

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

FORM 8-K

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

Date of Report (Date of Earliest Event Reported): December 21, 2020 (December 20, 2020)

KemPharm, Inc.

(Exact Name of Registrant as Specified in Its Charter)

Delaware
(State or Other
Jurisdiction of Incorporation)

001-36913
(Commission
File Number)

20-5894398
(IRS Employer
Identification No.)

**1180 Celebration Boulevard, Suite
103, Celebration, FL**
(Address of Principal Executive Offices)

34747
(Zip Code)

Registrant's Telephone Number, Including Area Code: (321) 939-3416
(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instructions A.2. below):

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

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

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock	KMPH	None

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

Emerging growth company

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

Item 1.01 Entry into a Material Definitive Agreement.

December 2020 Exchange Agreement and Amendment to Facility Agreement, Notes and Investors' Rights Agreement

On December 20, 2020, KemPharm, Inc., a Delaware corporation (the "**Company**"), entered into a December 2020 Exchange Agreement and Amendment to Facility Agreement, Notes and Investors' Rights Agreement (the "**December 2020 Exchange Agreement**") with Deerfield Private Design Fund III, L.P. ("**DPDF**") and Deerfield Special Situations Fund, L.P. (together with DPDF, the "**Deerfield Holders**"). Under the December 2020 Exchange Agreement, the Company and the Deerfield Holders have agreed that (a) the Company will make a cash pre-payment of a portion of principal amount of the Company's senior secured convertible notes (the "**Notes**") issued under the Facility Agreement (as defined below) to the Deerfield Holders and other holders (collectively, " **Holders**") of the Notes that elect to participate in the exchange transaction in an aggregate amount (the "**Cash Payment Amount**") equal to \$25.0 million, plus accrued interest if such payment is made on or after January 1, 2021, provided that such amount may be increased on a pro rata basis if any Holders, other than the Deerfield Holders, choose to participate in the transactions contemplated under the December 2020 Exchange Agreement or with the prior written consent of the Company and the Deerfield Holders, and (b) subject to the satisfaction or waiver of certain conditions specified in the December 2020 Exchange Agreement, including the making of the Deerfield Holders debt repayment, issue shares of its Series B-2 Preferred Stock, par value \$0.0001 per share (the "**Series B-2 Preferred Stock**"), and warrants exercisable for shares of its common stock (the "**Exchange Warrants**"), in exchange for the cancellation of the principal amount of the Notes owned by the Holders party to the December 2020 Exchange Agreement in an aggregate amount equal to the Cash Payment Amount, plus the Q4 PIK Interest Payment (as defined in the December 2020 Exchange Agreement) (such transaction, the "**Exchange**"). Upon payment of the Cash Payment Amount and completion of the Exchange, the Company anticipates that the aggregate principal amount of the outstanding Notes held by the Holders will be no greater than approximately \$18.3 million.

The December 2020 Exchange Agreement provides that the Company must give each Holder, other than the Deerfield Holders, notice of and the opportunity to participate in the transactions contemplated under the December 2020 Exchange Agreement on the same basis as, and subject to the same conditions that apply in respect of, the Deerfield Holders. Any Holder who agrees to participate in the transactions contemplated under the December 2020 Exchange Agreement must return a joinder thereto on or before December 23, 2020.

Subject to the occurrence of the prepayment and exchange transactions described above and other conditions specified in the December 2020 Exchange Agreement, the December 2020 Exchange Agreement will amend that certain Facility Agreement dated as of June 2, 2014, as amended (the "**Facility Agreement**"), by and among the Company and the Holders in order to, among other things, (i) extend the maturity date of the Notes to March 31, 2023, (ii) provide for cash payments of interest on the Loans (as defined in the Facility Agreement) for the periods following July 1, 2021, and (iii) provide for specified prepayment terms on the Loans.

The December 2020 Exchange Agreement amends the Notes to provide that the failure of the Company's common stock to remain listed on an eligible securities market will not constitute a "Major Transaction" unless such failure occurs after March 31, 2023.

The December 2020 Exchange Agreement amends that certain Amended and Restated Investors' Rights Agreement, dated as of February 19, 2015 (the "**IRA**"), by and among the Company, DPDF and the other parties signatory thereto in order to, among other things, add Deerfield Special Situations Fund, L.P. as a party thereto and to give effect to the issuance of the Exchange Warrants and the Company's registration obligations under the December 2020 Exchange Agreement (as described in more detail below).

The Exchange Warrants to be issued pursuant to the December 2020 Exchange Agreement will be exercisable for a number of shares of the Company's common stock equal to 75% of the shares of common stock issuable upon conversion of the Series B-2 Preferred Stock issued in the Exchange (without regard for any beneficial ownership limitations included therein). The Exercise Warrants will be subject to substantially the same terms and conditions as the warrants issued to the public in the public offering of the Company's securities contemplated pursuant to a registration statement on Form S-1, file no. 333-250945 (the "**Public Offering**"), with an exercise price equal to the exercise price per share of the warrants issued in the Public Offering and will provide that the Holders will be limited from exercising such Exchange Warrants if, as a result of such exercise, such holders (together with certain affiliates and "group" members of such holders) would beneficially own more than 4.985% of the total number of shares of the Company's common stock then issued and outstanding.

The December 2020 Exchange Agreement contains customary representations, warranties and covenants made by the Company and the Holders party thereto, including a covenant of the Company for the benefit of the Holders party to the Exchange Agreement to file a registration statement to register for resale under the Securities Act of 1933, as amended, the shares of common stock issuable upon exercise of the Exchange Warrants or conversion of the shares of Series B-2 Preferred Stock issued pursuant to the terms of the December 2020 Exchange Agreement.

The transactions contemplated under the December 2020 Exchange Agreement, including the obligation to pre-pay any portion of the Notes or to complete the Exchange and the effectiveness of certain amendments to the Facility Agreement, the Notes and the IRA, are subject to specified conditions of closing, including the closing of the Public Offering, the filing of the Series B-2 Certificate of Designation and the approval for listing of the Company's common stock, including the shares issuable upon conversion of the Series B-2 Preferred Stock and exercise of the Exchange Warrants, on the Nasdaq Capital Market.

The foregoing descriptions of the December 2020 Exchange Agreement are a summary and are qualified in their entirety by Exhibit 10.1 attached hereto, which is incorporated by reference into this Item 1.01.

Item 3.03. Material Modifications to Rights of Security Holders.

The information contained above in Item 1.01 related to the December 2020 Exchange Agreement, the amendment of the IRA and the Exchange Warrants and the information below in Item 5.03 related to the Series B-2 Certificate of Designation is hereby incorporated by reference into this Item 3.03.

Item 5.03. Amendment to Articles of Incorporation or Bylaws; Change in Fiscal Year.

Amended and Restated Certificate of Designation of Preferences, Rights and Limitations of the Series B-2 Convertible Preferred Stock

As a condition to closing of the December 2020 Exchange Agreement, the Company has agreed to file an Amended and Restated Certificate of Designation of Preferences, Rights and Limitations of Series B-2 Convertible Preferred Stock (the "***Series B-2 Certificate of Designation***") with the Secretary of State of the State Delaware, setting forth the preferences, rights and limitations of the Series B-2 Preferred Stock. The form of the Series B-2 Certificate of Designation to be in effect upon closing of the Exchange is filed as Exhibits 3.1 to this Current Report on Form 8-K and is incorporated herein by reference.

Each share of Series B-2 Preferred Stock will have an aggregate stated value of \$1,000 and will be convertible into shares of the Company's common stock at a per share price equal to the price per share to the public of the Company's common stock in the Public Offering (subject to adjustment to reflect stock splits and similar events).

The Series B-2 Preferred Stock will be convertible at any time on or after the PDUFA Date (as defined in the Series B-2 Certificate of Designation) at the option of the holders thereof; provided that the holders thereof will be prohibited from converting shares of Series B-2 Preferred Stock into shares of the Company's common stock if, as a result of such conversion, such holders (together with certain affiliates and "group" members of such Holders) would beneficially own more than 4.985% of the total number of shares of the Company's common stock then issued and outstanding. The Series B-2 Preferred Stock will not be redeemable. In the event of the Company's liquidation, dissolution or winding up or a change in control of the Company (each, a "***Liquidation Event***"), the holders of Series B-2 Preferred Stock will receive, prior to any distribution or payment on our common stock, an amount equal to the greater of (i) \$1,000 per share (in the case of a change in control, transaction consideration with such value), or (ii) the amount (in the case of a change in control, in the form of the transaction consideration) per share each such holder would have been entitled to receive if every share of Series B-2 Preferred Stock had been converted into common stock immediately prior to such Liquidation Event, in each case, plus any declared but unpaid dividends thereon. With respect to rights upon liquidation, the Series B-2 Preferred Stock will rank senior to the common stock, on parity with any Parity Securities (as defined in the Series B-2 Certificate of Designation) and junior to any Senior Securities as defined in the Series B-2 Certificate of Designation) and existing and future indebtedness. Except as otherwise required by law (or with respect to approval of certain actions involving the Company's organizational documents that adversely affect the holders of Series B-2 Preferred Stock and other

specified matters regarding the rights, preferences and privileges of the Series B-2 Preferred Stock), the Series B-2 Preferred Stock will not have voting rights. The Series B-2 Preferred Stock will not be subject to any price-based anti-dilution protections and will not provide for any accruing dividends, but will provide that holders of Series B-2 Preferred Stock will participate in any dividends on the Company's common stock on an as-converted basis (without giving effect to the limitation on conversion described above). The Series B-2 Certificate of Designation will also provide for partial liquidated damages in the event that the Company fails to timely convert shares of Series B-2 Preferred Stock into common stock in accordance with the Series B-2 Certificate of Designation.

The foregoing description of the Series B-2 Certificate of Designation Amendment is a summary and is qualified in its entirety by Exhibit 3.1 attached hereto, which is incorporated by reference into this Item 5.03.

Forward Looking Statements

This Current Report on Form 8-K contains "forward-looking statements" within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended, including, without limitation, statements about the closing of the transactions contemplated under the December 2020 Exchange Agreement, including pre-payment of any portion of the Notes, the Exchange and certain of the amendments to the Facility Agreement, the Notes and the IRA, or the closing of the Public Offering and other statements containing the words "expect," "intend," "may," "will," and similar expressions. Such statements constitute forward-looking statements within the meaning of The Private Securities Litigation Reform Act of 1995. Actual results may differ materially from those indicated by such forward-looking statements as a result of various important factors, including: the uncertainties related to market conditions, uncertainties inherent in the operation of the Company's business and such other factors as are set forth in the risk factors detailed in the Company's Quarterly Report on Form 10-Q for the quarter ended September 30, 2020. In addition, the forward-looking statements included in this Current Report on Form 8-K, including the press release and presentation incorporated herein by reference, represent the Company's views as of the date hereof. The Company anticipates that subsequent events and developments will cause the Company's views to change. However, while the Company may elect to update these forward-looking statements at some point in the future, the Company specifically disclaims any obligation to do so except as required by law. These forward-looking statements should not be relied upon as representing the Company's views as of any date subsequent to the date hereof.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

<u>Exhibit Number</u>	<u>Exhibit Description</u>
3.1	<u>Form of Amended and Restated Certificate of Designation of Preferences, Rights and Limitations of Series B-2 Convertible Preferred Stock.</u>
10.1	<u>December 2020 Exchange Agreement and Amendment to Facility Agreement, Notes and Investors' Rights Agreement, dated as of December 20, 2020, by and among KemPharm, Inc., Deerfield Private Design Fund III, L.P. and Deerfield Special Situations Fund, L.P.</u>

SIGNATURES

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

KemPharm, Inc.

Date: December 21, 2020

By: /s/ R. LaDuane Clifton
R. LaDuane Clifton, CPA
Chief Financial Officer, Secretary and Treasurer

KEMPHARM, INC.

**AMENDED AND RESTATED
CERTIFICATE OF DESIGNATION OF PREFERENCES,
RIGHTS AND LIMITATIONS
OF
SERIES B-2 CONVERTIBLE PREFERRED STOCK**

PURSUANT TO SECTION 151(g) OF THE
DELAWARE GENERAL CORPORATION LAW

KEMPHARM, INC., a Delaware corporation (the “**Corporation**”), in accordance with the provisions of Section 103 of the Delaware General Corporation Law (the “**DGCL**”), does hereby certify that, in accordance with Section 151 of the DGCL, the following resolution was duly adopted by the Board of Directors of the Corporation (the “**Board of Directors**”) on December __, 2020:

RESOLVED, that the Board of Directors, pursuant to authority expressly vested in it by the provisions of the Amended and Restated Certificate of Incorporation (as amended or restated from time to time, the “**Certificate of Incorporation**”) of the Corporation, hereby (i) states that no shares of that series of Preferred Stock designated as the Series B-2 Convertible Preferred Stock, par value \$0.0001 per share, pursuant to the Corporation’s Certificate of Designation of Preferences, Rights and Limitations of Series B-2 Convertible Preferred Stock, as filed with the Secretary of State for the State of Delaware on September 3, 2019, as amended (the “**Original Certificate of Designation**”), have been issued, (ii) desires to amend the voting powers, designations, preferences and relative, participating, optional or other rights, if any, or the qualifications, limitations or restrictions thereof and (iii) authorizes the amendment and restatement in its entirety of the Original Certificate of Designation, which amendment and restatement shall become effective upon filing with the Secretary of State of the State of Delaware. This Certificate of Designation (as defined below) amends, restates and integrates and further amends the provisions of Original Certificate of Designation and authorizes the issuance of a series of Preferred Stock designated as the Series B-2 Convertible Preferred Stock, par value \$0.0001 per share, of the Corporation, and hereby fixes the designation, number of shares, powers, preferences, rights, qualifications, limitations and restrictions thereof (in addition to any provisions set forth in the Certificate of Incorporation of the Corporation which are applicable to the Preferred Stock of all classes and series) as follows:

SERIES B-2 CONVERTIBLE PREFERRED STOCK

Section 1. Definitions. For the purposes hereof, the following terms shall have the following meanings:

“**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 144 under the Securities Act. With respect to a Holder, any investment fund or managed account that is managed on a discretionary basis by the same investment manager as such Holder will be deemed to be an Affiliate of such Holder.

“**Alternate Consideration**” shall have the meaning set forth in Section 7(b).

“**Asset Sale**” means any one transaction or series of related transaction in which the Corporation, directly or indirectly in one or more related transactions, effects any sale, transfer or other disposition (whether way of exclusive license or otherwise) of all or substantially all of its assets (including for the avoidance of doubt, the sale or disposition of all substantially all of the assets of the Corporation and its wholly-owned subsidiaries, taken as a whole) and distributes the proceeds thereof to its stockholders.

“**Beneficial Ownership Limitation**” shall have the meaning set forth in Section 6(c).

“**Bloomberg**” means Bloomberg Financial Markets or an equivalent, reliable reporting service mutually acceptable to and designated by the Corporation and the holders of a majority of the outstanding shares of Series B-2 Preferred Stock.

“**Board of Directors**” shall have the meaning set forth in the preamble.

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

“**Buy-In**” shall have the meaning set forth in Section 6(d)(iii).

“**Certificate of Designation**” shall mean this Amended and Restated Certificate of Designation of Preferences, Rights and Limitations of Series B-2 Convertible Preferred Stock.

“**Certificate of Incorporation**” shall have the meaning set forth in the preamble.

“**Change in Control**” means (i) any Fundamental Transaction following which the stockholders of the Corporation immediately prior to the consummation of such Fundamental Transaction (a) no longer hold a majority of the shares of voting stock of the Corporation or (b) no longer have the ability to elect a majority of the board of directors of the Corporation, or (ii) an Asset Sale.

“**Closing Sale Price**” means, for the Common Stock or any other security as of any date, the last closing trade price for such security prior to 4:00 p.m., New York City time, on the principal securities exchange or trading market where the Common Stock or such other security is listed or traded, as reported by Bloomberg, or if no last closing trade price is reported for the Common Stock or such other security by Bloomberg, the last trade price of the Common Stock or such other security in the over-the-counter market on the electronic bulletin board for the Common Stock or such other security as reported by Bloomberg, L.P., or, if no last trade price is reported for the Common Stock or such other security by Bloomberg, L.P., the average of the bid prices of any market makers for the Common Stock or such other security that are listed or

quoted on the OTC Bulletin Board, the OTCQX Market or the OTCQB Market or in the OTC Pink market of OTC Markets Group (or, in each case, any successor to such market). If the Closing Sale Price cannot be calculated for a security on a particular date on any of the foregoing bases, the Closing Sale Price of such security on such date shall be the fair market value mutually determined by the Corporation and the holders of a majority of the then outstanding shares of Series B-2 Preferred Stock. All such determinations to be appropriately adjusted for any stock dividend, stock split, stock combination or other similar transaction during the applicable calculation period.

“**Commission**” means the Securities and Exchange Commission.

“**Common Stock**” means the Corporation’s common stock, par value \$0.0001 per share, and stock of any other class of securities into which such securities may hereafter be reclassified or changed.

“**Common Stock Equivalents**” means any securities of the Corporation or the Subsidiaries that would entitle the holder thereof to acquire at any time Common Stock, including 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.

“**Conversion Date**” shall have the meaning set forth in Section 6(a).

“**Conversion Price**” means, as of any Conversion Date or other date of determination, \$[•] per share, subject to adjustment as provided herein.

“**Conversion Ratio**” shall have the meaning set forth in Section 6(b).

“**Conversion Shares**” means, collectively, the shares of Common Stock issuable upon conversion of the shares of Series B-2 Preferred Stock in accordance with the terms hereof.

“**Daily Failure Amount**” means the product of (x) 0.005 multiplied by (y) the Closing Sale Price of the Common Stock on the applicable Share Delivery Date.

“**DGCL**” shall have the meaning set forth in the preamble.

“**Distributions**” shall have the meaning set forth in Section 5(a).

“**DTC**” shall have the meaning set forth in Section 6(a).

“**DWAC**” shall have the meaning set forth in Section 6(a).

“**DWAC Delivery**” shall have the meaning set forth in Section 6(a).

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

“**Fundamental Transaction**” shall have the meaning set forth in Section 7(b).

“**Holder**” and “**Holders**” shall have the meaning given such terms in Section 2(a).

“**Junior Securities**” shall have the meaning set forth in Section 5(a).

“**Measurement Period**” means the period of fifteen (15) consecutive Trading Days immediately preceding the Conversion Date or other applicable date of determination.

“**Notice of Conversion**” shall have the meaning set forth in Section 6(a).

“**Parity Securities**” shall have the meaning set forth in Section 5(a).

“**PDUFA Date**” means the earlier of (i) the date immediately following the date upon which the Corporation first publicly announces the outcome of the review by the U.S. Food and Drug Administration of the Corporation’s new drug application of its product candidate known as KP415, and (ii) March 2, 2021.

“**Person**” means any individual, sole proprietorship, partnership (general or limited), limited liability company, joint venture, company, trust (statutory or common law), unincorporated organization, association, corporation, institution, public benefit corporation, firm, joint stock company, estate, entity or governmental or regulatory agency.

“**Securities Act**” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

“**Senior Securities**” shall have the meaning set forth in Section 5(a).

“**Series A Preferred Stock**” means the Series A Convertible Preferred Stock, par value \$0.0001 per share, of the Corporation.

“**Series B-2 Preferred Stock**” shall have the meaning set forth in Section 2(a).

“**Series B-2 Preferred Stock Register**” shall have the meaning set forth in Section 2(b).

“**Share Delivery Date**” shall have the meaning set forth in Section 6(d)(i).

“**Standard Settlement Period**” means the standard settlement period for equity trades effected by U.S. broker-dealers, expressed in a number of Trading Days, as in effect on the applicable date (which, as of December __, 2020, is two (2) Trading Days).

“**Stated Value**” means \$1,000 (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to Series B-2 Preferred Stock).

“**Stock Event**” means a stock split, stock combination, reclassification, payment of stock dividend, recapitalization or other similar transaction of such character that the outstanding shares of Common Stock shall be changed into or become exchangeable for a larger or smaller number of shares.

“**Trading Day**” means a day on which the Common Stock or other security is traded for any period on the principal securities exchange or other securities market on which the Common Stock or other security is then being traded.

“**Volume Weighted Average Price**” means, for the Common Stock or other security as of any Trading Day, the volume weighted average sale price of the Common Stock or such other security on the principal securities exchange or other securities market on which the Common Stock or other security is then being traded, as reported by Bloomberg. All such determinations to be appropriately adjusted for any stock dividend, stock split, stock combination or other similar transaction during the applicable calculation period.

Section 2. Designation, Amount and Par Value; Assignment.

a) The series of preferred stock designated by this Certificate of Designation shall be designated as the Corporation’s Series B-2 Convertible Preferred Stock (the “**Series B-2 Preferred Stock**”) and the number of shares so designated shall be [•] (which shall not be subject to increase (whether by amendment, merger, consolidation or otherwise) without the written consent of the holders of a majority of the then outstanding shares of Series B-2 Preferred Stock (each holder of any outstanding shares of Series B-2 Preferred Stock, a “**Holder**” and collectively, the “**Holders**”)) and shall be designated from the 10,000,000 shares of Preferred Stock authorized to be issued under the Certificate of Incorporation. Each share of Series B-2 Preferred Stock shall have a par value of \$0.0001 per share.

b) The Corporation shall register shares of the Series B-2 Preferred Stock, upon records to be maintained by the Corporation for that purpose (the “**Series B-2 Preferred Stock Register**”), in the name of the Holders thereof from time to time. The Corporation may deem and treat the registered Holder of shares of Series B-2 Preferred Stock as the absolute owner thereof for the purpose of any conversion thereof and for all other purposes. The Corporation shall register the transfer of any shares of Series B-2 Preferred Stock in the Series B-2 Preferred Stock Register, upon surrender of the certificates evidencing such shares to be transferred, duly endorsed by the Holder thereof, to the Corporation at its address specified herein. Upon any such registration or transfer, a new certificate evidencing the shares of Series B-2 Preferred Stock so transferred shall be issued to the transferee and a new certificate evidencing the remaining portion of the shares not so transferred, if any, shall be issued to the transferring Holder, in each case, within three Business Days. For the avoidance of doubt, the issuance of any such new certificate shall not be deemed a new issuance of the shares evidenced thereby for purposes of the definition of “Conversion Price.” The shares of Series B-2 Preferred Stock and the rights evidenced hereby and thereby shall inure to the benefit of and be binding upon the successors and assigns of the Holder. The provisions of this Certificate of Designation are intended to be for the benefit of all Holders from time to time and shall be enforceable by any such Holder.

Section 3. Dividends.

a) Any dividends or distributions declared by the Board of Directors out of funds legally available therefor shall be distributed among the holders of Common Stock and the Series B-2 Preferred Stock on a pro rata basis based on the number of shares of Common Stock held by each such holder (determined on an as-converted to Common Stock basis based on the then-effective applicable Conversion Price, assuming the Class B-2 Preferred Stock is at all times convertible (regardless of whether the PDUFA Date has occurred) and without giving effect to the Beneficial Ownership Limitation or other restriction or limitation on conversion) as of the record date fixed for determining those entitled to receive such distribution.

b) In the event the Corporation shall declare a distribution on the Common Stock payable in securities of other Persons, evidences of indebtedness issued by the Corporation or other Persons, Common Stock Equivalents or other assets (excluding cash dividends distributed in accordance with Section 3(a)), including options or rights to purchase any such securities or evidences of indebtedness or securities convertible into any of the foregoing, then, in each such case the holders of the Series B-2 Preferred Stock shall be entitled to a proportionate share of any such distribution pursuant to this Section 3(b) as though they were the holders of the number of shares of Common Stock of the Corporation into which their shares of Series B-2 Preferred Stock are convertible based on the then-effective applicable Conversion Price (assuming the Class B-2 Preferred Stock is at all times convertible (regardless of whether the PDUFA Date has occurred) and without giving effect to the Beneficial Ownership Limitation or any other restriction or limitation on conversion) as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution. Notwithstanding anything herein to the contrary, (i) any distribution on the Common Stock in the form of Common Stock shall be subject to the terms of Section 7(a) and not this Section 3(b) and (ii) the conversion, exchange or exercise of any Common Stock Equivalent distributed in respect of shares of Series B-2 Preferred Stock into or for Common Stock shall be subject to the provisions of Section 6(c) hereof, as if incorporated directly in such Common Stock Equivalent, *mutatis mutandis*.

Section 4. Voting Rights; Protective Provisions. Except as otherwise provided herein or as otherwise required by the DGCL, the Series B-2 Preferred Stock shall have no voting rights. However, as long as any shares of Series B-2 Preferred Stock are outstanding, without the affirmative vote or written consent of the Holders of a majority of the then outstanding shares of the Series B-2 Preferred Stock, the Corporation shall not, directly or indirectly, whether by or through any subsidiary and whether by merger, consolidation or otherwise, and any such act or transaction entered into without such consent shall be null and void *ab initio*, and of no force or effect, (a) alter or change, directly or indirectly, the powers, preferences or rights of the Series B-2 Preferred Stock so as to affect them adversely or otherwise alter or amend this Certificate of Designation; provided that this clause (a) shall not require the affirmative vote or written consent of the Holders of a majority of the then outstanding shares of the Series B-2 Preferred Stock as to the designation or issuance of any Junior Securities; (b) increase the number of authorized shares of Series B-2 Preferred Stock; (c) amend, modify or repeal any provision of the Certificate of Incorporation or the Bylaws in a manner that would adversely affect or otherwise impair the rights of the Holders pursuant to this Certificate of Designation relative to the holders of

Common Stock; (d) enter into, or become party or subject to, any agreement in respect of any of the acts or transactions requiring the consent of the Holders pursuant to this Section 4 or that would otherwise adversely affect the preferences, rights or powers of, or any restrictions provided for the benefit of, the Series B-2 Preferred Stock set forth in this Certificate of Designation; (e) create, authorize or designate (by reclassification, merger or otherwise), issue or obligate itself to issue, any Senior Securities or Parity Securities (including any security convertible into or exercisable or exchangeable for any Senior Securities or Parity Securities); (f) make, pay, redeem or set aside funds for the payment of any dividend, distribution or payment with respect to any equity security of the Corporation, except for (i) payments, redemptions, distributions and reserves in respect of the Series B-2 Preferred Stock, (ii) dividends or other distributions payable on the Common Stock solely in the form of additional shares of Common Stock or (iii) dividends or distributions payable upon a liquidation, dissolution or winding up of the Corporation, Fundamental Transaction or Change in Control; or (g) consummate or consent to any Fundamental Transaction or Change in Control without complying with the Corporation's obligations in respect thereof pursuant to Section 7(b). Notwithstanding any provision of the Certificate of Incorporation or the Corporation's bylaws to the contrary, including Section D of Article V of the Certificate of Incorporation, any vote of the holders of Series B-2 Preferred Stock required under the terms of the DGCL, this Certificate of Designation or otherwise may be taken by written consent or electronic transmission.

Section 5. Rank; Liquidation.

a) Rank. The Series B-2 Preferred Stock shall rank (i) senior to all of the Common Stock; (ii) senior to any class or series of capital stock of the Corporation hereafter created specifically ranking by its terms junior to any Series B-2 Preferred Stock ("**Junior Securities**"); (iii) on parity with the Series A Preferred Stock, Series B-1 Preferred Stock and with any class or series of capital stock of the Corporation created specifically ranking by its terms on parity with the Series B-2 Preferred Stock ("**Parity Securities**"); and (iv) junior to any class or series of capital stock of the Corporation hereafter created specifically ranking by its terms senior to any Series B-2 Preferred Stock ("**Senior Securities**"), in each case, as to dividends or distributions of assets upon liquidation, dissolution or winding up of the Corporation, whether voluntarily or involuntarily (all such distributions being referred to collectively as "**Distributions**").

b) Liquidation, Dissolution, or Winding Up. Subject to any superior liquidation rights of the holders of any Senior Securities of the Corporation, upon any voluntary or involuntary liquidation, dissolution or winding up of the Corporation, each Holder shall be entitled to be paid out of the assets of the Corporation legally available for distribution to stockholders, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Common Stock and Junior Securities and *pari passu* with any distribution to the holders of Parity Securities, with respect to each share of Series B-2 Preferred Stock, an amount equal to the sum of (i) the greater of (A) the Stated Value, or (B) such amount per share as would have been payable had all shares of Series B-2 Preferred Stock been converted into Common Stock immediately prior to such voluntary or involuntary liquidation, dissolution or winding up of the Corporation (based on the then effective Conversion Price, assuming the Class B-2 Preferred Stock is at all times convertible (regardless of whether the PDUFA Date has occurred) and without giving effect to the Beneficial Ownership Limitation or any other restriction or limitation on conversion), *plus* (ii) an amount equal to any dividends declared but unpaid thereon, before any payments shall be made or any assets distributed to holders of any class of Common Stock or Junior Securities.

Section 6. Conversion.

a) Conversions at Option of Holder. Each share of Series B-2 Preferred Stock shall be convertible, at any time and from time to time from and after the PDUFA Date, at the option of the Holder thereof, into a number of shares of Common Stock equal to the Conversion Ratio. Holders shall effect conversions by providing the Corporation with the form of conversion notice attached hereto as **Annex A** (a "**Notice of Conversion**") duly completed and executed. The Notice of Conversion may specify, at the Holder's election, whether the applicable Conversion Shares shall be credited to the account of the Holder's prime broker with Depository Trust Corporation ("**DTC**") through its Deposit/Withdrawal At Custodian ("**DWAC**") system (a "**DWAC Delivery**"). Other than in the case of a conversion in connection with a Fundamental Transaction, the Notice of Conversion must specify at least a number of Conversion Shares equal to the lesser of (x) 1,000 shares (such number subject to appropriate adjustment following the occurrence of an event specified in Section 7(a) hereof) and (y) the number of Conversion Shares issuable upon conversion of all shares of Series B-2 Preferred Stock then held by the Holder. The "**Conversion Date**," or the date on which a conversion shall be deemed effective, shall be defined as the Trading Day that the Notice of Conversion, completed and executed, is sent by electronic mail or facsimile to, and received during regular business hours by, the Corporation. The calculations and entries set forth in the Notice of Conversion shall control in the absence of verifiable or mathematical error. Shares of Series B-2 Preferred Stock converted into Common Stock in accordance with the terms hereof shall be canceled and shall not be reissued. The Holder shall not be required to physically surrender the certificate(s) representing the Series B-2 Preferred Stock to the Corporation until all shares of Series B-2 Preferred Stock represented by such certificate(s) have been converted in full, in which case the Holder shall surrender such certificate(s) to the Corporation for cancellation within three (3) Trading Days of the date the final Notice of Conversion is delivered to the Corporation. Execution and delivery of a Notice of Conversion with respect to a partial conversion shall have the same effect as cancellation of the original certificate(s) representing such shares of Series B-2 Preferred Stock and issuance of a certificate representing such remaining shares of Series B-2 Preferred Stock. In accordance with the preceding sentence, upon the written request of the Holder and the surrender of certificate(s) representing Series B-2 Preferred Stock, the Corporation shall, within three (3) Trading Days of such request, deliver to the Holder certificate(s) (as specified by the Holder in such request) representing such remaining Series B-2 Preferred Stock. Provided the Holder to which shares of Common Stock are to be issued represents that (i) it is not as of the Conversion Date, and for a period of three (3) months prior to the Conversion Date has not been, an "affiliate" (as such term is used in Rule 144 under the Securities Act) of the Corporation, and (ii) the shares of Series B-2 Preferred Stock being converted have not been held by such an affiliate within the six (6)-month period immediately preceding the Conversion Date, the shares of Common Stock issued upon conversion of Series B-2 Preferred Stock by such Holder will not contain or be subject to any legend or stop transfer instructions restricting the sale or transferability thereof. For the avoidance of doubt, by delivering a Notice of Conversion, a Holder shall be deemed to have made the representations contemplated by the immediately preceding sentence, unless the applicable Holder otherwise indicates in such Notice of Conversion.

b) **Conversion Ratio.** The “**Conversion Ratio**” for each share of Series B-2 Preferred Stock shall be equal to the Stated Value divided by the Conversion Price (as in effect on the applicable Conversion Date).

c) **Beneficial Ownership Limitation.** Notwithstanding anything herein to the contrary, but subject to the last sentence of this Section 6(c), the Corporation shall not effect any conversion of the Series B-2 Preferred Stock, and a Holder shall not have the right to convert any portion of the Series B-2 Preferred Stock, to the extent that, after giving effect to an attempted conversion set forth on the applicable Notice of Conversion, such Holder together with such Holder’s Affiliates, and any other Person whose beneficial ownership of Common Stock would be aggregated with the Holder’s for purposes of Section 13(d) of the Exchange Act and the applicable rules and regulations of the Commission, including any “group” of which the Holder is a member would beneficially own a number of shares of Common Stock in excess of the Beneficial Ownership Limitation. Delivery of a Notice of Conversion by a Holder in respect of the conversion of Series B-2 Preferred Stock shall constitute a representation by such Holder that the issuance of shares of Common Stock in accordance with such Notice of Conversion will not cause such Holder (together with such Holder’s Affiliates, and any other Person whose beneficial ownership of Common Stock would be aggregated with such Holder’s for purposes of Section 13(d) of the Exchange Act and the applicable regulations of the Commission) to beneficially own a number of shares of Common Stock in excess of the Beneficial Ownership Limitation, as determined in accordance with this Certificate of Designation. For purposes of this Section 6(a), the number of shares of Common Stock beneficially owned by such Holder and its Affiliates shall include the number of shares of Common Stock issuable upon conversion of the Series B-2 Preferred Stock subject to the Notice of Conversion with respect to which such determination is being made, but shall exclude the number of shares of Common Stock which are issuable upon (A) conversion of the remaining, unconverted Series B-2 Preferred Stock beneficially owned by such Holder or any of its Affiliates, and (B) exercise, exchange or conversion of the unexercised, unexchanged or unconverted portion of any other securities of the Corporation subject to a limitation on conversion, exchange or exercise analogous to the limitation contained herein (including any other class or series of preferred stock and warrants) beneficially owned by such Holder or any of its Affiliates. Except as set forth in the preceding sentence, for purposes of this Section 6(c), beneficial ownership shall be calculated in accordance with Section 13(d) of the Exchange Act and the rules and regulations promulgated thereunder. 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 6(c), in determining the number of outstanding shares of Common Stock, a Holder may rely on the number of outstanding shares of Common Stock as stated in the Corporation’s most recent quarterly or annual report filed with the Commission, or any current report filed by the Corporation with the Commission subsequent thereto. Upon the written request of a Holder (which may be via electronic mail), the Corporation shall within two (2) Trading Days following such request, confirm in writing via electronic mail to such 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 any actual conversion, exchange or exercise of securities of the Corporation, including Series B-2 Preferred Stock, by such Holder or its Affiliates since the date as of which such number of outstanding shares of Common Stock was last publicly reported. The “**Beneficial Ownership Limitation**” shall be 4.985% of the number of shares of the Common Stock outstanding immediately after giving effect to the issuance of shares of Common Stock issuable upon the conversion of Series B-2 Preferred Stock held by the applicable Holder.

d) Mechanics of Conversion

i. Delivery of Certificate or Electronic Issuance Upon Conversion. Not later than the earlier of two (2) Trading Days and the number of Trading Days constituting the Standard Settlement Period after the applicable Conversion Date (such earlier date, the “**Share Delivery Date**”), the Corporation shall (a) deliver, or cause to be delivered, to the converting Holder a certificate or certificates representing the number of Conversion Shares being acquired upon the conversion of shares of Series B-2 Preferred Stock or (b) in the case of a DWAC Delivery, electronically deliver such Conversion Shares by crediting the account of the Holder’s prime broker with DTC through its DWAC system. If in the case of any Notice of Conversion such certificate or certificates are not delivered to or as directed by or, in the case of a DWAC Delivery, such shares are not electronically delivered to or as directed by, the applicable Holder by the Share Delivery Date, the applicable Holder shall be entitled to elect to rescind such Notice of Conversion by written notice to the Corporation at any time on or before its receipt of such certificate or certificates for Conversion Shares or electronic receipt of such shares, as applicable, in which event the Corporation shall promptly return to such Holder any original Series B-2 Preferred Stock certificate delivered to the Corporation and such Holder shall promptly return to the Corporation any Common Stock certificates or otherwise direct the return of any shares of Common Stock delivered to the Holder through the DWAC system, representing the shares of Series B-2 Preferred Stock unsuccessfully tendered for conversion to the Corporation; provided that the liquidated damages described in Section 6(d)(ii) shall be payable through the date such notice of rescission is given to the Corporation.

ii. Obligation Absolute; Partial Liquidated Damages. Subject to Section 6(c) hereof and subject to Holder’s right to rescind a Notice of Conversion pursuant to Section 6(d)(i) above, the Corporation’s obligation to issue and deliver the Conversion Shares upon conversion of Series B-2 Preferred Stock in accordance with the terms hereof is absolute and unconditional, irrespective of any action or inaction by a Holder to enforce the same, any waiver or consent with respect to any provision hereof, the recovery of any judgment against any Person or any action to enforce the same, or any setoff, counterclaim, recoupment, limitation or termination, or any breach or alleged breach by such Holder or any other Person of any obligation to the Corporation or any violation or alleged violation of law by such Holder or any other Person, and irrespective of any other circumstance which might otherwise limit such obligation of the Corporation to such Holder in connection with the issuance of such Conversion Shares. Subject to Section 6(c) hereof and subject to Holder’s right to rescind a Notice of Conversion pursuant to Section 6(d)(i) above, in the event a Holder shall elect to convert any or all of its Series B-2 Preferred Stock, the Corporation may not refuse conversion based on any claim that such Holder or anyone associated or affiliated with such Holder has been engaged in any

violation of law, agreement or for any other reason, unless an injunction from a court, on notice to Holder, restraining and/or enjoining conversion of all or part of the Series B-2 Preferred Stock of such Holder shall have been sought and obtained, and the Corporation posts a surety bond for the benefit of such Holder in the amount of 150% of the value of the Conversion Shares into which would be converted the Series B-2 Preferred Stock which is subject to the injunction, which bond shall remain in effect until the completion of arbitration/litigation of the underlying dispute and the proceeds of which shall be payable to such Holder to the extent it obtains judgment. In the absence of such injunction, the Corporation shall, subject to Section 6(c) hereof and subject to Holder's right to rescind a Notice of Conversion pursuant to Section 6(d)(i) above, issue Conversion Shares upon a properly noticed conversion. If the Corporation fails to deliver to a Holder such certificate or certificates, or electronically deliver such shares in the case of a DWAC Delivery, pursuant to Section 6(d)(i) on or prior to the Share Delivery Date applicable to such conversion, the Corporation shall pay to such Holder, in cash, as partial liquidated damages and not as a penalty, an amount equal to the product of (x) the number of Conversion Shares issuable by the Corporation on such Share Delivery Date, (y) an amount equal to the Daily Failure Amount and (z) the number of Trading Days after the Share Delivery Date that such certificates have not been delivered, or, in the case of a DWAC Delivery, such shares have not been electronically delivered; provided that the Holder shall have no right to any such liquidated damages hereunder if the failure of the Corporation to deliver such Conversion Shares is a failure caused by incorrect or incomplete information provided by Holder to the Corporation; provided, further, that the Corporation shall notify a Holder as promptly as possible after the Corporation becomes aware of the fact that information provided by such Holder to the Corporation is incorrect or incomplete. Any such amount shall be paid on or before the fifth (5th) Trading Day of each month following a month in which such amount accrued. Nothing herein shall limit a Holder's right to pursue actual damages for the Corporation's failure to deliver Conversion Shares within the period specified herein, and such Holder shall have the right to pursue all remedies available to it hereunder, at law or in equity including a decree of specific performance and/or injunctive relief. The exercise of any such rights shall not prohibit a Holder from seeking to enforce damages pursuant to any other Section hereof or under applicable law.

iii. Compensation for Buy-In on Failure to Timely Deliver Certificates Upon Conversion. If the Corporation fails to deliver to a Holder a certificate or certificates representing Conversion Shares or to effect a DWAC Delivery, as applicable, by the Share Delivery Date pursuant to Section 6(d)(i), and if after such Share Delivery Date such Holder is required by its brokerage firm 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 such Holder of the Conversion Shares which such Holder was entitled to receive upon the conversion relating to such Share Delivery Date (a "**Buy-In**"), then the Corporation shall (A) pay in cash to such Holder (in addition to any other remedies available to or elected by such Holder) the amount by which (x) such Holder's total purchase price (including any brokerage commissions) for the shares of Common Stock so purchased exceeds (y) the product of (1) the aggregate number of shares of Common Stock that such Holder was entitled to receive from the conversion at

issue multiplied by (2) the actual sale price at which the sell order giving rise to such purchase obligation was executed (including any brokerage commissions), and (B) at the option of such Holder, either reissue (if surrendered) the shares of Series B-2 Preferred Stock equal to the number of shares of Series B-2 Preferred Stock submitted for conversion or deliver to such Holder the number of shares of Common Stock that would have been issued if the Corporation had timely complied with its delivery requirements under Section 6(d)(i); provided that the Holder shall have no right to any such payment under clause (A) hereof if the failure of the Corporation to deliver such Conversion Shares is a failure caused by incorrect or incomplete information provided by Holder to the Corporation; provided, further, that the Corporation shall notify a Holder as promptly as possible after the Corporation becomes aware of the fact that information provided by such Holder to the Corporation is incorrect or incomplete. For example, if a Holder purchases shares of Common Stock having a total purchase price of \$11,000 to cover a Buy-In with respect to an attempted conversion of shares of Series B-2 Preferred Stock with respect to which the actual sale price (including any brokerage commissions) giving rise to such purchase obligation was a total of \$10,000 under clause (A) of the immediately preceding sentence, the Corporation shall be required to pay such Holder \$1,000. The Holder shall provide the Corporation written notice within five (5) Trading Days after the occurrence of a Buy-In indicating the amounts payable to such Holder in respect of the Buy-In together with applicable confirmations and any other evidence reasonably requested by the Corporation related thereto. Nothing herein shall limit a Holder's right to pursue any other remedies available to it hereunder, at law or in equity including a decree of specific performance and/or injunctive relief with respect to the Corporation's failure to timely deliver certificates representing shares of Common Stock upon conversion of the shares of Series B-2 Preferred Stock as required pursuant to the terms hereof.

iv. Reservation of Shares Issuable Upon Conversion. The Corporation covenants that it will at all times reserve and keep available out of its authorized and unissued shares of Common Stock for the sole purpose of issuance upon conversion of the Series B-2 Preferred Stock and payment of dividends on the Series B-2 Preferred Stock, each as herein provided, free from preemptive rights or any other actual contingent purchase rights of Persons other than the Holders of the Series B-2 Preferred Stock, not less than such aggregate number of shares of the Common Stock as shall be issuable (taking into account the adjustments of Section 7, assuming the Class B-2 Preferred Stock is at all times convertible (regardless of whether the PDUFA Date has occurred) and without regard to the Beneficial Ownership Limitation) upon the conversion of all outstanding shares of Series B-2 Preferred Stock. The Corporation covenants that all shares of Common Stock that shall be so issuable shall, upon issue, be duly authorized, validly issued, fully paid and nonassessable.

v. Fractional Shares. No fractional shares or scrip representing fractional shares of Common Stock shall be issued upon the conversion of the Series B-2 Preferred Stock. As to any fraction of a share which a Holder would otherwise be entitled to receive upon such conversion, the Corporation shall round up to the next whole share.

vi. Taxes. The Corporation shall be responsible for paying, and the issuance of certificates for shares of the Common Stock upon conversion of the Series B-2 Preferred Stock shall be made without charge to any Holder for, any stamp, court or documentary, intangible, filing or similar taxes that may be payable in respect of the issuance or delivery thereof; provided that the Corporation shall not be required to pay any tax that may be payable in respect of any transfer involved in the issuance and delivery of any such certificate upon conversion in a name other than that of the registered Holder(s) of such shares of Series B-2 Preferred Stock (or such Holder(s)' prime broker) and the Corporation shall not be required to issue or deliver such certificates in a name other than that of the registered Holder(s) (or such Holder(s)' prime broker) unless or until the Person or Persons requesting the issuance thereof shall have paid to the Corporation the amount of the applicable transfer tax (if any) or shall have established to the satisfaction of the Corporation that the applicable transfer tax (if any) has been paid.

vii. Status as Preferred Stockholder. Effective as of the delivery by the Holder of the Notice of Conversion by the Holder by facsimile or electronic mail, as provided herein, subject to Section 6(c) hereof, (A) the shares of Series B-2 Preferred Stock being converted shall be deemed converted into shares of Common Stock, (B) the Holder shall be deemed the Holder or record of such applicable Conversion Shares, and (C) subject to a Holder's right to rescind a Notice of Conversion pursuant to Section 6(d)(i), the Holder's rights as a Holder of such converted shares of Series B-2 Preferred Stock shall cease and terminate, excepting only the right to receive certificates evidencing such shares of Common Stock, or electronic delivery of such shares in the case of DWAC Delivery, and to any remedies provided herein or otherwise available at law or in equity to such Holder because of a failure by the Corporation to comply with the terms of this Certificate of Designation. In all cases, the Holder shall retain all of its rights and remedies for the Corporation's failure to convert Series B-2 Preferred Stock.

Section 7. Certain Adjustments.

a) Stock Dividends and Stock Splits. If the Corporation, at any time while this Series B-2 Preferred Stock is outstanding: (A) pays a stock dividend or otherwise makes a distribution or distributions payable in shares of Common Stock on shares of Common Stock or any other Common Stock Equivalents (which, for avoidance of doubt, shall not include any shares of Common Stock issued by the Corporation upon conversion of this Series B-2 Preferred Stock); (B) subdivides outstanding shares of Common Stock into a larger number of shares; (C) combines (including by way of a reverse stock split) outstanding shares of Common Stock into a smaller number of shares; or (D) issues, in the event of a reclassification of shares of the Common Stock, any shares of capital stock of the Corporation, then the Conversion Price shall be multiplied by a fraction of which the numerator shall be the number of shares of Common Stock outstanding immediately before such event and of which the denominator shall be the number of shares of Common Stock (or in the event that clause (D) of this Section 7(a) shall apply, shares of reclassified capital stock), outstanding immediately after such event (excluding any treasury shares of the Corporation). Any adjustment made pursuant to this Section 7(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 re-classification.

b) **Fundamental Transaction.** If, at any time while this Series B-2 Preferred Stock is outstanding, (i) the Corporation, directly or indirectly in one or more related transactions, effects any merger or consolidation of the Corporation with or into another Person (other than a merger in which the Corporation is the surviving or continuing entity and its capital stock outstanding immediately prior to the merger or consolidation is not exchanged for or converted into other securities, cash and/or other property), (ii) any tender offer or exchange offer (whether by the Corporation or another Person) is completed pursuant to which holders of Common Stock are permitted to tender or exchange their shares for other securities, cash and/or property, or (iii) the Corporation, directly or indirectly in one or more related transactions, effects any reclassification of the Common Stock or any compulsory share exchange pursuant (other than as a result of a dividend, subdivision or combination covered by Section 7(a) above) to which the Common Stock is effectively converted into or exchanged for other securities, cash and/or property (in any such case, a “**Fundamental Transaction**”), then, upon the effectiveness of such Fundamental Transaction, each Holder of Series B-2 Preferred Stock shall receive for each Conversion Share that would have been issuable upon such conversion immediately prior to the occurrence of such Fundamental Transaction (without regard to the Beneficial Ownership Limitation), the same kind and amount of securities, cash and/or property as it would have been entitled to receive upon the occurrence of such Fundamental Transaction if it had been, immediately prior to such Fundamental Transaction, the holder of one share of Common Stock; (provided that if such Fundamental Transaction constitutes a Change in Control or in the event of a Change in Control that is an Asset Sale, then, upon the effectiveness of such Change in Control, each Holder of Series B-2 Preferred Stock shall receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation, or any other payment or distribution of any of the consideration in such Change of Control, to the holders of the Common Stock or any other Junior Securities and *pari passu* with any distribution or other payment to the holders of Parity Securities, for each share of Series B-2 Preferred Stock, (i) if the value of the aggregate of the securities, cash and/or other property to which the Holder of one share of Series B-2 Preferred Stock would be entitled if the Holder held the aggregate number of Conversion Shares that would have been issuable upon conversion of such share of Series B-2 Preferred Stock immediately prior to the occurrence of such Change in Control (assuming the Class B-2 Preferred Stock is at all times convertible (regardless of whether the PDUFA Date has occurred) and without regard to the Beneficial Ownership Limitation or any other restriction or limitation on conversion) is equal to or greater than the Stated Value, such securities, cash and/or other property, or (ii) if the value of the aggregate of such securities, cash and/or other property would be less than or equal to the Stated Value, such kind of securities, cash and/or other property (in the same proportions as would be applicable under the immediately preceding clause (i)) with an aggregate value equal to the Stated Value (the kind and amount of securities, cash and/or property payable in respect of each Conversion Share in connection with a Fundamental Change or Change in Control, determined in accordance with the foregoing being referred to as “**Alternate Consideration**”). For purposes of any such conversion, the determination of the Conversion Ratio 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 or Change in Control, and the Corporation shall adjust the

Conversion Ratio 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 and/or property to be received in a Fundamental Transaction or Change in Control, then the Holders shall be given the same choice as to the Alternate Consideration it receives upon any conversion of, or otherwise in respect of, its Series B-2 Preferred Stock in connection with such Fundamental Transaction or Change in Control on the same terms and conditions as given to the holders of Common Stock. To the extent necessary to effectuate the foregoing provisions, the Corporation shall cause any successor to the Corporation or surviving entity in such Fundamental Transaction or Change in Control (or any direct or indirect parent entity thereof) to assume in writing all of the obligations of the Corporation under this Certificate of Designation in accordance with the provisions of this Section 7(b) pursuant to written agreements in form and substance approved by the holders of a majority of the then outstanding shares of Series B-2 Preferred Stock prior to such Fundamental Transaction or Change in Control. The Corporation shall not have the power to enter into any merger or other agreement to which the Corporation or any of its Affiliates is a party and pursuant to which a Fundamental Transaction or Change in Control is effected unless such agreement shall include terms in compliance with the provisions of this Section 7(b). Without limiting the foregoing, the Corporation shall cause any successor entity (as well as its parent) in a Fundamental Transaction in which the Corporation is not the survivor to assume in writing all of the obligations of the Corporation under this Certificate of Designation in accordance with the provisions of this Section 7(b) pursuant to written agreements in form and substance approved by the Holders of not less than a majority of the then outstanding shares of Series B-2 Preferred Stock prior to such Fundamental Transaction. For purposes of determining the value of any securities and/or other property to which a holder of shares of Common Stock would be entitled pursuant to a Fundamental Transaction or Change in Control: (X) the value of any security that is traded on a national securities exchange at the effective time of such Fundamental Transaction or Change in Control shall be equal to the Volume Weighted Average Price per share of such security for the five (5) Trading Days immediately prior to such effective time; and (Y) the value of any other property (including a security that is not traded on a national securities exchange at the effective time of such Fundamental Transaction or Change in Control) shall be equal to the fair market value thereof as determined by the mutual agreement of the Corporation and the Holders of not less than a majority of the then outstanding shares of Series B-2 Preferred Stock prior to such Fundamental Transaction or Change in Control.

c) Certain Events. If any event occurs of the type contemplated by the provisions of Section 7(a) or Section 7(b), but not expressly provided for by such provisions, then the Board of Directors will make an appropriate adjustment in the Conversion Price or the securities, cash or property issuable upon conversion of the Series B-2 Preferred Stock, as applicable, so as to protect the rights of the Holders.

d) Calculations. All calculations under this Section 7 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 7, 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 any treasury shares of the Corporation) issued and outstanding.

e) Notice to the Holders.

i. Adjustment to Conversion Price. Whenever the Conversion Price is adjusted pursuant to any provision of this Section 7, the Corporation shall promptly deliver to each Holder a notice setting forth the Conversion Price after such adjustment and setting forth a brief statement of the facts requiring such adjustment.

ii. Notice to Allow Conversion by Holder. If (A) the Corporation shall declare a dividend (or any other distribution in whatever form) on the Common Stock, (B) the Corporation shall declare a special nonrecurring cash dividend on or a redemption of the Common Stock, (C) the Corporation shall authorize the granting to all holders of the Common Stock of 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 Corporation shall be required in connection with any reclassification of the Common Stock, any consolidation or merger to which the Corporation is a party, any sale, transfer or other disposition of all or substantially all of the assets of the Corporation, or any compulsory share exchange whereby the Common Stock is converted into other securities, cash and/or property or (E) the Corporation shall authorize the voluntary or involuntary dissolution, liquidation or winding up of the affairs of the Corporation or any Fundamental Transaction or Change in Control, then, in each case, the Corporation shall cause to be filed at each office or agency maintained for the purpose of conversion of this Series B-2 Preferred Stock, and shall cause to be delivered to each Holder at its last address as it shall appear upon the stock books of the Corporation, at the same time any notice related to any such transaction is delivered to the holders of Common Stock, a notice stating (x) the date on which a record is to be taken for the purpose of such dividend, distribution, redemption, rights or warrants or Fundamental Transaction or Change in Control, 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 or Fundamental Transaction or Change in Control 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 and/or other property deliverable upon such reclassification, consolidation, merger, sale, transfer, share exchange or Fundamental Transaction; 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.

Section 8. Miscellaneous.

a) Notice. Any and all notices or other communications or deliveries to be provided by the Holders hereunder including any Notice of Conversion, shall be in writing and delivered personally, by electronic mail (lclifton@kempharm.com), or sent by a nationally recognized overnight courier service, addressed to the Corporation, at its principal place of business, to the attention of the Chief Financial Officer of the Corporation, or such other electronic mail address or address as the Corporation may specify for such purposes by notice to the Holders delivered in

accordance with this Section 8. Any and all notices or other communications or deliveries to be provided by the Corporation hereunder shall be in writing and delivered personally, by confirmed electronic mail, or sent by a nationally recognized overnight courier service addressed to each Holder at the electronic mail address or address of such Holder appearing on the books of the Corporation, or if no such address appears on the books of the Corporation, at the principal place of business of such Holder. Any notice or other communication or deliveries hereunder shall be deemed given and effective on the earliest of (i) the time and date of transmission, if such notice or communication is delivered via electronic mail to the e-mail address specified in this Section 8, (ii) the second Business Day following the date of mailing, if sent by nationally recognized overnight courier service, or (iii) upon actual receipt by the party to whom such notice is required to be given.

b) Absolute Obligation. Except as expressly provided herein, no provision of this Certificate of Designation shall alter or impair the obligation of the Corporation, which is absolute and unconditional, to pay liquidated damages on the shares of Series B-2 Preferred Stock at the time, place and rate, and in the coin or currency, herein prescribed.

c) Lost or Mutilated Series B-2 Preferred Stock Certificate. If a Holder's Series B-2 Preferred Stock certificate shall be mutilated, lost, stolen or destroyed, the Corporation shall execute and deliver, in exchange and substitution for and upon cancellation of a mutilated certificate, or in lieu of or in substitution for a lost, stolen or destroyed certificate, a new certificate for the shares of Series B-2 Preferred Stock so mutilated, lost, stolen or destroyed, but only upon receipt of evidence of such loss, theft or destruction of such certificate, and of the ownership thereof reasonably satisfactory to the Corporation and, in each case, customary and reasonable indemnity, if requested.

d) Waiver. Any waiver by the Corporation or a Holder of a breach of any provision of this Certificate of Designation shall not operate as or be construed to be a waiver of any other breach of such provision or of any breach of any other provision of this Certificate of Designation or a waiver by any other Holders. The failure of the Corporation or a Holder to insist upon strict adherence to any term of this Certificate of Designation on one or more occasions shall not be considered a waiver or deprive that party (or any other Holder) of the right thereafter to insist upon strict adherence to that term or any other term of this Certificate of Designation. Any waiver by the Corporation or a Holder must be in writing. Notwithstanding any provision in this Certificate of Designation to the contrary, any provision contained herein (other than Section 6(c) which cannot be waived by the Holders) and any right of the Holders of Series B-2 Preferred Stock granted hereunder may be waived as to all shares of Series B-2 Preferred Stock (and the Holders thereof) upon the affirmative vote or written consent of the Holders of not less than a majority of the then outstanding shares of Series B-2 Preferred Stock, unless a higher percentage is required by the DGCL, in which case the affirmative consent or written consent of the Holders of not less than such higher percentage shall be required.

e) Severability. If any provision of this Certificate of Designation is invalid, illegal or unenforceable, the balance of this Certificate of Designation shall remain in effect, and if any provision is inapplicable to any Person or circumstance, it shall nevertheless remain applicable to all other Persons and circumstances. If it shall be found that any interest or other amount deemed interest due hereunder violates the applicable law governing usury, the applicable rate of interest due hereunder shall automatically be lowered to equal the maximum rate of interest permitted under applicable law.

f) Next Business Day. Whenever any payment or other obligation hereunder shall be due on a day other than a Business Day, such payment shall be made on the next succeeding Business Day.

g) Headings. The headings contained herein are for convenience only, do not constitute a part of this Certificate of Designation and shall not be deemed to limit or affect any of the provisions hereof.

h) Status of Converted Series B-2 Preferred Stock. If any shares of Series B-2 Preferred Stock shall have been converted into shares of Common Stock or reacquired by the Corporation, such shares shall resume the status of authorized but unissued shares of preferred stock and shall no longer be designated as Series B-2 Preferred Stock.

i) Determinations Made by Accountants. In the case of an inability of the Corporation and the holders of a majority of outstanding shares of Series B-2 Preferred Stock to reach a mutual agreement as to any arithmetic calculation hereunder, the Corporation or the Holders of a majority of the then outstanding Series B-2 Preferred Stock shall submit to the other their arithmetic calculations via electronic transmission within two (2) Trading Days of receipt, or deemed receipt, of any notice or other event giving rise to such dispute, as the case may be. If such Holder(s) and the Corporation are unable to agree upon such calculation within two (2) Trading Days after the submission of such disputed calculation, then the Corporation shall, within two (2) Trading Days thereafter, submit via electronic transmission the disputed arithmetic calculation, to an independent, reputable registered public accounting firm selected by the Corporation and approved by such Holder(s), which approval shall not be unreasonably withheld. The accountants shall perform the determinations or calculations and notify the Corporation and such Holder(s) of the results no later than five (5) Trading Days from the time it receives from the Corporation and such Holder(s) their respective calculations. Such accountants' determination or calculation, as the case may be, shall be binding upon all parties absent verifiable error. Notwithstanding the foregoing, in the event of an inability of the Corporation and the holders of a majority of the outstanding shares of Series B-2 Preferred Stock to reach a mutual determination as to the Conversion Price as contemplated by a Notice of Conversion, if requested by a Holder submitting such Notice of Conversion, the Corporation shall issue to such Holder the Conversion Shares, if any, that are not in dispute in accordance with the terms hereof. For the avoidance of doubt, any determinations made by the accountants, as the case may be, pursuant to this Section 8(i) shall be deemed to be "facts ascertainable" outside of this Certificate of Designation within the meaning of Sections 102(d) and 151(a) of the DGCL, and shall not be deemed to be a determination in or relating to arbitration or made by an arbitrator.

j) Benefit of Holders. The provisions of this Certificate of Designation are intended to be for the benefit of all Holders from time to time and shall be enforceable by any such Holder.

k) Interpretative Matters. Unless otherwise indicated or the context otherwise requires, (i) all references to Sections are to Sections contained in this Certificate of Designation, (b) words in the singular or plural include the singular and plural and pronouns stated in either the masculine, the feminine or neuter gender shall include the masculine, feminine and neuter, (c) the words “hereof,” “herein” and words of similar effect shall reference this Certificate of Designation in its entirety, and (d) the use of the word “including” in this Certificate of Designation shall be by way of example rather than limitation.

RESOLVED, FURTHER, that the chief executive officer, the president, the chief financial officer or any vice-president, and the secretary or any assistant secretary, of the Corporation be and they hereby are authorized and directed to prepare and file this Certificate of Designation in accordance with the foregoing resolution and the provisions of Delaware law.

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Designation this day of December __, 2020.

Name: R. LaDuane Clifton
Title: Chief Financial Officer

ANNEX A
CONVERSION NOTICE

(TO BE EXECUTED BY THE REGISTERED HOLDER IN ORDER TO CONVERT SHARES OF SERIES B-2 PREFERRED STOCK)

Reference is made to the Certificate of Designation of Preferences, Rights and Limitations of Series B-2 Convertible Preferred Stock (the “**Certificate of Designation**”). In accordance with and pursuant to the Certificate of Designation, the undersigned hereby elects to convert the number of shares of Series B-2 Convertible Preferred Stock, par value \$0.0001 per share and with a stated value of \$1,000 per share (the “**Series B-2 Preferred Stock**”), of KemPharm, Inc., a Delaware corporation (the “**Corporation**”), indicated below into shares of common stock, par value \$0.0001 per share (the “**Common Stock**”), of the Corporation, by tendering the stock certificate(s), if applicable, representing the shares of Series B-2 Preferred Stock specified below as of the date specified below.

Date of Conversion: _____

Number of shares of Series B-2 Preferred Stock to be converted:

This Conversion is conditioned upon the consummation of the following transaction: _____¹

Please confirm the following information:

Conversion Price: _____

Number of shares of Common Stock to be issued: _____

Please issue the shares of Common Stock in accordance with the terms of the Certificate of Designation as follows:

- Deposit/Withdrawal At Custodian (“**DWAC**”) system; or
- Physical Certificate

Issue to: _____

Address (for delivery of physical certificate): _____

E-mail: _____

DTC Participant Number and Name (if through DWAC): _____

Account Number (if through DWAC): _____

¹ No such condition applies if left blank.

Unless otherwise indicated below, by delivering this Conversion Notice, the undersigned represents that (i) it is not as of the date hereof (the “**Conversion Date**”), and for a period of three (3) months prior to the Conversion Date has not been, an “affiliate” (as such term is used in Rule 144 under the Securities Act of 1933, as amended) of the Corporation, and (ii) the shares of Series B-2 Preferred Stock being converted hereby have not been held by such an affiliate within the six (6)-month period immediately preceding the Conversion Date.

[HOLDER]

**DECEMBER 2020 EXCHANGE AGREEMENT AND
AMENDMENT TO FACILITY AGREEMENT, NOTES AND INVESTORS' RIGHTS AGREEMENT**

This **DECEMBER 2020 EXCHANGE AGREEMENT AND AMENDMENT TO FACILITY AGREEMENT, NOTES AND INVESTORS' RIGHTS AGREEMENT** (including the schedules, annexes and exhibits hereto, this "**Agreement**"), dated as of December 20, 2020, is by and among KemPharm, Inc., a Delaware corporation (the "**Borrower**"), Deerfield Private Design Fund III, L.P. ("**DPDF**"), Deerfield Special Situations Fund, L.P. ("**DSS**") and, together with DPDF, the "**Deerfield Lenders**") and such other Lenders who become a party to this Agreement by signing a Joinder Agreement (as defined below) and otherwise in accordance with Section 5.08 hereof (such Lenders, together with the Deerfield Lenders, the "**Participating Lenders**"). Capitalized terms used but not otherwise defined in this Agreement shall have the meanings given to them in the Facility Agreement (as defined below).

RECITALS:

A. The Borrower, the Deerfield Lenders, Delaware Street Capital Master Fund, L.P. and M. Kingdon Offshore Master Fund, LP are parties (by joinder or otherwise) to that certain Facility Agreement, dated as of June 2, 2014, as amended (as the same previously has been amended, modified, restated or otherwise supplemented from time to time, the "**Existing Facility Agreement**").

B. Each Lender owns the Note(s) set forth on Schedule 1 hereto. As of the date hereof, the aggregate outstanding principal amount of the December 2019 Notes and A&R Senior Secured Convertible Note held by the Deerfield Lenders represents more than 50% of the aggregate principal amount of the Loans outstanding.

C. The Existing Facility Agreement obligates the Borrower to make a PIK Interest Payment on each of the Notes on the first Business Day of January 2021 (the aggregate thereof, the "**Q4 PIK Interest Payment**").

D. The Borrower is undertaking a public offering (the "**Public Offering**") of its common stock, \$0.0001 par value per share (the "**Common Stock**"), warrants to purchase shares of Common Stock (the "**Public Offering Warrants**") and pre-funded warrants to purchase shares of Common Stock (the "**Pre-Funded Warrants**"), in each case, pursuant to a registration statement on Form S-1, file no. 333-250945 (including any amendments or supplements thereto, the exhibits thereto and any prospectuses (preliminary, final, free writing or otherwise) contained therein or relating thereto and any amendment or supplement to any such prospectus, the "**Registration Statement**").

E. Pursuant to this Agreement (and subject to the terms and conditions hereof), upon the closing of the Public Offering, the Borrower is agreeing to prepay a portion of the then outstanding Obligations under the Notes held by the Participating Lenders in an amount equal to the Prepayment Amount (as defined below).

F. Pursuant to this Agreement (and subject to the terms and conditions hereof), effective as of the Effective Time (as defined below), the Deerfield Lenders and the other Participating Lenders (if any) are willing to exchange a portion of the Exchanged Notes (as defined below) held by them having an aggregate principal amount equal to the result of (i) the Prepayment Amount (as defined below), plus (ii) the amount of the Q4 PIK Interest Payment, whether or not the Q4 PIK Interest Amount has then become due and payable and added to the principal of the Notes (such sum, the “**Aggregate Exchanged Principal Amount**”) for (y) shares of the Borrower’s Series B-2 Preferred Stock, par value \$0.0001 per share (the “**Series B-2 Preferred Stock**”) and (z) warrants to purchase Common Stock containing the terms of the Exchange Warrants (as defined below).

G. Pursuant to this Agreement (and subject to the terms and conditions hereof), effective at such times as are set forth herein, the Deerfield Lenders (representing the Required Lenders) and the Borrower have agreed to amend the Existing Facility Agreement, among other things, to extend the maturity thereof with respect to a portion of the Loans.

H. Pursuant to this Agreement (and subject to the terms and conditions hereof), effective at such times as are set forth herein, the Deerfield Lenders (representing the Required Note Holders (as defined in the Notes)) and the Borrower have agreed to amend the Notes, among other things, to modify certain defined terms contained therein.

I. Pursuant to this Agreement (and subject to the terms and conditions hereof), effective as of the Effective Time, DPDF (being the holder of a majority of the Registrable Securities (as defined in the Amended and Restated Investors’ Rights Agreement, dated as of February 19, 2015, among the Borrower, DPDF and the other parties signatory thereto (as the same previously has been amended, modified, restated or otherwise supplemented from time to time, the “**Existing IRA**”)) and the Borrower have agreed to amend the Investors’ Rights Agreement to, among other things, provide each Deerfield Lender with certain registration rights in respect of the shares of Common Stock issuable upon exercise of the Exchange Warrants (the “**Exercise Shares**”).

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, agree as follows:

ARTICLE I.

DEFINITIONS

Whenever used in this Agreement, the Exhibits or the Schedules attached hereto, unless the context otherwise requires, the following terms have the following meanings:

“**A&R Certificate of Designation**” means the Amended and Restated Certificate of Designation of Preferences, Rights and Limitations of the Series B-2 Preferred Stock Certificate of Designation, in substantially the form attached hereto as Exhibit A.

“**Cash Interest**” means any interest on (i) the Aggregate Exchanged Principal Amount that accrues on or after January 1, 2021 through and including the Effective Date (as defined below), and (ii) the Prepayment Amount that accrues on or after January 1, 2021 through and including the Repayment Date (as defined below). For the sake of clarity, Cash Interest shall not include the Q4 PIK Interest Payment.

“**Exchange Percentage**” means, with respect to each Lender that is a Participating Lender on the date hereof, or becomes a Participating Lender in accordance with Section 5.08, a percentage equal to 100, multiplied by a fraction, the numerator of which is the outstanding principal amount of the Note(s) held by such Participating Lender as of the date of this Agreement and the denominator of which is the aggregate outstanding principal amount of the Notes held by all Participating Lenders as of the date of this Agreement.

“**Exchange Shares**” means, with respect to each Participating Lender, a number of shares of Series B-2 Preferred Stock equal to the result of (x) such Participating Lender’s Exchange Percentage of the result of the Prepayment Amount, plus the amount of the Q4 PIK Interest Payment, *divided by* (y) the Stated Value (as defined in the A&R Certificate of Designation (as defined below)) as of the Effective Time.

“**Exchange Warrant**” means, with respect to each Participating Lender, a warrant to purchase a number of shares of Common Stock equal to 75% of the number of shares of Common Stock issuable immediately following the Effective Time upon conversion of all of such Participating Lender’s Exchange Shares (without regard to the Beneficial Ownership Limitation (as defined in the A&R Certificate of Designation) or any other restriction or limitation on the conversion thereof and assuming that the Exchange Shares were convertible into Conversion Shares (as defined below) immediately following the Effective Time), which warrant shall have the same economic and other terms as the Public Offering Warrants, including the same exercise price per share of Common Stock, shall be in a form reasonably acceptable to the Deerfield Lenders and (irrespective of any contrary terms contained in the Public Offering Warrants) shall (a) provide for (i) a limitation on the exercise thereof that is substantially equivalent to the Beneficial Ownership Limitation set forth in the A&R Certificate of Designation, (ii) the issuance and delivery of shares of Common Stock upon exercise thereof pursuant to procedures comparable to the mechanics for conversion applicable under the A&R Certificate of Designation, (iii) the removal of restrictive legends (or the issuance and delivery of shares of Common Stock without restrictive legend) upon the occurrence of specified events, and (iv) the right to exercise such warrant for cash or on a “cashless” (net issue) basis, subject to specified conditions set forth in the Exchange Warrant that are acceptable to the Deerfield Lenders, (b) not require any ink-original notice of exercise, nor any medallion guarantee (or other type of guarantee or notarization) of any notice of exercise, and (c) shall include such other terms as the Deerfield Lenders shall reasonably request to reflect that such warrants were not issued pursuant to an effective registration statement under the Securities Act.

“**Exchanged Principal Amount**” means, with respect to each Participating Lender, a principal amount of its Exchanged Note(s) equal to such Participating Lender’s Exchange Percentage of the Aggregate Exchanged Principal Amount. Notwithstanding anything in the foregoing to the contrary, if any Non-DF Lender does not choose to become a Participating Lender pursuant to Section 5.08, then, upon the written consent of the Deerfield Lenders and the Borrower, the Deerfield Lenders may increase the aggregate amount of the Exchange Principal Amount of the Deerfield Lenders by up to the amount that such Non-DF Lender would have been entitled to if it chose to participate in the transactions contemplated under this Agreement.

“**Exchanged Note(s)**” means, with respect to each Participating Lender, the Note set forth opposite its name on Schedule 1 hereto or, in each case, portion thereof being exchanged hereunder.

“**Facility Agreement**” means the Existing Facility Agreement, as amended hereby and as the same may in the future be amended, modified, restated or otherwise supplemented from time to time.

“**IRA**” means the Existing IRA, as amended hereby and as the same may in the future be amended, modified, restated or otherwise supplemented from time to time.

“**Prepayment Amount**” means an amount in cash equal to \$25,000,000, provided, that if any Non-DF Lender (as defined below) becomes a Participating Lender pursuant to Section 5.08, then, at the Borrower’s election made by written notice to the Participating Lenders, the Prepayment Amount may be increased to an amount that does not exceed the result of \$25,000,000, divided by the Deerfield Lenders’ aggregate Exchange Percentage (it being acknowledged and agreed that the aggregate amount of the prepayment to the Deerfield Lenders’ Notes pursuant to Section 2.01 shall in no event exceed \$25,000,000). Notwithstanding anything in the foregoing to the contrary, if any Non-DF Lender does not choose to become a Participating Lender pursuant to Section 5.08, then, upon the written consent of the Deerfield Lenders and the Borrower, the Deerfield Lenders may increase the aggregate amount of prepayment to the Deerfield Lenders by up to the amount that such Non-DF Lender would have been entitled to if it chose to participate in the transactions contemplated under this Agreement.

ARTICLE II.

PREPAYMENT AND EXCHANGE

Section 2.01. Prepayment. Subject to the terms and conditions hereof, substantially contemporaneously with the closing of the Public Offering, the Borrower shall pay or cause to be paid to each Participating Lender, such Participating Lender’s Exchange Percentage of the Prepayment Amount, plus, if the date of such payment (the “**Repayment Date**”) occurs on or after January 1, 2021, the Cash Interest thereon, by wire transfer of immediately available funds denominated in United States dollars, to an account designated by such Participating Lender at least one Business Day prior to the Repayment Date. Each such payment shall constitute a prepayment of the outstanding Obligations under the applicable Participating Lender’s Note (it being acknowledged and agreed that, in the case of DPDF, such prepayment shall be applied to reduce the Obligations under its December 2019 Note).

Section 2.02. Exchange. Subject to the terms and conditions hereof, each Participating Lender hereby agrees to exchange its Exchanged Principal Amount of its Exchanged Note(s) for the issuance by the Borrower to such Participating Lender of such Participating Lender’s Exchange Shares and Exchange Warrant (the “**Exchange**”). If the Effective Date occurs on or after January 1, 2021, the Borrower shall pay or cause to be paid to each Participating Lender, Cash Interest on

such Participating Lender's Exchange Percentage of the Exchanged Principal Amount by wire transfer of immediately available funds denominated in United States dollars, to an account designated by such Participating Lender at least one Business Day prior to the Effective Date. The Exchange and the related amendments to the Transaction Documents are being made as part of and pursuant to a plan of reorganization of the Borrower described in Section 368(a)(1)(E) of the Code.

Section 2.03. Exchange Settlement.

(a) Subject to the satisfaction (or waiver) of all of the conditions to the Exchange set forth in Sections 7.01, 7.02 and 7.03, the Exchange shall be consummated and become effective on the date of, and immediately following, the closing of the Public Offering, or such later date and time as is mutually agreed to by the Borrower and the Deerfield Lenders (the date of the Public Offering closing or later mutually agreed date, the "**Effective Date**" and the time of such closing or later mutually agreed time, the "**Effective Time**").

(b) Upon the Effective Time, the Borrower shall issue and deliver to each Participating Lender (i) a certificate, duly executed on behalf of the Borrower and not bearing any restrictive legend, representing such Participating Lender's Exchange Shares and () such Participating Lender's Exchange Warrant, duly executed on behalf of the Borrower.

(c) Upon the Effective Time, (i) each Participating Lender shall be deemed for all purposes to have become the legal, beneficial and record holder of its Exchange Shares and Exchange Warrants and (ii) the Obligations under each Participating Lender's Exchanged Note(s) shall be deemed to have been reduced by such Participating Lender's Exchanged Principal Amount (it being acknowledged and agreed that, in the case of DPDF, such reduction shall be applied first to reduce the Obligations under its December 2019 Note and, if such Obligations are satisfied in full after giving effect to such reduction, to reduce the Obligations under its A&R Senior Secured Convertible Note).

(d) As promptly as possible following the Effective Time, (A) the Borrower shall deliver to each Participating Lender in respect of its Exchanged Note(s) a replacement Note of like tenor (but giving effect to the amendments contemplated herein), in a principal amount that gives effect to the Exchange and the prepayment made pursuant to Section 2.01, and (B) each Participating Lender shall thereafter deliver its existing Exchanged Note(s) for cancellation. For the avoidance of doubt, neither the Exchange nor the effectiveness of the amendments to the Facility Agreement contemplated hereby shall be conditioned upon, or be subject to, the delivery of such new Notes by the Borrower or delivery of the existing Notes by the Participating Lenders.

ARTICLE III.
AMENDMENT OF EXISTING FACILITY AGREEMENT, NOTES AND EXISTING IRA

Section 3.01. Amendments to Existing Facility Agreement.

(a) Effective as of the date of this Agreement, the Existing Facility Agreement is hereby amended as follows:

(i) Section 1.1 of the Facility Agreement shall be hereby amended by adding the following new definitions in the appropriate alphabetical order:

“December 2020 Exchange Agreement” means the December 2020 Exchange Agreement and Amendment to Facility Agreement and Investors’ Rights Agreement dated as of December 20, 2020, among the Borrower, Deerfield Private Design Fund III, L.P. and Deerfield Special Situations Fund, L.P.

“December 2020 Effective Date” means the “Effective Date” as defined in the December 2020 Exchange Agreement.

“Deerfield Lenders” means Deerfield Private Design Fund III, L.P. and Deerfield Special Situations Fund, L.P.

“Exchange” has the meaning set forth in the December 2020 Exchange Agreement.

“Exchanged Principal Amount” has the meaning set forth in the December 2020 Exchange Agreement.

“Exchange Shares” has the meaning set forth in the December 2020 Exchange Agreement.

“Non-DF Lenders” means Lenders other than the Deerfield Lenders.

“Participating Lenders” has the meaning set forth in the December 2020 Exchange Agreement.

“Public Offering” has the meaning set forth in the December 2020 Exchange Agreement.

(ii) Section 1.1 of the Facility Agreement shall be hereby amended by amending and restating the definition of “First Disbursement” in its entirety to read as follows:

“First Disbursement” has the meaning set forth in Section 2.2(a).

(iii) Section 1.1 of the Facility Agreement shall be hereby amended by amending and restating the definition of “Second Disbursement, Third Disbursement and Fourth Disbursement” in its entirety to read as follows:

“Second Disbursement, Third Disbursement and Fourth Disbursement” have the meanings set forth in Section 2.2(b).

(iv) Section 1.1 of the Facility Agreement shall be hereby amended by amending and restating the definition of “Term Notes” in its entirety to read as follows:

“Term Notes” means the Term Notes issued to the DPDF Lender pursuant to Section 2.2, each of which will be substantially in the form attached hereto as Exhibit C.

(v) Section 1.1 of the Facility Agreement shall be hereby amended by amending and restating the definition of “Transaction Documents” in its entirety to read as follows:

“Transaction Documents” means this Agreement, the Notes, the Security Agreements and the Warrants, the Series D Charter Filing, the Series B-2 Certificate of Designation, the Agreement and Plan of Merger, the September 2019 Exchange Agreement, the December 2019 Exchange Agreement, the December 2020 Exchange Agreement, and any other document or instrument delivered in connection with any of the foregoing, whether or not specifically mentioned herein or therein, in each case, as amended from time to time in accordance with the terms hereof and thereof.

(vi) Section 2.3(c) shall be amended to add “Except as otherwise provided in the December 2020 Exchange Agreement,” at the beginning of the first sentence thereof.

(vii) Section 2.3(d) of the Facility Agreement shall be hereby amended and restated in its entirety to read as follows:

“(d) Any conversions of any principal of the Loans (and Notes evidencing such Loans) by any Participating Lender into Exchange Shares shall be applied against, and reduce, and shall otherwise for all purposes hereof be deemed a repayment of, such principal amount. Promptly upon any such reduction in the principal of any Participating Lender’s Senior Secured Convertible Note, the Borrower shall provide written notice to the Agent of such reduction and of the reduced principal amount of such Senior Secured Convertible Note. If during the period commencing on the date a Prepayment Notice (as defined below) is delivered to a Lender and the date the payment contemplated by such Prepayment Notice is received by such Lender, such Lender elects to convert a portion of its Notes into capital stock of the Borrower in accordance with the terms of the Notes, such conversion shall be applied first to reduce the amount to be repaid pursuant to such Prepayment Notice, unless otherwise specified by such Lender.”

(viii) Section 6.16 of the Facility Agreement shall be hereby amended and restated in its entirety to read as follows:

“If any Lender, directly or through any of its Affiliates, obtains any payment of interest or principal on any of its Loans (whether voluntary, involuntary or through the exercise of any right of setoff or the receipt of any Collateral or “proceeds” (as defined under the UCC (as defined in the Guaranty and Security Agreement)) of Collateral) (and other than pursuant to Section 6.5 or pursuant to the December 2020 Exchange Agreement) and such payment exceeds the amount

such Lender would have been entitled to receive if all payments had gone to, and been distributed in accordance with the provisions of this Agreement and the other Transaction Documents, such Lender shall purchase for cash from the other Lenders such participations in their Loans as necessary for such Lender to share such excess payment with such Lenders to ensure such payment is applied as though it had been applied in accordance with this Agreement; provided, however, that (i) if such payment is rescinded or otherwise recovered from such Lender in whole or in part, such purchase shall be rescinded and the purchase price therefor shall be returned to such Lender without interest and (ii) such Lender shall, to the fullest extent permitted by Applicable Law, be able to exercise all its rights of payment (including the right of setoff) with respect to such participation as fully as if such Lender were the direct creditor of the applicable Credit Party in the amount of such participation.”

(b) Subject to the satisfaction (or waiver by the Required Lenders) of the conditions precedent set forth in Sections 7.01, 7.02 and 7.03 of this Agreement and the closing of the Public Offering, effective immediately prior to the consummation of the Exchange, the Existing Facility Agreement, as amended by Section 3.01(a) of this Agreement, shall be hereby amended as follows:

(i) Section 1.1 of the Facility Agreement shall be hereby amended by adding the following new definitions in the appropriate alphabetical order:

“Maturity Date” means (i) March 31, 2023, or (ii) such earlier date as the principal amount of the Obligations is declared to be or automatically becomes due and payable following an Event of Default (whether pursuant to Section 5.5 or otherwise). Notwithstanding anything herein to the contrary, the Maturity Date for any Lender’s loan may be extended to a later date by written consent of the Borrower and such Lender.

“PIK Interest Payment” has the meaning set forth in Section 2.7.

“PIK Interest Period” has the meaning set forth in Section 2.7.

“Prepayment Fee Amount” has the meaning set forth in Section 2.9.

(ii) Section 1.1 of the Facility Agreement shall be hereby amended by amending and restating the definition of “Obligations” in its entirety to read as follows:

“Obligations” means all Loans and Disbursements, Prepayment Fee Amount, interest, fees, expenses, costs, liabilities, indebtedness and other obligations (monetary (including post-petition interest, costs, fees, expenses and other amounts, whether allowed or not) or otherwise) of (or owed by) the Borrower and the other Grantors to Collateral Agent, any Lender or any other Person that arises under this Agreement or the other Transaction Documents, in each case howsoever created, arising or evidenced, whether direct or indirect (including those acquired by assignment), absolute or contingent, now or hereafter existing, or due or to become due.

(iii) Section 1.1 of the Facility Agreement shall be hereby amended by amending and restating the definition of “Required Lenders” in its entirety to read as follows:

“Required Lenders” means, at any time, Lenders holding Loans representing more than 50% of the sum of the Loans outstanding, including at least one of the Deerfield Lenders.

(iv) Section 1.1 of the Facility Agreement shall be hereby amended by amending and restating the definition of “Series B-2 Certificates of Designations” in its entirety to read as follows:

“Series B-2 Certificate of Designation” means the Amended and Restated Certificate of Designation of Preferences, Rights and Limitations of the Series B-2 Preferred Stock of the Borrower.

(v) Section 2.3(a) of the Facility Agreement shall be hereby amended and restated in its entirety to read as follows:

“(a) The Borrower shall pay in cash Dollars to each of the Lenders its Pro Rata Share of the outstanding principal amount of the Loans, together with all accrued and unpaid interest thereon, on the Maturity Date.”

(vi) Section 2.7 of the Facility Agreement shall be hereby amended and restated in its entirety to read as follows:

“The outstanding principal amount of the Notes shall bear interest at the Interest Rate (calculated on the basis of the actual number of days elapsed in each month). Accrued interest shall first be paid in arrears on July 1, 2014 and thereafter quarterly in arrears on the first Business Day of each, October, January, April and July thereafter (each, an “Interest Payment Date”) and on the Maturity Date. Notwithstanding the foregoing and except as set forth below, interest on each Note (or any Note issued in substitution therefor) that accrues and is otherwise payable on an Interest Payment Date occurring during the period (the “PIK Interest Period”) after the Effective Date to and including the July 1, 2021 Interest Payment Date shall be paid in kind by adding the amount of such interest to the then outstanding principal amount of the Loans (each such payment in kind being referred to as a “PIK Interest Payment”); provided, however, that no PIK Interest Payment (nor any other interest) shall be due or payable hereunder on January 1, 2021 in respect of the Loans held by the Participating Lenders (the PIK Interest Payment otherwise due and payable on such date on such Loans being satisfied in accordance with the December 2020 Exchange Agreement). Following an increase in the principal amount of each Note (or any Note issued in substitution therefor) as a result of a PIK Interest Payment, such increased principal shall bear interest at the rate applicable to such Note, and such interest shall be paid in kind (and such payment in kind shall also be deemed a “PIK Interest Payment” hereunder). Any reference in this Agreement or any other Transaction Document to the Loans or the

outstanding principal balance of the Loans, shall include all interest on the Loans that shall have been capitalized and added to the principal balance of the Loans on each Interest Payment Date that has not been repaid or prepaid in accordance with the terms hereof. From and after the PIK Interest Period, all interest shall be payable in cash Dollars on each Interest Payment Date. Notwithstanding the foregoing, and for the avoidance of doubt, accrued and unpaid interest shall also be paid in cash Dollars on the date of any payment or prepayment of any Loan in full, on the Maturity Date or upon any other payment or prepayment (in connection with the acceleration of the Loans, an amortization payment or otherwise), and all payments and prepayments (in connection with the acceleration of the Loans, an amortization payment or otherwise) shall be applied to the Loans in accordance with Section 2.3(c) of this Agreement.”

(vii) Section 2.9 of the Facility Agreement shall be hereby amended and restated in its entirety to read as follows:

“Section 2.9 **Prepayment Fee**. If any Loans or other Obligations owed to any Lender (after giving effect to the transactions contemplated under the December 2020 Exchange Agreement) are prepaid, repaid, redeemed or paid, in addition to the principal amount of the Loans and other Obligations and accrued interest, fees and other amounts owed thereon to such Lender:

(a) after March 31, 2021 but on or prior to March 31, 2022, then the amount (in addition to the principal amount of the Loans and Obligations and any accrued interest, fees and other amounts owed thereon) required to be prepaid, repaid, redeemed or paid to each Lender shall be an amount equal to five percent (5%) of the amount of the Loans and any overdue interest thereon and any other overdue amounts and Obligations prepaid, repaid, redeemed or paid to such Lender; or

(b) after March 31, 2022 but prior to March 31, 2023, then the amount (in addition to the principal amount of the Loans and Obligations and any accrued interest, fees and other amounts owed thereon) required to be prepaid, repaid, redeemed or paid to each Lender shall be an amount equal to three percent (3%) of the amount of the Loans and other Obligations and any overdue interest thereon and any other overdue amounts and Obligations prepaid, repaid, redeemed or paid to such Lender; or

(c) on or after March 31, 2023, then the amount (in addition to the principal amount of the Loans and Obligations and any accrued interest, fees and other amounts owed thereon) required to be prepaid, repaid, redeemed or paid to each Lender shall be an amount equal to zero percent (0%) of the amount of the Loans and any overdue interest thereon and any other overdue amounts and Obligations prepaid, repaid, redeemed or paid to such Lender (such amount required to be paid (or that is otherwise owed) pursuant to the foregoing, the “Prepayment Fee Amount”).

The Borrower shall provide the Lenders thirty (30) days prior written notice of any voluntary payment, repayment, redemption or prepayment of the Obligations (a “Prepayment Notice”). The Parties acknowledge and agree that, in light of the impracticality and extreme difficulty of ascertaining actual damages, the Prepayment Fee Amount is intended to be a reasonable calculation of the actual damages that would be suffered by the Lenders as a result of any such prepayment, repayment, redemption, payment or termination. The Parties further acknowledge and agree that the Lenders would not have entered into this Agreement, and the Deerfield Lenders and any other Lenders party thereto would not have entered into the December 2020 Exchange Agreement, without the Credit Parties agreeing to pay the Prepayment Fee Amount in the aforementioned instances. The Parties hereto further acknowledge and agree that the Prepayment Fee Amount is not intended to act as a penalty or to punish the Borrowers or any other Credit Party for any such prepayment, repayment, redemption or payment.”

Section 3.02. Amendment to the Notes.

(a) Effective as of the date of this Agreement, the definition of “Required Note Holders” in each outstanding Note is hereby amended and restated to read in its entirety as follows:

““**Required Note Holders**” means, as of any date of determination, holders of at least 50% of the aggregate outstanding principal amount of the Notes, including at least one of the Deerfield Lenders.”

(b) Subject to the satisfaction (or waiver by the Required Note Holders) of the conditions precedent set forth in Sections 7.01, 7.02 and 7.03 of this Agreement and the closing of the Public Offering, effective immediately prior to the consummation of the Exchange, clause (E) of the definition of “Major Transaction” in each outstanding Note, as amended by Section 3.02(a) of this Agreement, shall hereby be amended and restated to read in its entirety as follows:

“(E) at any time after March 31, 2023 the shares of Common Stock are not listed on an Eligible Market;”

Section 3.03. Amendment to Investors’ Rights Agreement. Subject to the satisfaction (or waiver by the Deerfield Lenders) of the conditions precedent set forth in Sections 7.01, 7.02 and 7.03 of this Agreement, effective upon the consummation of the Exchange, the Existing IRA shall hereby be amended as follows:

(a) The definition of “Deerfield Warrants” in Section 1 of the Existing IRA shall hereby be amended and restated to read in its entirety as follows:

““**Deerfield Warrants**” shall mean (i) the warrants, as amended from time to time, to purchase shares of Series D Preferred Stock issued by the Company to Deerfield Private Fund III, L.P. pursuant to the Deerfield Facility Agreement and (ii) the warrants, as amended from time to time, to purchase shares of common stock issued by the Borrower to each of Deerfield Private Design Fund III, L.P. and Deerfield Special Situations Fund, L.P. pursuant to that certain December 2020 Exchange Agreement, date as of December 20, 2020, among the Company, Deerfield Private Design Fund III, L.P. and Deerfield Special Situations Fund, L.P.”

(b) The Mandatory Registration Statement (as defined below) shall be deemed to constitute a registration statement required to be filed under Section 2 of the IRA for purposes of Sections 2.4, 2.5, 2.6 and 2.8 thereof. Each of the Borrower and DSS hereby agrees that, effective as of the Effective Time, DSS shall (i) become a party to the IRA as a “Deerfield Investor” (within the meaning of the IRA), (ii) become fully bound by, and subject to, all of the covenants, terms, conditions, restrictions and provisions of the IRA applicable to a Deerfield Investor and holder of Deerfield Warrants (within the meaning of the IRA) and (iii) be entitled to the rights, remedies, benefits and privileges of a Deerfield Lender and holder of Deerfield Warrants under the IRA. The parties hereto acknowledge and agree that, with respect to DSS, this Agreement shall be deemed a joinder to the IRA for all purposes thereof.

(c) DPDF hereby waives, for and on behalf of all Holders (as defined in the Existing IRA), solely with respect to the Registration Statement and the Offering, its right (i) to be notified prior to the Borrower’s registration of its securities pursuant to the Registration Statement in connection with the Offering and (ii) to cause to be registered the Registrable Securities (as defined in the Existing IRA) in the Registration Statement or to cause the Registrable Securities to otherwise be included in the Offering.

ARTICLE IV.

REPRESENTATIONS AND WARRANTIES

Section 4.01. Representations and Warranties of the Participating Lenders. Each Participating Lender, severally and not jointly, hereby (or by virtue of its execution of a Joinder Agreement) represents and warrants to the Borrower as of the date of this Agreement and as of the Effective Date as follows:

(a) Organization and Good Standing. Such Participating Lender 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.

(b) Authority. Such Participating Lender has the requisite corporate power and authority to enter into and to consummate the transactions contemplated by this Agreement and each Transaction Document to which it is a party and otherwise to carry out its obligations hereunder and thereunder. The execution and delivery by such Participating Lender of this Agreement and each Transaction Document to which it is a party and the consummation by it of the transactions contemplated hereby and thereby have been duly authorized by all necessary action on the part of such Participating Lender and no further action is required in connection herewith or therewith.

(c) Valid and Binding Agreement. This Agreement and each Transaction Document to which such Participating Lender is a party have been duly executed and delivered by such Participating Lender and constitute the valid and binding obligations of such Participating Lender, enforceable against such Participating Lender in accordance with their terms, except (i) as

limited by general equitable principles and applicable bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other laws of general application affecting enforcement of creditors' rights generally and (ii) as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies.

(d) Non-Contravention. The execution and delivery by such Participating Lender of this Agreement and each Transaction Document to which such Participating Lender is a party and the performance by such Participating Lender of its obligations hereunder and thereunder, do not and will not (i) violate any provision of such Participating Lender's organizational documents, or (ii) 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 such Participating Lender is subject, or by which any of such Participating Lender's Exchanged Note(s) is (are) bound or affected except, in each instance of clauses (i) and (ii) hereof, where such violation or conflict would not reasonably be expected, individually or in the aggregate, to result in a material adverse effect on the ability of such Participating Lender to timely perform its obligations under this Agreement or any other Transaction Document to which such Participating Lender is a party.

(e) Exemption. As of the Effective Time, such Participating Lender shall have held its Exchanged Note(s) of record and beneficially for a period of at least one (1) year for purposes of Rule 144 under the Securities Act and is not, and during the three-month period prior to the date hereof has not been, an "affiliate" (as such term is used in Rule 144 under the Securities Act) of the Borrower. Such Participating Lender understands that the Exchange Shares and the Exchange Warrants, together with the shares of Common Stock issuable upon conversion of the Exchange Shares (the "**Conversion Shares**") and, together with the Exchange Shares, the Exchange Warrants and the Exercise Shares, the "**Securities**") and the Exercise Shares are being offered, sold, issued and delivered to it in reliance upon specific exemptions from registration or qualification under federal and applicable state securities laws.

(f) Ownership of the Exchanged Notes. Such Participating Lender is the record and beneficial owner of, and has good and valid title to, its Exchanged Note(s), free and clear of all Liens, and has full power to dispose thereof and to exercise all rights thereunder (other than as restricted by this Agreement or the Facility Agreement and other than pledges or security interests that such Participating Lender may have created in favor of a prime broker under and in accordance with its prime brokerage account with such broker), without the consent or approval of, or any other action on the part of, any other Person. Other than the transactions contemplated by this Agreement, there is no outstanding contract, vote, plan, pending proposal or other right of any Person to acquire such Participating Lender's Exchanged Note(s) or any portion thereof. Such Participating Lender has not, in whole or in part, (a) assigned, transferred, hypothecated, pledged, exchanged or otherwise disposed of any of its Exchanged Note(s) or its rights in its Exchanged Note(s), or (b) except as would not materially and adversely affect the ability of such Participating Lender to consummate the transactions contemplated hereby, given any person or entity any transfer order, power of attorney or other authority of any nature whatsoever with respect to its Exchanged Note(s).

(g) Accredited Investor. Such Participating Lender is an “accredited investor” as that term is defined in Rule 501(a) of Regulation D under the Securities Act. Such Participating Lender understands the economic risk of its investment in the Securities, and has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of an investment in the Securities.

(h) Information. Such Participating Lender acknowledges and agrees that (i) such Participating Lender has had the opportunity to review the Borrower’s SEC Reports (as defined below) and this Agreement (including the exhibits hereto), (ii) such Participating Lender has had an opportunity to submit questions to the Borrower concerning the Borrower, its business, operations, financial performance, financial condition and prospects, and the terms and conditions of the Exchange and has all information that it considers necessary in making an informed investment decision, (iii) such Participating Lender has had the opportunity to consult with its accounting, tax, financial and legal advisors to be able to evaluate the risks involved in the Exchange and to make an informed investment decision with respect to the Exchange. Notwithstanding anything to the contrary contained herein, the rights and remedies available to such Participating Lender, neither any such review nor any due diligence investigation conducted by such Participating Lender or its advisors, if any, or its representatives shall modify, amend or otherwise affect such Participating Lender’s right to rely on the representations, warranties, covenants and agreements of the Borrower contained in this Agreement and the other Transaction Documents.

(i) Transactions in Borrower’s Securities. In the case of the Deerfield Lenders, such Deerfield Lender has not, directly or indirectly, and no person acting on behalf of or pursuant to any understanding with it has, engaged in any purchase or sale of the securities of the Borrower (including, without limitation, any Short Sales (as defined below) involving any of the Borrower’s securities) from August 12, 2020 through the date of this Agreement, “**Short Sales**” include, without limitation, all “short sales” as defined in Rule 200 of Regulation SHO promulgated under the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”), and all types of direct and indirect forward sale contracts, options, puts, calls, short sales, swaps, derivatives and similar arrangements (including on a total return basis), and sales and other transactions through non-U.S. broker-dealers or foreign regulated brokers. Solely for purposes of this Section 4.01(i), subject to such Deerfield Lender’s compliance with their respective obligations under the U.S. federal securities laws and such Deerfield Lender’s internal policies, (a) such “Deerfield Lender” shall not be deemed to include any employees, subsidiaries or affiliates of such Deerfield Lender that are effectively walled off by appropriate information barriers approved by such Deerfield Lender’s respective legal or compliance department (and thus have not been privy to any information concerning the Transactions), and (b) the foregoing representations and covenants of this Section 4.01(i) shall not apply to any transaction by or on behalf of an account of such Deerfield Lender that was effected without the advice or participation of, or such account’s receipt of information regarding the Transactions provided by, such Deerfield Lender.

Section 4.02. Representations and Warranties of the Borrower. The Borrower hereby represents and warrants to the Participating Lenders as of the date of this Agreement and as of the Effective Time as follows:

(a) Organization and Good Standing. The Borrower 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.

(b) Authority. The Borrower has the requisite corporate power and authority, as applicable, to enter into and to consummate the transactions contemplated by this Agreement (including the Public Offering), the Exchange Warrants, the A&R Certificate of Designation, the IRA and other Transaction Documents and otherwise to carry out its obligations hereunder and thereunder. The execution and delivery by the Borrower of this Agreement, the Exchange Warrants, the A&R Certificate of Designation, the IRA and the other Transaction Documents 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 Borrower, and no further action of the Borrower, its board of directors, managers, members or stockholders, as applicable, is required in connection herewith or therewith.

(c) Consents. The Borrower is not required to obtain any consent from, authorization or order of, or make any filing or registration with any governmental authority or any regulatory or self-regulatory agency or any other Person in order for it to execute, deliver or perform any of its respective obligations under or contemplated by this Agreement, the Exchange Warrants, the A&R Certificate of Designation, the IRA and other Transaction Documents, in accordance with the terms hereof or thereof, other than (i) filing the A&R Certificate of Designation with the Secretary of State of the State of Delaware, (ii) filing the Announcing 8-K Filing (as defined below), the Closing 8-K Filing (as defined below) and the Mandatory Registration Statement with the U.S. Securities and Exchange Commission (the “**Commission**”), (iii) filing a registration statement on Form 8-A12(b) with the Commission regarding the registration of the Borrower’s common stock and a certification filed by The Nasdaq Stock Market LLC with the Commission regarding the same, (iv) filing any amendment or supplement to the Registration Statement required with the Commission to reflect the final terms of the Public Offering, including any preliminary, final or free-writing prospectus filed in relation thereto, and (v) filing with the Commission an acceleration request regarding effectiveness of, and receipt of the effectiveness order to be issued by the Commission in respect of the Registration Statement and the Mandatory Registration Statement (such filings and orders, the “**Required Filings**”). None of the Securities will be issued in violation of, any preemptive or similar rights of any Person, or otherwise subject to any preemptive or similar rights of any Person that have not been validly waived, nor will the issuance of any of the Securities trigger any “anti-dilution” or similar adjustment (including any such provisions under the Public Offering Warrants or the Pre-Funded Warrants).

(d) Valid and Binding Agreement. This Agreement has been duly executed and delivered by the Borrower, and constitutes, and upon the execution and delivery by the Borrower thereof (and, in the case of the A&R Certificate of Designation the filing thereof with the Secretary of State of the State of Delaware), the Exchange Warrants, the A&R Certificate of Designation, the IRA and each other Transaction Document being executed or amended in connection herewith will constitute the valid and binding obligations of the Borrower, enforceable against the Borrower in accordance with their terms, except (i) as limited by general equitable principles and applicable bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other laws of general application affecting enforcement of creditors’ rights generally and (ii) as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies.

(e) Non-Contravention. The execution and delivery by the Borrower of this Agreement, the Exchange Warrants, the A&R Certificate of Designation, the IRA and each other Transaction Document being executed and delivered by the Borrower in connection herewith and the performance by the Borrower of its obligations hereunder and under the Exchange Warrants, the A&R Certificate of Designation, the IRA and each other Transaction Document do not and will not (i) violate any provision of the Borrower's organizational documents, (ii) 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 Borrower is subject, or by which any property or asset of the Borrower is bound or affected, (iii) require any permit, authorization, consent, approval, exemption or other action by, notice to or filing with, any court or other federal, state, local or other governmental authority or other Person, other than the Required Filings, (iv) violate, conflict with, result in a material breach of, or constitute (with or without notice or lapse of time or both) a material default under, or an event which would give rise to any right of notice, modification, acceleration, payment, cancellation or termination under, or in any manner release any party thereto from any obligation under, any permit or contract to which the Borrower is a party or by which any of its properties or assets are bound, (v) violate, conflict with, result in a material breach of, or constitute (with or without notice or lapse of time or both) a material default under, or an event which would give rise to any right of notice, modification, acceleration, payment, cancellation or termination under, or in any manner release any party thereto from any obligation under, the Facility Agreement or the GPC License Agreement, or (vi) result in the creation or imposition of any Lien on any part of the properties or assets of the Borrower, except, in each instance of clauses (ii), (iii), (iv) and (vi) hereof, where such violation, conflict, breach, default or Lien would not reasonably be expected, individually or in the aggregate, to result in a material adverse effect on (a) the business, operations, results of operations, condition (financial or otherwise) or properties of the Borrower and its Subsidiaries, taken as a whole, (b) the legality, validity or enforceability of any provision of this Agreement, the Exchange Warrants, the A&R Certificate of Designation, the IRA or any other Transaction Document, (c) the ability of the Borrower to timely perform its obligations under this Agreement, the Exchange Warrants, the A&R Certificate of Designation, the IRA or any other Transaction Document, or (d) the rights and remedies of the Participating Lenders under this Agreement, the Exchange Warrants, the A&R Certificate of Designation, the IRA or any other Transaction Document. As of the date hereof, no Event of Default under the Facility Agreement exists, and, to the knowledge of the Borrower, no event has occurred, and no fact or circumstance exists, that, with or without notice, lapse of time or both would reasonably be expected to result in an Event of Default under the Facility Agreement.

(f) Issuance of Exchange Shares and Conversion Shares. The Exchange Shares issuable hereunder, the Conversion Shares issuable upon conversion of the Exchange Shares and the Exercise Shares issuable upon exercise of the Exchange Warrants are duly authorized and, when issued in accordance with this Agreement, the A&R Certificate of Designation or the applicable Exchange Warrant, as applicable, will be duly and validly issued, fully paid and nonassessable, free and clear of all Liens imposed by the Borrower, and will not be issued in violation of, or subject to, any preemptive or similar rights of any person. The Borrower has reserved from its duly authorized capital stock a sufficient number of shares of Common Stock for issuance hereafter upon conversion of the Exchange Shares and exercise of the Exchange Warrants (plus any additional shares of Common Stock that may be issuable as a result of the anti-dilution provisions of the Exchange Warrants), in each case, free and clear of preemptive or similar rights. As of the date hereof, the authorized shares of capital stock of the Borrower consists of 250,000,000 shares of Common Stock, of which 72,592,380 shares are issued and outstanding and 10,000,000 shares of preferred stock, none of which are issued and outstanding.

(g) SEC Reports; Nasdaq. The Borrower has filed all reports, schedules, forms, statements and other documents required to be filed by it under the Securities Act and the Exchange Act, including pursuant to Section 13(a) or 15(d) thereof, for the two years preceding the date hereof (the foregoing materials, including the exhibits thereto and documents incorporated by reference therein, being collectively referred to herein as the “**SEC Reports**”). None of the SEC Reports, when filed, contained any untrue statement of a material fact or omitted to state a material fact (and the Registration Statement, when filed, did not and will not contain any untrue statement of a material fact and did not and will not omit to state a material fact) required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. The Borrower has applied to list the Common Stock on the Nasdaq Capital Market.

(h) Certain Fees. No brokerage or finder’s fees or commissions are or will be payable by the Borrower or any of its affiliates or representatives to any broker, financial advisor or consultant, finder, placement agent, investment banker, bank or other Person with respect to the transactions contemplated by this Agreement. The Participating Lenders shall have no obligation with respect to any fees or with respect to any claims made by or on behalf of other Persons for fees of a type contemplated in this Section 4.02(h) that may be due in connection with the transactions contemplated hereby.

(i) Exemption from Registration. No registration under the Securities Act or any state securities laws is or will be required for the offer and issuance of the Exchange Shares and the Exchange Warrants by the Borrower to the Participating Lenders as contemplated hereby or for the offer and issuance of the Conversion Shares and Exercise Shares by the Borrower to the Participating Lenders as contemplated hereby and by the A&R Certificate of Designation and the Exchange Warrants, as applicable. The amendments and transactions contemplated hereby or entered into in connection herewith, including the issuance and sale of the Exchange Shares and the Exchange Warrants hereunder and the issuance and sale of the Conversion Shares and the Exercise Shares pursuant to the terms of the A&R Certificate of Designation and the Exchange Warrants, as applicable, do not and will not contravene, or require stockholder approval under the rules of any securities exchange or otherwise. Assuming each Participating Lender to which Exchange Shares are to be issued is not as of the date of issuance, and for a period of three (3) months prior to the date of issuance has not been, an “affiliate” (as such term is used in Rule 144 under the Securities Act) of the Borrower (which the Borrower shall assume (and the applicable Participating Lender shall be deemed to represent) unless such Participating Lender has otherwise advised the Borrower in writing) and in reliance on such Participating Lender’s representations contained in Section 4.01(e) hereof, the Conversion Shares and, in the case of a cashless exercise of the Exchange Warrants, the Exercise Shares, will be freely tradeable by such Participating Lender without restriction or limitation (including volume limitation), pursuant to Rule 144 under the Securities Act, and will not contain or be subject to any legend or stop transfer instructions restricting the sale or transferability thereof. The Borrower is not, and never has been, a “shell company” (as defined in Rule 12b-2 under the Exchange Act) and is not an issuer of a type identified in, or subject to, Rule 144(i)(1) under the Securities Act.

(j) No Integrated Offering. Neither the Borrower, nor any of its affiliates, nor any person acting on its or their behalf has, directly or indirectly, made, or will make, any offers or sales of any security or solicited, or will solicit, any offers to buy any security, under circumstances that would cause the offering and issuance of the Exchange Shares, the Exchange Warrants, any Conversion Shares or any Exercise Shares to be integrated with prior or contemporaneous offerings by the Borrower (i) for purposes of the Securities Act and which would require the registration of any such Securities under the Securities Act or (ii) for purposes of any applicable stockholder approval provisions of the Nasdaq Capital Market that would require stockholder approval for the issuance of the Exchange Shares, the Exchange Warrants, any Conversion Shares or any Exercise Shares.

(k) No Bad Actor Disqualification. None of the Credit Parties, any of its predecessors, any director, executive officer, other officer of any Credit Party participating in the offering of the Notes or the Conversion Shares, any beneficial owner (as that term is defined in Rule 13d-3 under the Exchange Act) of 20% or more of any Credit Party's outstanding voting equity securities, calculated on the basis of voting power, any "promoter" (as that term is defined in Rule 405 under the Securities Act) connected with any Credit Party at the time this representation is made, any placement agent or dealer participating in the offering of the Notes or the Conversion Shares and any of such agents' or dealer's directors, executive officers, other officers participating in the offering of the Exchange Shares, Exchange Warrants, Conversion Shares or the Exercise Shares (each, a "**Covered Person**") is subject to any of the "Bad Actor" disqualifications described in Rule 506(d)(1)(i) to (viii) under the Securities Act (a "**Disqualification Event**"). The Borrower has exercised reasonable care to determine (i) the identity of each person that is a Covered Person and (ii) whether any Covered Person is subject to a Disqualification Event. Each Credit Party has complied in all material respects, to the extent applicable, with its disclosure obligations under Rule 506(e). No Credit Party is any other reason disqualified from reliance upon Rule 506 of Regulation D for purposes of the offer, sale and issuance of the Exchange Shares, Exchange Warrants, Conversion Shares or Exercise Shares.

(l) No Unlawful Payments. Neither the Borrower, to the knowledge of the Borrower, nor any of its directors or officers or any employee, agent, affiliate, representative of or other person associated with or acting on behalf of the Borrower, has (a) used any corporate funds for any unlawful contribution, gift, entertainment or other unlawful expense relating to political activity, (b) made any direct or indirect unlawful payment to any foreign or domestic government official or employee from corporate funds, (c) violated or is in violation of any provision of the U.S. Foreign Corrupt Practices Act of 1977, as amended, or (d) made any bribe, unlawful rebate, payoff, influence payment, kickback or other unlawful payment.

(m) Compliance with Money Laundering Laws. The operations of the Borrower are and have been conducted at all times in compliance with all financial recordkeeping and reporting requirements applicable to the Borrower, including those of the Bank Secrecy Act, as amended by Title III of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, and the money laundering and any related or similar laws of all jurisdictions in which the Borrower conducts business (collectively, the "**Money Laundering Laws**"), and no action, suit or proceeding by or before any governmental authority involving the Borrower with respect to the Money Laundering Laws is pending or, to the knowledge of the Borrower, threatened.

(n) **OFAC.** The Borrower is not (a) a country, the government of a country, or an agency of the government of a country, (b) an organization directly or indirectly controlled by a country or its government, or (c) a person resident in or determined to be resident in a country, in each case, that is subject to a comprehensive country sanctions program administered and enforced by the Office of Foreign Assets Control of the U.S. Department of the Treasury (“**OFAC**”), and the Borrower is not a person named on the list of Specially Designated Nationals maintained by OFAC.

(o) **Application of Takeover Protections.** The Borrower and its board of directors have taken all necessary action, if any, in order to render inapplicable the Borrower’s issuance of the Exchange Shares, the Exchange Warrants, the Conversion Shares and the Exercise Shares, and the Participating Lenders’ ownership of such securities from the provisions of any control share acquisition, interested stockholder, business combination, poison pill (including any distribution under a rights agreement) or other similar anti-takeover provision under the organizational documents of the Borrower or the laws of the state of its incorporation which is applicable to the Participating Lenders as a result of the transactions contemplated by this Agreement, including the Borrower’s issuance of the Exchange Shares, Exchange Warrants, Conversion Shares and Exercise Shares.

(p) **Solvency.** After giving effect to the Exchange, the Public Offering and the other transactions contemplated by this Agreement, the Borrower (a) is Solvent and (b) has not taken action, and no action has been taken by a third party, for the winding up, dissolution or liquidation or similar executory or judicial proceeding in respect of, the Borrower or any of its subsidiaries or for the appointment of a liquidator, custodian, receiver, trustee, administrator or other similar officer for the Borrower or any of its subsidiaries or any or all of its assets or revenues. For purposes hereof, “**Solvent**” means, with respect to any Person, (x) the value of the assets of such Person (both at fair value and present fair saleable value) is greater than the total amount of liabilities (including contingent and unliquidated liabilities) of such Person, (y) such Person is able to pay all liabilities of such Person as such liabilities mature and (z) such Person does not have unreasonably small capital in relation to such Person’s business as contemplated as of such date. In computing the amount of contingent or unliquidated liabilities at any time, such liabilities shall be computed at the amount that, in light of all the facts and circumstances existing at such time, represents the amount that can reasonably be expected to become an actual or matured liability.

(q) **Litigation.** No proceeding is pending before or, to the knowledge of Borrower, threatened by any Governmental Authority (a) to which any Credit Party is a party, (b) that purports to affect or pertain to the Transaction Documents or the transactions contemplated hereby or thereby or (c) that has as the subject thereof any assets owned by any Credit Party or any of its Subsidiaries, in each case, that could reasonably be expected, individually or in the aggregate, to have a Material Adverse Effect. No injunction, writ, temporary restraining order or any order of any nature has been issued by any court or other Governmental Authority purporting to enjoin or restrain the execution, delivery or performance of this Agreement or any other Transaction Document or directing that the transactions provided for herein or therein not be consummated as herein or therein provided.

(r) Compliance with Laws. Except as could not reasonably be expected, individually or in the aggregate, to have a Material Adverse Effect, each Credit Party is in compliance with all Applicable Laws and authorizations.

ARTICLE V. COVENANTS

Section 5.01. Reservation of Shares. On and after the Effective Time, the Borrower shall at all times reserve and keep available, free of preemptive or similar rights, a sufficient number of shares of Common Stock for the purpose of enabling the Borrower to issue all of the Conversion Shares and the Exercise Shares (without regard to the Beneficial Ownership Limitation under the A&R Certificate of Designation or any comparable limitation on the exercise of the Exchange Warrants and assuming (i) in the case of the Exchange Warrants, the cash exercise thereof and (ii) in the case of the Exchange Shares, that the Exchange Shares are immediately convertible into Conversion Shares).

Section 5.02. Blue Sky Filings. The Borrower shall take such action as is necessary in order to obtain an exemption for, or to qualify the Exchange Shares, Exchange Warrants, Conversion Shares and Exercise Shares for issuance and sale to the Participating Lenders under applicable securities or “Blue Sky” laws of the states of the United States, and shall provide evidence of such actions promptly upon request of any of the Participating Lenders.

Section 5.03. Disclosure; Confidentiality. On or before 8:00 a.m., New York time, on the first Business Day following the date of this Agreement, the Borrower shall file with the Commission a Current Report on Form 8-K describing all the material terms of the transactions contemplated by this Agreement, the A&R Certificate of Designation and the other Transaction Documents entered into pursuant to, or in connection with, this Agreement, attaching this Agreement (including the form of the A&R Certificate of Designation and the other exhibits and schedules to this Agreement) and the other Transaction Documents entered into pursuant to, or in connection with, this Agreement (in each case, without any redaction therefrom) and disclosing any other presently material non-public information (if any) provided or made available to any Deerfield Lender (or any Deerfield Lender’s agents or representatives) on or prior to the date hereof (the “**Announcing 8-K Filing**”). No later than 8:00 a.m. on the earlier of (i) the first Business Day following the Effective Date and (ii) the date this Agreement is terminated, the Borrower shall file with the Commission a Current Report on Form 8-K (the “**Closing 8-K Filing**”) (y) disclosing the occurrence of the Effective Time and the consummation of the Exchange and attaching the A&R Certificate of Designation and the form of the Exchange Warrant or, if applicable, (z) disclosing that this Agreement has been terminated. The Borrower represents and warrants that, from and after the filing of the Announcing 8-K Filing, it shall have publicly disclosed all material, non-public information (if any) provided or made available to any Deerfield Lender (or any Deerfield Lender’s agents or representatives) by the Borrower or any of its officers, directors, employees, Affiliates or agents in connection with the transactions contemplated by this Agreement or otherwise on or prior to the date hereof. Notwithstanding anything contained in this Agreement to the contrary, and without implication that the contrary would otherwise be true, the Borrower expressly acknowledges and agrees that, from and after the Announcing 8-K Filing, no Deerfield Lender nor any affiliate of any Deerfield Lender shall have (unless expressly agreed to by such particular Deerfield Lender after the date hereof in a written definitive and binding

agreement executed by the Borrower and such particular Deerfield Lender or customary oral (confirmed by e-mail) “wall cross” agreement (it being understood and agreed that no Deerfield Lender may bind any other Deerfield Lender with respect thereto)), any duty of trust or confidence with respect to, or a duty not to trade in any securities while aware of, any information regarding the Borrower.

Section 5.04. Taxes. The Borrower shall be responsible for paying all present or future stamp, court or documentary, intangible, recording, filing or similar taxes that arise from any payment or issuance made under, from the execution, delivery, performance or enforcement of, or otherwise with respect to, this Agreement.

Section 5.05. Fees and Expenses. Regardless of whether the Effective Time occurs, the Borrower shall promptly reimburse the Deerfield Lenders for all of their reasonable out-of-pocket, costs, fees and expenses, including legal fees and expenses, incurred in connection with the negotiation and drafting of this Agreement and any other agreement entered into in connection herewith and the consummation (or termination) of the transactions contemplated hereby and thereby.

Section 5.06. Registration Rights.

(a) As soon as practicable following the Effective Date, the Borrower shall prepare, and, on or prior to the first Business Day following the Effective Date, file with the SEC a registration statement (the “**Mandatory Registration Statement**”) on Form S-3 (or, if Form S-3 is not then available, on such form of registration statement as is then available to effect a registration of the Conversion Shares, the Exercise Shares and any other Registrable Securities (as defined in the IRA) of a Deerfield Lender reasonably requested to be included in the Mandatory Registration Statement by the Deerfield Lender, subject to the consent of the Deerfield Lenders, (which consent shall not be unreasonably delayed or withheld), covering the resale of all of the Conversion Shares, Exercise Shares and such Registrable Securities (without regard to any limitation on the conversion or exercise thereof, and assuming the Exchange Shares are immediately convertible into Conversion Shares), which registration statement, to the extent allowable under the Securities Act and the rules and regulations promulgated thereunder (including Rule 416), shall state that such registration statement also covers such indeterminate number of additional shares of Common Stock as may become issuable upon conversion of or otherwise pursuant to the Exchange Warrants to prevent dilution resulting from stock splits, stock dividends, stock issuances or similar transactions. The Mandatory Registration Statement shall contain a “plan of distribution” approved by the Deerfield Lenders (which approval shall not be unreasonably delayed or withheld). No Deerfield Lender shall be named as an “underwriter” in such registration statement without such Deerfield Lender’s prior written consent. Such registration statement (and each amendment or supplement thereto, and each request for acceleration of effectiveness thereof) shall be provided to (and shall be subject to the approval, which shall not be unreasonably withheld or delayed, of) the Deerfield Lenders and their legal counsel prior to its filing or other submission. The Deerfield Lenders shall provide to the Borrower any information reasonably requested from the Deerfield Lenders necessary for the Borrower to prepare and file the Mandatory Registration Statement.

(b) The Borrower shall use its reasonable best efforts to cause the Mandatory Registration Statement to become effective as soon as possible after such filing, but in any event shall use its reasonable best efforts to cause the Mandatory Registration Statement to become effective no later than the 60th day following the Effective Date if such Mandatory Registration Statement on Form S-3 (or no later than the 90th day following the Effective Date, if Form S-3 is not then available, and such Mandatory Registration Statement is on such form of registration statement as is then available to effect a registration contemplated under this Section 5.06(b)), and shall use its reasonable best efforts to keep the Mandatory Registration Statement current and effective pursuant to Rule 415 at all times after its effective date until such date as is the earlier of (i) the date on which all of the Registrable Securities (as defined in the IRA) included therein have been sold pursuant to the Mandatory Registration Statement or pursuant to Rule 144 under the Securities Act and (ii) the date on which all of the Registrable Securities included in the Mandatory Registration Statement (in the good faith opinion of counsel to the Deerfield Lenders) may be immediately sold to the public without registration or restriction (including without limitation as to volume by each holder thereof), and without compliance with any “current public information” requirement, pursuant to Rule 144 under the Securities Act (assuming, for this purpose, the cash exercise of the Exchange Warrants). The Mandatory Registration Statement (including any amendments or supplements thereto and prospectuses contained therein or related thereto), except for information provided in writing by an Investor pursuant to Section 4(a), shall 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.

(c) The Borrower agrees to provide each Non-DF Lender who delivers a joinder to this Agreement and participates in the transactions contemplated hereunder with registration rights in respect of the Exercise Shares and Conversion Shares that are substantially equivalent to the registration rights provided to the Deerfield Lenders in respect of their Exercise Shares and Conversion Shares.

Section 5.07. Listing. Prior to the Effective Date, the Borrower shall submit an application for the listing of the Conversion Shares and the Exercise Shares on the Nasdaq Capital Market and will use its commercially reasonable efforts to secure such listing. From and after the Effective Time, for so long as any Securities remain outstanding, (i) the Borrower shall use commercially reasonable efforts to maintain the Common Stock’s listing on Nasdaq; and (ii) the Borrower shall not take any action which would be reasonably expected to result in the delisting or suspension of trading the Common Stock on the Nasdaq Capital Market. The Borrower shall pay all fees and expenses in connection with satisfying its obligations under this Section 5.07.

Section 5.08. Participating Lenders. Within one Business Day following the date hereof, the Borrower shall deliver written notice (a “**Joinder Notice**”) to each Lender other than the Deerfield Lenders (“**Non-DF Lenders**”) of the Borrower’s entry into this Agreement. The Joinder Notice shall be accompanied by a copy of this Agreement and a joinder agreement in the form attached hereto as Exhibit B (the “**Joinder Agreement**”) and offer each Non-DF Lender the opportunity to become a party to this agreement as a Participating Lender by executing and delivering to the Borrower and each Deerfield Lender a Joinder Agreement on or prior to December 23, 2020. For the avoidance of doubt, if any Non-DF Lender does not execute and deliver a Joinder Agreement, each shall be deemed to have elected not to be, and shall not be, a Participating Lender.

ARTICLE VI.
ACKNOWLEDGMENT OF THE BORROWER

Section 6.01. The Borrower irrevocably and unconditionally acknowledges, affirms and covenants to each Participating Lender that:

- (a) such Participating Lender is not in default under the Facility Agreement and has not otherwise breached any obligations to the Borrower; and
- (b) there are no offsets, counterclaims or defenses to the obligations under the Facility Agreement as of the date hereof, including the liabilities and obligations of the Borrower under the Notes or the rights, remedies or powers of such Participating Lender in respect of any of the obligations under the Facility Agreement, and the Borrower agrees not to interpose (and each does hereby waive and release) any such defense, set off or counterclaim in any action brought by such Participating Lender with respect thereto.

ARTICLE VII.
CONDITIONS PRECEDENT.

Section 7.01. Conditions to the Borrower's Obligation. The effectiveness of the amendments contemplated by Section 3.01(b), Section 3.02(b) and Section 3.03 and the obligation of the Borrower to consummate the Exchange with, and make the prepayment contemplated by Section 2.01 to, each Participating Lender and are subject to satisfaction of the following conditions on or prior to the Effective Time, provided that the conditions set forth in this Section 7.01 are for the Borrower's sole benefit and may be waived by the Borrower at any time in its sole discretion by providing the Participating Lenders with prior written notice thereof:

- (a) The representations and warranties of such Participating Lender herein shall be true and correct as of the date when made and as of the Effective Time as though made at that time (except for representations and warranties that speak as of a specific date, which shall be true and correct as of such date); and
- (b) Such Participating Lender shall have performed, satisfied and complied with the covenants, agreements and conditions required by this Agreement to be performed, satisfied or complied with by such Participating Lender at or prior to the Effective Time.

Section 7.02. Conditions to Each Participating Lender's Obligation. The effectiveness of the amendments contemplated by Section 3.01(b), Section 3.02(b) and Section 3.03 and the obligation of each Participating Lender to consummate the Exchange are subject to satisfaction of the following conditions on or prior to the Effective Time, provided that the conditions set forth in this Section 7.02 are for each Participating Lenders' sole benefit and may be waived by the Deerfield Lenders (on behalf of themselves and the other Participating Lenders) at any time in its sole discretion by providing the Borrower with prior written notice thereof:

- (a) The Borrower shall have executed and delivered to each Participating Lender its Exchange Warrant and a stock certificate representing its Exchange Shares, in each case, in accordance with Section 2.03;

- (b) Such Participating Lender shall have received its Exchange Percentage of the Prepayment Amount, plus, if the Repayment Date is on or after January 1, 2021, Cash Interest thereon, on the Repayment Date;
- (c) The A&R Certificate of Designation shall have been filed with the Secretary of State of the State of Delaware and become effective, and a copy thereof certified by such Secretary of State shall have been delivered to such Participating Lender;
- (d) No stock split, stock dividend, stock combination, recapitalization or similar event, and no liquidation, dissolution or similar event shall have been effected or authorized during the period commencing on (and including) the date of this Agreement and ending at (and including) the Effective Time (other than the any reverse stock split of the Borrower's Common Stock to be effected in connection with the Public Offering; provided that each applicable conversion price, exercise price and conversion or exchange ratio shall be appropriately adjusted to give effect to such reverse stock split);
- (e) The representations and warranties of the Borrower herein shall be true and correct as of the date when made and as of the Effective Time as though made at that time (except for representations and warranties that speak as of a specific date, which shall be true and correct as of such date), and each other document, agreement or instrument being executed and delivered pursuant to, or in connection with the execution and delivery of, this Agreement by the Borrower shall be true and correct;
- (f) The Borrower shall have performed and complied with all agreements and conditions contained in this Agreement and in each such other document, agreement or instrument, in each case, to be performed by or complied with by the Borrower prior to the Effective Time in all respects;
- (g) The Participating Lenders shall have received a certification from the chief executive officer or chief financial officer of the Borrower certifying as to the matters set forth in Sections 7.02(d) and (e);
- (h) The Borrower shall have delivered to the Participating Lenders evidence of authority, officer's certificates and good standing certificates in the jurisdiction of organization of the Borrower, in form and substance satisfactory to the Participating Lenders;
- (i) The Participating Lenders (or their counsel) shall have received customary legal opinions from Cooley LLP, as counsel to the Borrower, in form and substance reasonably satisfactory to the Deerfield Lenders;
- (j) The Borrower shall have delivered to such Participating Lender a secretary's certificate, dated as the Effective Date, certifying as to (A) resolutions duly adopted by the board of directors of the Borrower authorizing this Agreement and the other documents and transactions contemplated hereby, (B) the certificate of incorporation of the Borrower, as amended, and (C) the bylaws of the Borrower, each as in effect as of the Effective Time;
- (k) The Conversion Shares and the Exercise Shares shall have been approved for listing on the Nasdaq Capital Market, subject to official notice of issuance; and

(l) The Borrower shall have delivered to the Participating Lenders such other documents relating to the transactions contemplated by this Agreement as the Deerfield Lenders or their counsel may reasonably request.

Section 7.03. Conditions to Each Party's Obligation. The effectiveness of the amendments contemplated by Section 3.01(b), Section 3.02(b) and Section 3.03 and the obligation of the parties hereto to consummate the Exchange are subject to, and conditioned upon, the consummation of the Public Offering resulting in aggregate gross proceeds to the Borrower of at least \$40,000,000. Notwithstanding anything in this Agreement to the contrary, the Participating Lenders hereby acknowledge and agree that the decision to accept the terms of and effect the Public Offering shall be made solely by the Borrower, nothing contained in this Agreement will require the Borrower to accept the proposed terms of or to effect any Public Offering, and nothing in this Agreement shall prevent the Borrower from abandoning or otherwise electing not to proceed with any Public Offering. In addition, the amendments contemplated by Article III are subject to, and shall become effective immediately prior to, the consummation of the Exchange.

ARTICLE VIII. **MISCELLANEOUS**

Section 8.01. Entire Agreement. This Agreement together with the Exchange Warrants, the A&R Certificate of Designation and the other Transaction Documents constitute the entire agreement, and supersede all other prior and contemporaneous agreements and understandings, both oral and written, among the Participating Lenders and the Borrower with respect to the subject matter hereof.

Section 8.02. Amendments and Waivers. No provision of this Agreement may be waived or amended except in a written instrument signed by the Borrower and the Deerfield Lenders. Any amendment that is approved by the Deerfield Lenders shall bind all Participating Lenders, provided that any such amendment applies to the rights and obligations of the Participating Lenders hereunder on substantially the same basis. 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 either party to exercise any right hereunder in any manner impair the exercise of any such right.

Section 8.03. Successors and Assigns. All of the covenants and provisions of this Agreement by or for the benefit of the Participating Lenders or the Borrower shall bind and inure to the benefit of their respective successors and permitted assigns. No party hereunder may assign its rights or obligations hereunder without the prior written consent of the other parties hereto, except that a Participating Lender may assign or otherwise transfer its rights hereunder in respect of any Securities to any transferee or assignee of such Securities (in whole or in part), provided that such Participating Lender agrees in writing with the transferee or assignee to assign such rights, and such assignee or transferee agrees in writing to accept such rights subject to, and to be bound by, the terms of this Agreement, and a copy of such agreement is furnished to the Borrower after such transfer or assignment.

Section 8.04. Notices. Any notice, request or other communication to be given or made under this Agreement shall be in writing. Such notice, request or other communication shall be deemed to have been duly given or made when it shall be delivered by hand, overnight mail, international courier (confirmed by facsimile), electronic mail or facsimile to the party to which it is required or permitted to be given or made at such party's address specified below or at such other address as such party shall have designated by notice to the other parties.

If to the Borrower: KemPharm, Inc.

1180 Celebration Blvd.
Suite 103
Celebration, FL 34747
Fax: (321) 250-3698
E-mail: lclifton@kempharm.com
Attention: R. LaDuane Clifton, Chief Financial Officer

With a copy to (which shall not constitute notice hereunder):

Cooley LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
Fax: (703) 456-8100
Email: bsiler@cooley.com
Attention: Brent Siler

If to DPDF or DSS:

Deerfield Management Company, L.P.
780 Third Avenue, 37th Floor
New York, NY 10017 Fax: (212) 599-3075
Email: dclark@deerfield.com
Attn: David J. Clark

With a copy to:

Katten Muchin Rosenman LLP
525 W. Monroe Street
Chicago, Illinois 60661-3693
Fax: (212) 940-8776
Email: mark.wood@katten.com
Attn: Mark Wood

If to any Participating Lender other than the Deerfield Lenders, to such address as such Participating Lender shall specify in its Joinder Agreement

Section 8.05. Applicable Law; Consent to Jurisdiction.

(a) As part of the consideration and mutual promises being exchanged and given in connection with this Agreement, the parties hereto agree that all claims, controversies and disputes of any kind or nature arising under or relating in any way to the enforcement or interpretation of this Agreement or to the parties' dealings, rights or obligations in connection herewith, including disputes relating to the negotiations for, inducements to enter into, or execution of, this Agreement, and disputes concerning the interpretation, enforceability, performance, breach, termination or validity of all or any portion of this Agreement shall be governed by the laws of the State of New York without giving effect to any laws, rules or provisions that would cause the application of the laws of any jurisdiction other than the State of New York.

(b) The parties hereto agree that all claims, controversies and disputes of any kind or nature relating in any way to the enforcement or interpretation of this Agreement or to the parties' dealings, rights or obligations in connection herewith, shall be brought exclusively in the state and federal courts sitting in The City of New York, borough of Manhattan. With respect to any such claims, controversies or disputes, each of the parties hereby irrevocably:

(i) submits itself and its property, generally and unconditionally, to the personal jurisdiction of the aforesaid courts and agrees that it will not bring any action in any court or tribunal other than the aforesaid courts;

(ii) waives, and agrees not to assert, by way of motion, as a defense, counterclaim or otherwise, in any action or proceeding (A) any claim that it is not personally subject to the jurisdiction of the above named courts for any reason other than the failure to serve process in accordance with this Section 8.05, (B) any claim that it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise) and (C) to the fullest extent permitted by the applicable law, any claim that (1) the suit, action or proceeding in such court is brought in an inconvenient forum, (2) the venue of such suit, action or proceeding is improper or (3) this Agreement, or the subject matter hereof, may not be enforced in or by such courts; and

(iii) WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT. EACH PARTY TO THIS AGREEMENT CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) SUCH PARTY HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) SUCH PARTY MAKES THIS WAIVER VOLUNTARILY AND (D) SUCH PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 8.05.

Notwithstanding the foregoing in this Section 8.05, a party may commence any action or proceeding in a court other than the above-named courts solely for the purpose of enforcing an order or judgment issued by one of the above-named courts.

Section 8.06. Counterparts; Effectiveness. This Agreement and any amendment hereto may be executed and delivered in any number of counterparts, and by the different parties hereto in separate counterparts, each of which when executed shall be deemed to be an original, but all of which taken together shall constitute one and the same agreement. In the event that any signature to this Agreement or any amendment hereto 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. No party hereto shall raise the use of a facsimile machine or e-mail delivery of a “.pdf” format data file to deliver a signature to this Agreement or any amendment hereto or the fact that such signature was transmitted or communicated through the use of a facsimile machine or e-mail delivery of a “.pdf” format data file as a defense to the formation or enforceability of a contract, and each party hereto forever waives any such defense.

Section 8.07. No Third Party Beneficiaries. Nothing in this Agreement, express or implied, is intended to or shall confer upon any person (other than the parties to this Agreement) any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

Section 8.08. Remedies; Specific Performance. The rights and remedies provided in this Agreement shall be cumulative and in addition to all other remedies available under the Facility Agreement, the Notes, the A&R Certificate of Designation, the Exchange Warrants, the other Transaction Documents and/or otherwise at law or in equity. No remedy contained herein shall be deemed a waiver of compliance with the provisions giving rise to such remedy, and nothing herein shall limit any Participating Lender’s right to pursue actual damages for any failure by the Borrower to comply with the terms of this Agreement, the Facility Agreement, the A&R Certificate of Designation, the Exchange Warrants and the other Transaction Documents. The parties to this Agreement agree that irreparable damage would occur and that the parties to this Agreement would not have any adequate remedy at law in the event that any of the provisions of this Agreement, the Facility Agreement, the A&R Certificate of Designation, the Exchange Warrants or any other Transaction Document were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that each of the parties to this Agreement shall be entitled to an injunction or injunctions to prevent breaches of this Agreement, the Facility Agreement, the A&R Certificate of Designation, the Exchange Warrants or any other Transaction Document and to enforce specifically the terms and provisions of this Agreement, the Facility Agreement, the A&R Certificate of Designation, the Exchange Warrants and the other Transaction Documents in each case without the necessity of posting bond or other security or showing actual damages, and this being in addition to any other remedy to which such party is entitled at law or in equity.

Section 8.09. Effect of Headings. The section and subsection headings herein are for convenience only and not part of this Agreement and shall not affect the interpretation thereof.

Section 8.10. Severability. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of this Agreement so long as this Agreement as so modified continues to express, without material change, the original intentions of the parties as to the subject matter hereof and the prohibited nature, invalidity or unenforceability of the provision(s) in question does not substantially impair the respective expectations or reciprocal obligations of the parties or the practical realization of the benefits that would otherwise be conferred upon the parties. The parties will endeavor in good faith negotiations to replace the prohibited, invalid or unenforceable provision(s) with a valid provision(s), the effect of which comes as close as possible to that of the prohibited, invalid or unenforceable provision(s).

Section 8.11. Reservation of Rights. None of the Participating Lenders has hereby waived any of such Participating Lender's rights or remedies arising from any breach or default or any right otherwise available under the Facility Agreement, any other Transaction Document or at law or in equity as to any of such Participating Lender's Notes. Each of the Participating Lenders expressly reserves all such rights and remedies.

Section 8.12. Further Assurances. The parties hereby agree, from time to time, as and when reasonably requested by any other party hereto, to execute and deliver or cause to be executed and delivered, all such documents, instruments and agreements, including secretary's certificates, stock powers and irrevocable transfer agent instructions, and to take or cause to be taken such further or other action, as any party may reasonably deem necessary or desirable in order to carry out the intent and purposes of this Agreement. Without limiting the foregoing, the Borrower shall use its reasonable best efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties in doing, all things necessary, proper or advisable to consummate and make effective, in an expeditious manner, the transactions contemplated hereby, including by using its reasonable best efforts to satisfy, or cause to be satisfied, each of the conditions set forth in Section 7.02.

Section 8.13. No Strict Construction. The language used in this Agreement will be deemed to be the language chosen by the parties to express their mutual intent, and no rule of strict construction will be applied against any party.

Section 8.14. Interpretative Matters. Unless otherwise indicated or the context otherwise requires, (a) all references to Sections, Schedules, Appendices or Exhibits are to Sections, Schedules, Appendices or Exhibits contained in or attached to this Agreement, (b) words in the singular or plural include the singular and plural and pronouns stated in either the masculine, the feminine or neuter gender shall include the masculine, feminine and neuter, (c) the words "hereof," "herein" and words of similar effect shall reference this Agreement in its entirety, and (d) the use of the word "including" in this Agreement shall be by way of example rather than limitation. Unless otherwise indicated, references to "Transaction Documents" in this Agreement refer to Transaction Documents, each as amended as of the Effective Date, including as provided by this Agreement.

Section 8.15. Reaffirmation. Other than as expressly provided in this Agreement, the execution and delivery of this Agreement shall not operate as a waiver of any right, power or remedy of the Participating Lenders, constitute a waiver of any provision of the Facility Agreement, the Notes, any other Transaction Documents (as currently in effect) or any other document executed in connection therewith or serve to effect a novation of the obligations thereunder. The Borrower, as issuer, debtor, grantor, pledger, mortgagor, guarantor or assignor, or in other any other similar capacity in which it grants liens or security interests in its property hereby (i) acknowledges and agrees that it has reviewed this Agreement, (ii) ratifies and reaffirms all of its obligations, contingent or otherwise, under each of the Transaction Documents, and (iii) to the extent the Borrower granted Liens on or security interests in any of its property pursuant to any such Transaction Document as security for the Obligations under or with respect to the Transaction Documents, ratifies and reaffirms such grant of security interests and Liens as provided in the Transaction Documents and confirms and agrees that such security interests and Liens continue to secure all of the currently outstanding or future Obligations (as amended hereby) on the terms and conditions of the Transactions Documents (for the avoidance of doubt as amended as of the date of this Agreement (including as provided in this Agreement)). The Borrower hereby consents to this Agreement and acknowledges that this Agreement, each Exchange Warrant, the A&R Certificate of Designation and each document or agreement executed and delivered pursuant to, or in connection with, the execution and delivery of this Agreement is a Transaction Document and each of the other Transaction Documents, each as amended as of the Effective Date (including as provided in this Agreement), remains in full force and effect and is hereby ratified and reaffirmed; provided that, nothing in this Section 8.15 shall obligate the Borrower to restate, or be considered to be a restatement of, the representations of the Borrower contained in Article 3 of the Facility Agreement as of the date hereof. Any reference in the Transaction Documents to "hereunder," "hereof," "herein," or words of like import referring to such agreement shall refer to such Transaction Document as amended as of the Effective Date (including as provided in this Agreement).

Section 8.16. Payment Set Aside. Notwithstanding anything to the contrary contained herein, if any payment or transfer (or any portion thereof) to any of the Participating Lenders shall be subsequently invalidated, declared to be fraudulent or a fraudulent conveyance or preferential, avoided, rescinded, set aside or otherwise required to be return or repaid, whether in bankruptcy, reorganization, insolvency or similar proceedings involving the Borrower or otherwise, then the Obligations purportedly satisfied with such payment or transfer, to the extent that such payment is or must be invalidated, declared to be fraudulent or a fraudulent conveyance or preferential, avoided, rescinded, set aside or otherwise required to be return or repaid, shall immediately be reinstated, without need for any action by any Person, and shall be enforceable against the Borrower, any guarantor and their successors and permitted assigns as if such payment had never been made (in which case this Agreement shall in no way impair the claims of Participating Lenders with respect to such payment or transfer). The provisions of this Section 8.16 shall survive the satisfaction in full of the Obligations and the termination of the Facility Agreement.

Section 8.17. Independent Nature of Lenders. The obligations of each Participating Lender under this Agreement and each of the other Transaction Documents are several and not joint with the obligations of any other Participating Lender, and no Participating Lender shall be responsible in any way for the performance of the obligations of any other Participating Lender under this Agreement or any other Transaction Document. Each Participating Lender shall be

responsible only for its own representations, warranties, agreements and covenants hereunder and under the other Transaction Documents. The decision of each Participating Lender to enter into this Agreement, consummate the Exchange and acquire the Exchange Shares and the Exchange Warrants pursuant to this Agreement has been made by such Participating Lender independently of any other Participating Lender and independently of any information, materials, statements or opinions as to the business, affairs, operations, assets, properties, liabilities, results of operations, condition (financial or otherwise) or prospects of the Borrower that may have been made or given by any other Participating Lender or by any agent, attorney, advisor, representative or employee of any other Participating Lender, and no Participating Lender or any of its agents, attorneys, advisors, representatives or employees shall have any liability to any other Participating Lender (or any other Person) relating to or arising from any such information, materials, statements or opinions. Nothing contained in this Agreement, and no action taken by any Participating Lender pursuant hereto (including a Participating Lender's acquisition of any Securities or any other securities at the same time as any other Participating Lender), shall be deemed to constitute the Participating Lenders as, and the Borrower acknowledges and agrees that the Participating Lenders do not thereby constitute, a partnership, an association, a joint venture or any other kind of entity, or create a presumption that the Participating Lenders are in any way acting in concert or as a group with respect to such Obligations or the transactions contemplated by this Agreement or any other Transaction Document, and the Borrower shall not assert any contrary position.

Section 8.18. Termination. Except to the extent otherwise agreed in writing by the Deerfield Lenders prior to the Effective Time, this Agreement shall terminate and be of no further force or effect if any of the conditions set forth in Article VII are not satisfied or waived by the Deerfield Lenders on or prior to January 31, 2021; provided, however, that the Borrower's obligations under Sections 5.03 and 5.05 hereof shall survive such termination.

Section 8.19. No Fiduciary Relationship. The Borrower acknowledges and agrees that (a) each Deerfield Lender is acting at arm's length from the Borrower with respect to this Agreement and the Transaction Documents and the transactions contemplated hereby and thereby; (b) no Deerfield Lender will, solely by virtue of this Agreement or any of the Transaction Documents or any transaction contemplated hereby or thereby, become an Affiliate of, or have any agency, tenancy or joint venture relationship with, the Borrower; (c) no Deerfield Lender has acted, or is or will be acting, as a financial advisor to, or fiduciary (or in any similar capacity) of, or has any fiduciary or similar duty to, the Borrower with respect to, or in connection with, this Agreement and the Transaction Documents and the transactions contemplated hereby and thereby, and the Borrower agrees not to assert, and hereby waives, any claim that any Deerfield Lender has any fiduciary duty to the Borrower; (d) any advice given by a Deerfield Lender or any of its representatives or agents in connection with this Agreement and the Transaction Documents and the transactions contemplated hereby and thereby is merely incidental to such Deerfield Lender's performance of its obligations hereunder and thereunder; and (e) the Borrower's decision to enter into this Agreement has been based solely on the independent evaluation by the Borrower and their representatives.

IN WITNESS WHEREOF, each party hereto has caused this Agreement to be duly executed as of the date first written above.

THE BORROWER:

KEMPHARM, INC.

By: /s/ R. LaDuane Clifton

Name: R. LaDuane Clifton

Title: Chief Financial Officer, Treasurer & Secretary

[Signature Page to December 2020 Exchange Agreement and Amendment to Facility Agreement, Notes and Investors' Rights Agreement]

DEERFIELD LENDERS:

DEERFIELD PRIVATE DESIGN FUND III, L.P.

By: Deerfield Mgmt III, L.P., its General Partner
By: J.E. Flynn Capital III, LLC, its General Partner

By: /s/ David J. Clark
Name: David J. Clark
Title: Authorized Signatory

DEERFIELD SPECIAL SITUATIONS FUND, L.P.

By: Deerfield Mgmt, L.P., its General Partner
By: J.E. Flynn Capital, LLC, its General Partner

By: /s/ David J. Clark
Name: David J. Clark
Title: Authorized Signatory

[Signature Page to December 2020 Exchange Agreement and Amendment to Facility Agreement, and Investors' Rights Agreement]

Schedule 1

<u>Lender</u>	<u>Type of Note</u>	<u>Original Principal Amount</u>
Deerfield Private Design Fund III, L.P.*	A&R Senior Secured Convertible Note	\$ 6,980,824.22
Deerfield Private Design Fund III, L.P.*	December 2019 Note	\$ 52,567,366.96
Deerfield Special Situations Fund, L.P.	December 2019 Note	\$ 10,513,675.50
Delaware Street Capital Master Fund, L.P.	December 2019 Note	\$ 8,336,968.75
M. Kingdon Offshore Master Fund, LP	January 2020 Note	\$ 3,037,354.16

* All prepayments made to Deerfield Private Design Fund III, L.P. and all securities delivered to Deerfield Private Design Fund III, L.P. in the Exchange shall be applied first to reduce Obligations under its December 2019 Note.

Exhibit A
Form of A&R Certificate of Designation

(See Exhibit 3.1 to the Current Report on Form 8-K to which this Exhibit A is a part)

Exhibit B
Joinder Agreement

Reference is hereby made to that certain December 2020 Exchange Agreement and Amendment to Facility Agreement and Investors' Rights Agreement, dated as of December 20, 2020 (the "**Exchange Agreement**"), among KemPharm, Inc., Deerfield Private Design Fund III, L.P., Deerfield Special Situations Fund, L.P. and such other lenders that become a party thereto by executing a joinder agreement.

The undersigned, being a Lender under the Facility Agreement (as defined in the Exchange Agreement), (A) acknowledges that it (i) has been provided with a copy of the Exchange Agreement (including the exhibits and schedules thereto) and (ii) has been afforded the opportunity to review the Exchange Agreement with its financial, tax and legal advisors; and (B) agrees (i) to become a Participating Lender under, and a party to, the Exchange Agreement and (ii) that the undersigned shall be fully bound by, and subject to, all of the covenants, terms, conditions, restrictions, and provisions of the Exchange Agreement, as the same may be amended, modified or restated from time to time, applicable to a Participating Lender with respect to the Note set forth opposite the undersigned's name on Schedule 1 to the Exchange Agreement. Without limiting the foregoing, the undersigned acknowledges and agrees that, by executing this Joinder Agreement, the undersigned shall be deemed to make the representations and warranties set forth in Section 4.01 of the Exchange Agreement.

[_____]

By: _____

Name: _____

Title: _____

Address: _____
