engagement Agreement and this Agreement, the terms of this Agreement shall prevail.

7.3 Notices. Any and all notices or other communications or deliveries required or permitted to be provided hereunder shall be in writing and shall be deemed given and effective on the earliest of: (a) the time of transmission, if such notice or communication is delivered via facsimile at the facsimile number or e-mail attachment at the email address set forth on the signature pages attached hereto at or prior to 5:30 p.m. (New York City time) on a Trading Day, (b) the next Trading Day after the time of transmission, if such notice or communication is delivered via facsimile at the facsimile number or e-mail attachment at the e-mail address as set forth on the signature pages attached hereto on a day that is not a Trading Day or later than 5:30 p.m. (New York City time) on any Trading Day, (c) the second (2<sup>nd</sup>) Trading Day following the date of mailing, if sent by U.S. nationally recognized overnight courier service or (d) upon actual receipt by the party to whom such notice is required to be given. The address for such notices and communications shall be as set forth on the signature pages attached hereto.

7.4 Amendments; Waivers. No provision of this Agreement may be waived, modified, supplemented or amended except in a written instrument signed, in the case of an amendment, by the Company and the Representative. No waiver of any default with respect to any provision, condition or requirement of this Agreement shall be deemed to be a continuing waiver in the future or a waiver of any subsequent default or a waiver of any other provision, condition or requirement hereof, nor shall any delay or omission of any party to exercise any right hereunder in any manner impair the exercise of any such right.

7.5 Headings. The headings herein are for convenience only, do not constitute a part of this Agreement and shall not be deemed to limit or affect any of the provisions hereof.

7.6 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties and their successors and permitted assigns.

7.7 Governing Law. All questions concerning the construction, validity, enforcement and interpretation of the Transaction Documents shall be governed by and construed and enforced in accordance with the internal laws of the State of New York, without regard to the principles of conflicts of law thereof. Each party agrees that all legal Proceedings concerning the interpretations, enforcement and defense of the transactions contemplated by this Agreement and any other Transaction Documents (whether brought against a party hereto or its respective affiliates, directors, officers, shareholders, partners, members, employees or agents) shall be commenced exclusively in the state and federal courts sitting in the City of New York. Each party hereby irrevocably submits to the exclusive jurisdiction of the state and federal courts sitting in the City of New York, Borough of Manhattan for the adjudication of any dispute hereunder or in connection herewith or with any transaction contemplated hereby or discussed herein (including with respect to the enforcement of any of the Transaction Documents), and hereby irrevocably waives, and agrees not to assert in any Action or Proceeding, any claim that it is not personally subject to the jurisdiction of any such court, that such Action or Proceeding is improper or is an inconvenient venue for such Proceeding. Each party hereby irrevocably waives personal service of process and consents to process being served in any such Action or Proceeding by mailing a copy thereof via registered or certified mail or overnight delivery (with evidence of delivery) to such party at the address in effect for notices to it under this Agreement and agrees that such service shall constitute good and sufficient service of process and notice thereof. Nothing contained herein shall be deemed to limit in any way any right to serve process in any other manner permitted by law. If either party shall commence an Action or Proceeding to enforce any provisions of the Transaction Documents, then, in addition to the obligations of the Company under Article VI, the prevailing party in such Action or Proceeding shall be reimbursed by the other party for its reasonable attorneys' fees and other costs and expenses incurred with the investigation, preparation and prosecution of such Action or Proceeding.

7.8 Survival. The representations and warranties contained herein shall survive the Closing and the Option Closing, if any, and the delivery of the Securities.

7.9 Execution. This Agreement may be executed in two or more counterparts, all of which when taken together shall be considered one and the same agreement and shall become effective when counterparts have been signed by each party and delivered to each other party, it being understood that the parties need not sign the same counterpart. In the event that any signature is delivered by facsimile transmission or by e-mail delivery of a “.pdf” format data file, such signature shall create a valid and binding obligation of the party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or “.pdf” signature page were an original thereof.

7.10 Severability. If any term, provision, covenant or restriction of this Agreement is held by a court of competent jurisdiction to be invalid, illegal, void or unenforceable, the remainder of the terms, provisions, covenants and restrictions set forth herein shall remain in full force and effect and shall in no way be affected, impaired or invalidated, and the parties hereto shall use their commercially reasonable efforts to find and employ an alternative means to achieve the same or substantially the same result as that contemplated by such term, provision, covenant or restriction. It is hereby stipulated and declared to be the intention of the parties that they would have executed the remaining terms, provisions, covenants and restrictions without including any of such that may be hereafter declared invalid, illegal, void or unenforceable.

7.11 Remedies. In addition to being entitled to exercise all rights provided herein or granted by law, including recovery of damages, the Underwriters and the Company will be entitled to specific performance under the Transaction Documents. The parties agree that monetary damages may not be adequate compensation for any loss incurred by reason of any breach of obligations contained in the Transaction Documents and hereby agree to waive and not to assert in any Action for specific performance of any such obligation the defense that a remedy at law would be adequate.

7.12 Saturdays, Sundays, Holidays, etc. If the last or appointed day for the taking of any action or the expiration of any right required or granted herein shall not be a Business Day, then such action may be taken or such right may be exercised on the next succeeding Business Day.

7.13 Construction. The parties agree that each of them and/or their respective counsel have reviewed and had an opportunity to revise the Transaction Documents and, therefore, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of the Transaction Documents or any amendments thereto. In addition, each and every reference to share prices and shares of Common Stock in any Transaction Document shall be subject to adjustment for reverse and forward stock splits, stock dividends, stock combinations and other similar transactions of the Common Stock that occur after the date of this Agreement.

**7.14 WAIVER OF JURY TRIAL. IN ANY ACTION, SUIT, OR PROCEEDING IN ANY JURISDICTION BROUGHT BY ANY PARTY AGAINST ANY OTHER PARTY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY, THE PARTIES EACH KNOWINGLY AND INTENTIONALLY, TO THE GREATEST EXTENT PERMITTED BY APPLICABLE LAW, HEREBY ABSOLUTELY, UNCONDITIONALLY, IRREVOCABLY AND EXPRESSLY WAIVE FOREVER ANY RIGHT TO TRIAL BY JURY.**

*(Signature Pages Follow)*

If the foregoing correctly sets forth the understanding between the Underwriters and the Company, please so indicate in the space provided below for that purpose, whereupon this letter shall constitute a binding agreement among the Company and the several Underwriters in accordance with its terms.

Very truly yours,

**WINDTREE THERAPEUTICS, INC.**

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

Address for Notice:  
2600 Kelly Road, Suite 100  
Warrington, Pennsylvania 18976  
Attn: Chief Financial Officer

Copy to:

Pepper Hamilton LLP  
3000 Two Logan Square  
Philadelphia, Pennsylvania 19103  
Email: bushey@pepperlaw.com and porterj@pepperlaw.com  
Attn: Rachael M. Bushey and Jennifer Porter

Accepted on the date first above written.

**LADENBURG THALMANN & CO. INC.**

As the Representative of the several  
Underwriters listed on Schedule I  
By: Ladenburg Thalmann & Co. Inc.

By: \_\_\_\_\_  
Name: Nicholas Stergis  
Title: Managing Director

Address for Notice:  
4400 Biscayne Boulevard, 14th Floor  
Miami, Florida 33137  
Attn: General Counsel

Copy to:  
Ellenoff Grossman & Schole LLP  
1345 Avenue of the Americas  
New York, New York 10105  
E-mail: mnertney@egsllp.com  
Attention: Michael Nertney

*[Signature Page to Underwriting Agreement]*

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SCHEDULE I

SCHEDULE OF UNDERWRITERS

<u>Underwriters</u>	<u>Closing Shares</u>	<u>Closing Warrants</u>	<u>Closing Purchase Price</u>
Ladenburg Thalmann & Co. Inc.			\$
National Securities Corporation			
<b>Total</b>			\$



## COMMON STOCK PURCHASE WARRANT

## WINDTREE THERAPEUTICS, INC.

Warrant No. \_\_\_\_\_  
 Warrant Shares: \_\_\_\_\_  
 CUSIP:  
 ISIN:

Initial Exercise Date: \_\_\_\_\_, 2020

THIS COMMON STOCK PURCHASE WARRANT (the "Warrant") certifies that, for value received, \_\_\_\_\_ or its assigns (the "Holder") is entitled, upon the terms and subject to the limitations on exercise and the conditions hereinafter set forth, at any time on or after the date hereof (the "Initial Exercise Date") and on or prior to 5:00 p.m. (New York City time) on the five (5) year anniversary of the Initial Exercise Date (the "Termination Date") but not thereafter, to subscribe for and purchase from Windtree Therapeutics, Inc., a Delaware corporation (the "Company"), up to \_\_\_\_\_ shares (as subject to adjustment hereunder, the "Warrant Shares") of Common Stock. The purchase price of one share of Common Stock under this Warrant shall be equal to the Exercise Price, as defined in Section 2(b). This Warrant shall initially be issued and maintained in the form of a security held in book-entry form and the Depository Trust Company or its nominee ("DTC") shall initially be the sole registered holder of this Warrant, subject to a Holder's right to elect to receive a Warrant in certificated form pursuant to the terms of the Warrant Agency Agreement, in which case this sentence shall not apply.

Section 1. Definitions. In addition to the terms defined elsewhere in this Warrant, the following terms have the meanings indicated in this Section 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.

"Bid Price" means, for any date, the price determined by the first of the following clauses that applies: (a) if the Common Stock is then listed or quoted on a Trading Market, the bid price of the Common Stock for the time in question (or the nearest preceding date) on the Trading Market on which the Common Stock is then listed or quoted as reported by Bloomberg L.P. (based on a Trading Day from 9:30 a.m. (New York City time) to 4:02 p.m. (New York City time)), (b) if the Common Stock is not then listed or quoted for trading on a Trading Market and if prices for the Common Stock are then reported on the Pink Open Market (or a similar organization or agency succeeding to its functions of reporting prices), the most recent bid price per share of the Common Stock so reported, or (c) in all other cases, the fair market value of a share of Common Stock as determined by an independent appraiser selected in good faith by the Holders of a majority in interest of the Warrants then outstanding and reasonably acceptable to the Company, the fees and expenses of which shall be paid by the Company.

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“Business Day” means any day other than Saturday, Sunday or other day on which commercial banks in The City of New York are authorized or required by law to remain closed; provided, however, for clarification, commercial banks shall not be deemed to be authorized or required by law to remain closed due to “stay at home”, “shelter-in-place”, “non-essential employee” or any other similar orders or restrictions or the closure of any physical branch locations at the direction of any governmental authority so long as the electronic funds transfer systems (including for wire transfers) of commercial banks in The City of New York are generally are open for use by customers on such day.

“Commission” means the United States Securities and Exchange Commission.

“Common Stock” means the common stock of the Company, par value \$0.001 per share, and any other class of securities into which such securities may hereafter be reclassified or changed.

“Common Stock Equivalents” means any securities of the Company or the Subsidiaries which would entitle the holder thereof to acquire at any time Common Stock, including, without limitation, any debt, preferred stock, right, option, warrant or other instrument that is at any time convertible into or exercisable or exchangeable for, or otherwise entitles the holder thereof to receive, Common Stock.

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

“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.

“Registration Statement” means the Company’s registration statement on Form S-1 (File No. 333-236085).

“Securities Act” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

“Subsidiary” means any subsidiary of the Company and shall, where applicable, also include any direct or indirect subsidiary of the Company formed or acquired after the date hereof.

“Trading Day” means a day on which the Common Stock may be traded on a Trading Market.

“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 American, the Nasdaq Capital Market, the Nasdaq Global Market, the Nasdaq Global Select Market, the New York Stock Exchange, the OTCQB or the OTCQX (or any successors to any of the foregoing).

“Transfer Agent” means Continental Stock Transfer and Trust Company, the current transfer agent of the Company, with a mailing address of 1 State Street 30th Floor, New York, NY 10004-1561 Attention: [●], a facsimile number of [●] and an email address of [●], and any successor transfer agent of the Company.

“VWAP” means, for any date, the price determined by the first of the following clauses that applies: (a) if the Common Stock is then listed or quoted on a Trading Market, the daily volume weighted average price of the Common Stock for such date (or the nearest preceding date) on the Trading Market on which the Common Stock is then listed or quoted as reported by Bloomberg L.P. (based on a Trading Day from 9:30 a.m. (New York City time) to 4:02 p.m. (New York City time)), (b) if the Common Stock is not then listed or quoted for trading on a Trading Market and if prices for the Common Stock are then reported on the Pink Open Market (or a similar organization or agency succeeding to its functions of reporting prices), the most recent bid price per share of the Common Stock so reported or (c) in all other cases, the fair market value of a share of Common Stock as determined by an independent appraiser selected in good faith by the holders of a majority in interest of the Warrants then outstanding and reasonably acceptable to the Company, the fees and expenses of which shall be paid by the Company.

“Warrant Agency Agreement” means that certain warrant agency agreement, dated on or about the Initial Exercise Date, between the Company and the Warrant Agent.

“Warrant Agent” means the Transfer Agent and any successor warrant agent of the Company.

“Warrants” means this Warrant and other Common Stock purchase warrants issued by the Company pursuant to the Registration Statement.

## Section 2. Exercise.

a) Exercise of Warrant. Exercise of the purchase rights represented by this Warrant may be made, in whole or in part, at any time or times on or after the Initial Exercise Date and on or before the Termination Date by delivery to the Company of a duly executed facsimile copy or PDF copy submitted by e-mail (or e-mail attachment) of the Notice of Exercise in the form annexed hereto (the “Notice of Exercise”) with a copy of the Notice of Exercise delivered to the Warrant Agent. Within the earlier of (i) two (2) Trading Days and (ii) the number of Trading Days comprising the Standard Settlement Period (as defined in Section 2(d)(i) herein) following the date of exercise as aforesaid, the Holder shall deliver the aggregate Exercise Price for the Warrant Shares specified in the applicable Notice of Exercise by wire transfer pursuant to wire instructions provided by the Company or cashier’s check drawn on a United States bank unless the cashless exercise procedure specified in Section 2(c) below is specified in the applicable Notice of Exercise. No ink-original Notice of Exercise shall be required, nor shall any medallion guarantee (or other type of guarantee or notarization) of any Notice of Exercise be required. Notwithstanding anything herein to the contrary, the Holder shall not be required to physically surrender this Warrant to the Company until the Holder has purchased all of the Warrant Shares available hereunder and the Warrant has been exercised in full, in which case, the Holder shall surrender this Warrant to the Company for cancellation within three (3) Trading Days of the date on which the final Notice of Exercise is delivered to the Company. Partial exercises of this Warrant resulting in purchases of a portion of the total number of Warrant Shares available hereunder shall have the effect of lowering the outstanding number of Warrant Shares purchasable hereunder in an amount equal to the applicable number of Warrant Shares purchased. The Holder and the Company shall maintain records showing the number of Warrant Shares purchased and the date of such purchases. The Company shall deliver any objection to any Notice of Exercise within one (1) Business Day of receipt of such notice. **The Holder and any assignee, by acceptance of this Warrant, acknowledge and agree that, by reason of the provisions of this paragraph, following the purchase of a portion of the Warrant Shares hereunder, the number of Warrant Shares available for purchase hereunder at any given time may be less than the amount stated on the face hereof.**

Notwithstanding the foregoing in this Section 2(a), a holder whose interest in this Warrant is a beneficial interest in certificate(s) representing this Warrant held in book-entry form through DTC (or another established clearing corporation performing similar functions), shall effect exercises made pursuant to this Section 2(a) by delivering to DTC (or such other clearing corporation, as applicable) the appropriate instruction form for exercise, complying with the procedures to effect exercise that are required by DTC (or such other clearing corporation, as applicable), subject to a Holder's right to elect to receive a Warrant in certificated form pursuant to the terms of the Warrant Agency Agreement, in which case this sentence shall not apply.

b) Exercise Price. The exercise price per share of Common Stock under this Warrant shall be \$[●], subject to adjustment hereunder (the "Exercise Price").

c) Cashless Exercise. If at the time of exercise hereof there is no effective registration statement registering, or the prospectus contained therein is not available for the issuance of the Warrant Shares to the Holder, then this Warrant may also be exercised, in whole or in part, at such time by means of a "cashless exercise" in which the Holder shall be entitled to receive a number of Warrant Shares equal to the quotient obtained by dividing [(A-B) (X)] by (A), where:

(A) = as applicable: (i) the VWAP on the Trading Day immediately preceding the date of the applicable Notice of Exercise if such Notice of Exercise is (1) both executed and delivered pursuant to Section 2(a) hereof on a day that is not a Trading Day or (2) both executed and delivered pursuant to Section 2(a) hereof on a Trading Day prior to the opening of "regular trading hours" (as defined in Rule 600(b)(68) of Regulation NMS promulgated under the federal securities laws) on such Trading Day, (ii) at the option of the Holder, either (y) the VWAP on the Trading Day immediately preceding the date of the applicable Notice of Exercise or (z) the Bid Price of the Common Stock on the principal Trading Market as reported by Bloomberg L.P. as of the time of the Holder's execution of the applicable Notice of Exercise if such Notice of Exercise is executed during "regular trading hours" on a Trading Day and is delivered within two (2) hours thereafter (including until two (2) hours after the close of "regular trading hours" on a Trading Day) pursuant to Section 2(a) hereof or (iii) the VWAP on the date of the applicable Notice of Exercise if the date of such Notice of Exercise is a Trading Day and such Notice of Exercise is both executed and delivered pursuant to Section 2(a) hereof after the close of "regular trading hours" on such Trading Day;

(B) = the Exercise Price of this Warrant, as adjusted hereunder; and

(X) = the number of Warrant Shares that would be issuable upon exercise of this Warrant in accordance with the terms of this Warrant if such exercise were by means of a cash exercise rather than a cashless exercise.

If Warrant Shares are issued in such a cashless exercise, the parties acknowledge and agree that in accordance with Section 3(a)(9) of the Securities Act, the Warrant Shares shall take on the registered characteristics of the Warrants being exercised. The Company agrees not to take any position contrary to this Section 2(c).

d) Mechanics of Exercise.

i. Delivery of Warrant Shares Upon Exercise. The Company shall cause the Warrant Shares purchased hereunder to be transmitted by the Transfer Agent to the Holder by crediting the account of the Holder's or its designee's balance account with The Depository Trust Company through its Deposit or Withdrawal at Custodian system ("DWAC") if the Company is then a participant in such system and either (A) there is an effective registration statement permitting the issuance of the Warrant Shares to or resale of the Warrant Shares by Holder or (B) this Warrant is being exercised via cashless exercise, and otherwise by book entry, registered in the Company's share register in the name of the Holder or its designee, for the number of Warrant Shares to which the Holder is entitled pursuant to such exercise to the address specified by the Holder in the Notice of Exercise by the date that is the earliest of (i) two (2) Trading Days after the delivery to the Company of the Notice of Exercise and (ii) the number of Trading Days comprising the Standard Settlement Period after the delivery to the Company of the Notice of Exercise (such date, the "Warrant Share Delivery Date"). Upon delivery of the Notice of Exercise, the Holder shall be deemed for all corporate purposes to have become the holder of record of the Warrant Shares with respect to which this Warrant has been exercised, irrespective of the date of delivery of the Warrant Shares, provided that payment of the aggregate Exercise Price (other than in the case of a cashless exercise) is received within the earlier of (i) two (2) Trading Days and (ii) the number of Trading Days comprising the Standard Settlement Period following delivery of the Notice of Exercise. If the Company fails for any reason to deliver to the Holder the Warrant Shares subject to a Notice of Exercise by the Warrant Share Delivery Date, the Company shall pay to the Holder, in cash, as liquidated damages and not as a penalty, for each \$1,000 of Warrant Shares subject to such exercise (based on the VWAP of the Common Stock on the date of the applicable Notice of Exercise), \$5.00 per Trading Day (increasing to \$10.00 per Trading Day on the fifth Trading Day after such liquidated damages begin to accrue but in no event shall such liquidated damages in the aggregate exceed more than \$10,000 per failed delivery) for each Trading Day after such Warrant Share Delivery Date until such Warrant Shares are delivered or Holder rescinds such exercise. The Company agrees to use best efforts to maintain a transfer agent that is a participant in the FAST program so long as this Warrant remains outstanding and exercisable. As used herein, "Standard Settlement Period" means the standard settlement period, expressed in a number of Trading Days, on the Company's primary Trading Market with respect to the Common Stock as in effect on the date of delivery of the Notice of Exercise.

ii. Delivery of New Warrants Upon Exercise. If this Warrant shall have been exercised in part, the Company shall, at the request of a Holder and upon surrender of this Warrant, at the time of delivery of the Warrant Shares, deliver to the Holder a new Warrant evidencing the rights of the Holder to purchase the unpurchased Warrant Shares called for by this Warrant, which new Warrant shall in all other respects be identical with this Warrant.

iii. Rescission Rights. If the Company fails to cause the Transfer Agent to transmit to the Holder the Warrant Shares pursuant to Section 2(d)(i) by the Warrant Share Delivery Date, then the Holder will have the right to rescind such exercise.

iv. Compensation for Buy-In on Failure to Timely Deliver Warrant Shares Upon Exercise. In addition to any other rights available to the Holder, if the Company fails to cause the Transfer Agent to transmit to the Holder the Warrant Shares in accordance with the provisions of Section 2(d)(i) above pursuant to an exercise on or before the Warrant Share Delivery Date (other than any such failure that is solely due to any action or inaction by the Holder with respect to such exercise), and if after such date the Holder is required by its broker to purchase (in an open market transaction or otherwise) or the Holder's brokerage firm otherwise purchases, shares of Common Stock to deliver in satisfaction of a sale by the Holder of the Warrant Shares which the Holder anticipated receiving upon such exercise (a "Buy-In"), then the Company shall (A) pay in cash to the Holder the amount, if any, by which (x) the Holder's total purchase price (including brokerage commissions, if any) for the shares of Common Stock so purchased exceeds (y) the amount obtained by multiplying (1) the number of Warrant Shares that the Company was required to deliver to the Holder in connection with the exercise at issue times (2) the price at which the sell order giving rise to such purchase obligation was executed, and (B) at the option of the Holder, either reinstate the portion of the Warrant and equivalent number of Warrant Shares for which such exercise was not honored (in which case such exercise shall be deemed rescinded) or deliver to the Holder the number of shares of Common Stock that would have been issued had the Company timely complied with its exercise and delivery obligations hereunder. For example, if the Holder purchases Common Stock having a total purchase price of \$11,000 to cover a Buy-In with respect to an attempted exercise of shares of Common Stock with an aggregate sale price giving rise to such purchase obligation of \$10,000, under clause (A) of the immediately preceding sentence the Company shall be required to pay the Holder \$1,000. The Holder shall provide the Company written notice indicating the amounts payable to the Holder in respect of the Buy-In and, upon request of the Company, evidence of the amount of such loss. Nothing herein shall limit a Holder's right to pursue any other remedies available to it hereunder, at law or in equity including, without limitation, a decree of specific performance and/or injunctive relief with respect to the Company's failure to timely deliver shares of Common Stock upon exercise of the Warrant as required pursuant to the terms hereof.

v. No Fractional Shares or Scrip. No fractional shares or scrip representing fractional shares shall be issued upon the exercise of this Warrant. As to any fraction of a share which the Holder would otherwise be entitled to purchase upon such exercise, the Company shall round up to the next whole share.

vi. Charges, Taxes and Expenses. Issuance of Warrant Shares shall be made without charge to the Holder for any issue or transfer tax or other incidental expense in respect of the issuance of such Warrant Shares, all of which taxes and expenses shall be paid by the Company, and such Warrant Shares shall be issued in the name of the Holder or in such name or names as may be directed by the Holder; provided, however, that, in the event that Warrant Shares are to be issued in a name other than the name of the Holder, this Warrant when surrendered for exercise shall be accompanied by the Assignment Form attached hereto duly executed by the Holder and the Company may require, as a condition thereto, the payment of a sum sufficient to reimburse it for any transfer tax incidental thereto and all required documents. The Company shall pay all Transfer Agent fees required for same-day processing of any Notice of Exercise and all fees to the Depository Trust Company (or another established clearing corporation performing similar functions) required for same-day electronic delivery of the Warrant Shares.

vii. Closing of Books. The Company will not close its stockholder books or records in any manner which prevents the timely exercise of this Warrant, pursuant to the terms hereof.

e) Holder's Exercise Limitations. The Company shall not effect any exercise of this Warrant, and a Holder shall not have the right to exercise any portion of this Warrant, pursuant to Section 2 or otherwise, to the extent that after giving effect to such issuance after exercise as set forth on the applicable Notice of Exercise, the Holder (together with the Holder's Affiliates, and any other Persons acting as a group together with the Holder or any of the Holder's Affiliates (such Persons, "Attribution Parties")), would beneficially own in excess of the Beneficial Ownership Limitation (as defined below). For purposes of the foregoing sentence, the number of shares of Common Stock beneficially owned by the Holder and its Affiliates and Attribution Parties shall include the number of shares of Common Stock issuable upon exercise of this Warrant with respect to which such determination is being made, but shall exclude the number of shares of Common Stock which would be issuable upon (i) exercise of the remaining, nonexercised portion of this Warrant beneficially owned by the Holder or any of its Affiliates or Attribution Parties and (ii) exercise or conversion of the unexercised or nonconverted portion of any other securities of the Company (including, without limitation, any other Common Stock Equivalents) subject to a limitation on conversion or exercise analogous to the limitation contained herein beneficially owned by the Holder or any of its Affiliates or Attribution Parties. Except as set forth in the preceding sentence, for purposes of this Section 2(e), beneficial ownership shall be calculated in accordance with Section 13(d) of the Exchange Act and the rules and regulations promulgated thereunder, it being acknowledged by the Holder that the Company is not representing to the Holder that such calculation is in compliance with Section 13(d) of the Exchange Act and the Holder is solely responsible for any schedules required to be filed in accordance therewith. To the extent that the limitation contained in this Section 2(e) applies, the determination of whether this Warrant is exercisable (in relation to other securities owned by the Holder together with any Affiliates and Attribution Parties) and of which portion of this Warrant is exercisable shall be in the sole discretion of the Holder, and the submission of a Notice of Exercise shall be deemed to be the Holder's determination of whether this Warrant is exercisable (in relation to other securities owned by the Holder together with any Affiliates and Attribution Parties) and of which portion of this Warrant is exercisable, in each case subject to the Beneficial Ownership Limitation. To ensure compliance with this restriction, each Holder shall be deemed to represent to the Company each time it delivers a Notice of Exercise that such Notice of Exercise has not violated the restrictions set forth in this paragraph, and the Company shall have no obligation to verify or confirm the accuracy of such determination. In addition, a determination as to any group status as contemplated above shall be determined in accordance with Section 13(d) of the Exchange Act and the rules and regulations promulgated thereunder. For purposes of this Section 2(e), in determining the number of outstanding shares of Common Stock, a Holder may rely on the number of outstanding shares of Common Stock as reflected in (A) the Company's most recent periodic or annual report filed with the Commission, as the case may be, (B) a more recent public announcement by the Company or (C) a more recent written notice by the Company or the Transfer Agent setting forth the number of shares of Common Stock outstanding. Upon the written or oral request of a Holder, the Company shall within two Trading Days confirm orally and in writing to the Holder the number of shares of Common Stock then outstanding. In any case, the number of outstanding shares of Common Stock shall be determined after giving effect to the conversion or exercise of securities of the Company, including this Warrant, by the Holder or its Affiliates or Attribution Parties since the date as of which such number of outstanding shares of Common Stock was reported. The "Beneficial Ownership Limitation" shall be 4.99% (or, upon election by a Holder prior to the issuance of any Warrants, 9.99%) of the number of shares of the Common Stock outstanding immediately after giving effect to the issuance of shares of Common Stock issuable upon exercise of this Warrant. The Holder, upon notice to the Company, may increase or decrease the Beneficial Ownership Limitation provisions of this Section 2(e), provided that the Beneficial Ownership Limitation in no event exceeds 9.99% of the number of shares of the Common Stock outstanding immediately after giving effect to the issuance of shares of Common Stock upon exercise of this Warrant held by the Holder and the provisions of this Section 2(e) shall continue to apply. Any increase in the Beneficial Ownership Limitation will not be effective until the 61<sup>st</sup> day after such notice is delivered to the Company. The provisions of this paragraph shall be construed and implemented in a manner otherwise than in strict conformity with the terms of this Section 2(e) to correct this paragraph (or any portion hereof) which may be defective or inconsistent with the intended Beneficial Ownership Limitation herein contained or to make changes or supplements necessary or desirable to properly give effect to such limitation. The limitations contained in this paragraph shall apply to a successor holder of this Warrant.



f) Call Provision. Subject to the provisions of Section 2(e) and this Section 2(f), if, after the Initial Exercise Date, (i) the VWAP for each of 30 consecutive Trading Days (the "Measurement Period," which 30 consecutive Trading Day period shall not have commenced until after the Initial Exercise Date) exceeds \$\_\_\_\_ (subject to adjustment for forward and reverse stock splits, recapitalizations, stock dividends and the like after the Initial Exercise Date), (ii) the average daily volume for such Measurement Period exceeds \$500,000 per Trading Day and (iii) the Holder is not in possession of any information that constitutes, or might constitute, material non-public information which was provided by the Company, any of its Subsidiaries, or any of their officers, directors, employees, agents or Affiliates, then the Company may, within 1 Trading Day of the end of such Measurement Period, call for cancellation of all or any portion of this Warrant for which a Notice of Exercise has not yet been delivered (such right, a "Call") for consideration equal to \$0.001 per Warrant Share. To exercise this right, the Company must deliver to the Holder an irrevocable written notice (a "Call Notice"), indicating therein the portion of unexercised portion of this Warrant to which such notice applies. If the conditions set forth below for such Call are satisfied from the period from the date of the Call Notice through and including the Call Date (as defined below), then any portion of this Warrant subject to such Call Notice for which a Notice of Exercise shall not have been received by the Call Date will be cancelled at 6:30 p.m. (New York City time) on the tenth Trading Day after the date the Call Notice is received by the Holder (such date and time, the "Call Date"). Any unexercised portion of this Warrant to which the Call Notice does not pertain will be unaffected by such Call Notice. In furtherance thereof, the Company covenants and agrees that it will honor all Notices of Exercise with respect to Warrant Shares subject to a Call Notice that are tendered through 6:30 p.m. (New York City time) on the Call Date. The parties agree that any Notice of Exercise delivered following a Call Notice which calls less than all of the Warrants shall first reduce to zero the number of Warrant Shares subject to such Call Notice prior to reducing the remaining Warrant Shares available for purchase under this Warrant. For example, if (A) this Warrant then permits the Holder to acquire 100 Warrant Shares, (B) a Call Notice pertains to 75 Warrant Shares, and (C) prior to 6:30 p.m. (New York City time) on the Call Date the Holder tenders a Notice of Exercise in respect of 50 Warrant Shares, then (x) on the Call Date the right under this Warrant to acquire 25 Warrant Shares will be automatically cancelled, (y) the Company, in the time and manner required under this Warrant, will have issued and delivered to the Holder 50 Warrant Shares in respect of the exercises following receipt of the Call Notice, and (z) the Holder may, until the Termination Date, exercise this Warrant for 25 Warrant Shares (subject to adjustment as herein provided and subject to subsequent Call Notices). Subject again to the provisions of this Section 2(f), the Company may deliver subsequent Call Notices for any portion of this Warrant for which the Holder shall not have delivered a Notice of Exercise. Notwithstanding anything to the contrary set forth in this Warrant, the Company may not deliver a Call Notice or require the cancellation of this Warrant (and any such Call Notice shall be void), unless, from the beginning of the Measurement Period through the Call Date, (1) the Company shall have honored in accordance with the terms of this Warrant all Notices of Exercise delivered by 6:30 p.m. (New York City time) on the Call Date, and (2) a registration statement shall be effective as to all Warrant Shares and the prospectus thereunder available for use by the Company for the sale of all such Warrant Shares to the Holder, and (3) the Common Stock shall be listed or quoted for trading on the Trading Market, and (4) there is a sufficient number of authorized shares of Common Stock for issuance of all Warrant Shares, and (5) the issuance of all Warrant Shares subject to a Call Notice shall not cause a breach of any provision of Section 2(e) herein. The Company's right to call the Warrants under this Section 2(f) shall be exercised ratably among the Holders based on each Holder's initial purchase of Warrants.

Section 3. Certain Adjustments.

a) Stock Dividends and Splits. If the Company, at any time while this Warrant is outstanding: (i) pays a stock dividend or otherwise makes a distribution or distributions on shares of its Common Stock or any other equity or equity equivalent securities payable in shares of Common Stock (which, for avoidance of doubt, shall not include any shares of Common Stock issued by the Company upon exercise of this Warrant), (ii) subdivides outstanding shares of Common Stock into a larger number of shares, (iii) combines (including by way of reverse stock split) outstanding shares of Common Stock into a smaller number of shares, or (iv) issues by reclassification of shares of the Common Stock any shares of capital stock of the Company, then in each case the Exercise Price shall be multiplied by a fraction of which the numerator shall be the number of shares of Common Stock (excluding treasury shares, if any) outstanding immediately before such event and of which the denominator shall be the number of shares of Common Stock outstanding immediately after such event, and the number of shares issuable upon exercise of this Warrant shall be proportionately adjusted such that the aggregate Exercise Price of this Warrant shall remain unchanged. Any adjustment made pursuant to this Section 3(a) shall become effective immediately after the record date for the determination of stockholders entitled to receive such dividend or distribution and shall become effective immediately after the effective date in the case of a subdivision, combination or reclassification.

b) Subsequent Rights Offerings. In addition to any adjustments pursuant to Section 3(a) above, if at any time the Company grants, issues or sells any Common Stock Equivalents or rights to purchase stock, warrants, securities or other property pro rata to the record holders of any class of shares of Common Stock (the "Purchase Rights"), then the Holder will be entitled to acquire, upon the terms applicable to such Purchase Rights, the aggregate Purchase Rights which the Holder could have acquired if the Holder had held the number of shares of Common Stock acquirable upon complete exercise of this Warrant (without regard to any limitations on exercise hereof, including without limitation, the Beneficial Ownership Limitation) immediately before the date on which a record is taken for the grant, issuance or sale of such Purchase Rights, or, if no such record is taken, the date as of which the record holders of shares of Common Stock are to be determined for the grant, issue or sale of such Purchase Rights (provided, however, that, to the extent that the Holder's right to participate in any such Purchase Right would result in the Holder exceeding the Beneficial Ownership Limitation, then the Holder shall not be entitled to participate in such Purchase Right to such extent (or beneficial ownership of such shares of Common Stock as a result of such Purchase Right to such extent) and such Purchase Right to such extent shall be held in abeyance for the Holder until such time, if ever, as its right thereto would not result in the Holder exceeding the Beneficial Ownership Limitation).

c) Pro Rata Distributions. During such time as this Warrant is outstanding, if the Company shall declare or make any dividend or other distribution of its assets (or rights to acquire its assets) to holders of shares of Common Stock, by way of return of capital or otherwise (including, without limitation, any distribution of cash, stock or other securities, property or options by way of a dividend, spin off, reclassification, corporate rearrangement, scheme of arrangement or other similar transaction) (a "Distribution"), at any time after the issuance of this Warrant, then, in each such case, the Holder shall be entitled to participate in such Distribution to the same extent that the Holder would have participated therein if the Holder had held the number of shares of Common Stock acquirable upon complete exercise of this Warrant (without regard to any limitations on exercise hereof, including without limitation, the Beneficial Ownership Limitation) immediately before the date of which a record is taken for such Distribution, or, if no such record is taken, the date as of which the record holders of shares of Common Stock are to be determined for the participation in such Distribution (provided, however, that, to the extent that the Holder's right to participate in any such Distribution would result in the Holder exceeding the Beneficial Ownership Limitation, then the Holder shall not be entitled to participate in such Distribution to such extent (or in the beneficial ownership of any shares of Common Stock as a result of such Distribution to such extent) and the portion of such Distribution shall be held in abeyance for the benefit of the Holder until such time, if ever, as its right thereto would not result in the Holder exceeding the Beneficial Ownership Limitation). To the extent that this Warrant has not been partially or completely exercised at the time of such Distribution, such portion of the Distribution shall be held in abeyance for the benefit of the Holder until the Holder has exercised this Warrant.

d) Fundamental Transaction. If, at any time while this Warrant is outstanding, (i) the Company, directly or indirectly, in one or more related transactions effects any merger or consolidation of the Company with or into another Person, (ii) the Company (and all of its Subsidiaries, taken as a whole), directly or indirectly, effects any sale, lease, license, assignment, transfer, conveyance or other disposition of all or substantially all of its assets in one or a series of related transactions, (iii) any, direct or indirect, purchase offer, tender offer or exchange offer (whether by the Company or another Person) is completed pursuant to which holders of Common Stock are permitted to sell, tender or exchange their shares for other securities, cash or property and has been accepted by the holders of 50% or more of the outstanding Common Stock, (iv) the Company, directly or indirectly, in one or more related transactions effects any reclassification, reorganization or recapitalization of the Common Stock or any compulsory share exchange pursuant to which the Common Stock is effectively converted into or exchanged for other securities, cash or property, or (v) the Company, directly or indirectly, in one or more related transactions consummates a stock or share purchase agreement or other business combination (including, without limitation, a reorganization, recapitalization, spin-off, merger or scheme of arrangement) with another Person or group of Persons whereby such other Person or group acquires more than 50% of the outstanding shares of Common Stock (not including any shares of Common Stock held by the other Person or other Persons making or party to, or associated or affiliated with the other Persons making or party to, such stock or share purchase agreement or other business combination) (each a "Fundamental Transaction"), then, upon any subsequent exercise of this Warrant, the Holder shall have the right to receive, for each Warrant Share that would have been issuable upon such exercise immediately prior to the occurrence of such Fundamental Transaction, at the option of the Holder (without regard to any limitation in Section 2(e) or Section 2(f) on the exercise of this Warrant), the number of shares of Common Stock of the successor or acquiring corporation or of the Company, if it is the surviving corporation, and any additional consideration (the "Alternate Consideration") receivable as a result of such Fundamental Transaction by a holder of the number of shares of Common Stock for which this Warrant is exercisable immediately prior to such Fundamental Transaction (without regard to any limitation in Section 2(e) or Section 2(f) on the exercise of this Warrant). For purposes of any such exercise, the determination of the Exercise Price shall be appropriately adjusted to apply to such Alternate Consideration based on the amount of Alternate Consideration issuable in respect of one share of Common Stock in such Fundamental Transaction, and the Company shall apportion the Exercise Price among the Alternate Consideration in a reasonable manner reflecting the relative value of any different components of the Alternate Consideration. If holders of Common Stock are given any choice as to the securities, cash or property to be received in a Fundamental Transaction, then the Holder shall be given the same choice as to the Alternate Consideration it receives upon any exercise of this Warrant following such Fundamental Transaction. The Company shall cause any successor entity in a Fundamental Transaction in which the Company is not the survivor (the "Successor Entity") to assume in writing all of the obligations of the Company under this Warrant in accordance with the provisions of this Section 3(e) pursuant to written agreements in form and substance reasonably satisfactory to the Holder and approved by the Holder (without unreasonable delay) prior to such Fundamental Transaction and shall, at the option of the Holder, deliver to the Holder in exchange for this Warrant a security of the Successor Entity evidenced by a written instrument substantially similar in form and substance to this Warrant which is exercisable for a corresponding number of shares of capital stock of such Successor Entity (or its parent entity) equivalent to the shares of Common Stock acquirable and receivable upon exercise of this Warrant (without regard to any limitations on the exercise of this Warrant) prior to such Fundamental Transaction, and with an exercise price which applies the exercise price hereunder to such shares of capital stock (but taking into account the relative value of the shares of Common Stock pursuant to such Fundamental Transaction and the value of such shares of capital stock, such number of shares of capital stock and such exercise price being for the purpose of protecting the economic value of this Warrant immediately prior to the consummation of such Fundamental Transaction), and which is reasonably satisfactory in form and substance to the Holder. Upon the occurrence of any such Fundamental Transaction, the Successor Entity shall succeed to, and be substituted for (so that from and after the date of such Fundamental Transaction, the provisions of this Warrant referring to the "Company" shall refer instead to the Successor Entity), and may exercise every right and power of the Company and shall assume all of the obligations of the Company under this Warrant with the same effect as if such Successor Entity had been named as the Company herein.

e) Calculations. All calculations under this Section 3 shall be made to the nearest cent or the nearest 1/100th of a share, as the case may be. For purposes of this Section 3, the number of shares of Common Stock deemed to be issued and outstanding as of a given date shall be the sum of the number of shares of Common Stock (excluding treasury shares, if any) issued and outstanding.

f) Notice to Holder.

i. Adjustment to Exercise Price. Whenever the Exercise Price is adjusted pursuant to any provision of this Section 3, the Company or Warrant Agent shall promptly deliver to the Holder by facsimile or email a notice setting forth the Exercise Price after such adjustment and any resulting adjustment to the number of Warrant Shares and setting forth a brief statement of the facts requiring such adjustment.

ii. Notice to Allow Exercise by Holder. If (A) the Company shall declare a dividend (or any other distribution in whatever form) on the Common Stock, (B) the Company shall declare a special nonrecurring cash dividend on or a redemption of the Common Stock, (C) the Company shall authorize the granting to all holders of the Common Stock rights or warrants to subscribe for or purchase any shares of capital stock of any class or of any rights, (D) the approval of any stockholders of the Company shall be required in connection with any reclassification of the Common Stock, any consolidation or merger to which the Company (and all of its Subsidiaries, taken as a whole) is a party, any sale or transfer of all or substantially all of the assets of the Company, or any compulsory share exchange whereby the Common Stock is converted into other securities, cash or property, or (E) the Company shall authorize the voluntary or involuntary dissolution, liquidation or winding up of the affairs of the Company, then, in each case, the Company shall cause to be delivered by facsimile or email to the Holder at its last facsimile number or email address as it shall appear upon the Warrant Register of the Company, at least twenty (20) calendar days prior to the applicable record or effective date hereinafter specified but in no event earlier than the date on which the Company makes a public announcement<sup>1</sup>, a notice (unless such information is filed with the Commission, in which case a notice shall not be required) stating (x) the date on which a record is to be taken for the purpose of such dividend, distribution, redemption, rights or warrants, or if a record is not to be taken, the date as of which the holders of the Common Stock of record to be entitled to such dividend, distributions, redemption, rights or warrants are to be determined or (y) the date on which such reclassification, consolidation, merger, sale, transfer or share exchange is expected to become effective or close, and the date as of which it is expected that holders of the Common Stock of record shall be entitled to exchange their shares of the Common Stock for securities, cash or other property deliverable upon such reclassification, consolidation, merger, sale, transfer or share exchange; provided that the failure to deliver such notice or any defect therein or in the delivery thereof shall not affect the validity of the corporate action required to be specified in such notice. To the extent that any notice provided in this Warrant constitutes, or contains, material, non-public information regarding the Company or any of its Subsidiaries, the Company shall simultaneously file such notice with the Commission pursuant to a Current Report on Form 8-K. The Holder shall remain entitled to exercise this Warrant during the period commencing on the date of such notice to the effective date of the event triggering such notice except as may otherwise be expressly set forth herein.

g) Voluntary Adjustment By Company. Subject to the rules and regulations of the Trading Market, the Company may at any time during the term of this Warrant, subject to the prior written consent of the Holder, reduce the then current Exercise Price to any amount and for any period of time deemed appropriate by the board of directors of the Company.

**Section 4. Transfer of Warrant**

a) Transferability. Subject to compliance with any applicable securities laws, this Warrant and all rights hereunder are transferable, in whole or in part, upon surrender of this Warrant at the principal office of the Company or its designated agent, together with a written assignment of this Warrant substantially in the form attached hereto, duly executed by the Holder or its agent or attorney and funds sufficient to pay any transfer taxes payable upon the making of such transfer. Upon such surrender and, if required, such payment, the Company shall execute and deliver a new Warrant or Warrants in the name of the assignee or assignees, as applicable, and in the denomination or denominations specified in such instrument of assignment, and shall issue to the assignor a new Warrant evidencing the portion of this Warrant not so assigned, and this Warrant shall promptly be cancelled. Notwithstanding anything herein to the contrary, the Holder shall not be required to physically surrender this Warrant to the Company unless the Holder has assigned this Warrant in full, in which case, the Holder shall surrender this Warrant to the Company within three (3) Trading Days of the date on which the Holder delivers an assignment form to the Company assigning this Warrant in full. The Warrant, if properly assigned in accordance herewith, may be exercised by a new holder for the purchase of Warrant Shares without having a new Warrant issued.

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<sup>1</sup> NTD: This change was discussed and agreed to between the parties.

b) New Warrants. If this Warrant is not held in global form through DTC (or any successor depository), this Warrant may be divided or combined with other Warrants upon presentation hereof at the aforesaid office of the Company, together with a written notice specifying the names and denominations in which new Warrants are to be issued, signed by the Holder or its agent or attorney. Subject to compliance with Section 4(a), as to any transfer which may be involved in such division or combination, the Company shall execute and deliver a new Warrant or Warrants in exchange for the Warrant or Warrants to be divided or combined in accordance with such notice. All Warrants issued on transfers or exchanges shall be dated the initial issuance date of this Warrant and shall be identical with this Warrant except as to the number of Warrant Shares issuable pursuant thereto.

c) Warrant Register. The Warrant Agent shall register this Warrant, upon records to be maintained by the Warrant Agent for that purpose (the "Warrant Register"), in the name of the record Holder hereof from time to time. The Company and the Warrant Agent may deem and treat the registered Holder of this Warrant as the absolute owner hereof for the purpose of any exercise hereof or any distribution to the Holder, and for all other purposes, absent actual notice to the contrary.

Section 5. Miscellaneous.

a) No Rights as Stockholder Until Exercise; No Settlement in Cash. This Warrant does not entitle the Holder to any voting rights, dividends or other rights as a stockholder of the Company prior to the exercise hereof as set forth in Section 2(d)(i), except as expressly set forth in Section 3. Without limiting any rights of a Holder to receive Warrant Shares on a "cashless exercise" pursuant to Section 2(c) or to receive cash payments pursuant to Section 2(d)(i) and Section 2(d)(iv) herein, in no event shall the Company be required to net cash settle an exercise of this Warrant.

b) Loss, Theft, Destruction or Mutilation of Warrant. The Company covenants that upon receipt by the Company of evidence reasonably satisfactory to it of the loss, theft, destruction or mutilation of this Warrant or any stock certificate relating to the Warrant Shares, and in case of loss, theft or destruction, of indemnity or security reasonably satisfactory to it (which, in the case of the Warrant, shall not include the posting of any bond), and upon surrender and cancellation of such Warrant or stock certificate, if mutilated, the Company will make and deliver a new Warrant or stock certificate of like tenor and dated as of such cancellation, in lieu of such Warrant or stock certificate.

c) Saturdays, Sundays, Holidays, etc. If the last or appointed day for the taking of any action or the expiration of any right required or granted herein shall not be a Business Day, then such action may be taken or such right may be exercised on the next succeeding Business Day.

d) Authorized Shares.

The Company covenants that, during the period the Warrant is outstanding, it will reserve from its authorized and unissued Common Stock a sufficient number of shares to provide for the issuance of the Warrant Shares upon the exercise of any purchase rights under this Warrant. The Company further covenants that its issuance of this Warrant shall constitute full authority to its officers who are charged with the duty of issuing the necessary Warrant Shares upon the exercise of the purchase rights under this Warrant. The Company will take all such reasonable action as may be necessary to assure that such Warrant Shares may be issued as provided herein without violation of any applicable law or regulation, or of any requirements of the Trading Market upon which the Common Stock may be listed. The Company covenants that all Warrant Shares which may be issued upon the exercise of the purchase rights represented by this Warrant will, upon exercise of the purchase rights represented by this Warrant and payment for such Warrant Shares in accordance herewith, be duly authorized, validly issued, fully paid and nonassessable and free from all taxes, liens and charges created by the Company in respect of the issue thereof (other than taxes in respect of any transfer occurring contemporaneously with such issue).

Except and to the extent as waived or consented to by the Holder, the Company shall not by any action, including, without limitation, amending its certificate of incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of this Warrant, but will at all times in good faith assist in the carrying out of all such terms and in the taking of all such actions as may be necessary or appropriate to protect the rights of Holder as set forth in this Warrant against impairment. Without limiting the generality of the foregoing, the Company will (i) not increase the par value of any Warrant Shares above the amount payable therefor upon such exercise immediately prior to such increase in par value, (ii) take all such action as may be necessary or appropriate in order that the Company may validly and legally issue fully paid and nonassessable Warrant Shares upon the exercise of this Warrant and (iii) use commercially reasonable efforts to obtain all such authorizations, exemptions or consents from any public regulatory body having jurisdiction thereof, as may be, necessary to enable the Company to perform its obligations under this Warrant.

Before taking any action which would result in an adjustment in the number of Warrant Shares for which this Warrant is exercisable or in the Exercise Price, the Company shall obtain all such authorizations or exemptions thereof, or consents thereto, as may be necessary from any public regulatory body or bodies having jurisdiction thereof.



e) Governing Law. All questions concerning the construction, validity, enforcement and interpretation of this Warrant shall be governed by and construed and enforced in accordance with the internal laws of the State of New York, without regard to the principles of conflicts of law thereof. Each party agrees that all legal proceedings concerning the interpretations, enforcement and defense of the transactions contemplated by this Warrant (whether brought against a party hereto or their respective affiliates, directors, officers, shareholders, partners, members, employees or agents) shall be commenced exclusively in the state and federal courts sitting in the City of New York. Each party hereby irrevocably submits to the exclusive jurisdiction of the state and federal courts sitting in the City of New York, Borough of Manhattan for the adjudication of any dispute hereunder or in connection herewith or with any transaction contemplated hereby or discussed herein, and hereby irrevocably waives, and agrees not to assert in any suit, action or proceeding, any claim that it is not personally subject to the jurisdiction of any such court, that such suit, action or proceeding is improper or is an inconvenient venue for such proceeding. Each party hereby irrevocably waives personal service of process and consents to process being served in any such suit, action or proceeding by mailing a copy thereof via registered or certified mail or overnight delivery (with evidence of delivery) to such party at the address in effect for notices to it under this Warrant and agrees that such service shall constitute good and sufficient service of process and notice thereof. Nothing contained herein shall be deemed to limit in any way any right to serve process in any other manner permitted by law. If either party shall commence an action, suit or proceeding to enforce any provisions of this Warrant, the prevailing party in such action, suit or proceeding shall be reimbursed by the other party for their reasonable attorneys' fees and other costs and expenses incurred with the investigation, preparation and prosecution of such action or proceeding.

f) Restrictions. The Holder acknowledges that the Warrant Shares acquired upon the exercise of this Warrant, if not registered, and the Holder does not utilize cashless exercise, will have restrictions upon resale imposed by state and federal securities laws.

g) Nonwaiver and Expenses. No course of dealing or any delay or failure to exercise any right hereunder on the part of Holder shall operate as a waiver of such right or otherwise prejudice the Holder's rights, powers or remedies, notwithstanding the fact that all rights hereunder terminate on the Termination Date. Without limiting any other provision of this Warrant, if the Company willfully and knowingly fails to comply with any provision of this Warrant, which results in any material damages to the Holder, the Company shall pay to the Holder such amounts as shall be sufficient to cover any costs and expenses including, but not limited to, reasonable attorneys' fees, including those of appellate proceedings, incurred by the Holder in collecting any amounts due pursuant hereto or in otherwise enforcing any of its rights, powers or remedies hereunder.

h) Notices. Any and all notices or other communications or deliveries to be provided by the Holders hereunder including, without limitation, any Notice of Exercise, shall be in writing and delivered personally, by facsimile or e-mail, or sent by a nationally recognized overnight courier service, addressed to the Company, at 2600 Kelly Road, Suite 100, Warrington, Pennsylvania 18976 Attention: [●], facsimile number: 215-488-9557, email address: [●], or such other facsimile number, email address or address as the Company may specify for such purposes by notice to the Holders. Any and all notices or other communications or deliveries to be provided by the Company hereunder shall be in writing and delivered personally, by facsimile or e-mail, or sent by a nationally recognized overnight courier service addressed to each Holder at the facsimile number, e-mail address or address of such Holder appearing on the books of the Company. Any notice or other communication or deliveries hereunder shall be deemed given and effective on the earliest of (i) the time of transmission, if such notice or communication is delivered via facsimile at the facsimile number or via e-mail at the e-mail address set forth in this Section prior to 5:30 p.m. (New York City time) on any date, (ii) the next Trading Day after the time of transmission, if such notice or communication is delivered via facsimile at the facsimile number or via e-mail at the e-mail address set forth in this Section on a day that is not a Trading Day or later than 5:30 p.m. (New York City time) on any Trading Day, (iii) the second Trading Day following the date of mailing, if sent by U.S. nationally recognized overnight courier service, or (iv) upon actual receipt by the party to whom such notice is required to be given. To the extent that any notice provided hereunder constitutes, or contains, material, non-public information regarding the Company or any Subsidiaries, the Company shall simultaneously file such notice with the Commission pursuant to a Current Report on Form 8-K.

i) Limitation of Liability. No provision hereof, in the absence of any affirmative action by the Holder to exercise this Warrant to purchase Warrant Shares, and no enumeration herein of the rights or privileges of the Holder, shall give rise to any liability of the Holder for the purchase price of any Common Stock or as a stockholder of the Company, whether such liability is asserted by the Company or by creditors of the Company.

j) Remedies. The Holder, in addition to being entitled to exercise all rights granted by law, including recovery of damages, will be entitled to specific performance of its rights under this Warrant. The Company agrees that monetary damages would not be adequate compensation for any loss incurred by reason of a breach by it of the provisions of this Warrant and hereby agrees to waive and not to assert the defense in any action for specific performance that a remedy at law would be adequate.

k) Successors and Assigns. Subject to applicable securities laws, this Warrant and the rights and obligations evidenced hereby shall inure to the benefit of and be binding upon the successors and permitted assigns of the Company and the successors and permitted assigns of Holder. The provisions of this Warrant are intended to be for the benefit of any Holder from time to time of this Warrant and shall be enforceable by the Holder or holder of Warrant Shares.

l) Amendment. This Warrant may be modified or amended or the provisions hereof waived with the written consent of the Company, on the one hand, and the Holder or the beneficial owner of this Warrant, on the other hand.

m) Severability. Wherever possible, each provision of this Warrant shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Warrant shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions or the remaining provisions of this Warrant.

n) Headings. The headings used in this Warrant are for the convenience of reference only and shall not, for any purpose, be deemed a part of this Warrant.

o) Warrant Agency Agreement. If this Warrant is held in global form through DTC (or any successor depository), this Warrant is issued subject to the Warrant Agency Agreement. To the extent any provision of this Warrant conflicts with the express provisions of the Warrant Agency Agreement, the provisions of this Warrant shall govern and be controlling.

*(Signature Page Follows)*

IN WITNESS WHEREOF, the Company has caused this Warrant to be executed by its officer thereunto duly authorized as of the date first above indicated.

**WINDTREE THERAPEUTICS, INC.**

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

Countersigned:  
**CONTINENTAL STOCK TRANSFER  
& TRUST COMPANY, AS WARRANT AGENT**

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

*(Signature Page of Warrant)*

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**NOTICE OF EXERCISE**

TO: WINDTREE THERAPEUTICS, INC.

(1) The undersigned hereby elects to purchase \_\_\_\_\_ Warrant Shares of the Company pursuant to the terms of the attached Warrant (only if exercised in full), and tenders herewith payment of the exercise price in full, together with all applicable transfer taxes, if any.

(2) Payment shall take the form of (check applicable box):

in lawful money of the United States; or

if permitted, the cancellation of such number of Warrant Shares as is necessary, in accordance with the formula set forth in subsection 2(c), to exercise this Warrant with respect to the maximum number of Warrant Shares purchasable pursuant to the cashless exercise procedure set forth in subsection 2(c).

(3) Please issue said Warrant Shares in the name of the undersigned or in such other name as is specified below:

\_\_\_\_\_

The Warrant Shares shall be delivered to the following DWAC Account Number:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

[SIGNATURE OF HOLDER]

Name of Investing Entity: \_\_\_\_\_

Signature of Authorized Signatory of Investing Entity: \_\_\_\_\_

Name of Authorized Signatory: \_\_\_\_\_

Title of Authorized Signatory: \_\_\_\_\_

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

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**ASSIGNMENT FORM**

*(To assign the foregoing Warrant, execute this form and supply required information. Do not use this form to purchase shares.)*

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

Name: \_\_\_\_\_  
(Please Print)

Address: \_\_\_\_\_  
(Please Print)

Phone Number: \_\_\_\_\_

Email Address: \_\_\_\_\_

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

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

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

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Windtree Therapeutics, Inc.

and

Continental Stock Transfer & Trust Company, as  
Warrant Agent

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Warrant Agency Agreement

Dated as of [●], 2020

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## WARRANT AGENCY AGREEMENT

WARRANT AGENCY AGREEMENT, dated as of [●], 2020 (“Agreement”), between Windtree Therapeutics, Inc., a Delaware corporation (the “Company”), and Continental Stock Transfer & Trust Company, a New York corporation (the “Warrant Agent”).

### WITNESSETH

WHEREAS, pursuant to a registered offering by the Company of an aggregate of [●] units (each a “Unit” and collectively, the “Units”) each Unit consisting of one share of the Company’s common stock, par value \$0.001 per share (the “Common Stock”) and one warrant to purchase [●] shares of Common Stock (each a “Warrant” and collectively, the “Warrants”), pursuant to an effective registration statement, as amended on Form S-1 (File No. 333-236085) (the “Registration Statement”) and prospectus (the “Prospectus”), the Company wishes to issue the Warrants in book entry form entitling the respective holders of the Warrants (the “Holder”, which term shall include a Holder’s transferees, successors and assigns and “Holder” shall include, if the Warrants are held in “street name,” a Participant (as defined below) or a designee appointed by such Participant) to purchase an aggregate of up to [●] shares of Common Stock (including up to [●] Warrants subject to an over-allotment option granted to the underwriters by the Company described in the Registration Statement) upon the terms and subject to the conditions hereinafter set forth (the “Offering”);

WHEREAS, the shares of Common Stock and Warrants to be issued in connection with the Offering shall be immediately separable and will be issued separately, but will be purchased together in the Offering; and

WHEREAS, the Company wishes the Warrant Agent to act on behalf of the Company, and the Warrant Agent is willing so to act, in connection with the issuance, registration, transfer, exchange, exercise and replacement of the Warrants and, in the Warrant Agent’s capacity as the Company’s transfer agent, the delivery of the Warrant Shares (as defined below).

NOW, THEREFORE, in consideration of the premises and the mutual agreements herein set forth, the parties hereby agree as follows:

Section 1. Certain Definitions. For purposes of this Agreement, the following terms have the meanings indicated:

(a) “Business Day” means any day other than Saturday, Sunday or other day on which commercial banks in The City of New York are authorized or required by law to remain closed; provided, however, for clarification, commercial banks shall not be deemed to be authorized or required by law to remain closed due to “stay at home”, “shelter-in-place”, “non-essential employee” or any other similar orders or restrictions or the closure of any physical branch locations at the direction of any governmental authority so long as the electronic funds transfer systems (including for wire transfers) of commercial banks in The City of New York are generally are open for use by customers on such day.

(b) “Close of Business” on any given date means 5:00 p.m., New York City time, on such date; provided, however, that if such date is not a Business Day it means 5:00 p.m., New York City time, on the next succeeding Business Day.

(c) “Person” means an individual, corporation, association, partnership, limited liability company, joint venture, trust, unincorporated organization, government or political subdivision thereof or governmental agency or other entity.

(d) “Warrant Certificate” means a certificate issued to a Holder, representing such number of Warrant Shares as is indicated therein.

(e) “Warrant Shares” means the shares of Common Stock underlying the Warrants and issuable upon exercise of the Warrants.

All other capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Warrant.

Section 2. Appointment of Warrant Agent. The Company hereby appoints the Warrant Agent to act as agent for the Company in accordance with the terms and conditions hereof, and the Warrant Agent hereby accepts such appointment. The Company may from time to time appoint a Co-Warrant Agent as it may, in its sole discretion, deem necessary or desirable. The Warrant Agent shall have no duty to supervise, and will in no event be liable for the acts or omissions of, any co-Warrant Agent.

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### Section 3. Global Warrants.

(a) The Warrants shall be issuable in book entry form (the “Global Warrants”). All of the Warrants shall initially be represented by one or more Global Warrants deposited with the Warrant Agent and registered in the name of Cede & Co., a nominee of The Depository Trust Company (the “Depository”), or as otherwise directed by the Depository. Ownership of beneficial interests in the Warrants shall be shown on, and the transfer of such ownership shall be effected through, records maintained by (i) the Depository or its nominee for each Global Warrant or (ii) institutions that have accounts with the Depository (such institution, with respect to a Warrant in its account, a “Participant”).

(b) If the Depository subsequently ceases to make its book-entry settlement system available for the Warrants, the Company may instruct the Warrant Agent regarding other arrangements for book-entry settlement. In the event that the Warrants are not eligible for, or it is no longer necessary to have the Warrants available in, book-entry form, the Warrant Agent shall provide written instructions to the Depository to deliver to the Warrant Agent for cancellation each Global Warrant, and the Company shall instruct the Warrant Agent to deliver to each Holder a Warrant Certificate.

(c) A Holder has the right to elect at any time or from time to time a Warrant Exchange (as defined below) pursuant to a Warrant Certificate Request Notice (as defined below). Upon written notice by a Holder to the Warrant Agent for the exchange of some or all of such Holder’s Global Warrants for a Warrant Certificate evidencing the same number of Warrants, which request shall be in the form attached hereto as Annex A (a “Warrant Certificate Request Notice” and the date of delivery of such Warrant Certificate Request Notice by the Holder, the “Warrant Certificate Request Notice Date” and the deemed surrender upon delivery by the Holder of a number of Global Warrants for the same number of Warrants evidenced by a Warrant Certificate, a “Warrant Exchange”), the Warrant Agent shall promptly effect the Warrant Exchange and shall promptly issue and deliver to the Holder a Warrant Certificate for such number of Warrants in the name set forth in the Warrant Certificate Request Notice. Such Warrant Certificate shall be dated the original issue date of the Warrants and shall be manually executed by an authorized signatory of the Company. In connection with a Warrant Exchange, the Company agrees to deliver, or to direct the Warrant Agent to deliver, the Warrant Certificate to the Holder within three (3) Business Days of the Warrant Certificate Request Notice pursuant to the delivery instructions in the Warrant Certificate Request Notice (“Warrant Certificate Delivery Date”). If the Company fails for any reason to deliver to the Holder the Warrant Certificate subject to the Warrant Certificate Request Notice by the Warrant Certificate Delivery Date, the Company shall pay to the Holder, in cash, as liquidated damages and not as a penalty, for each \$1,000 of Warrant Shares evidenced by such Warrant Certificate (based on the VWAP (as defined in the Warrant) of the Common Stock on the Warrant Certificate Request Notice Date), \$5.00 per Business Day (increasing to \$10.00 per Business Day on the fifth Business Day after such liquidated damages begin to accrue) for each Business Day after such Warrant Certificate Delivery Date until such Warrant Certificate is delivered or, prior to delivery of such Warrant Certificate, the Holder rescinds such Warrant Exchange. The Company covenants and agrees that, upon the date of delivery of the Warrant Certificate Request Notice, the Holder shall be deemed to be the holder of the Warrant Certificate and, notwithstanding anything to the contrary set forth herein, the Warrant Certificate shall be deemed for all purposes to contain all of the terms and conditions of the Warrants evidenced by such Warrant Certificate and the terms of this Agreement, other than Section 3(c), which shall not apply to the Warrants evidenced by a Warrant Certificate. In the event a beneficial owner requests a Warrant Exchange, upon issuance of the paper Warrant Certificate, the Company shall act as warrant agent and the terms of the paper Warrant Certificate so issued shall exclusively govern in respect thereof. For purposes of clarity, the Company and the Warrant Agent acknowledge and agree that, with respect to the terms of the Warrants, the Warrant Certificate or Global Warrant shall set forth the terms of the Warrants and, in the event of any conflict between the Warrant Certificate or the Global Warrant and this Agreement, the Warrant Certificate or the Global Warrants, as the case may be, shall control. For purposes of Regulation SHO, a holder whose interest in this Warrant is a beneficial interest in certificate(s) representing this Warrant held in book-entry form through DTC shall be deemed to have exercised its interest in this Warrant upon instructing its broker that is a DTC participant to exercise its interest in this Warrant, except that, if the date of exercise is a date when the stock transfer books of the Company are closed, such person shall be deemed to have become the holder of such shares at the open of business on the next succeeding date on which the stock transfer books are open

Section 4. Form of Warrant. The Warrants, together with the form of election to purchase Common Stock (the “Exercise Notice”) and the form of assignment to be printed on the reverse thereof, whether a Warrant Certificate or a Global Warrant, shall be substantially in the form of Exhibit 1 hereto.

Section 5. Countersignature and Registration. The Warrants shall be executed on behalf of the Company by its Chief Executive Officer or Chief Financial Officer, either manually or by facsimile signature. The Warrants shall be countersigned by the Warrant Agent either manually or by facsimile signature and shall not be valid for any purpose unless so countersigned. In case any officer of the Company who shall have signed a Warrant shall cease to be such officer of the Company before countersignature by the Warrant Agent and issuance and delivery by the Company, such Warrant, nevertheless, may be countersigned by the Warrant Agent, issued and delivered with the same force and effect as though the person who signed such Warrant had not ceased to be such officer of the Company; and any Warrant may be signed on behalf of the Company by any person who, at the actual date of the execution of such Warrant, shall be a proper officer of the Company to sign such Warrant, although at the date of the execution of this Warrant Agreement any such person was not such an officer.

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The Warrant Agent will keep or cause to be kept, at one of its offices, or at the office of one of its agents, books for registration and transfer of the Warrant Certificates issued hereunder. Such books shall show the names and addresses of the respective Holders of the Warrant Certificates, the number of warrants evidenced on the face of each of such Warrant Certificate and the date of each of such Warrant Certificate. The Warrant Agent will create a special account for the issuance of Warrant Certificates.

Section 6. Transfer, Split Up, Combination and Exchange of Warrant Certificates; Mutilated, Destroyed, Lost or Stolen Warrant Certificates. Subject to the provisions of the Warrant and the last sentence of this first paragraph of Section 6 of this Agreement and subject to applicable law, rules or regulations, or any “stop transfer” instructions the Company may give to the Warrant Agent, at any time after the closing date of the Offering, and at or prior to the Close of Business on the Termination Date, any Warrant Certificate or Warrant Certificates or Global Warrant or Global Warrants may be transferred, split up, combined or exchanged for another Warrant Certificate or Warrant Certificates or Global Warrant or Global Warrants, entitling the Holder to purchase a like number of shares of Common Stock as the Warrant Certificate or Warrant Certificates or Global Warrant or Global Warrants surrendered then entitled such Holder to purchase. Any Holder desiring to transfer, split up, combine or exchange any Warrant Certificate or Global Warrant shall make such request in writing delivered to the Warrant Agent, and shall surrender the Warrant Certificate or Warrant Certificates to be transferred, split up, combined or exchanged at the principal office of the Warrant Agent, provided that no such surrender is applicable to the Holder of a Global Warrant. Any requested transfer of Warrants, whether a Global Warrant or a Warrant Certificate, shall be accompanied by reasonable evidence of authority of the party making such request that may be required by the Warrant Agent. Thereupon the Warrant Agent shall, subject to the last sentence of this first paragraph of Section 6 of this Agreement, countersign and deliver to the Person entitled thereto any Warrant Certificate or Global Warrant, as the case may be, as so requested. The Company may require payment from the Holder of a sum sufficient to cover any tax or governmental charge that may be imposed in connection with any transfer, split up, combination or exchange of Warrants. The Company shall compensate the Warrant Agent per the fee schedule mutually agreed upon by the parties hereto and provided separately on the date hereof.

Upon receipt by the Warrant Agent of evidence reasonably satisfactory to it of the loss, theft, destruction or mutilation of a Warrant Certificate, which evidence shall include an affidavit of loss, or in the case of mutilated certificates, the certificate or portion thereof remaining, and, in case of loss, theft or destruction, of indemnity in customary form and amount, and satisfaction of any other reasonable requirements established by Section 8-405 of the Uniform Commercial Code as in effect in the State of Delaware, and reimbursement to the Company and the Warrant Agent of all reasonable expenses incidental thereto, and upon surrender to the Warrant Agent and cancellation of the Warrant Certificate if mutilated, the Company will make and deliver a new Warrant Certificate of like tenor to the Warrant Agent for delivery to the Holder in lieu of the Warrant Certificate so lost, stolen, destroyed or mutilated.

Section 7. Exercise of Warrants; Exercise Price; Termination Date.

(a) The Warrants shall be exercisable commencing on the Initial Exercise Date. The Warrants shall cease to be exercisable and shall terminate and become void, and all rights thereunder and under this Agreement shall cease, at or prior to the Close of Business on the Termination Date. Subject to the foregoing and to Section 7(b) below, the Holder of a Warrant may exercise the Warrant in whole or in part upon providing the items required by Section 7(c) below to the Warrant Agent at the principal office of the Warrant Agent or to the office of one of its agents as may be designated by the Warrant Agent from time to time. In the case of the Holder of a Global Warrant, the Holder shall deliver the executed Exercise Notice and payment of the Exercise Price pursuant to Section 2(a) of the Warrant. Notwithstanding any other provision in this Agreement, a holder whose interest in a Global Warrant is a beneficial interest in a Global Warrant held in book-entry form through the Depository (or another established clearing corporation performing similar functions), shall effect exercises by delivering to the Depository (or such other clearing corporation, as applicable) the appropriate instruction form for exercise, complying with the procedures to effect exercise that are required by the Depository (or such other clearing corporation, as applicable). The Company acknowledges that the bank accounts maintained by the Warrant Agent in connection with the services provided under this Agreement will be in its name and that the Warrant Agent may receive investment earnings in connection with the investment at Warrant Agent risk and for its benefit of funds held in those accounts from time to time. Neither the Company nor the Holders will receive interest on any deposits or Exercise Price.

(b) Upon receipt of an Exercise Notice for a cashless exercise pursuant to Section 2(c) of the Warrant (each, a “Cashless Exercise”), the Company will promptly calculate and transmit to the Warrant Agent the number of Warrant Shares issuable in connection with such Cashless Exercise and deliver a copy of the Exercise Notice to the Warrant Agent, which shall issue such number of Warrant Shares in connection with such Cashless Exercise.

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(c) Upon the Warrant Agent's receipt, at or prior to the Close of Business on the Termination Date set forth in a Warrant, of the executed Exercise Notice, accompanied by payment of the Exercise Price pursuant to Section 2(a) of the Warrant, the shares to be purchased (other than in the case of a Cashless Exercise), an amount equal to any applicable tax, governmental charge or expense reimbursement referred to in Section 6 by wire transfer, or by certified check or bank draft payable to the order of the Warrant Agent and, in the case of an exercise of a Warrant in the form of a Warrant Certificate for all of the Warrant Shares represented thereby, the Warrant Certificate, the Warrant Agent shall cause the Warrant Shares underlying such Warrant to be delivered to or upon the order of the Holder of such Warrant, registered in such name or names as may be designated by such Holder, no later than the Warrant Share Delivery Date. If the Company is then a participant in the DWAC system of the Depository and either (A) there is an effective registration statement permitting the issuance of the Warrant Shares to or resale of the Warrant Shares by Holder or (B) the Warrant is being exercised via Cashless Exercise, then the certificates for Warrant Shares shall be transmitted by the Warrant Agent to the Holder by crediting the account of the Holder's broker with the Depository through its DWAC system. For the avoidance of doubt, if the Company becomes obligated to pay any amounts to any Holders pursuant to Section 2(d)(i) or 2(d)(iv) of the Warrant, such obligation shall be solely that of the Company and not that of the Warrant Agent. Notwithstanding anything else to the contrary in this Agreement, except in the case of a Cashless Exercise, if any Holder fails to duly deliver payment to the Warrant Agent of an amount equal to the aggregate Exercise Price of the Warrant Shares to be purchased upon exercise of such Holder's Warrant as set forth in Section 7(a) hereof, the Warrant Agent will not be obligated to deliver certificates representing any such Warrant Shares (via DWAC or otherwise) until following receipt of such payment, and the applicable Warrant Share Delivery Date shall be deemed extended by one day for each day (or part thereof) until such payment is delivered to the Warrant Agent.

(d) The Warrant Agent shall deposit all funds received by it in payment of the Exercise Price for all Warrants in the account of the Company maintained with the Warrant Agent for such purpose (or to such other account as directed by the Company in writing) and shall advise the Company via telephone at the end of each day on which funds for the exercise of any Warrant are received of the amount so deposited to its account. The Warrant Agent shall promptly confirm such telephonic advice to the Company in writing.

(e) In case the Holder of any Warrant Certificate exercises fewer than all Warrants evidenced thereby and surrenders such Warrant Certificate in connection with such partial exercise, a new Warrant Certificate evidencing the number of Warrant Shares equivalent to the number of Warrant Shares remaining unexercised may be issued by the Warrant Agent to the Holder of such Warrant Certificate or to his duly authorized assigns in accordance with Section 2(d)(ii) of the Warrant, subject to the provisions of Section 6 hereof.

Section 8. Cancellation and Destruction of Warrant Certificates. All Warrant Certificates surrendered for the purpose of exercise, transfer, split up, combination or exchange shall, if surrendered to the Company or to any of its agents, be delivered to the Warrant Agent for cancellation or in canceled form, or, if surrendered to the Warrant Agent, shall be canceled by it, and no Warrant Certificates shall be issued in lieu thereof except as expressly permitted by any of the provisions of this Agreement. The Company shall deliver to the Warrant Agent for cancellation and retirement, and the Warrant Agent shall so cancel and retire, any other Warrant Certificate purchased or acquired by the Company otherwise than upon the exercise thereof. The Warrant Agent shall deliver all canceled Warrant Certificates to the Company, or shall, at the written request of the Company, destroy such canceled Warrant Certificates, and in such case shall deliver a certificate of destruction thereof to the Company, subject to any applicable law, rule or regulation requiring the Warrant Agent to retain such canceled certificates.

Section 9. Certain Representations; Reservation and Availability of Shares of Common Stock or Cash.

(a) This Agreement has been duly authorized, executed and delivered by the Company and, assuming due authorization, execution and delivery hereof by the Warrant Agent, constitutes a valid and legally binding obligation of the Company enforceable against the Company in accordance with its terms, and the Warrants have been duly authorized, executed and issued by the Company and, assuming due authentication thereof by the Warrant Agent pursuant hereto and payment therefor by the Holders as provided in the Registration Statement, constitute valid and legally binding obligations of the Company enforceable against the Company in accordance with their terms and entitled to the benefits thereof; in each case except as enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium and other similar laws relating to or affecting creditors' rights generally or by general equitable principles (regardless of whether such enforceability is considered in a proceeding in equity or at law).

(b) As of the date hereof and prior to the Offering, the authorized capital stock of the Company consists of (i) 120,000,000 shares of Common Stock, of which [●] shares of Common Stock are issued and outstanding, and (ii) 5,000,000 shares of undesignated preferred stock, par value \$0.001 per share, none of which are issued and outstanding. As of the date hereof, [●] shares of Common Stock are reserved for issuance upon exercise of the Warrants, inclusive of any Warrants the Underwriter may acquire upon exercise of its over-allotment option described in the Registration Statement. Except as disclosed in the Registration Statement, there are no other outstanding obligations, warrants, options or other rights to subscribe for or purchase from the Company any class of capital stock of the Company.

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(c) The Company covenants and agrees that it will cause to be reserved and kept available out of its authorized and unissued shares of Common Stock or its authorized and issued shares of Common Stock held in its treasury, free from preemptive rights, the number of shares of Common Stock that will be sufficient to permit the exercise in full of all outstanding Warrants.

(d) The Warrant Agent will create a special account for the issuance of Common Stock upon the exercise of Warrants.

(e) The Company further covenants and agrees that it will pay when due and payable any and all federal and state transfer taxes and charges which may be payable in respect of the original issuance or delivery of the Warrant Certificates or certificates evidencing Common Stock upon exercise of the Warrants. The Company shall not, however, be required to pay any tax or governmental charge which may be payable in respect of any transfer involved in the transfer or delivery of Warrant Certificates or the issuance or delivery of certificates for Common Stock in a name other than that of the Holder of the Warrant Certificate evidencing Warrants surrendered for exercise or to issue or deliver any certificate for shares of Common Stock upon the exercise of any Warrants until any such tax or governmental charge shall have been paid (any such tax or governmental charge being payable by the Holder of such Warrant Certificate at the time of surrender) or until it has been established to the Company's reasonable satisfaction that no such tax or governmental charge is due.

Section 10. Common Stock Record Date. Each Holder shall be deemed to have become the holder of record for the Warrant Shares pursuant to Section 2(d)(i) of the Warrants.

Section 11. Adjustment of Exercise Price, Number of Shares of Common Stock or Number of the Company Warrants. The Exercise Price, the number of shares covered by each Warrant and the number of Warrants outstanding are subject to adjustment from time to time as provided in Section 3 of the Warrant. In the event that at any time, as a result of an adjustment made pursuant to Section 3 of the Warrant, the Holder of any Warrant thereafter exercised shall become entitled to receive any shares of capital stock of the Company other than shares of Common Stock, thereafter the number of such other shares so receivable upon exercise of any Warrant shall be subject to adjustment from time to time in a manner and on terms as nearly equivalent as practicable to the provisions with respect to the shares contained in Section 3 of the Warrant, and the provisions of Sections 7, 9 and 13 of this Agreement with respect to the shares of Common Stock shall apply on like terms to any such other shares. All Warrants originally issued by the Company subsequent to any adjustment made to the Exercise Price pursuant to the Warrant shall evidence the right to purchase, at the adjusted Exercise Price, the number of shares of Common Stock purchasable from time to time hereunder upon exercise of the Warrants, all subject to further adjustment as provided herein.

Section 12. Certification of Adjusted Exercise Price or Number of Shares of Common Stock. Whenever the Exercise Price or the number of shares of Common Stock issuable upon the exercise of each Warrant is adjusted as provided in Section 11 or 13 of this Agreement, the Company shall (a) promptly prepare a certificate setting forth the Exercise Price of each Warrant as so adjusted, and a brief statement of the facts accounting for such adjustment, (b) promptly file with the Warrant Agent and with each transfer agent for the Common Stock a copy of such certificate and (c) instruct the Warrant Agent to send a brief summary thereof to each Holder of a Warrant.

Section 13. Fractional Shares of Common Stock.

(a) The Company shall not issue fractions of Warrants or distribute a Global Warrant or Warrant Certificates that evidence fractional Warrants. Whenever any fractional Warrant would otherwise be required to be issued or distributed, the actual issuance or distribution shall reflect a rounding of such fraction down to the nearest whole Warrant.

(b) The Company shall not issue fractions of shares of Common Stock upon exercise of Warrants or distribute stock certificates that evidence fractional shares of Common Stock. Whenever any fraction of a share of Common Stock would otherwise be required to be issued or distributed, the actual issuance or distribution in respect thereof shall be made in accordance with Section 2(d)(v) of the Warrant.

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Section 14. Conditions of the Warrant Agent's Obligations. The Warrant Agent accepts its obligations herein set forth upon the terms and conditions hereof, including the following to all of which the Company agrees and to all of which the rights hereunder of the Holders from time to time of the Warrant shall be subject:

- (a) Compensation and Indemnification. The Company agrees promptly to pay the Warrant Agent the compensation detailed on Exhibit 2 hereto for all services rendered by the Warrant Agent and to reimburse the Warrant Agent for reasonable out-of-pocket expenses (including reasonable and documented counsel fees) incurred without gross negligence, bad faith or willful misconduct by the Warrant Agent in connection with the services rendered hereunder by the Warrant Agent. The Company also agrees to indemnify the Warrant Agent for, and to hold it harmless against, any loss, liability or expense incurred without gross negligence, bad faith or willful misconduct on the part of the Warrant Agent, arising out of or in connection with its acting as Warrant Agent hereunder, including the reasonable costs and expenses of defending against any claim of such liability.
- (b) Agent for the Company. In acting under this Warrant Agreement and in connection with the Warrant Certificates, the Warrant Agent is acting solely as agent of the Company and does not assume any obligations or relationship of agency or trust for or with any of the Holders of Warrant Certificates or beneficial owners of Warrants.
- (c) Counsel. The Warrant Agent may consult with counsel satisfactory to it, which may include counsel for the Company, and the written advice of such counsel shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by it hereunder in good faith and in accordance with the advice of such counsel.
- (d) Documents. The Warrant Agent shall be protected and shall incur no liability for or in respect of any action taken or omitted by it in reliance upon any Warrant Certificate, notice, direction, consent, certificate, affidavit, statement or other paper or document reasonably believed by it to be genuine and to have been presented or signed by the proper parties.
- (e) Certain Transactions. The Warrant Agent, and its officers, directors and employees, may become the owner of, or acquire any interest in, Warrants, with the same rights that it or they would have if it were not the Warrant Agent hereunder, and, to the extent permitted by applicable law, it or they may engage or be interested in any financial or other transaction with the Company and may act on, or as depositary, trustee or agent for, any committee or body of Holders of Warrant Securities or other obligations of the Company as freely as if it were not the Warrant Agent hereunder. Nothing in this Warrant Agreement shall be deemed to prevent the Warrant Agent from acting as trustee under any indenture to which the Company is a party.
- (f) No Liability for Interest. Unless otherwise agreed with the Company, the Warrant Agent shall have no liability for interest on any monies at any time received by it pursuant to any of the provisions of this Agreement or of the Warrant Certificates.
- (g) No Liability for Invalidity. The Warrant Agent shall have no liability with respect to any invalidity of this Agreement or any of the Warrant Certificates (except as to the Warrant Agent's countersignature thereon).
- (h) No Responsibility for Representations. The Warrant Agent shall not be responsible for any of the recitals or representations herein or in the Warrant Certificates (except as to the Warrant Agent's countersignature thereon), all of which are made solely by the Company.
- (i) No Implied Obligations. The Warrant Agent shall be obligated to perform only such duties as are herein and in the Warrants specifically set forth and no implied duties or obligations shall be read into this Agreement or the Warrants against the Warrant Agent. The Warrant Agent shall not be under any obligation to take any action hereunder which may tend to involve it in any expense or liability, the payment of which within a reasonable time is not, in its reasonable opinion, assured to it. The Warrant Agent shall not be accountable or under any duty or responsibility for the use by the Company of any of the Warrants authenticated by the Warrant Agent and delivered by it to the Company pursuant to this Agreement or for the application by the Company of the proceeds of the Warrants. The Warrant Agent shall have no duty or responsibility in case of any default by the Company in the performance of its covenants or agreements contained herein or in the Warrants or in the case of the receipt of any written demand from a Holder of a Warrant Certificate with respect to such default, including, without limiting the generality of the foregoing, any duty or responsibility to initiate or attempt to initiate any proceedings at law.

Section 15. Purchase or Consolidation or Change of Name of Warrant Agent. Any corporation into which the Warrant Agent or any successor Warrant Agent may be merged or with which it may be consolidated, or any corporation resulting from any merger or consolidation to which the Warrant Agent or any successor Warrant Agent shall be party, or any corporation succeeding to the corporate trust business of the Warrant Agent or any successor Warrant Agent, shall be the successor to the Warrant Agent under this Agreement without the execution or filing of any paper or any further act on the part of any of the parties hereto, provided that such corporation would be eligible for appointment as a successor Warrant Agent under the provisions of Section 17 of this Agreement. In case at the time such successor Warrant Agent shall succeed to the agency created by this Agreement any of the Warrants shall have been countersigned but not delivered, any such successor Warrant Agent may adopt the countersignature of the predecessor Warrant Agent and deliver such Warrants so countersigned; and in case at that time any of the Warrants shall not have been countersigned, any successor Warrant Agent may countersign such Warrants either in the name of the predecessor Warrant Agent or in the name of the successor Warrant Agent; and in all such cases such Warrants shall have the full force provided in the Warrants and in this Agreement.

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In case at any time the name of the Warrant Agent shall be changed and at such time any of the Warrants shall have been countersigned but not delivered, the Warrant Agent may adopt the countersignature under its prior name and deliver Warrants so countersigned; and in case at that time any of the Warrants shall not have been countersigned, the Warrant Agent may countersign such Warrants either in its prior name or in its changed name; and in all such cases such Warrants shall have the full force provided in the Warrants and in this Agreement.

Section 16. Duties of Warrant Agent. The Warrant Agent undertakes the duties and obligations imposed by this Agreement upon the following terms and conditions, by all of which the Company, by its acceptance hereof, shall be bound:

(a) The Warrant Agent may consult with legal counsel reasonably acceptable to the Company (who may be legal counsel for the Company), and the opinion of such counsel shall be full and complete authorization and protection to the Warrant Agent as to any action taken or omitted by it in good faith and in accordance with such opinion.

(b) Whenever in the performance of its duties under this Agreement the Warrant Agent shall deem it necessary or desirable that any fact or matter be proved or established by the Company prior to taking or suffering any action hereunder, such fact or matter (unless other evidence in respect thereof be herein specifically prescribed) may be deemed to be conclusively proved and established by a certificate signed by the Chief Executive Officer or Chief Financial Officer of the Company; and such certificate shall be full authentication to the Warrant Agent for any action taken or suffered in good faith by it under the provisions of this Agreement in reliance upon such certificate.

(c) Subject to the limitation set forth in Section 14 of this Agreement, the Warrant Agent shall be liable hereunder only for its own gross negligence, bad faith or willful misconduct, or for a breach by it of this Agreement.

(d) The Warrant Agent shall not be liable for or by reason of any of the statements of fact or recitals contained in this Agreement or in the Warrants (except its countersignature thereof) by the Company or be required to verify the same, but all such statements and recitals are and shall be deemed to have been made by the Company only.

(e) The Warrant Agent shall not be under any responsibility in respect of the validity of this Agreement or the execution and delivery hereof (except the due execution hereof by the Warrant Agent) or in respect of the validity or execution of any Warrant (except its countersignature thereof); nor shall it be responsible for any breach by the Company of any covenant or condition contained in this Agreement or in any Warrant; nor shall it be responsible for the adjustment of the Exercise Price or the making of any change in the number of shares of Common Stock required under the provisions of Section 11 or 13 or responsible for the manner, method or amount of any such change or the ascertaining of the existence of facts that would require any such adjustment or change (except with respect to the exercise of Warrants evidenced by Warrant Certificates after actual notice of any adjustment of the Exercise Price); nor shall it by any act hereunder be deemed to make any representation or warranty as to the authorization or reservation of any shares of Common Stock to be issued pursuant to this Agreement or any Warrant or as to whether any shares of Common Stock will, when issued, be duly authorized, validly issued, fully paid and nonassessable.

(f) Each party hereto agrees that it will perform, execute, acknowledge and deliver or cause to be performed, executed, acknowledged and delivered all such further and other acts, instruments and assurances as may reasonably be required by the other party hereto for the carrying out or performing by any party of the provisions of this Agreement.

(g) The Warrant Agent is hereby authorized to accept instructions with respect to the performance of its duties hereunder from the Chief Executive Officer or Chief Financial Officer of the Company, and to apply to such officers for advice or instructions in connection with its duties, and it shall not be liable and shall be indemnified and held harmless for any action taken or suffered to be taken by it in good faith in accordance with instructions of any such officer, provided Warrant Agent carries out such instructions without gross negligence, bad faith or willful misconduct.

(h) The Warrant Agent and any shareholder, director, officer or employee of the Warrant Agent may buy, sell or deal in any of the Warrants or other securities of the Company or become pecuniarily interested in any transaction in which the Company may be interested, or contract with or lend money to the Company or otherwise act as fully and freely as though it were not Warrant Agent under this Agreement. Nothing herein shall preclude the Warrant Agent from acting in any other capacity for the Company or for any other legal entity.

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(i) The Warrant Agent may execute and exercise any of the rights or powers hereby vested in it or perform any duty hereunder either itself or by or through its attorney or agents, and the Warrant Agent shall not be answerable or accountable for any act, default, neglect or misconduct of any such attorney or agents or for any loss to the Company resulting from any such act, default, neglect or misconduct, provided reasonable care was exercised in the selection and continued employment thereof.

Section 17. Change of Warrant Agent. The Warrant Agent may resign and be discharged from its duties under this Agreement upon 30 days' notice in writing sent to the Company and to each transfer agent of the Common Stock, and to the Holders of the Warrant Certificates. The Company may remove the Warrant Agent or any successor Warrant Agent upon 30 days' notice in writing, sent to the Warrant Agent or successor Warrant Agent, as the case may be, and to each transfer agent of the Common Stock, and to the Holders of the Warrant Certificates. If the Warrant Agent shall resign or be removed or shall otherwise become incapable of acting, the Company shall appoint a successor to the Warrant Agent. If the Company shall fail to make such appointment within a period of 30 days after such removal or after it has been notified in writing of such resignation or incapacity by the resigning or incapacitated Warrant Agent or by the Holder of a Warrant Certificate (who shall, with such notice, submit his Warrant Certificate for inspection by the Company), then the Holder of any Warrant Certificate may apply to any court of competent jurisdiction for the appointment of a new Warrant Agent. Any successor Warrant Agent, whether appointed by the Company or by such a court, shall be a corporation organized and doing business under the laws of the United States or of a state thereof, in good standing, which is authorized under such laws to exercise corporate trust powers and is subject to supervision or examination by federal or state authority and which has at the time of its appointment as Warrant Agent a combined capital and surplus of at least \$50,000,000. After appointment, the successor Warrant Agent shall be vested with the same powers, rights, duties and responsibilities as if it had been originally named as Warrant Agent without further act or deed; but the predecessor Warrant Agent shall deliver and transfer to the successor Warrant Agent any property at the time held by it hereunder, and execute and deliver any further assurance, conveyance, act or deed necessary for the purpose. Not later than the effective date of any such appointment, the Company shall file notice thereof in writing with the predecessor Warrant Agent and each transfer agent of the Common Stock, and mail a notice thereof in writing to the Holders of the Warrant Certificates. However, failure to give any notice provided for in this Section 17, or any defect therein, shall not affect the legality or validity of the resignation or removal of the Warrant Agent or the appointment of the successor Warrant Agent, as the case may be.

Section 18. Issuance of New Warrants. Notwithstanding any of the provisions of this Agreement or of the Warrants to the contrary, the Company may, at its option, issue a new Global Warrant or Warrant Certificates, if any, evidencing Warrants in such form as may be approved by its Board of Directors to reflect any adjustment or change in the Exercise Price per share and the number or kind or class of shares of stock or other securities or property purchasable under the Global Warrant or Warrant Certificates, if any, made in accordance with the provisions of this Agreement.

Section 19. Notices. Notices or demands authorized by this Agreement to be given or made (i) by the Warrant Agent or by the Holder of any Warrant Certificate to or on the Company, (ii) subject to the provisions of Section 17, by the Company or by the Holder of any Warrant Certificate to or on the Warrant Agent or (iii) by the Company or the Warrant Agent to the Holder of any Warrant Certificate, shall be deemed given (a) on the date delivered, if delivered personally, (b) on the first Business Day following the deposit thereof with Federal Express or another recognized overnight courier, if sent by Federal Express or another recognized overnight courier, (c) on the fourth Business Day following the mailing thereof with postage prepaid, if mailed by registered or certified mail (return receipt requested), and (d) the date of transmission, if such notice or communication is delivered via facsimile or email attachment at or prior to 5:30 p.m. (New York City time) on a Business Day and (e) the next Business Day after the date of transmission, if such notice or communication is delivered via facsimile or email attachment on a day that is not a Business Day or later than 5:30 p.m. (New York City time) on any Business Day, in each case to the parties at the following addresses (or at such other address for a party as shall be specified by like notice):

(a) If to the Company, to:

Windtree Therapeutics, Inc.  
2600 Kelly Road, Suite 100  
Warrington, Pennsylvania 18976  
Facsimile: 215-488-9557  
Attention: Chief Financial Officer

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(b) If to the Warrant Agent, to:

Continental Stock Transfer & Trust Company  
1 State Street, 30 Floor  
New York, NY 10004-1561  
Facsimile: [●]  
Attention: [●]

(c) If to the Holder of any Warrant Certificate, to the address of such Holder as shown on the registry books of the Company. Any notice required to be delivered by the Company to the Holder of any Warrant may be given by the Warrant Agent on behalf of the Company. Notwithstanding any other provision of this Agreement, where this Agreement provides for notice of any event to a Holder of any Warrant Certificate, for a Global Warrant, such notice shall be sufficiently given if given to the Depositary (or its designee) pursuant to the procedures of the Depositary or its designee.

For any notice delivered by email to be deemed given or made, such notice must be followed by notice sent by overnight courier service to be delivered on the next business day following such email, unless the recipient of such email has acknowledged via return email receipt of such email.

#### Section 20. Supplements and Amendments.

(a) The Company and the Warrant Agent may from time to time supplement or amend this Agreement without the approval of any Holders of Warrant Certificates in order to cure any ambiguity, to correct or supplement any provision contained herein which may be defective or inconsistent with any other provisions herein, or to make any other provisions with regard to matters or questions arising hereunder which the Company and the Warrant Agent may deem necessary or desirable and which shall not adversely affect the interests of the Holders of the Warrants Certificates in any material respect.

(b) In addition to the foregoing, with the consent of Holders of Warrants entitled, upon exercise thereof, to receive not less than a majority of the shares of Common Stock issuable thereunder, the Company and the Warrant Agent may modify this Agreement for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Warrant Agreement or modifying in any manner the rights of the Holders of the Warrant Certificates; provided, however, that no modification of the terms (including but not limited to the adjustments described in Section 11 of this Agreement) upon which the Warrants are exercisable or reducing the percentage required for consent to modification of this Agreement may be made without the consent of the Holder of each outstanding warrant certificate affected thereby. As a condition precedent to the Warrant Agent's execution of any amendment, the Company shall deliver to the Warrant Agent a certificate from a duly authorized officer of the Company that states that the proposed amendment complies with the terms of this Section 20 of this Agreement.

Section 21. Successors. All covenants and provisions of this Agreement by or for the benefit of the Company or the Warrant Agent shall bind and inure to the benefit of their respective successors and assigns hereunder.

Section 22. Benefits of this Agreement. Nothing in this Agreement shall be construed to give any Person other than the Company, the Holders of Warrant Certificates and the Warrant Agent any legal or equitable right, remedy or claim under this Agreement; but this Agreement shall be for the sole and exclusive benefit of the Company, the Warrant Agent and the Holders of the Warrant Certificates.

Section 23. Governing Law. This Agreement and each Warrant issued hereunder shall be governed by, and construed in accordance with, the laws of the State of New York without giving effect to the conflicts of law principles thereof.

Section 24. Counterparts. This Agreement may be executed in any number of counterparts and each of such counterparts shall for all purposes be deemed to be an original, and all such counterparts shall together constitute but one and the same instrument.

Section 25. Captions. The captions of the sections of this Agreement have been inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof.

Section 26. Information. The Company agrees to promptly provide to the Holders of the Warrants any information it provides to all holders of the Common Stock, except to the extent any such information is publicly available on the EDGAR system (or any successor thereof) of the Securities and Exchange Commission.

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Section 27. Force Majeure. Notwithstanding anything to the contrary contained herein, Warrant Agent shall not be liable for any delays or failures in performance resulting from acts beyond its reasonable control including, without limitation, acts of God, terrorist acts, shortage of supply, breakdowns or malfunctions, interruptions or malfunction of computer facilities, or loss of data due to power failures or mechanical difficulties with information storage or retrieval systems, labor difficulties, war, or civil unrest, it being understood that the Warrant Agent shall use reasonable best efforts which are consistent with accepted practices in the banking industry to resume performance as soon as practicable under the circumstances.

*(Signature Page Follows)*

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

**WINDTREE THERAPEUTICS, INC.**

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

**CONTINENTAL STOCK TRANSFER & TRUST COMPANY**

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

*[Signature Page to Warrant Agency Agreement]*

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**Annex A: Form of Warrant Certificate Request Notice**

WARRANT CERTIFICATE REQUEST NOTICE

To: Continental Stock Transfer & Trust Company as Warrant Agent for Windtree Therapeutics, Inc. (the "Company")

The undersigned Holder of Common Stock Purchase Warrants ("Warrants") in the form of Global Warrants issued by the Company hereby elects to receive a Warrant Certificate evidencing the Warrants held by the Holder as specified below:

1. Name of Holder of Warrants in form of Global Warrants: \_\_\_\_\_
2. Name of Holder in Warrant Certificate (if different from name of Holder of Warrants in form of Global Warrants):  
\_\_\_\_\_
3. Number of Warrants in name of Holder in form of Global Warrants: \_\_\_\_\_
4. Number of Warrants for which Warrant Certificate shall be issued: \_\_\_\_\_
5. Number of Warrants in name of Holder in form of Global Warrants after issuance of Warrant Certificate, if any: \_\_\_\_\_
6. Warrant Certificate shall be delivered to the following address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The undersigned hereby acknowledges and agrees that, in connection with this Warrant Exchange and the issuance of the Warrant Certificate, the Holder is deemed to have surrendered the number of Warrants in form of Global Warrants in the name of the Holder equal to the number of Warrants evidenced by the Warrant Certificate.

[SIGNATURE OF HOLDER]

Name of Investing Entity: \_\_\_\_\_

*Signature of Authorized Signatory of Investing Entity:* \_\_\_\_\_

Name of Authorized Signatory: \_\_\_\_\_

Title of Authorized Signatory: \_\_\_\_\_

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

**Exhibit 1: Form of Warrant**

**FORM OF SERIES I WARRANT TO PURCHASE COMMON STOCK**

THIS AMENDMENT NO. 1 TO THE SERIES I WARRANT TO PURCHASE COMMON STOCK (THIS “AGREEMENT”) IS MADE AS OF MAY 6, 2020, BY AND BETWEEN WINDTREE THERAPEUTICS, INC., A DELAWARE CORPORATION (THE “COMPANY”) AND THE UNDERSIGNED HOLDER (“HOLDER”). THE COMPANY AND THE HOLDER ARE SOMETIMES REFERRED TO HEREIN COLLECTIVELY AS THE “PARTIES” AND INDIVIDUALLY AS A “PARTY.”

**RECITALS**

**WHEREAS**, the Company issued to the Holder that certain Series I Warrant to Purchase Common Stock on December 6, 2019 (the “Warrant”), which, among other things, entitles the Holder to purchase \_\_\_\_\_ shares of common stock of the Company, par value \$0.001 per share (the “Warrant Shares”);

**WHEREAS**, the Warrant may be exercised in exchange for Warrant Shares at a price a per share of \$12.09 at any time or times commencing on June 6, 2020 until December 6, 2024; and

**WHEREAS**, in accordance with Section 8 of the Warrant, the Company and the Holder hereby wish to amend the Warrant (as more fully set forth below).

**NOW, THEREFORE**, in consideration of the mutual promises and covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree as follows:

**AGREEMENT**

1. **Definitions.** Any and all capitalized terms not specifically defined herein shall have the meanings ascribed to them in the Warrant.

2. **Amendment to Section 1(b) of the Warrant.** Section 1(b) of each Warrant is hereby deleted in its entirety and replaced with:

“**Exercise Price.** For purposes of this Warrant, “Exercise Price” means a per Warrant Share price of \$12.09, subject to adjustment as provided herein; provided, if this Warrant is exercised, in whole or in part, prior to December 5, 2021, “Exercise Price” shall mean a per Warrant Share price of \$6.97, subject to adjustment as provided herein.

3. **Insertion of New Section 1(g) into the Warrant.** A new Section 1(g) of the Warrant as set forth below is hereby inserted into the Warrant immediately following Section 1(f) thereof:

“The Holder irrevocably agrees with the Company that, for a period of ninety (90) days following the earlier of (i) the closing date of the Company’s next public offering of securities, or (ii) December 24, 2020, the Holder will not offer, sell, contract to sell, hypothecate, pledge or otherwise dispose of (or enter into any transaction which is designed to, or might reasonably be expected to, result in the disposition (whether by actual disposition or effective economic disposition due to cash settlement or otherwise) by the Holder or any of its Affiliates and Attribution Parties), directly or indirectly, or establish or increase a put equivalent position or liquidate or decrease a call equivalent position within the meaning of Section 16 of the Exchange Act, with respect to any shares of Common Stock or securities convertible, exchangeable or exercisable into, shares of Common Stock beneficially owned, held or hereafter acquired by the Holder (the “**Restricted Securities**”). Beneficial ownership shall be calculated in accordance with Section 13(d) of the Exchange Act. In furtherance of the foregoing, the Company and any duly appointed transfer agent for the registration or transfer of the Restricted Securities are hereby authorized to decline to make any transfer of securities if such transfer would constitute a violation or breach of this Section 1(g).”

4. Governing Law. This Agreement and the Parties' rights and obligations hereunder shall be governed by, and construed and interpreted in accordance with, the laws of the State of Delaware, without regard to the principles of conflicts of law thereof.

5. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the Parties and their respective successors, heirs and permitted assigns. No Party may assign its rights, duties or obligations under this Agreement without the prior written consent of the other Parties.

6. Counterparts. This Agreement may be executed in any number of separate counterparts, all of which shall constitute one agreement. Execution and delivery of this Agreement may be effected by pdf, facsimile, or other electronic transmission of signature pages.

7. Amendments. This Agreement may be amended, modified or waived only in a writing signed by each of the Parties hereto.

*[Signature pages follow]*

IN WITNESS WHEREOF, the undersigned have executed this Amendment No. 1 to Series I Warrant to Purchase Common Stock as of the date first written above.

**WINDTREE THERAPEUTICS, INC.**

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

Name: Craig Fraser

Title: President and Chief Executive Officer

*[Signature Page to Amendment No. 1 to Series I Warrant to Purchase Common Stock]*

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**HOLDER:**

**INVESTOR:** \_\_\_\_\_

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

Name: \_\_\_\_\_

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

*[Signature Page to Amendment No. 1 to Series I Warrant to Purchase Common Stock]*





3000 Two Logan Square  
 Eighteenth and Arch Streets  
 Philadelphia, PA 19103-2799  
 215.981.4000  
 Fax 215.981.4750

May 6, 2020

Windtree Therapeutics, Inc.  
 2600 Kelly Road, Suite 100  
 Warrington, PA 18976

Re: Registration Statement on Form S-1

Ladies and Gentlemen:

We have acted as counsel to Windtree Therapeutics, Inc., a Delaware corporation (the “**Company**”), in connection with the Company’s Registration Statement on Form S-1 (File No. 333-236085) filed with the Securities and Exchange Commission (the “**Commission**”) on January 27, 2020, as amended by Pre-Effective Amendment No. 1 filed with the Commission on the date hereof (as amended, the “**Registration Statement**”) pursuant to the requirements of the Securities Act of 1933, as amended (the “**Act**”). The Registration Statement relates to the registration under the Act of (i) up to 587,334 shares (including up to 76,609 shares for the purpose of covering over-allotments) (the “**Shares**”) of the Company’s common stock, par value \$0.001 (the “**Common Stock**”), (ii) up to 587,334 warrants (including up to 76,609 warrants for the purpose of covering over-allotments) to purchase shares of Common Stock (the “**Warrants**”) and (iii) up to 293,667 shares of Common Stock (including up to 38,304 shares for the purpose of covering over-allotments) issuable upon exercise of the Warrants (the “**Warrant Shares**”). The Shares, the Warrants and the Warrant Shares are collectively herein referred to as the “**Registered Securities**.” This opinion is being furnished in connection with the requirements of Item 601(b)(5) of Regulation S-K under the Act, and no opinion is expressed herein as to any matter pertaining to the contents of the Registration Statement or related Prospectus, other than as expressly stated herein with respect to the issue of the Securities.

As such counsel, we have examined such matters of fact and questions of law as we have considered appropriate for purposes of this letter. With your consent, we have relied upon certificates and other assurances of officers of the Company and others as to factual matters without having independently verified such factual matters. In our examination of the aforesaid documents, we have assumed the genuineness of all signatures, the legal capacity of all natural persons, the accuracy and completeness of all documents submitted to us, the authenticity of all original documents, and the conformity to authentic original documents of all documents submitted to us as copies (including pdfs). We are opining herein as to General Corporation Law of the State of Delaware, and we express no opinion with respect to any other laws.

Philadelphia	Boston	Washington, D.C.	Los Angeles	New York	Pittsburgh	Detroit
Berwyn	Harrisburg	Orange County	Princeton	Rochester	Silicon Valley	Wilmington

www.pepperlaw.com

Subject to the foregoing and the other matters set forth herein, it is our opinion that:

1. The Shares have been duly authorized by all necessary corporate action of the Company and, when the Shares shall have been duly registered on the books of the transfer agent and registrar therefor in the name or on behalf of the purchasers, and have been issued by the Company against payment therefor (not less than par value) in the circumstances contemplated by the form of underwriting agreement most recently filed as an exhibit to the Registration Statement, the Shares will be validly issued, fully paid and nonassessable;

2. The Warrants have been duly authorized by all necessary corporate action of the Company and, when executed and delivered against payment therefor in the circumstances contemplated by the form of underwriting agreement most recently filed as an exhibit to the Registration Statement and pursuant to the form of warrant agreement most recently filed as an exhibit to the Registration Statement, will be legally issued binding obligations of the Company enforceable against the Company in accordance with their terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally, and subject to general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law); and

3. The Warrant Shares have been duly authorized by all necessary corporate action of the Company and, when issued and paid for in accordance with the terms of the Warrants, will be validly issued, fully paid and nonassessable.

This opinion is for your benefit in connection with the Registration Statement and may be relied upon by you and by persons entitled to rely upon it pursuant to the applicable provisions of the Act. We consent to your filing this opinion as an exhibit to the Registration Statement and to the reference to our firm in the related Prospectus under the heading "Legal Matters." In giving such consent, we do not thereby admit that we are in the category of persons whose consent is required under Section 7 of the Act or the rules and regulations of the Commission thereunder.

Very truly yours,

/s/ Pepper Hamilton LLP

**AMENDMENT NO. 1  
TO  
PAYMENT RESTRUCTURING AGREEMENT**

This Amendment No. 1 to Payment Restructuring Agreement (this “**Amendment**”) is made by and between Windtree Therapeutics, Inc., a corporation organized and existing under the laws of the state of Delaware, having its principal place of business at 2600 Kelly Road, Suite 100, Warrington, PA 18976 USA (“**Windtree**”), and Battelle Memorial Institute, through its Corporate Operations, a corporation organized and existing under the laws of the state of Ohio, having its principal place of business at 505 King Avenue, Columbus, OH 43201-2693 USA (“**Battelle**”). This Amendment is effective as of the date of the last signature below (the “**Amendment Effective Date**”).

WHEREAS, Windtree and Battelle are parties to that certain Payment Restructuring Agreement made and entered into as of December 7, 2018 (as amended through the Amendment Effective Date, the “**Agreement**”); and

WHEREAS, Windtree and Battelle now desire to amend the Agreement as provided herein.

NOW, THEREFORE, in consideration of the covenants and promises contained in this Amendment and intending to be legally bound, Windtree and Battelle hereby agree to modify, replace, supplement or amend the terms of the Agreement, as the case may be, as follows:

1. Definitions. All capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

2. Section B.iv.b. Section B.iv.b of the Agreement, is hereby amended and restated in its entirety as follows:

“b. Milestone Payments will be due and payable as follows:

1. A Milestone Payment will be due and payable on the earlier of enrollment of the first patient in the next AEROSURF clinical study as evidenced by use of the Next Generation System in the clinic or April 15, 2020; and

2. A Milestone Payment will be due and payable on the earlier of the date on which Windtree completes the device technology transfer to the selected manufacturer and assembler for the Next Generation System, as evidenced by contract manufacturers’ production of at least one disposable and durable unit or September 1, 2020.”

The following sentence that immediately follows Section B.iv.b.2., is hereby removed in its entirety.

“Notwithstanding the foregoing, if any Milestone Payments remain unpaid on December 31, 2019 for any reason whatsoever, including, but not limited to Windtree’s failure to complete a Follow- on Financing, enroll a first patient in a clinical study or complete Device Technology Transfer, then all unpaid Milestone Payments shall be accelerated and become due and payable on or before January 7, 2020.”

3. No Other Modifications. Except as expressly set forth in this Amendment, the Agreement and all provisions thereof in effect as of the Amendment Effective Date shall continue in full force and effect without any modification or amendment.

4. Counterparts. This Amendment may be executed in one or more counterparts, each of which shall be an original and all of which shall constitute together the same document.
5. Signatures. Electronic signatures sent via electronic mail or similar means shall be deemed to be original signatures for purposes of this Amendment.

**[signature page follows]**

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**In Witness Whereof**, the Parties have duly executed this Amendment as of the Amendment Effective Date.

**WINDTREE THERAPEUTICS, INC.**

**BATTELLE MEMORIAL INSTITUTE**  
**Corporate Operations**

By: /s/ John Tattory  
Name: John Tattory  
Title: SVP and Chief Financial Officer  
Date: March 30, 2020

By: /s/ Amanda K. Botti  
Name: Amanda K. Botti  
Title: Contracts Manager  
Date: March 30, 2020

CERTAIN CONFIDENTIAL INFORMATION CONTAINED IN THIS DOCUMENT, MARKED BY [\*\*\*] HAS BEEN OMITTED BECAUSE IT IS NOT MATERIAL AND WOULD LIKELY CAUSE COMPETITIVE HARM TO THE REGISTRANT IF PUBLICLY DISCLOSED.

### BINDING TERM SHEET

THIS BINDING TERM SHEET (this “*Term Sheet*”) is entered into on March 18, 2020 (the “Effective Date”), by and between LEE’S PHARMACEUTICAL (HK) LTD. (“LP”), and WINDTREE THERAPEUTICS, INC., a Delaware corporation (“WINT”), as follows:

#### **Purpose of Term Sheet**

- The parties intend for this Term Sheet to provide (1) guidance to the parties in the preparation of definitive written agreement(s) for the transactions described in this Term Sheet (collectively, the “*Definitive Agreement*”) and (2) certain obligations legally binding on the parties.

#### **Terms**

- LP shall pay to WINT the following amounts (the “**Project Expenses**”), which payment will be used by WINT in connection with the development of AEROSURF® from April 1, 2020 through September 30, 2020, with the main focus being the carrying out of the “Device Bridging Study” as briefly described in Exhibit A: (a) USD\$1,000,000 no later than April 1, 2020; (b) USD\$1,400,000 no later than July 1, 2020; and (c) USD\$1,500,000 or USD\$ 400,000 (as the case may be), subject to the provisions set forth below, no later than September 1, 2020. The payments above are non-refundable. In any case, the parties expressly agree that, on or prior to August 31, 2020, if WINT both (1) receives proceeds, net of transaction costs including legal fees, accounting fees and underwriter discounts, commissions and fees, from the sale of its equity securities equal to USD\$4,500,000 or more and (2) WINT’s common stock becomes listed on the NASDAQ National Market or NASDAQ Global Market, then the Project Expenses will be adjusted such that WINT will absorb USD\$ 1,100,000 of the budgeted KL4 platform fixed costs (as set forth in Exhibit A). In such case, the third payment under (c) above will be lowered from US\$1,500,000 to USD\$ 400,000.
  - During the period from April 1, 2020 through September 30, 2020, the parties will negotiate in good faith for a definitive agreement concerning LP provision of additional semi-annual non-refundable payments to cover the continued development of AEROSURF after September 30, 2020. Such payments would also be considered Project Expenses. The parties expect such payments to be equal and subject to an agreed budget for such continued development, which budget will be agreed no later than one month prior to the start of each subsequent 6-month period/s. Additionally, WINT and LP will agree no later than one month prior to the end of any 6-month period, on the ongoing global strategy and operating plan to include review of development progress and plan of global development under WINT’s active management (versus localizing programs and costs and support (i.e., analytics) into China only).
  - “**Commercialization Net Revenue**” means (a) any and all revenue amounts and payments received by WINT and its affiliate/s in consideration for any sale, divestiture, license or other development and/or commercialization of the KL4/AEROSURF portfolio (i.e., Surfaxin, Surfaxin LS; AEROSURF as well as any KL4-containing product as a mono-substance and in combination with other active ingredients) including, without limitation, upfront and milestone payments, distributions of net profit, license maintenance fees, royalties and sublicense income but excluding (i) payments made by another licensee for bona fide research and development conducted by WINT; (ii) reimbursement paid to WINT by another licensee of patent expenses for the KL4/AEROSURF patent portfolio and (iii) all amounts received by WINT under the License, Development and Commercialization Agreement between LP and WINT dated as of June 12, 2017 (as amended, the “**License Agreement**”); *minus* (b) any payments, such as royalties and milestone payments, owed and paid by WINT in respect of third party intellectual property not previously funded by LP.
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**CERTAIN CONFIDENTIAL INFORMATION CONTAINED IN THIS DOCUMENT, MARKED BY [\*\*\*] HAS BEEN OMITTED BECAUSE IT IS NOT MATERIAL AND WOULD LIKELY CAUSE COMPETITIVE HARM TO THE REGISTRANT IF PUBLICLY DISCLOSED.**

- Until WINT has paid LP a total amount of Commercialization Net Revenue equal to one hundred twenty five percent (125%) of Project Expenses, WINT will pay LP fifty percent (50%) of Commercialization Net Revenue.
- Additionally, LP and WINT will amend Section 7.4(a)(i) (Royalty Rates for the Surfaxin Product and/or Surfaxin LS) of the License Agreement to decrease (i) royalty rates from [\*\*\*]% to [\*\*\*]% in the less than or equal to annual [\*\*\*] tier, (ii) from [\*\*\*]% to [\*\*\*]% in the greater than annual [\*\*\*] but less than or equal to annual [\*\*\*] tier, (iii) from [\*\*\*]% to [\*\*\*]% in the greater than annual [\*\*\*] but less than or equal to annual [\*\*\*] tier and iv) from [\*\*\*]% to [\*\*\*]% in the greater than annual [\*\*\*] tier.
- Except as required by law, neither party shall publicly announce that the parties have entered into this Term Sheet or the terms and conditions of this Term Sheet except with the prior written consent of the other party.
- The parties agree that: (1) this Term Sheet shall be governed by, construed and enforced in accordance with the laws of England and Wales; (2) all disputes arising out of or in connection with the Term Sheet and the Definitive Agreement shall be finally settled by arbitration before a single arbitrator under the auspices of JAMS, Inc., pursuant to its Comprehensive Arbitration Rules and Procedures then in effect (the “**JAMS Rules**”); (3) the arbitration will be conducted in London (United Kingdom), the language of the arbitration will be English and judgment on the award may be entered in any court having jurisdiction; (4) each party has participated fully in the review and revision of this Term Sheet and, therefore, any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in interpreting this Term Sheet; (5) the parties shall bear their own attorneys’ fees, costs, and expenses incurred in connection with the negotiation, preparation, execution and delivery of this Term Sheet and the Definitive Agreement; (6) this Term Sheet may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one agreement; (7) this Term Sheet constitutes the final, complete, and exclusive statement of the terms of the agreement between the parties pertaining to the subject matter of this Term Sheet and supersedes all other prior or contemporaneous, oral or written understandings and agreements of the parties; and (8) this Term Sheet may be supplemented, amended, or modified only by a writing signed by both parties.

[Signature Page to Follow]

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IN WITNESS WHEREOF, the parties have executed this Term Sheet as of the Effective Date.

WINDTREE THERAPEUTICS, INC.

LEE'S PHARMACEUTICAL (HK) LTD.

By: /s/ Craig Fraser

By: /s/ Benjamin Li

Name: Craig Fraser

Name: Benjamin Li

Title: CEO

Title: CEO



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**EXHIBIT A**

**[\*\*\*]**

O-Bank

Comprehensive Credit Facility Agreement

Contracting Party: CVie Therapeutics Limited  
Guarantor: Lee's Pharmaceutical Holdings Limited

CP114 107.01

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## O-Bank's Notification on Implementation of Paragraph 1 of Article 8 of the Personal Data Protection Act

Dear Customer,

Because the collection of personal data involves your privacy rights, when O-Bank Co., Ltd. (hereinafter referred to as our Bank) collects personal data from you, it shall comply with the provisions of Paragraph 1 of Article 8 of the Personal Data Protection Act (hereinafter referred to as the Personal Data Protection Act), and the following matters should be clearly notified to you:

- I. **The purpose of our Bank's collection of your personal data, the types of personal data and the period, region, targets and method of personal data use are as follows. Please read carefully:**
  - (1) **Purpose of collection:** A specific purpose as stated in the schedule that meets our Bank's business registration items or business types permitted to be handled according to law.
  - (2) **Types of personal data:** Name, identity card uniform number, gender, date of birth, communication method, nationality, place of birth, domicile and other details such as the contents of a relevant business application or contract, and the relevant business, account or service between our Bank and you, as well as the personal data actually collected from you or a third party (for example, the Joint Credit Information Center) shall prevail.
  - (3) **Period:** The duration of the specific purpose that is determined in accordance with relevant laws and regulations (such as the Business Entity Accounting Act, the Money Laundering Control Act, etc.), the retention period necessary for the execution of the business, or the retention period determined by an individual contract or our Bank (whichever comes later).
  - (4) **Region:** Domestic and foreign locations of the following targets.
  - (5) **Targets:** Our Bank (including domestic and overseas branches and sub-branches) and affiliated companies, outsourced institutions entrusted by our Bank to handle affairs, third parties that have a cooperation relationship with our Bank, correspondent financial institutions, institutions used in accordance with laws and regulations, other institutions related to our Bank's businesses (e.g., correspondent banks, Joint Credit Information Center, National Credit Card Center of R.O.C., Taiwan Clearing House, Financial Information Service Co., Ltd., credit guarantee agencies, international credit card organizations, acquirers, special shops, etc.), legally competent authorities with investigative powers, financial supervision agencies, Financial Ombudsman Institution, persons (if any) who intend to transfer assets and liabilities to our Bank or undertake risks or mergers with our Bank, and the targets you agree to (such as the targets for our Bank's joint marketing or interactive use of customer information, the targets that cooperate with our Bank to promote businesses, etc.).
  - (6) **Method:** In compliance with the relevant laws and regulations of the Personal Data Protection Act by using automated machines or other non-automatic methods.
- II. **According to Article 3 of the Personal Data Protection Act, you may exercise the following rights regarding your personal data held by our Bank:**
  - (1) Except for the exceptions stipulated in Article 10 of the Personal Data Protection Act, you may inquire, request reading or request to make copies of the personal data with our Bank, but our Bank may charge necessary fees in accordance with Article 14 of the Personal Data Protection Act.
  - (2) You may ask our Bank for supplement or correction, but in accordance with the provisions of Article 19 of the Enforcement Rules of the Personal Data Protection Act, you should properly explain the reasons and facts.
  - (3) If our Bank collects, processes or uses your personal data in violation of the provisions of the Personal Data Protection Act, then in accordance with Paragraph 4 of Article 11 of the Personal Data Protection Act, you may request our Bank to delete, stop collection, processing or use.
  - (4) In accordance with the provisions of Paragraph 2 of Article 11 of the Personal Data Protection Act, if you have a dispute over the correctness of your personal data, you may request our Bank to stop processing or using your personal data. However, in accordance with the proviso, this does not include the data that is necessary for our Bank to conduct business and the dispute is indicated or the data that has your written consent.
  - (5) In accordance with the provisions of Paragraph 3 of Article 11 of the Personal Data Protection Act, when the specific purpose of collecting the personal data disappears or the period expires, you may request our Bank to delete, stop processing or use your personal data. However, in accordance with the proviso, this does not include the data that is necessary for our Bank to conduct business or the data that has your written consent.
- III. **If you want to exercise the various rights stipulated in Article 3 of the aforementioned Personal Data Protection Act, for the method on how to exercise them, you may contact our Bank's Customer Service Hotline (080-080-1010) or visit our Bank's website (URL: <https://www.o-bank.com>).**

**IV. You are free to choose whether or not to provide relevant personal data and types. However, if the personal data and types you have refused to provide are data required for handling business reviews or operations, then our Bank may not be able to conduct the necessary business reviews or operations, and please understand that our Bank may not be able to provide you with the relevant services or better services.**

**Schedule**

Business Type	Specific Purpose and Code for the Business	Specific Purpose and Code in Common
1. Deposit and remittance business	022 Foreign exchange business, 036 Deposit and remittance business, 067 Credit card, cash card, debit card or electronic instrument certificate business, 082 Comprehensive management of deposit and borrowing operations between borrowers and depositors, 112 Bill exchange business, 181 Other businesses that meet the business registration items or organization's articles of association	040 Marketing 059 Collection, processing and use by the financial service industry in accordance with laws and regulations and requirements of financial supervision
2. Credit facility business	022 Foreign exchange business, 067 Credit card, cash card, debit card or electronic instrument certificate business, 082 Comprehensive management of deposit and borrowing operations between borrowers and depositors, 088 Credit approval and credit facility business, 106 Credit facility business, 111 Instrument business, 126 Debt discounting and purchase business, 154 Credit investigation, 181 Other businesses that meet the business registration items or organization's articles of association	060 Financial dispute settlement 061 Financial supervision, management and inspection 063 Collection, processing and use of personal data by non-governmental agencies in accordance with their legal obligations
3. Foreign exchange business	022 Foreign exchange business, 036 Deposit and remittance business, 044 Investment management, 082 Comprehensive management of deposit and borrowing operations between borrowers and depositors, 088 Credit approval and credit facility business, 106 Credit facility business, 154 Credit investigation, 181 Other businesses that meet the business registration items or organization's articles of association	069 Matters with respect to the management of contracts, quasi contracts or other legal relationships
4. Securities business	037 Registration of securities and securities holders, 044 Investment management, 082 Comprehensive management of deposit and borrowing operations between borrowers and depositors, 088 Credit approval and credit facility business, 106 Credit facility business, 111 Instrument business, 154 Credit investigation, 166 Securities, futures, securities investment trust and advisory related businesses, 181 Other businesses that meet the business registration items or organization's articles of association	090 Consumer, customer management and service 091 Consumer protection
5. Credit card business	022 Foreign exchange business, 067 Credit card, cash card, debit card or electronic instrument certificate business, 082 Comprehensive management of deposit and borrowing operations between borrowers and depositors, 088 Credit approval and credit facility business, 106 Credit facility business, 154 Credit investigation, 181 Other businesses that meet the business registration items or organization's articles of association	098 Business and technology information 104 Account management and debt trading business 136 Information (communication) and database management
6. Wealth management business	022 Foreign exchange business, 036 Deposit and remittance business, 044 Investment management, 068 Trust business, 082 Comprehensive management of deposit and borrowing operations between borrowers and depositors, 094 Property management, 166 Securities, futures, securities investment trust and advisory related businesses, 181 Other businesses that meet the business registration items or organization's articles of association	137 Information and communication security and management
7. Insurance agent business	001 Life insurance, 065 Insurance brokerage, agency or notarization business, 066 Insurance supervision, 093 Property insurance, 181 Other businesses that meet the business registration items or organization's articles of association	157 Investigation, statistics and research analysis 177 Other financial management businesses
8. Other businesses that meet the business registration items or organization's articles of association or other relevant businesses approved by the competent authority	181 Other businesses that meet the business registration items or organization's articles of association: Safe deposit box business, gold passbook business, electronic financial business, agency collection and payment business, agency sales of commemorative coin business, and cooperative promotion business	182 Other advising and consultant services

## Comprehensive Credit Facility Agreement

The Contracting Party, CVie Therapeutics Limited (hereinafter referred to as the Contracting Party), hereby invites the joint Guarantor, Lee's Pharmaceutical Holdings Limited (hereinafter referred to as the Guarantor), and O-Bank Co., Ltd. (including the main branch and its branches and sub-branches within and outside of the Republic of China, hereinafter referred to as your Bank), to conclude this Comprehensive Credit Facility Agreement (hereinafter referred to as this Agreement or this Contract), which is agreed to be within the range of the total credit line (amount) of  TWD  150,000,000. The Guarantor and the Contracting Party shall jointly bear the full repayment responsibility. It shall be used by the Contracting Party for one time, several times or revolving times when handling credit facility and derivative commodity transactions with your Bank. With regard to this credit line, the Contracting Party and the Guarantor solemnly agree to the following:

- (1) The format, conditions and other contents of this credit line can be confirmed by your Bank and the Contracting Party by signing a confirmation letter for credit facility transactions. This confirmation letter for credit facility transactions shall become part of this Agreement and shall be binding on the Contracting Party and the Guarantor. The matters specifically stated in the confirmation letter for credit facility transactions (including additional supplementary agreements separately signed in accordance with its stipulations) shall be deemed to be the special stipulations of this Agreement and shall be applied with priority. For the matters that are not specifically stipulated by it, the stipulations of this Agreement shall apply.
- (2) For each individual credit facility and transaction, the Contracting Party and the Guarantor shall sign a separate contract, application or other document in accordance with your Bank's regulations. In the case where a guarantee should be provided, the Contracting Party and the Guarantor shall provide the collateral required by your Bank in accordance with the Contract, and sign another document and handle registration in accordance with the method required by your Bank and relevant laws and regulations.

### Chapter I. Common Clauses

#### Article 1 (Total Credit Line)

The so-called total credit line (amount) shall be the total maximum limit for all credit facility and derivative commodity transactions between your Bank and the Contracting Party within the agreed credit facility use purpose, and the individual credit line (amount) for each transaction shall be determined by your Bank according to the Contracting Party's needs and credit status. It can be used one time, several times or revolving times.

The total amount of an individual credit line (amount) may exceed the total credit line (amount), but when the Contracting Party actually uses it, if the credit line (amount) intended to be used and the total of the principal balance of the credit facility and the balance of the derivative commodity transaction exceed the total credit line (amount), although it does not exceed the individual credit line (amount) intended to be used, it shall still be subject to the limit of the aforementioned total credit line (amount) and shall not be used beyond the limit, provided that the Contracting Party can use the total credit line (amount) and the individual credit line (amount) according to the Contract.

If the use of the credit line (amount) involves a foreign currency, the calculation of its individual and total credit lines (amounts) shall be converted based on the exchange rate set by your Bank at the time of use. If due to changes in the exchange rate, the Contracting Party's loan allocation amount under this Contract or the advance amount from your Bank exceeds the total credit line (amount) or the individual credit line (amount), the excess portion shall still be jointly repaid by the Contracting Party and the Guarantor.

#### Article 2 (Scope of Debts)

**The debt or all debts stated in this Contract refer to the bills, loans, guarantees, advances, overdrafts, discounts, acceptances, appointment guarantees, issuance of letters of credit, export bills, accounts receivable factoring (financing), derivative commodity transactions, and all other debts arising from the basic legal relationship on the basis of doing business with your Bank, including interest, delay interest, liquidated damages, damage compensations and other related expenses.**

#### Article 3 (Maximum Guarantee)

**The guarantee debt of the Guarantor of this Contract is the continuous guarantee debt and the joint guarantee debt of the maximum limit. The scope of its debts is the main debtor's current (including past debts that are not paid as of the present) and future borrowings, bills, advances, guarantees, acceptances, overdrafts, discounts, appointment guarantees, issuance of letters of credit, export bills, accounts receivable factoring (financing), derivative commodity transactions and all other debts and their interest, delay interest, liquidated damages, damages, other related fees, and all other debts arising from the basic legal relationship on the basis of doing business with your Bank, as well as their interest, delay interest, liquidated damages, damage compensations, other related expenses, and other debts subordinate to the main debt. The Guarantor is willing to jointly bear the full repayment responsibility with the main debtor.**

**The Guarantor may write a letter or your Bank may retain the notice as evidence for notifying the termination of the guarantee obligation stated in this Contract at any time according to law, but the termination shall become effective on the next business day after your Bank receives the notice, and the Guarantor shall still bear the guarantee responsibility for the main debt that has occurred before the notice takes effect.**

Article 4 (Joint Debts)

(If the Contracting Party is more than one) If the Contracting Party and other contracting parties jointly issue or send an instrument to your Bank for a common or joint loan, even if your Bank grants the fund payment to only one of the contracting parties to the jointly issued or sent instrument, it shall still be deemed that the fund payment has been granted to all contracting parties, and each contracting party shall still recognize the loan as its own debt and is willing to bear the joint repayment responsibility.

Article 5 (Notification of Changes and Delivery of Documents)

When there is a change in name, organization, articles of association, seal, representative, representative authority scope, notification address, etc., or other changes affecting your Bank's rights and interests, the Contracting Party and the Guarantor are willing to immediately notify your Bank of the change in writing and complete the procedures for changing or canceling the specimen seal. Before the aforementioned notification and procedures for changing or canceling the specimen seal are completed, the Contracting Party and the Guarantor shall still be responsible for any transactions with your Bank. If this causes any damage to your Bank, [the Contracting Party and the Guarantor] shall also be liable for compensation. If the Contracting Party and the Guarantor violate the aforementioned obligation for notifying a change of address, or due to reasons attributable to the Contracting Party and the Guarantor, the notification of your Bank cannot be delivered, then the act of your Bank sending to the last notification address shall be deemed to have been delivered after the usual postal period.

Article 6 (Interest)

The interest rate is calculated according to the agreement at the time when the individual credit facility agreement is made. If it is not agreed, it is calculated based on your Bank's benchmark lending rate when the debt is established plus 4% annual interest.

The interest rate in the preceding paragraph may be adjusted by your Bank according to the benchmark lending rate or the agreed interest rate without further notice. Unless otherwise agreed, the interest is paid monthly.

If the interest is delayed for one year and is not repaid after being urged by your Bank, your Bank may roll the delay interest into the original principal.

Article 7 (Delay Interest and Liquidated Damages)

When the Contracting Party delays repayment of the principal or interest payment or advance made by your Bank due to appointment guarantee, draft acceptance or other reasons, in addition to the delay interest that should be calculated based on the original loan interest rate (or in the case of an advance payment without prior agreement on the loan interest rate, then it should be calculated based on your Bank's benchmark lending rate on the date of advance plus 4%), for the portion that is overdue within six months, the liquidated damages for the overdue amount is calculated based on 10% of the original loan interest rate (or your Bank's benchmark lending rate on the date of advance plus 4% interest rate), and for the portion that is overdue for more than six months, the liquidated damages for the overdue amount is calculated based on 20% of the original loan interest rate (or your Bank's benchmark lending rate on the date of advance plus 4% interest rate).

When the delay and advance debt of the preceding paragraph is in a foreign currency, unless otherwise agreed, the delay interest should be calculated at the original loan interest rate (or the cost of the foreign currency loan funds of your Bank on the date of advance plus 4%), and for the portion that is overdue within six months, the liquidated damages for the overdue amount is calculated based on 10% of the original loan interest rate (or the cost of the foreign currency loan funds of your Bank on the date of advance plus 4% interest rate), and for the portion that is overdue for more than six months, the liquidated damages for the overdue amount is calculated based on 20% of the original loan interest rate (or the cost of the foreign currency loan funds of your Bank on the date of advance plus 4% interest rate).

If the interest or delay interest that the Contracting Party should pay for the various debts involves different interest rates, the Contracting Party and the Guarantor agree that when your Bank exercises its rights on the promissory note issued by the Contracting Party and the Guarantor, your Bank may use the highest interest rate among the various debts as the agreed interest rate for the promissory note.

Article 8 (Withholding Authorization)

In order to facilitate the settlement and payment of the principal, interest, procedural fees or delay interest, liquidated damages, and all other fees that should be paid according to the Contract for the transactions with your Bank (including but not limited to) for credit facility, foreign exchange credit facility, foreign exchange trading, and derivative financial commodity trading business transactions, as well as the procedural fees, postal and telecommunication fees, and all other related fees for foreign exchange import / export collection, foreign exchange deposit, foreign exchange remittance / inward remittance, clean collection, letter of credit notification, letter of credit transfer and other business, the Contracting Party hereby authorizes the deposit made by the authorizer in the  TWD  Deposit Account No. \_\_\_\_\_ of your Bank for withdrawal, transfer and payment and is willing to abide by the following clauses:

1. Your bank has the right to withdraw and transfer the aforementioned deposit, without the need for the Contracting Party's passbook, withdrawal slip, or promissory note, check, etc. to be issued by the Contracting Party as payment proof. If this results in an insufficient account deposit and a dispute with a third party, etc. the Contracting Party is willing to bear all responsibilities, which shall have nothing to do with your Bank. The Contracting Party shall submit the proof to your Bank as soon as possible to make up for the registration procedures.
2. For the various credit facility cases or various businesses that the Contracting Party applies to your Bank, all procedures that should be completed after the expiry date shall still be completed, and will never use the excuse that the withholding of interest or procedural fees or other fees have been entrusted and will not go to the bank to complete the procedures, otherwise the Contracting Party shall bear all responsibilities on its own.
3. If this transfer authorization is agreed to be for a TWD deposit account, and when the original transfer amount is in a foreign currency, the Contracting Party agrees that your Bank may convert it to TWD at the exchange rate of the debit date and proceed to debit it from the agreed account.
4. Despite this transfer authorization, your Bank is not obligated to withdraw the deposit for transfer and payment on behalf of [the Contracting Party]. If your Bank recognizes there is a need or dispute or the aforementioned business transactions have incomplete procedures or insufficient deposits, etc., [the Contracting Party] shall immediately go to the bank to complete all procedures after being notified by your Bank.

Article 9 (Authorization for Establishing Special Reserve Account)

The Contracting Party agrees for your Bank to open a demand deposit (reserve) account with the account number of \_\_\_\_\_ in the name of the Contracting Party and authorizes your Bank to issue a withdrawal receipt signed by only one of your Bank's authorized signing personnel to withdraw funds from the account, in order to settle all Contracting Party's debts with your Bank or transfer to other deposit accounts (**excluding checking deposit accounts**) opened by the Contracting Party with your Bank.

The withdrawal and transfer made by your Bank according to the preceding paragraph shall be fully recognized by the Contracting Party, and the deposit balance in the account shall be subject to the actual balance posted by your Bank. The Contracting Party shall have no objections.

Article 10 (Debt Settlement)

**When the Contracting Party has several debts with your Bank, if the payment made by the debt payer or the money obtained by disposing of the debtor's property or collateral by your Bank is insufficient to pay off all debts of the Contracting Party and the Guarantor, then the debts shall be settled in accordance with the provisions of Articles 321 and 322 of the Civil Code.**

**The payment made by the debt payer or the money obtained by disposing of the debtor's property or collateral by your Bank shall be used to settle in the order of fees, liquidated damages, interest and principal. However, if your Bank deems it necessary, it may be used to settle in the order of fees, interest, principal and liquidated damages.**

**The Contracting Party and the Guarantor agree that your Bank may use it to settle the collateral insurance premiums advanced by your Bank when necessary.**

Article 11 (Acceleration Clauses)

**For all Contracting Party's debts to your Bank, if there is any of the following circumstances, your Bank may suspend or reduce the payment of the credit facility amount for the Contracting Party at any time, or shorten the credit facility period, or the principal and interest shall be deemed to be fully due:**

1. **When any debt to your Bank or another financial institution is not settled or the principal is not repaid or [the Contracting Party] refuses to accept or pay in accordance with the Contract.**
2. **In accordance with the Bankruptcy Law, [the Contracting Party] requests for reconciliation, claims or is claimed for bankruptcy, claims or is claimed for company reorganization, is refused for business due to a clearing house's notice, is suspended for business or is liquidated for debts.**
3. **When the originally agreed obligation to provide guarantee is not provided.**
4. **When [the Contracting Party] dies and its heir declares to abandon the inheritance.**

5. When there is a declaration of confiscation of the main property due to a criminal act.
6. When the Contracting Party, Guarantor, person-in-charge of the Contracting Party or Guarantor, actual beneficiary, or a person who exercises control over the Contracting Party or Guarantor has been investigated and is subject to economic sanctions, or has been put on a sanction list that is recognized by a foreign government or international money laundering prevention organization or announced by an organization that tracks down terrorists or terrorist groups or by the Ministry of Justice of R.O.C.
7. When the interest of any debt to your bank or another financial institution is not paid according to the Contract.
8. The collateral is seized or lost, or the collateral value is reduced, or the collateral issuing company's financial situation deteriorates and is inadequate to guarantee the debt, or the Guarantor has bad credit or terminates the guarantee, and after your Bank asks for replacement of the collateral or guarantor or repayment for part of the principal within a time limit but fails to do so.
9. For the Contracting Party's debt to your bank, the actual use of funds is not consistent with the approved use of your Bank, or the engaged business, credit and assets may be adversely changed, which may harm your Bank's creditor rights.
10. [The Contracting Party] is subject to enforcement or provisional attachment, provisional injunction or other safeguard sanctions that may cause the debt to your Bank to be unpaid.
11. For the credit facility transactions between the Contracting Party and your bank, the statements or information provided by [the Contracting Party] have integrity violations such as falsehood or concealment.
12. The Contracting Party or Guarantor does not cooperate with the review, refuses to provide information such as the actual beneficiary or person who exercises control over the Contracting Party or Guarantor, and is unwilling to cooperate to provide the nature and purpose of transactions or the source of funds.
13. The Contracting Party, Guarantor or collateral provider fails to abide by the commitment to maintain a certain financial condition during the credit facility period or [fails to abide by] the other agreements or commitments stipulated in the relevant credit facility transaction documents of your Bank.

**In the circumstances of Item 1 to Item 6 of the preceding paragraph, there is no need for your Bank to notify or urge or give a correction period in advance. In the circumstances of Item 7 to Item 13 [of the preceding paragraph], your Bank must notify or urge or give a correction period within a reasonable period in advance.**

Signatures and seals of the Contracting Party and the Guarantor for confirmation: (signature and stamp)

#### Article 12 (Result from Breach of Contract)

In the event of a breach of contract as described in this Agreement, in addition to continue to abide by the stipulations of each credit facility agreement, the Contracting Party shall also agree to the following:

1. The Contracting Party shall immediately pay off all borrowed funds allocated by your Bank and pay their interest and related fees in accordance with your Bank's requirements.
2. For the contingent debt incurred by your Bank in issuing a letter of credit, acceptance, guarantee, or otherwise providing financing as entrusted by the Contracting Party or for a third party as a result of guarantee of or guarantee provided by the Contracting Party, your Bank has the right (but no obligation) to pay off all or part of it before the expiration date. At such time, as requested by your Bank, the Contracting Party shall immediately repay the funds advanced by your Bank and the delay interest and liquidated damages due from the advance date of your Bank to the repayment date in accordance with the stipulations of this Agreement.



3. Your Bank may also notify the Contracting Party to require the Contracting Party to immediately pay the amount equal to its outstanding contingent debt and deposit it in your Bank's account in the manner required by your Bank as a guarantee. Your Bank may use this guarantee amount to pay or settle all or part of the contingent debt or the Contracting Party's debt in advance. If the balance of the guarantee amount is insufficient to pay or settle the debt in advance, the Contracting Party shall pay the difference to your Bank, and your Bank may repay at maturity or settle the debt and interest in advance. If after the Contracting Party's entire debt to your Bank is paid off or settled in advance or your Bank's contingent debt is fully discharged, there is a balance in the guarantee amount, then it should be returned to the Contracting Party.
4. Your Bank may dispose of various collaterals according to law or the Contract, show a promissory note to request payment, and take other measures according to law or the Contract to recover compensation from the Contracting Party and the Guarantor.

Article 13 (Exercise of the Right of Offset on Unmatured Debt)

The Contracting Party and the Guarantor agree that for the various deposits deposited at your Bank and all debts to your Bank, even if the repayment period has not matured yet, if the Contracting Party fails to perform its debt obligations to your Bank, regardless of the nature and duration of the debts, if your Bank is unable to order or agree to the prohibition of offsetting requirements, or based on the management of no reason, or if a third party pays the Contracting Party and the Guarantor through the appointment of your Bank due to the transaction relationship, your Bank is entitled to exercise the right of offset before maturity. Also, if the Contracting Party and the Guarantor have other property deposited with your Bank, your Bank shall have the right to claim lien or offset.

The Contracting Party and the Guarantor understand and agree that the check deposit transaction agreement signed by the Contracting Party and the Guarantor with your Bank is for the right to be deemed fully due by your Bank according to the Contract when there is any breach of contract arising from any contract signed by the Contracting Party and the Guarantor with your Bank. For the cancellation conditions, once the cancellation conditions are fulfilled, the aforementioned check deposit transaction agreement will of course lose its effectiveness. Your Bank shall have the right to claim the offset of the refunded amount and notify the Contracting Party and the Guarantor of the result of the offset.

The meaning of the scheduled offset of your Bank in the preceding two paragraphs indicates that the offsetting effect will be effective when the account is deducted. At the same time, the deposit slips, passbooks, checks or other proofs issued by your Bank to the Contracting Party and the Guarantor will be invalidated within the scope of offset.

Article 14 (Replacement of Guarantor)

Based on specific facts (or based on the acceleration clauses concerning the loss of term benefits stipulated in Article 11 of this Contract's Common Clauses), if your Bank believes that the Guarantor's credit is poor and it is necessary to change the Guarantor, the Contracting Party will do so as soon as it is informed by your Bank. After the change of the original guarantor, whether it is one or several persons, the guarantee responsibility of the original guarantor shall be agreed by your Bank for change after the new guarantor signs the guarantee contract. However, if the new guarantor does not assume guarantee responsibility for the main debt that has occurred before the change, then the guarantee responsibility of the original guarantor that has been replaced shall be released only when the main debt that has occurred before the change is fully paid off and the change procedures are completed.

Article 15 (Supervision, Audit, Inspection and Provision of Information)

The Contracting Party and the Guarantor are willing to accept your Bank's supervision over the use purpose of the credit facility, audit on the business finance, and your Bank's inspection on the relevant accounting statements (including consolidated financial statements), receipts, and documents. However, your Bank has no obligation to supervise, audit, or inspect them. Your Bank may also require the Contracting Party and the Guarantor to complete and report the aforementioned credit information on time, or provide an independent and impartial accountant to sign or review the financial statements. If your Bank has doubts about the contents of the financial statements and the Contracting Party or the Guarantor cannot provide a reasonable explanation, it be willing to ask the accountant who signed or reviewed the financial statements to provide a work draft at your Bank's request. The Contracting Party or the Guarantor will also be willing to urge the accountant to send a copy of the aforementioned signed or reviewed financial statements to the Joint Credit Information Center for filing. When your Bank believes that the financial structure of the Contracting Party or the Guarantor should be improved, the Contracting Party or the Guarantor will agree to take actions to improve the financial structure. Due to business needs or the need to secure creditor's rights, your Bank may investigate or maintain the collateral provided by the Contracting Party or the collateral provider.

Article 16 (Data Collection, Processing and Utilization)

**The Contracting Party and the Guarantor agree that within the scope for the specific purposes of understanding the Contracting Party's and the Guarantor's credit, credit facility judgment, and other needs in accordance with the business registration items or businesses stipulated by the articles of association of your Bank, your Bank may provide the relevant basic information, financial information, deposit information, remittance and acceptance information, credit transaction information, credit investigation report information, credit facility related information, bill credit information, and customs declaration information of the Contracting Party and the Guarantor and other credit information related to this Contract to your Bank, industry peers, Joint Credit Information Center, Financial Information Service Co., Ltd., Taiwan Clearing House, credit guarantee agencies, entrusted external appraisal agencies, other institutions designated by the Financial Supervisory Commission R.O.C, and transferees and participants (including the intended transferees and participants) of your Bank's creditor's rights and debts or the persons entrusted by your Bank to handle affairs on your behalf for collection, processing, and utilization (including international transmission); and may inquire / collect the relevant information (including customs declaration information) of the Contracting Party and the Guarantor from the aforementioned entities. The above information is subject to the Bank's business transactions, accounts or services with the Contracting Party / Guarantor and the actual collection from the Contracting Party / Guarantor or a third party.**

**The Contracting Party and the Guarantor agree for the specific purpose required for the transfer of the creditor's rights, your Bank may provide the debt-related information of the Contracting Party and the Guarantor to the creditor's rights transferees, creditor's rights appraisal personnel, creditor's rights review personnel and government agencies.**

**The Contracting Party and the Guarantor agree that, in accordance with the clauses of this Agreement and other relevant contracts, your Bank may entrust a third party to handle the collection business as required.**

**For the provision and utilization of data in the preceding three paragraphs, your Bank shall require the users of such data to comply with the confidentiality requirements of the Banking Act, Personal Data Protection Act and other relevant laws and regulations, and they may not disclose such relevant data to a third party.**

Article 17 (Recognition of Defects, Damages and Losses of Bills, Loan Receipts, etc.)

When the bills, loan receipts and debt certificates of all other debts to your Bank issued, endorsed, accepted or guaranteed by the Contracting Party and the Guarantor have any damages or losses, or when the debt certificates are altered and your Bank has no serious fault, the Contracting Party and the Guarantor are willing to acknowledge your Bank's account books, subpoenas, computer-made documents, photocopies of transaction documents, and microfilmed records. And when the debt is due, the debt's various fees, liquidated damages, principal and interest shall be immediately settled, or according to your Bank's intention, before the debt is due, the bills, loan receipts or other debt certificates shall be corrected and provided. However, if the Contracting Party or the Guarantor can clearly prove that there is an error, then your Bank should correct them without exception.

Article 18 (Joint Guarantee Clauses)

For the debt guaranteed by the Guarantor, if the main debtor fails to perform in accordance with the Contract, the Guarantor shall immediately be responsible for the repayment and agree to the following:

1. Your Bank does not need to be compensated from the collateral first, but can ask the Guarantor for compensation.
2. After the Guarantor has paid off all debts on behalf of the main debtor, when requesting your Bank to transfer the collateral in accordance with law, it shall not object to the defect of the collateral.
3. The Guarantor may not surrender the guarantee unless it is in accordance with the stipulations of this Contract, but the guarantee debts borne before surrender cannot be forgiven, and the Guarantor shall not be released from the guarantee responsibility due to a change in position, identity or qualification. However, if your Bank considers it necessary based on the application or other specific facts, [your Bank] may notify in writing to release or replace the guaranty responsibility of one or more persons, and the other guarantors shall still be fully responsible for repaying the debts of the main debtor.
4. If a third party co-exists to assume the debts of the main debtor, the Guarantor shall still be willing to bear the joint guarantee responsibility.

Article 19 (Deferred or Installed Repayment)

If your Bank's loan or credit facility contract to the main debtor allows deferred or installed repayment, [your Bank] should immediately notify the Guarantor in writing, and the Guarantor agrees that if it does not reply within three days after your Bank's written notice is delivered or deemed to be delivered, then it shall be deemed that it has agreed to continue to bear the guarantee responsibility for the entire debt.

#### Article 20 (Return or Change of Collateral and Certificate)

Any party that holds a collateral receipt or guarantee certificate issued by your Bank to the Contracting Party or Guarantor or collateral provider, or a passbook or a seal of the Contracting Party or Guarantor or collateral provider, or a pickup document signed by the Contracting Party and goes to your Bank to request a return or change of the collateral or its certificate of rights or other relevant documents shall be deemed to be the agent of the Contracting Party or Guarantor or collateral provider, and your Bank may allow it to be returned or changed, but this does not apply when your Bank knows or can know that the party has no rights as an agent.

#### Article 21 (Delivery of Repayment Promissory Note and Authorization to Fill in Maturity Date of Note)

In accordance with the requirements of your Bank, in the capacity of a joint invoice issuer, the Contracting Party and the Guarantor shall jointly issue one or more promissory notes exempted from making the refusal certificate and give it or them to your Bank. The promissory note shall serve as a guarantee of the Contracting Party and the Guarantor for their various debts in the past, present and future to your Bank. The Contracting Party and the Guarantor also agree that if the Contracting Party or the Guarantor fails to pay off the debts in accordance with the Contract or fails to perform the various clauses of this Agreement or other contracts, your Bank may fill in the maturity date of the promissory note and exercise all rights of the promissory note at any time in accordance with relevant regulations. The Contracting Party and the Guarantor also agree to issue new promissory notes at any time as required by your Bank.

The Contracting Party and the Guarantor also authorize (and use this Agreement as a certificate of authorization): The promissory notes and loan receipts issued jointly and / or separately by the Contracting Party and / or the Guarantor and held by your Bank authorize your Bank to fill in the maturity date for each such promissory note or loan receipt when the Contracting Party does not pay off the debt in accordance with the Contract or an accelerated maturity event occurs. The Contracting Party and the Guarantor shall have no objections.

#### Article 22 (Payment Currency)

The Contracting Party agrees to pay the money that should be paid or repaid to your Bank in the currency of such financing or advance and shall be responsible for obtaining foreign exchange approval or other necessary permits for the currency of such repayment. The Contracting Party shall not be relieved of its obligation to pay off its debts in that currency because it has not obtained such approval, and the Contracting Party is willing to bear all liabilities if this causes any damage to your Bank. If the Contracting Party deposits any foreign currency with your Bank in exchange for another foreign currency, it must still be deemed to have been paid according to the Contract after the money has been converted into that currency. Before the money is actually converted into the payable currency, the risk of exchange rate difference shall be borne by the Contracting Party. The exchange rate of foreign exchange shall be determined by your Bank at the prevailing exchange rate.

#### Article 23 (Foreign Currency Exchange and Reclassification)

For any transaction entrusted by the Contracting Party for your Bank to perform, if your Bank needs to exchange one currency for another currency, the Contracting Party shall bear all relevant expenses and losses, including but not limited to losses due to changes in exchange rates. The Contracting Party and the Guarantor agree that if debts denominated in foreign currencies are not repaid in accordance with the Contract, unless otherwise stipulated by laws and decrees, your Bank may convert the principal, interest and related fees together into TWD at the spot foreign exchange selling exchange rate announced by your Bank on the conversion date. The Contracting Party and the Guarantor shall have no objection about the aforementioned conversion date, exchange rate amount, etc., but your Bank shall have no conversion obligation.

#### Article 24 (Adjustment of Loan Date and Amount)

With regard to the credit facility line provided by your Bank, if your Bank believes that the Contracting Party's use of this credit facility is improper, or its credit is poor, or if the Contracting Party is required to provide a guarantee and fails to provide it, or if due to other business needs of your Bank, your Bank may immediately notify the Contracting Party to stop the use of this credit facility, or reduce this credit facility line. If market funds are difficult to obtain, your Bank may also adjust the date and amount of the loan. With regard to the aforementioned changes or adjustments, if any dispute or expense occurs due to the involvement of a third party, the Contracting Party is fully responsible for handling it. If your Bank suffers any damage as a result, the Contracting Party shall also be fully responsible for compensation. However, if it is a credit facility case in which your Bank has already received the commitment fee and the loan has not been disbursed, the commitment fee shall be returned to the Contracting Party in proportion to the amount of the undisbursed loan.

#### Article 25 (Notifications and Prohibited Matters)

The Contracting Party shall immediately notify your Bank when any of the following circumstances occurs and explain the countermeasures adopted by the Contracting Party:

1. The Contracting Party's business, operating structure, personnel or financial situation has undergone a major or substantial change.
2. The Contracting Party has a lawsuit or other proceeding that belongs to a court, arbitration commission or government agency.

The Contracting Party must not do the following without your Bank's prior written consent:

1. Bear debts directly or indirectly to others (natural or legal persons) through debt commitments, guarantees, endorsements or other methods, but this does not include the endorsement of bills for deposits, withdrawals or similar exchanges in the normal course of business operations.
2. Merge with others or split the company.
3. Sell, lease or use other methods to transfer or dispose of all or a substantial part of the business or property.
4. Create or permit others to create liens, pledges or other collateral rights over the collateral to your Bank.
5. Conduct transactions with others that are different from normal business practices.
6. Borrow from financial institutions that are not established according to law.
7. Make loans to others, but this does not include normal commercial financing to customers.

#### Article 26 (Other Expenses and Taxes)

If the Contracting Party and the Guarantor fail to perform their obligations in accordance with the Contract and cause a collection or lawsuit, the Contracting Party and the Guarantor agree that the credit investigation fee, storage fee, transportation fee, attorneys' fee (limited to the remuneration paid to the appointed attorneys) and other necessary expenses for your Bank's exercise or preservation of its creditor's rights against the Contracting Party and the Guarantor shall all be paid by the Contracting Party and the Guarantor jointly and severally. However, this does not include a case where the court rules against your Bank.

The taxes, tax liabilities, fees, deductions, expenses, withholdings and other liabilities, except for your Bank's income tax, incurred due to the Contracting Party paying debts or making other payments to your Bank shall all be borne by the Contracting Party. And all current or future sales taxes, stamp duties, registration fees or other similar taxes incurred due to payment for financing or guarantees or for the signing, delivery, registration of any instruments signed in accordance with this Agreement and other contracts or for other related acts should also be borne by the Contracting Party. If your Bank is required to pay additional taxes due to changes in laws and decrees or the competent authority's interpretation of the laws and decrees, or if the tax base changes, the relevant taxes shall also be borne by the Contracting Party.

#### Article 27 (Document Completion)

For the credit facility application documents, individual credit facility contracts, supplementary contracts and other relevant documents delivered by the Contracting Party and / or the Guarantor to your Bank, if there are any blanks, the Contracting Party and / or the Guarantor hereby authorize your Bank to fill in the information and words, except for the amount, necessary to express the true intentions of both parties on the basis of the agreement of both parties.

#### Article 28 (Agreement on Authorization Seal for Credit Facility Transactions)

The Contracting Party hereby agrees with your Bank that for the Credit Line Allocation Application of Credit Facility Transactions and Foreign Exchange Business Transactions (excluding foreign exchange deposit business) with your Bank, except for the specimen seal on this Agreement, it is agreed that the authorization seal retained in the Attachment A of this Agreement - Authorization Seal Card for Credit Facility Transactions (hereinafter referred to as the "seal card") shall be used for processing, or another agreement shall be made with your Bank in writing.

The Contracting Party hereby declares that the authorization seal on the seal card has been confirmed by the Contracting Party to be without errors. The Contracting Party is willing to bear all responsibilities in accordance with law for all relevant acts using the authorization seal. The Contracting Party shall not refute the acts because the authorization seal is forged or misappropriated. If the authorization seal is changed, the Contracting Party agrees to immediately notify your Bank in writing and declares that the authorization seal retained in your Bank shall still be valid before the authorization seal procedures are changed or cancelled.

#### Article 29 (Governing Law and Jurisdiction Court)

The Contracting Party and the Guarantor are domestic (legal) persons or foreign (legal) persons who have various debts or collaterals with your Bank, and the laws of the Republic of China shall be applicable for the method and effect of the establishment of their legal acts. The Contracting Party and the Guarantor shall perform their debt obligations and guarantee obligations, and the place of performance shall be where the main branch or branch of your Bank is located. When the Contracting Party and the Guarantor fail to perform this Agreement and cause litigation, they agree to use the Taiwan Taipei District Court or \_\_\_\_\_ district court as the jurisdiction court of first instance agreed by both parties. However, if the law has special regulations for exclusive jurisdiction, then those regulations shall prevail.

## Chapter II. Individual Credit Facility Agreement

### Section 1. General Loans

- Article 1 This credit facility can be used by the Contracting Party to apply for various short, medium and long-term financing (revolving), but its actual contents are limited to those approved by your Bank.
- Article 2 When the Contracting Party uses this, the Contracting Party agrees to provide all necessary loan proofs and / or application documents recognized by your Bank and according to the conditions approved by your Bank. The interest rate, term and repayment method shall all be agreed one by one in the loan proofs or application documents.

### Section 2. (Guaranteed) Overdraft

- Article 1 The Contracting Party agrees to use it in accordance with the conditions and periods approved by your Bank. If the approved overdraft period expires without your Bank agreeing to renewal, the principal and interest shall be repaid in full.
- Article 2 The Contracting Party shall open a check deposit account number \_\_\_\_\_ in your Bank, and use it by the Contracting Party issuing checks or / and in other ways approved by your Bank.
- Article 3 The interest rate shall be calculated according to the interest rate approved by your Bank and stated in the confirmation letter for credit facility transactions, and it shall be adjusted with the adjustment of the agreed index interest rate. The interest shall be settled once a month and rolled into the original debit overdraft account. If the total principal and interest exceed the overdraft limit, the Contracting Party shall immediately repay the excess amount.

### Section 3. Appointment Guarantee and Acceptance

- Article 1 This credit facility is to be used by the Contracting Party for requesting your Bank to provide guarantee and acceptance (on a revolving basis) in terms of the debt guarantee and acceptance business that your Bank can handle in accordance with law. The amount, period, scope and other conditions of the guarantee and acceptance that your Bank is requested to provide shall be subject to the relevant laws and decrees or the guarantee and acceptance documents or bills issued by your Bank. Your Bank reserves the right to decide whether to provide guarantee and acceptance after review.
- When the Contracting Party uses this, the Contracting Party agrees to provide all necessary loan proofs and / or application documents recognized by your Bank and according to the conditions approved by your Bank. The rates and other conditions shall all be agreed one by one in the loan proofs or application documents.
- Article 2 The Contracting Party shall pay the guarantee procedural fee to your Bank in accordance with the agreed conditions before the issuance of the guarantee document. If the guarantee period is extended in the future, [the Contracting Party] shall be willing to pay another procedural fee when the original guarantee period expires as agreed by the two parties. All taxes or withholding taxes that should be paid related to this Contract shall be borne by the Contracting Party. The Contracting Party shall also pay any additional foreign exchange settlement fees, loan procedural fees, post and telecommunications fees, and all other fees. The guarantee procedural fee is non-refundable once it is paid. Even if the guarantee period is shortened or terminated early in the future, the Contracting Party must not claim a refund for the fee that is already paid.
- Article 3 If the Contracting Party fails to perform the agreed matters with the guarantee beneficiary within the guarantee period of your Bank, or does not apply for an extension after the guarantee period is expired, or the application for extension is not approved by your Bank, the Contracting Party shall immediately perform the agreed matters with the guarantee beneficiary. And before your Bank's guarantee obligation is fully discharged, the Contracting Party shall continue to pay the guarantee procedural fee at the original agreed rate based on the requested guarantee balance that has not been performed (based on the guaranteed balance recorded in your Bank's books or the balance after the guarantee beneficiary's written release of your Bank's guarantee obligation), and it shall be paid once every six months and be paid at the beginning of each period.

- Article 4 When the guarantee amount is calculated in a foreign currency, the Contracting Party shall bear the risk of changes in the exchange rate. If the foreign exchange rate changes and your Bank suffers losses, the Contracting Party is liable for full compensation. If the foreign currency amount of this credit facility guarantee is converted into TWD, unless otherwise agreed, it shall be calculated at the spot foreign exchange selling exchange rate announced by your Bank during the guarantee period.
- Article 5 The Contracting Party shall effectively perform or instruct its designees (including legal persons) to actually perform the main debt requested for your Bank to guarantee, and inform your Bank of the performance at any time. In case of any breach of contract and non-performance, the Contracting Party shall be willing to repay immediately when your Bank makes an advance due to performance of the guarantee obligation.
- Article 6 When your Bank handles the tax record matters of the guaranteed raw materials, semi-finished products and finished products for export for the Contracting Party, if the Contracting Party's write-off period is expired and when all or part of the bonded raw materials are still unprocessed for export, in addition to applying for extension approval from the Ministry of Finance in accordance with law, the Contracting Party shall immediately pay the Customs the tax and late payment due in accordance with law. Otherwise, your Bank may pay on behalf [of the Contracting Party] and dispose of the collateral, or recover compensation from the Contracting Party and the Guarantor.
- Article 7 When the Contracting Party fails to perform the agreed matters with the guarantee beneficiary, and once the guarantee beneficiary has notified your Bank in writing to perform the guarantee obligation, your Bank may perform the guarantee obligation directly and unconditionally based on the type of guarantee letter issued by this Contract. The Contracting Party or the Guarantor may not ask your Bank to refuse payment or give your Bank any instructions on the basis of an appointment relationship or for any other reason, and [the Contracting Party or the Guarantor] also may not ask your Bank to refuse payment or claim exemption from your Bank on the basis of having a reason for defense or any other reason (including force majeure) with the guarantee beneficiary or any third party.
- Article 8 When the Contracting Party applies to your Bank for acceptance of a bill of exchange in accordance with this Contract, unless otherwise approved by your Bank, the maximum period from the date of acceptance to the maturity date of the bill shall not exceed 180 days. When [the Contracting Party] applies to your Bank for guarantee of a promissory note, unless otherwise approved by your Bank, the maximum period from the date of guarantee to the maturity date of the note shall not exceed 365 days.
- Article 9 When the Contracting Party issues bills in batches or cycles during the effective period of this Contract, their amounts, terms and contents shall be based on the bills issued by the Contracting Party. And even if the maturity date of a bill is after the effective period of this Contract, the Contracting Party and the Guarantor shall still be willing to bear joint and several liability for repayment in accordance with this Contract.
- When the Contracting Party applies to your Bank for acceptance or guarantee of a bill, the payable amount of the bill should be deposited into a redemption account designated by your Bank or the instrument centralized depository institution before the maturity date of the bill. If there is a delay and your Bank pays it with an advance, the Contracting Party shall be willing to repay immediately, and from the date of your Bank's payment or advance to the date of the Contracting Party's repayment, the interest, delay interest and liquidated damages shall be calculated as agreed in this Agreement.

#### Section 4. Issuance of Domestic Letters of Credit

- The Contracting Party hereby invites the Guarantor to widely request your Bank to issue domestic spot and domestic forward letters of credit (hereinafter referred to as letters of credit). And when the beneficiary designated by the letter of credit issues a bill of exchange with your Bank as the payer in accordance with the requirements of each letter of credit, the bill of exchange shall be advanced (hereinafter referred to as advance) or accepted, and [the Contracting Party and the Guarantor] are willing to abide by the following clauses:
- Article 1 The Contracting Party agrees to use it in accordance with the conditions and periods approved by your Bank. All procedural fees that should be borne shall be paid immediately upon notification from your Bank. When the Contracting Party applies to your Bank for the issuance of a letter of credit, [the Contracting Party] should present the application for the issuance of a domestic letter of credit, relevant transaction proofs, and relevant documents required by your Bank [to your Bank], and [the Contracting Party] should also deposit a security deposit or provide a guarantee in accordance with the agreement with your Bank.
- Article 2 For a domestic forward letter of credit issuance in accordance with this credit facility, unless otherwise approved by your Bank, the time limit for a bill of exchange drawn under it shall not exceed 180 days.
- Article 3 The Contracting Party recognizes the amount listed in each application for the issuance of a letter of credit and the interest and all expenses incurred are the amount for your Bank to guarantee payment or advance on behalf of the Contracting Party, and [the Contracting Party] agrees to authorize your Bank to pay the bill of exchange's amount under each letter of credit based on the application for the issuance of a letter of credit and the relevant documents, such as the bill of exchange, under it.

Article 4 If the bill of exchange and supplementary document presented in accordance with the letter of credit are considered that their formats are in compliance with the conditions contained in the letter of credit and are to be advanced or accepted for advance after review by your Bank, regardless of whether your Bank's notice is in writing or verbally, the Contracting Party shall pay off each advance and pay its interest within five days from the date of the advance by your Bank. The interest on the advance shall be calculated and paid at a lump sum based on the benchmark lending rate set by your Bank on the date of the advance plus 2%. If it is an acceptance, the bill should be deposited with your Bank for payment before the maturity date of the acceptance bill. If the aforementioned period is exceeded, and the Contracting Party has not settled or deposited the bill for payment, [the Contracting Party] shall be willing to pay the interest at your Bank's benchmark lending rate plus 4% from the date of the advance or maturity date of the bill of exchange.

In order to simplify the procedures and avoid travelling on the road, the Contracting Party requests that when paying the bill of exchange in the preceding paragraph, your Bank refinance a short-term loan for the repayment within the scope of the approved credit line (amount) of this item, and the paid bill of exchange shall be deemed to be a loan allocation notice and proof. The Contracting Party is willing to make up all procedures for using the loan in accordance with the notice from your Bank, shall pay off within the loan period agreed with your Bank, and calculate and pay interest at the agreed interest rate.

For the aforementioned bill of exchange or document, even if it is later proven that it is forged, altered, or causes a dispute due to other reasons (including the situation that the quality or quantity of the goods does not match the document), it shall not have anything to do with your Bank, and the Contracting Party will never use any reason for defense and refusal of payment.

Article 5 Due to causes that cannot be attributed to your Bank, when there are errors or delays in the transmission of the letter of credit of this Contract by the transmission agency, or errors in the interpretation of special terms, and all or a part of the goods or the quality or quantity or value of the goods of the documents or contained in the documents are lost or delayed or have not arrived at the place of delivery, and losses or damages of the goods whether in transit or after arrival, or due to uninsured or insufficient insurance coverage, or due to any third party's blocking or detention, and other factors, they all shall have nothing to do with your Bank. Under any of the aforementioned circumstances, the letter of credit funds shall still be paid in full by the Contracting Party.

Article 6 The goods purchased in accordance with the records of each letter of credit shall be borne by the Contracting Party if the beneficiary of the letter of credit fails to perform the contract, the delivery is delayed or other irresistible circumstances that cause losses.

Article 7 Once the letters of credit are issued, they are irrevocable, and your Bank has the obligation to pay unconditionally in accordance with relevant regulations. The appointment relationship of the Civil Code is not applicable. Therefore, the Contracting Party must not request the revocation of the letters of credit issued by your Bank or give any instructions to your Bank, or give any objection or defense to your Bank's payment, based on the appointment relationship.

Regarding the relevant tasks, responsibilities and obligations under a letter of credit, if there is any unfinished matter in this Contract, the Contracting Party agrees that the provisions of "The Uniform Customs and Practices for Letter of Credit" issued by the current International Chamber of Commerce and the International Rules for the Interpretation of Trade Terms shall be part of the contents of this Contract and [the Contracting Party] shall be bound by them.

Article 8 For the goods under each letter of credit or the collateral provided by the Contracting Party, with your Bank's prior consent about the insurance type and insurance conditions, the Contracting Party is willing to purchase full insurance with your Bank as the beneficiary (or add special terms for the hypothec), and all costs required for purchasing the insurance shall be borne by the Contracting Party. If the Contracting Party fails to purchase insurance for a long time, or the insurance is expired and not renewed, your Bank shall have the right to do so on its behalf, but your Bank has no obligation to purchase insurance. If the costs required for purchasing the insurance are advanced by your Bank, the Contracting Party shall be willing to repay immediately. If there is a delay, the Contracting Party shall calculate and pay interest in accordance with Article 4 of Section 4 of this Agreement.

## Section 5. Issuance of Foreign Letters of Credit and Import Financing

In order to facilitate the foreign exchange settlement for purchasing materials from abroad with your Bank in the present and the future, the Contracting Party hereby invites the Guarantor to conclude this Contract and requests your Bank to deposit a security deposit within the scope of the approved credit line (amount) and in accordance with your Bank's regulations for foreign exchange settlement. And in accordance with the Contracting Party's separate application for the issuance of a letter of credit, financing application or other application documents required by your Bank and the various clauses (revolving) listed in them, [your Bank] shall issue the letter of credit and make advance in foreign currency (hereinafter referred to as advance) or accept or apply for guarantee delivery / sub-bill of lading endorsement or import collection financing under the import collection category.

[The Contracting Party and the Guarantor] are willing to abide by the following clauses:

- Article 1 The Contracting Party is willing for your Bank to advance or / and accept the letter of credit that it has applied for issuance in accordance with the relevant laws and regulations and customary methods. In addition to depositing the agreed import license with your Bank, providing the collateral as agreed with your Bank, and using this Contract as the proof for providing guarantee, the Contracting Party is willing to provide the delivery documents and purchased materials under each letter of credit of this Contract as a guarantee for all debts under each letter of credit. From the date when your Bank issues the letter of credit to the time when the purchased materials are delivered, your Bank shall obtain pledge of rights to all delivery documents (such as input permits, relevant delivery documents, etc.) for the relevant purchased materials, and as soon as the purchased materials arrive, your Bank shall obtain the chattel pledge of these goods.
- Article 2 Both the Contracting Party and the Guarantor acknowledge the difference (that is, the unsettled amount of foreign exchange settlement) between the amount of the letter of credit contained in the confirmation letter for letter of credit foreign exchange settlement or the transaction document under each letter of credit and the settled amount of the foreign exchange settlement, as well as its interest, liquidated damages and related expenses, are the amount that your Bank guarantees to pay or advances to overseas on behalf of the Contracting Party. [The Contracting Party and the Guarantor] also agree to use the relevant documents, such as the application for the issuance of a letter of credit, or confirmation letter for foreign exchange settlement, or transaction document, or bill of exchange, as its proof. The Contracting Party is willing to pay off each debt according to the stipulations of this Contract.
- Article 3 If the Contracting Party purchases materials in a non-US dollar region, [the Contracting Party] apply for the issuance of letters of credit and import financing in other currencies with your Bank's consent, but the total amount of each letter of credit and / or financing shall be within the limit (amount) approved by your Bank after being converted at the exchange rate specified by your Bank. If the aforementioned total exceeds the limit (amount) due to changes in the exchange rate or other reasons, then the excess shall be repaid upon a notice from your Bank, and the Contracting Party and the Guarantor shall be responsible for repaying it immediately.
- Article 4 For each spot letter of credit issued in accordance with this Contract, the Contracting Party shall repay each advance within 15 days after the receipt of the freight document under each letter of credit and notified by your Bank (in writing or verbally). The interest on the advance shall be calculated from the date on which your Bank actually makes the advance (for a letter of credit containing the terms for authorized debit, it is the debit date of your Bank making a deposit at a peer bank; for a letter of credit without the terms for authorized debit, it is the date on which your Bank posts and sends the payment message), and the interest is calculated and paid at your Bank's cost of foreign currency lending funds plus 4% or the interest rate approved by your Bank on the advance date. However, if there is any of the following circumstances, the repayment method shall be in accordance with its stipulations:
1. If the shipping documents are delivered but the goods have not been delivered, the Contracting Party should present the airline's certification documents or the certificates approved by your Bank, and it should be repaid within three days after goods arrival. However, if the shipping documents are delivered but the goods are still not delivered on the 30th day after being notified by your Bank, the Contracting Party should repay immediately.
  2. If the goods are delivered but the shipping documents have not been delivered, the Contracting Party shall immediately repay the principal and interest and related costs when applying for a guarantee delivery or sub-bill of lading endorsement.
  3. If the goods are shipped in batches, the advance principal and interest and related expenses of your Bank shall be repaid by the amounts of the separate batch freight documents in accordance with the amount of the letter of credit and / or the advance ratio. Even if the validity period of the letter of credit is expired, the Contracting Party is willing to repay immediately if the shipping documents arrived after the expiration date meet the conditions at bill negotiation.
- Article 5 For each forward letter of credit issued in accordance with this Contract, the repayment date of each debt shall be calculated according to the bill of exchange period or payment period specified on the application for issuing a letter of credit. If there is an advance, the interest on the advance shall be from calculated from the date on which your Bank actually makes the advance (for a letter of credit containing the terms for authorized debit, it is the debit date of your Bank making a deposit at a peer bank; for a letter of credit without the terms for authorized debit, it is the date on which your Bank posts and sends the payment message), and the interest is calculated and paid at your Bank's cost of foreign currency lending funds plus 4% or the interest rate approved by your Bank on the advance date.
- Article 6 After the Contracting Party applies for the issuance of a forward letter of credit, and after the arrival of each documentary bill, your Bank may refinance the original currency loan in the scope of the approved credit facility limit line. For the applied and issued spot letter of credit, after the arrival of each documentary bill, with your Bank's consent, your Bank may refinance the loan within the scope of the approved credit facility limit line. Each loan cannot exceed the maximum number of days approved by your Bank, and the maturity date notified by your Bank shall be the repayment date. Unless otherwise agreed, the interest shall be calculated at the interest rate stipulated in this Agreement and paid monthly.



- Article 7 The Contracting Party may apply for the currency conversion of foreign currency financing debts with the consent of your Bank and agree to convert to the agreed currency for payment at the exchange rate agreed by the two parties. The original collateral provided for financing debts shall still be the collateral for financing debts after currency conversion. The relevant maturity date and repayment method shall still be handled in accordance with the original contract.
- The interest on the financing debts after currency conversion is agreed to be charged at a rate determined separately by your Bank.
- Article 8 If the Contracting Party's debts are not performed in accordance with the Contract, or after the shipping documents under each letter of credit of this Contract are delivered, the customs declaration and delivery procedures are not immediately processed or there are any delays, or your Bank believes that the financial situation of the Contracting Party has deteriorated significantly based on specific facts and causes your Bank to suffer any loss or risk of loss, then the advances and loans shall be deemed to be due immediately. Your Bank may implement the guarantee right to pick up the goods, and may auction or freely dispose of the goods (including the method of disposal, time and price, etc.). If there is insufficient compensation, the Contracting Party shall still be willing to make up for it. The Contracting Party and the Guarantor shall be willing to immediately and jointly pay for all expenses, such as customs duties, warehouse rent and transportation fees, advanced by your Bank for picking up the goods.
- Article 9 On the repayment date of the debt or import financing under each letter of credit, the Contracting Party shall convert the principal and interest of the debt into TWD at the spot foreign exchange selling exchange rate announced by your Bank at the time of repayment or repay in the original currency.
- Article 10 When your Bank signs the guarantee delivery document or sub-bill of lading endorsement at the request of the Contracting Party, if the goods name, specifications, unit price, total amount and delivery conditions listed do not match those contained in the subsequent shipping documents, the Contracting Party and the Guarantor shall be willing to pay the additional payment and handle all other procedures in accordance with the conditions set out in the freight bill of lading sent to your Bank. The Contracting Party and the Guarantor shall be willing to pay for all damages if your Bank suffers any loss due to the contents of the delivered documents are different from the documents signed by your Bank. The contents contained in the application for guarantee delivery or sub-bill of lading endorsement shall be deemed as part of this Contract, and both the Contracting Party and the Guarantor shall be willing to comply.
- Article 11 For the goods under each letter of credit, the Contracting Party is willing to obtain your Bank's consent in advance regarding the insurance type and insurance conditions, purchase an appropriate insurance with your Bank as the priority beneficiary in accordance with international practices and individual price conditions, and give the original insurance policy and a copy of the premium receipt to your Bank for safekeeping. The costs required for purchasing the insurance shall be borne by the Contracting Party. If the Contracting Party fails to purchase insurance for a long time, or the insurance is expired and not renewed, your Bank shall have the right to do so on its behalf, but your Bank has no obligation to purchase insurance. If the costs required for purchasing the insurance are advanced by your Bank, the Contracting Party shall be willing to repay immediately. If there is a delay, your Bank may include it in the amount of the creditor's rights and calculate the delay interest and liquidated damages in accordance with the stipulations of Article 7 of the Common Clauses in Chapter I of this Contract.
- Article 12 For the goods purchased according to the records of each letter of credit, if there is a shipwreck, theft by pirates, flood, fire or other force majeure, or loss due to the letter of credit beneficiary's failure to perform the contract, delay in delivery, etc., or an insurance company's refusal to pay claim or insufficient claim payment or delay in claim payment, the Contracting Party shall be responsible for the loss and handle it on its own. The Contracting Party shall be willing to immediately repay the financing principal and interest, delay interest, liquidated damages and all expenses.
- Article 13 When the Contracting Party imports the imported materials by means of import collection or open account (O/A), with the consent of your Bank, [the Contracting Party] may apply to your Bank for guarantee delivery or sub-bill of lading endorsement within the agreed credit line (amount). At each application, the application for guarantee delivery or sub-bill of lading endorsement and relevant contract documents required by your Bank shall be presented. The Contracting Party acknowledges that according to the contents of each application and the amount of the relevant contract documents and agreed matters, the damage compensation borne by your Bank shall continue until the foreign documents are delivered to your Bank and the Contracting Party shall complete the bill acceptance or payment.
- Article 14 The Contracting Party hereby expressly and irrevocably authorizes your Bank, where the Contracting Party has an import permit and / or other relevant documents approved by the Bureau of Foreign Trade of the Ministry of Economic Affairs or its designated agency and entrusts your Bank to issue letters of credit, and after all or part of the goods under the letters of credit have been delivered, if the Contracting Party does not repay each letter of credit issued by your Bank within the repayment period stipulated in the relevant credit facility contract, or if the Contracting Party requests your Bank to issue letters of credit and your Bank considers all of them to be fully due in accordance with the stipulations of the relevant credit facility contract, then your Bank may apply to the Bureau of Foreign Trade of the Ministry of Economic Affairs for approval, pick up the goods from the Customs on behalf of [the Contracting Party] afterwards, and auction or freely dispose of the imported goods.

The Contracting Party also earnestly declares that your Bank's acts such as customs declaration and pickup in accordance with this authorization shall be deemed to be the acts of the Contracting Party and have the effect of binding on the Contracting Party.

Article 15 In addition to the aforementioned clause, the Contracting Party agrees that the clauses stipulated in Articles 1, 3 to 5, and 7 of the previous section for issuance of domestic letters of credit shall be used in accordance with the credit facility stipulations for this item.

#### Section 6. Export Documentary Bill and Export Collection Financing

This credit facility is for the Contracting Party, within the credit line (amount) and conditions approved by your Bank, in accordance with an application for export documentary bill, export collection application, financing application or other documents deemed necessary by your Bank and the various clauses (revolving) listed in them, to apply to your Bank for export documentary bill advances or discounts or export collection financing, and the Contracting Party is willing to abide by the following clauses:

- Article 1 The so-called documentary bill advance refers to the act of your bank to advance the amount under the bill of exchange and / or document after reviewing the bill of exchange and / or document presented by the Contracting Party according to the terms of the letter of credit issued by the issuing bank and presented by the Contracting Party. It is not a document forfaiting, and your Bank has the right to request the return of the advance. At the same time that your Bank advances the amount under the aforementioned bill of exchange and / or document, depending on the payment area, payment period, document situation and letter of credit terms, and according to the advance interest or forward letter of credit (foreign currency) rate approved by your Bank, [your Bank] may withhold interest and related expenses first.
- Article 2 After your Bank advances the amount under the aforementioned bill of exchange and / or document, if the advance payment cannot be recovered within the period calculated for the withholding interest, the Contracting Party shall be willing to pay the delay interest and liquidated damages according to your Bank's regulations. If your Bank fails to recover the advance from the issuing bank or the paying bank after the expiration of the interest payment days of the advance amount or within one month after maturity (whichever is earlier), the Contracting Party shall be willing to immediately repay the advance principal and interest and all related expenses to your Bank after receiving a notice (regardless of whether it is in writing or verbally) from your Bank, and [the Contracting Party] guarantees that your Bank will not suffer any damages due to the documentary bill advance of the aforementioned bill of exchange and / or document.
- Article 3 The Contracting Party agrees to transfer the relevant goods and documents to your Bank to be the Contracting Party's guarantee for all debts to your Bank, such as debts, bill debts and interest, delay interest, liquidated damages, damage compensations, procedural fees and various expenses, due to the handling of documentary bill advance and export collection financing.
- Article 4 Your Bank or the holder of the aforementioned bill of exchange and / or document may (but is not obligated) to insure the goods (i.e. your Bank's collateral) under the aforementioned bill of exchange and / or document to cover all insurance against including robbery, plunder, shore fire, etc. All insurance and related expenses shall be borne by the Contracting Party. Your Bank shall have the right of first priority for the aforementioned goods, and may dispose of them in accordance with the law in order to repay your Bank's creditor's rights and other expenses or insurance and other related expenses paid by a third party, without affecting your Bank's claim to other bill debtors. Your Bank may at the same time act as an agent in the usual manner of general business, handle all tasks on behalf of the Contracting Party, and charge procedural fees. If your Bank expresses no objection, the Contracting Party shall move the goods to a public or private dock or warehouse in accordance with the instructions of the payer or acceptor.
- Article 5 If the payer of the bill of exchange refuses acceptance and payment, or the goods have been delivered to the port of destination before the maturity date of the bill, your Bank or your Bank's correspondent bank may handle the unloading, customs declaration, storage and insurance of the aforementioned goods, and take any necessary measures based on the maintenance of the aforementioned goods. All expenses incurred from handling the aforementioned measures, as well as the intentional or negligent fault of employees in unloading, customs declaration, storage and insurance, or any damage caused by war, natural disaster or other force majeure factors, shall be borne by the Contracting Party.

- Article 6 For your Bank or the holder of the aforementioned bill of exchange and / or document, if the bill of exchange is prompted to be rejected by the acceptor or refused to be paid by the payer when it is due, or before the bill of exchange is due or before payment is made after it is advanced by your Bank, the payer, acceptor, issuing bank, confirming bank, etc. have stopped payment, absconded, declared bankruptcy, reconciled, been seized, been subjected to provisional attachment, been subjected to provisional injunction, been auctioned, or taken liquidation steps, or due to the impact of external interference, local laws and regulations, or any other reason, the bill of exchange or document is rejected for processing or cannot be requested for acceptance, or cannot be paid after payment acceptance, regardless of whether the bill of exchange is subject to conditional acceptance, absolute acceptance or whether the bill of exchange or document is returned, your Bank may require the Contracting Party to immediately repay the principal and interest of your Bank's advance and all expenses. Your Bank or the bill of exchange and / or document holder may sell (but is not obligated) all or part of the goods under the bill of exchange and / or document in accordance with the method deemed appropriate by your Bank or the bill of exchange and / or document holder. And in addition to using the proceeds for deducting procedural fees and commissions, [your Bank or the bill of exchange and / or document holder] may use the proceeds to pay the amounts and fees (including interest, delay interest and liquidated damages) of the bill and / or document. If there is a balance, your Bank or the bill of exchange and / or document holder may also use it to settle the Contracting Party's other debts or arrears to your Bank (regardless of whether they are guaranteed). In the event of a loss of the insured goods, your Bank shall still be able to obtain compensation in accordance with the insurance policy. After deducting the procedural fees, the proceeds shall be settled in the same manner for the aforementioned disposal of goods for sale.
- Article 7 If the net proceeds from the sale of goods are insufficient to pay the amount, interest and expenses stated in the bill of exchange or invoice, the Contracting Party agrees that the relevant proof presented by your Bank or the bill of exchange and / or document holder shall be the proof for the loss from the sale of the goods. Once your Bank or the bill of exchange and / or document holder gives a notice (regardless of whether verbally or in writing) to the Contracting Party, the payment shall be made immediately in full. This act shall not affect your Bank's right of recourse against the other debtors.
- Article 8 Regardless of whether the goods are sold or resold, your Bank or the bill of exchange holder may accept the payment request from the payer or acceptor before the bill of exchange is due and submit the bill of lading and other shipping documents to the payer or acceptor after payment. If your Bank or the bill of exchange holder accepts an advance payment, the interest from the unmatured period may be deducted at the usual interest rate of the place of payment of the bill.
- Article 9 If the bill of exchange is delivered after acceptance, your Bank may deliver the document to the acceptor after the acceptor has accepted the bill of exchange. In the case of a deferred payment, your Bank may also deliver the relevant document to the issuing bank or payer before payment is received. After it is due, if your Bank still has not received the payment or has only received part of the payment, the Contracting Party shall be responsible for all results. The Contracting Party shall repay the entire amount owed together with the increased remittance fees and procedural fees, and guarantee that your Bank will not suffer any damage.
- Article 10 Both your Bank and the bill of exchange holder may accept the conditional acceptance of the payer. After the bill of exchange has been paid when it is due, the accompanying bill of exchange may be delivered to the payer or acceptor as a supplementary document for the guarantee.
- Article 11 At any time before the bill of exchange is due, your Bank may deliver the goods to a third party in batches if deemed appropriate by your Bank or the bill of exchange acceptor or its representative. However, when all or part of the goods are delivered, a payment for the equivalent amount must be collected, and the equivalent amount should be a reasonable proportion to the price listed on the invoice or the amount contained in the guaranteed bill.
- Article 12 After the bill of exchange and / or document are negotiated by your Bank, if the bill of exchange and / or document do not conform to the conditions set out in the letter of credit, or for any other reason, they are rejected for handling by your Bank's discounting bank or correspondent bank, or rejected for payment by the issuing bank, paying bank or confirming bank, or if the goods are found to be different in quality, quantity, etc. on delivery or other occasions, or are rejected by the counterparty for any other reason, or your Bank suffers damage due to a defective bill of exchange and / or document, the Contracting Party shall be willing to take full responsibility. Upon notification from your Bank, [the Contracting Party] shall immediately repay the advance amount, interest and all other related expenses to your Bank. The interest shall be calculated and paid from your Bank's advance date to the Contracting Party's repayment date in accordance with the Contract and in accordance with the stipulations of Article 7 of the Common Clauses in Chapter I of this Agreement. The Contracting Party hereby authorizes your Bank to issue a guarantee letter, compensation promise or compensation to the issuing bank, confirming bank, or paying bank without notice to the Contracting Party if your Bank or your Bank's correspondent bank deems it necessary. The Contracting Party shall be willing to take full responsibility for these matters, and if your Bank suffers any loss as a result, the Contracting Party shall pay full compensation.

- Article 13 Your Bank or your Bank's correspondent bank may send the bill of exchange and / or supplementary document by any means it considers appropriate. If the bill of exchange and / or supplementary document are damaged, lost, mis-mailed, mis-sent or other uncertainties during delivery, and the late delivery to the place of payment is caused, then without going through any legal procedures and once notified by your Bank, the Contracting Party shall be willing to immediately make a new documentary bill of exchange and / or new supplementary document and provide them to your Bank based on the records in your Bank's account books and documents, or immediately repay your Bank's advance amount, interest and all other related expenses in accordance with your Bank's instructions.  
The Contracting Party understands: In accordance with the financial industry practices, when your Bank makes an advance payment for a letter of credit document, [your Bank] is not obligated to review the relevant documents on behalf of the Contracting Party, and [your Bank] is not required to make any statement or guarantee as to whether there are any defects or inconsistencies in these documents.
- Article 14 The Contracting Party agrees that upon request by your Bank, it shall immediately cooperate with the replacement, division or consolidation of your Bank's receipt of the bill of exchange and / or document issued by the Contracting Party.
- Article 15 Unless otherwise agreed in writing, anyone who holds a bill issued, endorsed, accepted or guaranteed by the Contracting Party may be exempted from making a certificate for payment refusal or acceptance refusal to exercise the right of recourse. If your Bank or your Bank's correspondent bank makes a refusal certificate because it considers it necessary, then the Contracting Party shall be willing to consider it legal and valid and bear the costs.
- Article 16 The Contracting Party warrants that the bill of exchange and / or document, letter of credit, etc. presented to your Bank are absolutely true, correct and valid. For the Contracting Party's signature or written text on the bill of exchange and / or document, if your Bank has done its careful duty of being a good manager and considers it to be in conformity with what is stored in your Bank or in conformity with what is shown in the bills of exchange and / or documents previously used by the Contracting Party, then it shall become effective immediately. If your Bank suffers any damage, the Contracting Party shall still be willing to bear full responsibility and compensate your Bank for the damage suffered.
- Article 17 If due to the lack of important items required by the documentary bill of exchange, the creditor's rights of the bill of exchange are not established, or the creditor's rights of the bill of exchange are extinguished due to time limitation or incomplete procedures, the Contracting Party shall still be willing to pay your Bank the face value of the bill of exchange, together with the interest accrued after the bill of exchange is due, and all expenses associated with it.
- Article 18 Any necessary actions taken by your Bank based on this business transaction shall be legally authorized by the Contracting Party, and this Contract shall be used as the proof of authorization.

#### Section 7. Purchase of Foreign Currency Bills (Purchase of Clean Bills)

In addition to the stipulations of this Contract, in accordance with the requirements of the separately concluded "Application /Agreement for Purchase / Collection of Foreign Currency Bills" and other documents provided as required by your Bank, the Contracting Party shall be willing to apply for the business of purchasing foreign currency bills (or also known as purchasing clean bills) to be handled by your Bank within the conditions approved by your Bank.

#### Section 8. Factoring / Financing of Accounts Receivable

In addition to the stipulations of this Contract, in accordance with the separately concluded "Accounts Receivable Creditor's Rights Factoring Contract" and "Accounts Receivable Creditor's Rights Purchase Factoring Agreement", other documents and loan proofs deemed necessary by your Bank and the various clauses listed in them, the Contracting Party shall be willing to apply for the business of using domestic and / or international accounts receivable factoring (financing) to be handled by your Bank within the conditions approved by your Bank.

#### Section 9. Advance of Domestic Bills / Notes Receivable Financing

Article 1 The Contracting Party agrees to provide all necessary loan proofs and / or application documents and notes receivable and their transaction proofs recognized by your Bank and according to the conditions approved by your Bank. Within the credit line, ratio, period and other credit facility conditions approved by your Bank, [the Contracting Party] shall request your Bank to make a one-time or multiple-time loan allocation or revolving use. The note receivable maturity cashing shall be deposited into a special demand deposit reserve account and the following matters shall be agreed:

1. The Contracting Party agrees for your Bank to open a special demand deposit reserve account in the name of the Contracting Party and authorizes your Bank to issue a withdrawal receipt signed by only one of your Bank's authorized signing personnel to withdraw funds from the account, in order to settle all Contracting Party's debts with your Bank or transfer to other deposit accounts (**excluding checking deposit accounts**) opened by the Contracting Party with your Bank. And the Contracting Party shall not use the funds in the special account without your Bank's consent.
2. The withdrawal and transfer made by your Bank according to the preceding paragraph shall be fully recognized by the Contracting Party, and the deposit balance in the special reserve account shall be subject to the actual balance posted by your Bank. The Contracting Party shall have no objections.
3. Except for the statement provided at the request of the Contracting Party, the special reserve account will not be issued with a passbook.
4. The notes provided by the Contracting Party are all obtained based on legal transactions, such as the sale or lease of goods or providing services, and are transferred to your Bank by the endorsement of the Contracting Party. If payment is not made at maturity, or the note cannot be presented for acceptance or payment, the Contracting Party shall redeem the note in the same amount of cash or spot note receivable within three days after receiving a notice from your Bank. Otherwise, your Bank may stop the Contracting Party's use of this credit facility or consider the loan balance of this credit facility to be fully due, and your Bank may be exempted from the obligation to notify the Contracting Party of the reason for refusal.
5. For the note provided by the Contracting Party, unless otherwise agreed, the maximum period between the maturity date (issuing date for a check) and the loan allocation date shall not exceed 180 days.

Article 2 When the Contracting Party provides note receivable endorsement and transfers it to your Bank as a guarantee or repayment method for performing the debt, the Contracting Party agrees to the following:

1. **In order to facilitate account processing, unless otherwise agreed, your Bank may settle the various debts owed by the debtor or the Contracting Party when the accumulated balance of the note receivable cashing has reached at least % of the financing loan balance. If it is insufficient, the Contracting Party shall still be fully liable for the repayment.**

Signature and seal of the Contracting Party for confirmation: (signature and stamp)

2. After the aforementioned note receivable is cashed and credited by your Bank, if your Bank agrees that the Contracting Party shall deliver the note receivable in excess of or equivalent to the cashed amount in the aforementioned manner to your Bank, your Bank may transfer the aforementioned cashed amount to the Contracting Party's account in your Bank, or remit to the Contracting Party's account in another financial institution according to the Contracting Party's instructions after the account is credited. The Contracting Party shall still be fully liable for repaying all debts to your Bank in accordance with the notes, loan proofs and / or application documents.
3. If the aforementioned note receivable is not cashed, if the Contracting Party or the Guarantor is notified to handle the matter but not handled within the restrictions or cannot be notified, depending on the financial situation of the note debtor, your Bank may settle with the note debtor at any amount lower than the face value.
4. Your Bank may at any time require the Contracting Party to endorse and transfer the note and its causal relationship with the note issuer (a sales contract, labor contract or other creditor's rights contract), and the Contracting Party shall also guarantee the payment capability of the debtor (note issuer) when the creditor's rights are transferred and when the debt is performed. Your Bank may ask the debtor (note issuer) for repayment and may use the proceeds to directly offset all debts the Contracting Party has with your Bank. However, if the funds are insufficient to pay off all debts the Contracting Party has with your Bank, the Contracting Party and the Guarantor shall still be responsible.

Article 3 The Contracting Party hereby earnestly declares that when the Contracting Party provides a note to your Bank for a loan, regardless of whether or not the note is defective, whenever it causes your Bank to suffer damage, the Contracting Party shall be willing to abandon the term benefits and immediately pay off all debts and compensate your Bank for damage suffered. [The Contracting Party] shall never use the defects of the note, or incomplete notification of legal procedures, or limitation of time as an excuse to refuse repayment and compensation.

### Chapter III. Other Stipulated Clauses

Article 1 The Contracting Party and the Guarantor represent and warrant the following:

1. The Contracting Party and the Guarantor have full capacity to sign and perform this Agreement, and this Agreement constitutes a legal, valid and binding debt to the Contracting Party and the Guarantor.
2. The signing or performance or complying with the clauses of this Agreement does not violate the laws and regulations, its company's articles of association, resolutions of shareholders' meeting / board of directors, or other contracts or documents signed by the Contracting Party or the Guarantor, and does not constitute a breach of any contract or document that is binding on the Contracting Party and the Guarantor, or on their property or income. It is also not necessary to obtain the consent of the other parties to these contracts and documents (after your Bank's request, the Contracting Party or the Guarantor shall immediately send to your Bank the proofs issued by its creditors' agreeing to the Contracting Party or the Guarantor signing this Agreement or other various proofs and documents required by your Bank).
3. The Contracting Party and the Guarantor have obtained and completed all approvals, consents, authorizations or registrations required for signing or performing this Agreement in accordance with the law.
4. All information provided by the Contracting Party and the Guarantor regarding the business transactions generated by this Contract at the request of your Bank or on their own initiative are true, correct and complete, without any falsehood, concealment or other misleading information at all, so your Bank may trust it in good faith. The Contracting Party and the Guarantor will never use any reason for defense or refusing to perform the Contract.
5. The Contracting Party, Guarantor, person-in-charge of the Contracting Party or Guarantor, actual beneficiary, or a person who exercises control over the Contracting Party or Guarantor is not subject to any economic sanctions and has not been put on a sanction list that is recognized by a foreign government or international money laundering prevention organization or announced by an organization that tracks down terrorists or terrorist groups or by the Ministry of Justice of R.O.C.
6. The Contracting Party or Guarantor will cooperate with your Bank's review, provide information such as the actual beneficiary or person who exercises control over the Contracting Party or Guarantor, and is willing to cooperate to provide the nature and purpose of transactions or the source of funds.

Article 2 The Contracting Party and the Guarantor agree to be bound by this Agreement and the confirmation letter for credit facility transactions, various credit facility application documents, various credit facility contracts, supplementary contracts and other relevant documents that are signed in the present or will sign in the future. Each of these contracts and documents forms part of this Agreement and has the same effect as this Agreement. However, if the matters specifically stipulated in these documents are inconsistent with the stipulations of this Agreement, then they shall be deemed to be the special stipulations of this Agreement and shall be applied with priority. For the matters that are not specifically stipulated by them, then the stipulations of this Agreement shall apply.

Article 3 This Agreement, the application, documents and guarantee-related documents used for the credit facility shall be formulated in Chinese and English, but if the contents of the Chinese and English are inconsistent, the Chinese shall prevail.

Article 4 Unless otherwise stipulated by this Contract or the two concerned parties, this Contract shall take effect from the date of signing, and this Contract shall continue to be effective until the Contracting Party and the Guarantor have fully paid off all their debts with your Bank and your Bank has agreed to terminate [this Contract].

If at the time of signing this Contract, the Contracting Party or the Guarantor already has an unpaid debt to your Bank, unless otherwise agreed with your Bank, the stipulations of this Contract shall apply to such unpaid debt from the date of signing this Contract.

Chapter IV. Individually Negotiated Clauses

Special clauses:

When the Guarantor signs this Contract, if he or she has the status of a director, supervisor or manager of the Contracting Party, and if any Guarantor resigns (is dismissed), is removed or otherwise causes any change in the above status within the effective period of this Contract, the Contracting Party and the Guarantor shall immediately notify your Bank in writing. Before such notification, for the loan allocations made by your Bank in accordance with the Contracting Party’s application, the Guarantor shall never use the provisions of Article 753-1 of the Civil Code as a defense. The Contracting Party and the Guarantor also agree that when your Bank receives or becomes aware of the change in the aforementioned status of the Guarantor, [your Bank] may stop the credit line allocations. After a new guarantor approved by your Bank is obtained or a guarantee renewal agreement is issued by the guarantor, the credit line allocations can be resumed.

The Contracting Party agrees that your Bank has not received a credit facility case with commitment fee. If the market interest (exchange) rate changes or other circumstances change, and your Bank cannot obtain the required funds from the money lending market, or the index interest rate stipulated in the confirmation letter for credit facility transactions between the two parties does not adequately reflect the cost of obtaining funds by your Bank during the credit facility period, the Contracting Party should renegotiate with your Bank for matters including the applicable interest rate, credit facility period and other relevant credit facility conditions. If it is not possible to reach a consensus after 20 bank business days from the date of the first negotiation between the two parties, your Bank may notify the Contracting Party in writing to stop using the relevant credit facility line.

To:  
O-Bank Co., Ltd.

Contracting Party: CVie Therapeutics Limited  
Representative or Legal Representative: John A. Tattory  
Uniform Number: 54360142  
Business or Mailing Address: 11th Floor, No. 36 Songren Road, Xinyi District, Taipei City

**I hereby declare that I have been informed by your Bank of the matters stipulated in Paragraph 1 of Article 8 of the Personal Data Protection Act, and I have reviewed all clauses within a reasonable period. In particular, the clauses in Article 2 to Article 3, Article 10 to Article 11, and Articles 16 of Chapter 1 have been individually negotiated by the two parties. I fully understand and agree to the contents before signing this Contract, and I have received a copy that completely matches this original.**

For Witness	Date: Month Day, Year March 17, 2020	Time: Hour Minute [illegible]	Witness: [illegible chop]
Address: 11th Floor, No. 36 Songren Road, Xinyi District, Taipei City			

Joint Guarantor: Lee's Pharmaceutical Holdings Limited  
Representative or Legal Representative: LEE SIU FONG  
Uniform Number: KYCL0172  
Business or Mailing Address: 1/F Building 20E, Phase 3, Hong Kong  
Science Park, Shatin, Hong Kong  
Registration Address: PO Box 309, Uglan House, Grand Cayman,  
KY1-1104, Cayman Islands

**I hereby declare that I have been informed by your Bank of the matters stipulated in Paragraph 1 of Article 8 of the Personal Data Protection Act, and I have reviewed all clauses within a reasonable period. In particular, the clauses in Article 2 to Article 3, Article 10 to Article 11, and Articles 16 of Chapter 1 have been individually negotiated by the two parties. I fully understand and agree to the contents before signing this Contract, and I have received a copy that completely matches this original.**

For Witness	Date: Month Day, Year March 17, 2020	Time: Hour Minute [illegible]	Witness: [illegible chop],
	Address: 11F, No.32, Songren Road, Xinyi District, Taipei		

Month 3    Day, 17    Year 2020

Supervisor	Handled by
	[chops]



**Attachment A**

**Authorization Seal Card for Credit Facility Transactions**

Authorization Seal Style
“Credit Line Allocation Application of Credit Facility Transactions” (a total of signatures below and valid with )  (signature and chops)
Used for “Foreign Exchange Business Transactions” (a total of signatures below and valid with )  (signature and chops)

Consent of Independent Registered Public Accounting Firm

We consent to the reference to our firm under the caption "Experts" and to the use of our report dated April 2, 2020 (except for the second paragraph of Note 2, as to which the date is May 6, 2020), in Amendment No. 1 to the Registration Statement (Form S-1 No. 333-236085) and related Prospectus of Windtree Therapeutics, Inc. dated May 6, 2020.

/s/ Ernst & Young LLP

Philadelphia, Pennsylvania

May 6, 2020

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