

US BANCORP \DE\  
Form 424B2  
June 02, 2008

Rule 424(b)(2)  
Registration No. 333-150298

### CALCULATION OF REGISTRATION FEE

<b>Title of Each Class of Securities Offered</b>	<b>Maximum Aggregate Offering Price</b>	<b>Amount of Registration Fee(1)</b>
Senior Notes	\$ 334,500,000	\$ 13,146.00

(1) Calculated in accordance with Rule 457(r) of the Securities Act of 1933.

PRICING SUPPLEMENT NO 3 DATED MAY 29, 2008 TO  
PROSPECTUS DATED APRIL 17, 2008,  
AS SUPPLEMENTED BY PROSPECTUS SUPPLEMENT DATED APRIL 25, 2008,  
AND SUPPLEMENTAL TO THE OFFICERS CERTIFICATE AND COMPANY ORDER DATED APRIL 25, 2008  
**U.S. BANCORP**  
**Medium-Term Notes, Series R (Senior)**  
**Medium-Term Notes, Series S (Subordinated)**

CUSIP No.: **91159HGQ7**

Series:

- Series R (Senior)
- Series S (Subordinated)

Form of Note:

- Book-Entry
- Certificated

Principal Amount: **\$334,500,000.00**

Trade Date: **Thursday, May 29, 2008**

Original Issue Date: **Thursday, June 05, 2008**

Maturity Date: **Friday, June 04, 2010**

Base Rate (and, if applicable, related Interest Periods):

- Fixed Rate Note
- Commercial Paper Note
- Federal Funds Note
- LIBOR Note
- EURIBOR Note
- Prime Rate Note
- CD Rate Note
- Treasury Rate Note
- CMT Rate Note
- Other Base Rate
- Zero Coupon Note

Agent's Commission:	<b>\$ 197,355.00</b>
Redemption Terms:	<b>Not Applicable</b>
Other Terms:	

Name of Agent and Delivery Instructions:	<b>Wachovia Securities</b>
	<b>DTC# 250</b>

Issue Price (Dollar Amount and Percentage of Principal Amount):

Amount:	<b>\$334,302,645.00 /</b>	<b>99.9410 %</b>
---------	---------------------------	------------------

Proceeds to the Company:	<b>\$334,302,645.00</b>
--------------------------	-------------------------

Interest Rate/Initial Interest Rate:

Interest Payment Dates:	<b>Quarterly, on the 4th of each September, December, March and June</b>
-------------------------	--

Regular Record Date:	<b>15 Calendar Days Prior</b>
----------------------	-------------------------------

Interest Determination Date:	<b>2 Business Days Prior</b>
------------------------------	------------------------------

Interest Reset Date:	<b>Quarterly, on the 4th of each September, December, March and June</b>
----------------------	--

Index Source:	<b>LIBOR01 (Reuters)</b>
Index Maturity:	<b>3 month</b>
Spread:	<b>0.400 %</b>

Spread Multiplier:  
Maximum Interest Rate:

Day Count:	<b>Act/360</b>
Minimum Interest Rate:	

For Original Issue Discount Notes:

Original Issue Discount %:

Yield to Maturity:  
Original Issue Discount Notes:

- o Subject to special provisions set forth therein with respect to the principal amount thereof payable upon any redemption or acceleration of the maturity thereof.
- o For Federal income tax purposes only.

Signature

/s/ Kenneth D. Nelson

(Authorized signature)

/s/ Lynn D. Flagstad

(Authorized signature)

o act has been a principal cause of or primarily resulted in the failure of Merger to occur on or before the End Date and such action or failure to act constitutes a breach of this Agreement or (ii) that (or whose affiliate) is in material breach of this Agreement;

(c) by either the Company or Parent if a Governmental Entity of competent jurisdiction shall have issued an order, decree or ruling or taken any other action (including the failure to have taken an action) having the effect of permanently restraining, enjoining or otherwise prohibiting the Merger, which order, decree, ruling or other action is final and nonappealable;

(d) by either the Company or Parent if the approval of the adoption of this Agreement by the Required Company Stockholders shall not have been obtained at the Company Stockholders Meeting duly convened therefor or at any adjournment or postponement thereof;

(e) by either the Company or Parent if the approval of the Merger and the issuance of the Convertible Notes contemplated hereunder by the Required Parent Stockholders shall not have been obtained at the Parent Stockholders Meeting duly convened therefor or at any adjournment or postponement thereof;

(f) by Parent, if (i) any representation or warranty of the Company set forth in this Agreement shall have been breached or become untrue or the Company has breached any covenant or agreement of the Company set forth in this Agreement, (ii) such breach or untruth is not cured within 30 days after receipt by the Company of written notice from Parent (*provided, however*, that such 30-day period shall not apply if such breach or misrepresentation is not curable), and (iii) such breach or misrepresentation would cause the conditions set forth in *Section 6.3* incapable of being satisfied by the End Date; *provided* that Parent is not then in breach of its respective representations and warranties, covenants or agreements set forth in this Agreement such that any of the conditions set forth in *Section 6.2(a)* or *Section 6.2(b)* would not be satisfied by the End Date;

---

**Table of Contents**

(g) by the Company, if (i) any representation or warranty of Parent or Merger Sub set forth in this Agreement shall have been breached or become untrue or Parent or Merger Sub has breached any covenant or agreement of Parent or Merger Sub set forth in this Agreement, (ii) such breach or untruth is not cured within 30 days after receipt by Parent of written notice from the Company (*provided, however*, that such 30-day period shall not apply if such breach or misrepresentation is not curable), and (iii) such breach or misrepresentation would cause the conditions set forth in *Section 6.2* incapable of being satisfied by the End Date; *provided* that the Company is not then in breach of its respective representations and warranties, covenants or agreements set forth in this Agreement such that any of the conditions set forth in *Section 6.3(a)* or *Section 6.3(b)* would not be satisfied by the End Date;

(h) by the Company, upon written notice to Parent, if the Company shall have entered into a definitive agreement to effect a Superior Offer in compliance with the provisions of *Section 5.3* and this *Article VII*; or

(i) by Parent, upon written notice to the Company, if the Company shall have entered into a definitive agreement to effect a Superior Offer.

*7.2. Notice of Termination; Effect of Termination.* Any termination of this Agreement under *Section 7.1* will be effective immediately upon the delivery of a valid written notice of the terminating party to the other party hereto. In the event of the termination of this Agreement as provided in *Section 7.1*, this Agreement shall be of no further force or effect and there shall be no liability or obligation on the part of Parent, the Company, Parent's Subsidiaries or their respective officers or directors, except (i) as set forth in *Section 5.4(a)*, this *Section 7.2*, *Section 7.3* and *Article VIII*, each of which shall survive the termination of this Agreement and (ii) with respect to any liabilities or damages incurred or suffered by a party as a result of the willful and material breach by the other party of any of its representations, warranties, covenants or other agreements set forth in this Agreement, nothing in this Agreement shall relieve any party from liability for such willful and material breach.

*7.3. Fees and Expenses.* In the event the Board of Directors of Company withholds, withdraws, amends or modifies the Company Board Recommendation following receipt of a Superior Offer and the Merger is not consummated, Company shall reimburse Parent for one-half of its reasonable and documented out-of-pocket legal, accounting and other advisory fees and expenses up to a maximum of \$500,000; it being understood and agreed that, notwithstanding anything to the contrary contained herein, (x) Parent shall provide to the Company an accounting of all such costs within three Business Days of any request and (y) the effectiveness of any election by the Company to terminate this Agreement under the circumstances described in this sentence shall be conditioned upon the Company paying to Parent all of such out-of-pocket fees and expenses. In the event Parent or Company terminates this Agreement for any other reason, each party hereto shall be responsible for the payment of its fees and expenses incurred in connection with this Agreement, except for remedies of Parent and Company available under *Section 8.7* hereof.

*7.4. Amendment; Waivers.* Any provision of this Agreement may be amended or waived if, but only if, such amendment or waiver is in writing and is duly executed and delivered by the Company and Parent. No failure or delay by any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided shall be cumulative and not exclusive of any rights or remedies provided by law.

**ARTICLE VIII**

**GENERAL PROVISIONS**

*8.1. Interpretation; Certain Definitions.*

(a) *Interpretation.* When a reference is made in this Agreement to Exhibits, such reference shall be to an Exhibit to this Agreement unless otherwise indicated. When a reference is made in this Agreement to

**Table of Contents**

Sections, such reference shall be to a section of this Agreement unless otherwise indicated. For purposes of this Agreement: (i) the words *include, includes and including*, when used herein, shall be deemed in each case to be followed by the words *without limitation*; (ii) the words *hereof, herein, hereto and hereunder* and words of similar import, when used in this Agreement, shall refer to this Agreement as a whole and not to any particular provision of this Agreement; (iii) references herein to *party* or *parties* shall mean a party or the parties to this Agreement unless the context provides otherwise; (iv) the table of contents and headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement; (v) the meaning assigned to each term defined herein shall be equally applicable to both the singular and the plural forms of such term, and words denoting any gender shall include all genders; (vi) a reference to any party to this Agreement or to any other agreement or document shall include such party's successors and permitted assigns; (vii) a reference to any Legal Requirement or to any provision of any Legal Requirement shall include any amendment to, and any modification or re-enactment thereof, any provision substituted therefor and all regulations and statutory instruments issued thereunder or pursuant thereto; (viii) all references to "\$" or *dollars* shall be deemed references to United States dollars; and (ix) capitalized terms used and not defined in the exhibits, annexes and schedules attached to this Agreement shall have the respective meanings set forth in this Agreement.

**(b) Certain Definitions.**

(i) *Acquisition Proposal*, with respect to the Company, shall mean a (A) a merger, joint venture, partnership, consolidation, tender offer, recapitalization, reorganization, share exchange, business combination or similar transaction involving the Company or (B) any other direct or indirect acquisition involving 50% or more of the total voting power of the Company, or all or substantially all of the total assets of the Company (*provided, however*, neither the transactions contemplated by this Agreement nor any other actual or proposed transaction involving Parent, Merger Sub or any of their affiliates shall be deemed an Acquisition Proposal).

(ii) *Additional Assets* shall mean: (i) any cash royalties or other immediately available cash consideration received on or prior to June 30, 2010 pursuant to the agreement by and between the Company and Advanced Cell Technology, Inc. as acknowledged and agreed to by Embriome Sciences, Inc. dated July 14, 2008, to the extent such cash recoveries exceed those specifically related amounts set forth on *Section 8.1(b)(ii)* of the Company Disclosure Letter; (ii) any cash amounts collected from subtenants at the Company's headquarters at 1301 Harbor Bay Parkway, Alameda, CA 94502, to the extent such cash recoveries exceed those specifically related amounts set forth on *Section 8.1(b)(ii)* of the Company Disclosure Letter; (iii) any other cash amounts received pursuant to the early termination of the lease at the Company's headquarters at 1301 Harbor Bay Parkway, Alameda, CA 94502 to the extent such cash recoveries exceed those specifically related amounts set forth on *Section 8.1(b)(ii)* of the Company Disclosure Letter; (iv) any cash amounts collected from any other sale of assets listed on *Section 4.1(b)(viii)* of the Company Disclosure Letter not already specified in clauses (i) through (iii) of this sentence and not including any Genzyme Settlement Amount; (v) any expenses avoided as a result of the early termination of the lease at the Company's headquarters at 1301 Harbor Bay Parkway, Alameda, CA 94502 to the extent such expenses are set forth on *Section 8.1(b)(ii)* of the Company Disclosure Letter; and (vi) any expenses set forth on *Section 8.1(b)(ii)* of the Company Disclosure Letter which are avoided or not incurred; notwithstanding clauses (i) through (vi) of this sentence, with respect to any other specific category of liability set forth on *Section 8.1(b)(ii)* of the Company Disclosure Letter, if the actual amount of such specifically-identified type of liability is lower than the applicable estimated amount set forth on *Section 8.1(b)(ii)* of the Company Disclosure Letter, then such excess amount shall be deemed to be part of *Additional Assets*.

(iii) *Additional Liabilities* shall mean (i) any and all liabilities of the Company, contingent or otherwise (and for the avoidance of doubt (x) any amounts paid to current or former directors and officers of the Company in connection with the releases contemplated by *Section 5.16* and (y) any amounts permitted to be paid under *Section 4.1(b)(xv)* of the Company Disclosure Letter), related to the business activities and operations of the Company prior to the Merger Effective Time, except as (but

---

**Table of Contents**

only to the extent) set forth as a quantified amount of liability set forth in *Section 8.1(b)(ii)* of the Company Disclosure Letter; it being understood and agreed for the avoidance of doubt that, with respect to any specific category of liability set forth on *Section 8.1(b)(ii)* of the Company Disclosure Letter, if the actual amount of such specifically-identified type of liability exceeds the applicable estimated amount set forth on *Section 8.1(b)(ii)* of the Company Disclosure Letter, then such excess amount shall be deemed to be part of *Additional Liabilities*; it further being understood that *Additional Liabilities* shall not include any liabilities fully insured against (but only to the extent in excess of any applicable deductible and below any payment cap) under Company's insurance policies as in effect as of the Merger Effective Time; (ii) the expenses of the Avigen Representative (as set forth in *Section 1.16*) incurred in connection with this Agreement and (iii) the expenses of the Holder Representative (as defined in the agreement governing the Contingent Payment Rights and as set forth in *Section 7.2* of such agreement) incurred prior to June 30, 2010.

(iv) *Avigen Representative* means Andrew A. Sauter or any successor person thereto appointed in accordance with *Section 1.16*.

(v) *Business Day* shall mean any day other than a Saturday, Sunday or one on which banks are authorized or permitted to close in New York, New York.

(vi) *COBRA* shall mean the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

(vii) *Company Balance Sheet* shall mean the balance sheet of the Company dated as of June 30, 2009 contained in the Company SEC Report filed with the SEC on August 10, 2009.

(viii) *Company Common Stock* shall mean the common stock, par value \$0.001, of the Company.

(ix) *Company Material Adverse Effect* shall mean any fact, circumstance, event, change, effect or occurrence ( *Effect* ) that (i) has or would be reasonably likely to have a material adverse effect on the business or financial condition of the Company taken as a whole (taking into account that the Company has effectively ceased business operations and is preparing to liquidate in the event the Merger is not consummated) or (ii) would prevent the Company from consummating the Merger or the other transactions contemplated hereby, but, in the case of the foregoing clause (i), none of the following shall be deemed in and of themselves, either alone or in combination, to constitute, and none of the following shall be taken into account in determining whether there has been or will be, a Company Material Adverse Effect: (A) any adverse Effect generally affecting the industry in which the Company operates or conducts its business or the economy or the financial or securities markets in the United States or elsewhere in the world, including effects on such industries, economy or markets resulting from any regulatory or political conditions or developments or any natural disaster or any acts of terrorism, sabotage, military action or war (whether or not declared) or any escalation or worsening thereof (except in each case to the extent such changes disproportionately affect the Company); (B) any Effect reflecting or resulting from changes in Legal Requirements or GAAP or the interpretations thereof; (C) any adverse Effect resulting from actions or omissions of the Company which Parent has requested, to which Parent has consented or that are in compliance with the terms of this Agreement; (D) any adverse Effect resulting from any legal proceedings arising from allegations of breach of fiduciary duty relating to this Agreement or false or misleading public disclosure (or omission) in connection with this Agreement made or brought by any of the current or former stockholders of the Company (on their own behalf or on behalf of the Company); (E) any change in the market price or trading volume of the outstanding securities of the Company; (F) any failure by the Company to meet internal projections or forecasts or published revenue or earnings predictions for any period; (G) any adverse Effect arising directly or indirectly from or otherwise relating to any act of God, any act of terrorism, war or other armed hostilities, any regional, national or international calamity or any other similar event; or (H) any adverse Effect resulting from the announcement or pendency of (1) the Merger or the proposal thereof (including the loss or departure of employees or adverse developments

**Table of Contents**

in relationships with customers, suppliers, distributors or other business partners) or (2) this Agreement and the transactions contemplated hereby.

(x) *Company Scheduled Contract* shall mean:

(1) any material contracts (as such term is defined in Item 601(b)(10) of Regulation S-K of the SEC) to which the Company is a party or by which the Company is bound;

(2) any employment or consulting Contract to which the Company is a party or by which the Company is bound, other than those that are terminable by the Company without liability or financial obligations of over \$10,000;

(3) any Contract or plan to which the Company is a party or by which the Company is bound, including any stock option plan, stock appreciation right plan or stock purchase plan, any of the benefits of which will be increased, or the vesting of benefits of which will be accelerated, by the occurrence of any of the transactions contemplated by this Agreement or the value of any of the benefits of which will be calculated on the basis of any of the transactions contemplated by this Agreement;

(4) any material agreement of indemnification to which the Company is a party or by which the Company is bound;

(5) any Contract containing any covenant (A) limiting in any material respect the right of the Company to make use of any material Intellectual Property or (B) otherwise having an adverse effect on the assets or property of the Company;

(6) any Contract pursuant to which the Company have continuing material obligations to jointly develop any material Intellectual Property that will not be owned, in whole or in part, by the Company and which may not be terminated without penalty upon notice of 90 days or less;

(7) any Contract containing any material support, maintenance or service obligation on the part of the Company, other than those obligations that are terminable by the Company without liability or financial obligations of over \$10,000;

(8) any material Contract to which the Company is a party or by which the Company is bound requiring or licensing any third party to manufacture or reproduce any of the Company's products, services or technology, including any component thereof, or any material Contract to sell, service or distribute any of the Company's products, services or technology, except agreements terminable by the Company without liability or financial obligations of over \$10,000;

(9) any mortgages, indentures, guarantees, loans or credit agreements, security agreements or other Contracts to which the Company is a party or by which the Company is bound relating to the borrowing of money or extension of credit and that evidence indebtedness in excess of \$10,000;

(10) any material settlement agreement entered into by the Company since December 31, 2006;

(11) any non-competition or non-solicitation agreements to which the Company is a party or by which the Company is bound;

(12) any material collaboration agreements for drug programs to which the Company is a party or by which the Company is bound;

(13) any material agreements to which the Company is a party or by which the Company is bound relating to preclinical and clinical studies and drug programs, including clinical trial agreements, investigator-sponsored clinical trial agreements, materials transfer agreements, feasibility agreements, sponsored research agreements, licenses and master services agreements; and

---

**Table of Contents**

(14) all insurance policies covering the Company or any of its Employees, properties or assets that are in full force and effect as of the date of this Agreement.

(xi) *Contingent Payment Right* shall mean the contingent payment right substantially in the form attached as *Exhibit H* hereto, such contingent payment rights to be issued by Parent at the Merger Effective Time.

(xii) *Contract* shall mean any written, oral or other agreement, contract, subcontract, settlement agreement, lease, binding understanding, instrument, note, option, warranty, purchase order, license, sublicense, insurance policy, benefit plan or other legally binding commitment or undertaking of any nature, as in effect as of the date hereof or as may hereinafter be in effect.

(xiii) *Convertible Note* shall mean one of the convertible notes issued pursuant to the Indenture, such convertible notes to be issued by Parent at the Merger Effective Time.

(xiv) *ERISA* shall mean the Employment Retirement Income Security Act of 1974, as amended.

(xv) *Escrow Account* shall mean the escrow account established under the Escrow Agreement.

(xvi) *First Payment Consideration* shall mean (A) \$35,461,000 (the *Targeted First Payment Cash Amount* ) divided by (B) the number of shares of Company Common Stock outstanding immediately prior to the Merger Effective Time (as increased by any shares of Company Common Stock acquired pursuant to any derivative securities outstanding as of the Merger Effective Time); *provided, however*, that the Targeted First Payment Cash Amount will be: (i) reduced by \$1 for every \$1 by which the aggregate cash liquidation proceeds of the marketable securities and restricted investments held by the Company as of June 30, 2009 are less than \$27,721,000 and (ii) increased by any Genzyme Settlement Amount.

(xvii) *Genzyme Settlement Amount* shall mean (A) in the event of a transaction of the type referred to in Section 4.1(b)(viii)(a), the amount received by the Company pursuant to Section 4.1(b)(viii)(a) or (B) in the event of a transaction of the type referred to in Section 4.1(b)(viii)(b), the amount received by the Company pursuant to Section 4.1(b)(viii)(b), less 50% of the amount received by the Company pursuant to Section 4.1(b)(viii)(b) above \$6 million.

(xviii) *Indenture* shall mean the indenture substantially in the form attached as *Exhibit I* hereto, by and between Parent and American Stock Transfer & Trust Co., LLC, as trustee, dated as of the Closing Date pursuant to which the Convertible Notes are to be issued.

(xix) *Knowledge* shall mean, with respect to any matter in question, the applicable party (including in the case of a corporation, any of its directors or executive officers) having actual knowledge or deemed to have knowledge of any piece of information that could be discerned pursuant to a reasonable investigation.

(xx) *Legal Requirements* shall mean any federal, state, local, municipal, foreign or other law, statute, constitution, principle of common law, resolution, ordinance, code, order, edict, decree, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Entity.

(xxi) *Liens* shall mean all pledges, claims, liens, charges, encumbrances, options and security interests of any kind or nature whatsoever, including any restriction on the right to vote, possess, use, sell, transfer or otherwise dispose of such capital stock or other ownership interests, except for restrictions imposed by applicable securities laws.

(xxii) *Made Available* shall mean (A) with respect to any documents or other materials relating to the Company, that such documents or materials were either (x) actually provided by a representative of the Company to a representative of Parent, (y) located in the electronic on-line data room organized by the Company in connection with the diligence investigation conducted by Parent or (z) filed with the SEC or otherwise made available publicly, and (B) with respect to any documents or other



---

**Table of Contents**

materials relating to Parent or Merger Sub, that such documents or materials were either (x) actually provided by a representative of Parent to a representative of the Company, (y) located in the electronic on-line data room organized by Parent in connection with the diligence investigation conducted by the Company or (z) filed with the SEC or otherwise made available publicly.

(xxiii) *Merger Effective Time* shall mean the time at which the Certificate of Merger is accepted for filing by the Secretary of State of the State of Delaware or such time as otherwise specified in the Certificate of Merger.

(xxiv) *Parent Balance Sheet* shall mean the balance sheet of Parent dated as of March 31, 2009 contained in the Company SEC Reports filed with the SEC on May 15, 2009.

(xxv) *Parent Common Stock* shall mean the common stock, par value \$0.001, of Parent.

(xxvi) *Parent Material Adverse Effect* shall mean any Effect that (i) has or would be reasonably likely to have a material adverse effect on the business, results of operations or financial condition of Parent and its Subsidiaries taken as a whole or (ii) would prevent Parent or Merger Sub from consummating the Merger or the other transactions contemplated hereby, but, in the case of the foregoing clause (i), none of the following shall be deemed in and of themselves, either alone or in combination, to constitute, and none of the following shall be taken into account in determining whether there has been or will be, a Parent Material Adverse Effect: (A) any adverse Effect generally affecting the industry in which Parent operates or conducts its business or the economy or the financial or securities markets in the United States or elsewhere in the world, including effects on such industries, economy or markets resulting from any regulatory or political conditions or developments or any natural disaster or any acts of terrorism, sabotage, military action or war (whether or not declared) or any escalation or worsening thereof (except in each case to the extent such changes disproportionately affect Parent or its Subsidiaries); (B) any Effect reflecting or resulting from changes in Legal Requirements or GAAP or the interpretations thereof; (C) any adverse Effect resulting from any legal proceedings arising from allegations of breach of fiduciary duty relating to this Agreement or false or misleading public disclosure (or omission) in connection with this Agreement made or brought by any of the current or former stockholders of Parent (on their own behalf or on behalf of Parent); (D) any change in the market price or trading volume of the outstanding securities of Parent; (E) any failure by Parent to meet internal projections or forecasts or published revenue or earnings predictions for any period; (F) any adverse Effect arising directly or indirectly from or otherwise relating to any act of God, any act of terrorism, war or other armed hostilities, any regional, national or international calamity or any other similar event; or (G) any adverse Effect resulting from the announcement or pendency of (1) the Merger or the proposal thereof (including the loss or departure of employees or adverse developments in relationships with customers, suppliers, distributors or other business partners) or (2) this Agreement and the transactions contemplated hereby.

(xxvii) *Permitted Liens* means (a) the lien of current real and personal property taxes incurred but not yet due and payable, (b) materialmen's or similar liens or obligations arising in the ordinary course of business securing obligations not yet due and payable or (c) purchase money security interests or similar liens arising in the ordinary course of business not to exceed \$25,000 in the aggregate.

(xxviii) *Person* shall mean any individual, corporation (including any non-profit corporation), general partnership, limited partnership, limited liability partnership, joint venture, estate, trust, company (including any limited liability company or joint stock company), firm or other enterprise, association, organization, entity or Governmental Entity.

(xxix) *Registered* shall mean issued by, registered with, renewed by or the subject of a pending application before any Governmental Entity or Internet domain name registrar.

(xxx) *Second Payment Consideration* shall equal (A) the amount remaining in the Escrow Account following satisfaction of the Demand Amount (as such amount may be reduced to the Selected

---

**Table of Contents**

Amount) divided by (B) the number of shares of Company Common Stock outstanding immediately prior to the Merger Effective Time (as increased by any shares of Company Common Stock acquired pursuant to any derivative securities outstanding as of the Merger Effective Time).

(xxxix) *Subsidiary* shall mean any corporation or other organization, whether incorporated or unincorporated, at least a majority of the securities or other interests of which having by their terms ordinary voting power to elect a majority of the Board of Directors or others performing similar functions with respect to such corporation or other organization is directly or indirectly owned or controlled by such party or by any one or more of its Subsidiaries, or by such party and one or more of its Subsidiaries.

(xxxix) *Superior Offer*, with respect to the Company, shall mean a bona fide written Acquisition Proposal pursuant to which a Third Party would own, if consummated, at least 50% of the outstanding capital stock of the Company (or of the surviving entity in a merger or the direct or indirect parent of the surviving entity in a merger) or at least 50% of the assets of the Company, on terms that the Board of Directors of the Company in good faith concludes (after consultation with its outside legal counsel and its financial adviser), taking into account all aspects of such Acquisition Proposal, including, among other things, all legal, financial, regulatory and other aspects of the offer and the Person making the offer, would if consummated result in a transaction that is more favorable from a financial point of view to the Company's stockholders (in their capacities as stockholders) than the Merger and is reasonably capable of being consummated on the terms proposed.

(xxxix) *Tax* or, collectively, *Taxes* shall mean any and all U.S. federal, state, local and non-U.S. taxes, including taxes based upon or measured by gross receipts, income, profits, sales, use and occupation, and value added, ad valorem, transfer, franchise, withholding, payroll, recapture, employment, excise and property taxes, together with all interest, penalties and additions imposed with respect to such amounts.

(xxxix) *Tax Return* shall mean any report, return (including information return), claim for refund, election, estimated tax filing or declaration relating to Taxes, including any schedule or attachment thereto, and including any amendments thereof.

(xxxix) *Tax Sharing Agreement* shall mean an agreement binding the Company that provides for the allocation, apportionment, sharing or assignment of any Tax liability or benefit; provided, however, that the following agreements shall be disregarded: (i) commercially reasonable agreements providing for the allocation or payment of real property Taxes attributable to real property leased or occupied by the Company and (ii) commercially reasonable agreements for the allocation or payment of personal property Taxes, sales or use Taxes or value added Taxes with respect to personal property leased, used, owned or sold in the ordinary course of business.

(xxxix) *Taxing Authority* shall mean a Governmental Entity responsible for the administration of a Tax.

(xxxix) *Third Party* shall mean any Person (other than the Company's financial and legal advisors) that is not directly or indirectly affiliated with Parent and that is not a representative of any other Person that is a Third Party.

(xxxix) *Trust Agreement* shall mean the trust agreement substantially in the form of *Exhibit J* hereto by and between Parent and American Stock Transfer & Trust Co., LLC, as trustee, dated as of the Closing Date.

8.2. *Non-Survival of Representations and Warranties.* The representations, warranties and covenants of the Company, Parent and Merger Sub contained in this Agreement, or any instrument delivered pursuant to this Agreement, shall terminate at the Merger Effective Time, except that *Section 5.11* and this *Article VIII* shall survive the Merger Effective Time.

**Table of Contents**

8.3. *Notices.* All notices and other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given (a) on the date of delivery, if delivered personally or by facsimile, upon confirmation of receipt, (b) on the first Business Day following the date of dispatch if delivered by a recognized next-day courier services or (c) on the third Business Day following the date of mailing if delivered by registered or certified mail, return receipt requested, postage prepaid, to the parties to this Agreement at the following address or to such other address either party to this Agreement shall specify by notice to the other party:

(a) if to Parent or Merger Sub, to:  
MediciNova, Inc.

4350 La Jolla Village Drive, Suite 950

San Diego, CA 92122

Attention: Chief Financial Officer

Telephone No.: (858) 373-1500

Facsimile No.: (858) 373-7000

with copies to:

Dechert LLP

1775 I Street, N.W.

Washington, D.C. 20006

Attention: David E. Schulman

Telephone No.: (202) 261-3300

Facsimile No.: (202) 261-3333

(b) if to the Company, to:  
Avigen, Inc.

1301 Harbor Bay Parkway

Alameda, CA 94502

Attention: Chief Executive Officer

Telephone No.: (510) 748-7150

Facsimile No.: (510) 749-7155

with copies to:

Cooley Godward Kronish LLP

Five Palo Alto Square

3000 El Camino Road

Palo Alto, CA 94305

Attention: Brett D. White

Telephone No.: (650) 843-5000

Facsimile No.: (650) 849-7400

(c) if to Avigen Representative, to:  
Andrew A. Sauter

1301 Harbor Bay Parkway

Alameda, CA 94502

Telephone No.: (510) 748-7150

Facsimile No.: (510) 748-7285

8.4. *Counterparts*. This Agreement may be executed in two or more counterparts, all of which shall be considered the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other party, it being understood that all parties need not sign the same counterpart.

---

**Table of Contents**

8.5. *Entire Agreement; Third-Party Beneficiaries.* This Agreement and all exhibits and attachments hereto, including the Certificate of Designations, Exchange Agreement, Company Disclosure Letter, Parent Disclosure Letter and Confidentiality Agreement, (i) constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof, it being understood that the Confidentiality Agreement shall continue in full force and effect until the Closing and shall survive any termination of this Agreement and (ii) are not intended to confer upon any other Person any rights or remedies hereunder.

8.6. *Severability.* In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be invalid, illegal, void or unenforceable, the remainder of this Agreement will continue in full force and effect and the application of such provision to other Persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto. The parties further agree to negotiate in good faith to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the greatest extent possible, the economic, business and other purposes of such void or unenforceable provision.

8.7. *Other Remedies; Specific Performance.*

(a) *Other Remedies.* Except as otherwise provided herein, any and all remedies herein expressly conferred upon a party will be deemed cumulative with and not exclusive of any other remedy conferred hereby, or by law or equity upon such party, and the exercise by a party of any one remedy will not preclude the exercise of any other remedy.

(b) *Specific Performance.* The parties hereto agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that the parties shall be entitled to an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof in any court of the United States or any state having jurisdiction, this being in addition to any other remedy to which they are entitled at law or in equity.

8.8. *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware.

8.9. *Jurisdiction.* Each of the parties hereto irrevocably and unconditionally agrees that any legal action or proceeding with respect to this Agreement and the rights and obligations arising hereunder, or for recognition and enforcement of any judgment in respect of this Agreement and the rights and obligations arising hereunder brought by the other party hereto or its successors or assigns, shall be brought and determined exclusively in the Delaware Court of Chancery and any state appellate court therefrom within the State of Delaware (or, if the Delaware Court of Chancery declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware). Each of the parties hereto hereby irrevocably submits with regard to any such action or proceeding for itself and in respect of its property, generally and unconditionally, to the exclusive personal jurisdiction of the aforesaid courts and agrees that it will not bring any action relating to this Agreement or any of the transactions contemplated by this Agreement in any court other than the aforesaid courts. Each of the parties hereto hereby irrevocably waives, and agrees not to assert, by way of motion, as a defense, counterclaim or otherwise, in any action or proceeding with respect to this Agreement, (i) any claim that it is not personally subject to the jurisdiction of the above-named courts for any reason, (ii) 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 (iii) to the fullest extent permitted by applicable Legal Requirements, any claim that (A) the suit, action or proceeding in such court is brought in an inconvenient forum, (B) the venue of such suit, action or proceeding is improper or (C) this Agreement, or the subject matter hereof, may not be enforced in or by such courts.

**Table of Contents**

8.10. *Rules of Construction.* The parties hereto agree that they have been represented by counsel during the negotiation and execution of this Agreement and, therefore, waive the application of any law, regulation, holding or rule of construction providing that ambiguities in an agreement or other document will be construed against the party drafting such agreement or document.

8.11. *Assignment.* No party may assign either this Agreement or any of its rights, interests, or obligations hereunder without the prior written approval of the other parties. Any purported assignment in violation of this *Section 8.11* shall be void. Subject to the preceding sentence, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

8.12. *Waiver of Jury Trial.* EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE IT HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT AND ANY OF THE AGREEMENTS DELIVERED BY THE PARTIES IN CONNECTION HERewith OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE EITHER OF SUCH WAIVERS, (B) IT UNDERSTANDS AND HAS CONSIDERED THE IMPLICATIONS OF SUCH WAIVERS, (C) IT MAKES SUCH WAIVERS VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS *SECTION 8.12*.

\*\*\*\*\*

A-54

**Table of Contents**

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized respective officers as of the date first written above.

MEDICINOVA, INC.

By: /s/ SHINTARO ASAKO  
Name: **Shintaro Asako**  
Title: **Chief Financial Officer**

ABSOLUTE MERGER, INC.

By: /s/ SHINTARO ASAKO  
Name: **Shintaro Asako**  
Title: **Chief Executive Officer**

AVIGEN, INC.

By: /s/ ANDREW SAUTER  
Name: **Andrew Sauter**  
Title: **Chief Executive Officer and  
Chief Financial Officer**

A-55

**Table of Contents**

**ANNEX B**

**CONTINGENT PAYMENT RIGHTS AGREEMENT**

This CONTINGENT PAYMENT RIGHTS AGREEMENT, dated as of \_\_\_\_\_, 2009 (this *Agreement* ), is entered into by and among MediciNova, Inc., a Delaware corporation (together with its successors and assigns, *Buyer* ), Avigen, Inc., a Delaware corporation (together with its successors and assigns, *Target* ), and American Stock Transfer & Trust Company, LLC, a New York limited liability trust company, as rights agent (the *Rights Agent* ) and as initial CPR Registrar (as defined herein).

**RECITALS**

WHEREAS, Buyer, Absolute Merger, Inc., a Delaware corporation and wholly owned Subsidiary (as defined herein) of Buyer ( *Merger Sub* ), and Target have entered into an Agreement and Plan of Merger dated as of \_\_\_\_\_, 2009 (the *Merger Agreement* ), pursuant to which Merger Sub will merge with and into Target (the *Merger* ), with Target surviving the Merger as a Subsidiary of Buyer;

WHEREAS, pursuant to the Merger Agreement, Buyer agreed to create and issue to holders of record of shares of Target's common stock, par value \$0.001 per share (the *Target Common Stock* ) immediately prior to the effective time of the Merger (the *Effective Time* ) contingent payment rights issued by Buyer pursuant to the Merger Agreement and this Agreement (the *CPRs* );

WHEREAS, the CPRs are not securities under the U.S. securities laws as (i) the rights to payment pursuant to the CPRs are an integral part of the consideration for the Merger, (ii) the CPRs carry no voting or dividend rights, (iii) the CPRs do not bear a stated rate of interest, (iv) the CPRs will not be assignable or transferable except by will, the laws of intestacy or other operation of law, (v) the CPRs will not be represented by any form of certificate or instrument, (vi) the CPRs will not represent any equity or ownership interest in the Buyer and (vii) the contingent payments pursuant to the CPRs are not dependent on the operating results of Buyer; and

WHEREAS, each holder of Target Common Stock immediately prior to the Effective Time will receive as a portion of the Merger consideration the right to receive upon the Effective Time one CPR for each share of Target Common Stock held immediately prior to the Effective Time;

NOW, THEREFORE, for and in consideration of the premises and the consummation of the Merger, it is mutually covenanted and agreed, for the equal and proportionate benefit of all Holders (as defined herein), as follows:



**Table of Contents**

**ARTICLE I**

**DEFINITIONS**

**Section 1.1. Definitions.**

(a) For all purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires:

(i) the terms defined in this *Article I* have the meanings assigned to them in this *Article I* and include the singular and plural;

(ii) all accounting terms used herein and not expressly defined herein shall have the meanings assigned to such terms in accordance with U.S. generally accepted accounting principles, as in effect on the date hereof;

(iii) the words herein, hereof and hereunder and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision;

(iv) unless the context otherwise requires, words describing the singular number shall include the plural and vice versa, words denoting any gender shall include all genders and words denoting natural Persons shall include corporations, partnerships and other Persons and vice versa; and

(v) all references to including shall be deemed to mean including without limitation.

(b) Capitalized terms used but not otherwise defined herein shall have the meanings ascribed thereto in the Merger Agreement. The following terms shall have the meanings ascribed to them as follows:

*Agreement* has the meaning set forth in the Preamble.

*Assignment Agreement* means the Assignment Agreement dated December 19, 2005, by and between Genzyme and Target, as amended through the date hereof.

*Board of Directors* means the board of directors of Buyer.

*Board Resolution* means a copy of a resolution certified by the secretary or an assistant secretary of Buyer to have been duly adopted by the Board of Directors and to be in full force and effect on the date of such certification and delivered to the Rights Agent.

*Business Day* means any day other than a Saturday, Sunday or a day on which commercial banks in New York, New York are authorized or obligated by law or executive order to close.

*Buyer* has the meaning set forth in the Preamble.

*Code* means the U.S. Internal Revenue Code of 1986, as amended, including any successor provisions and transition rules, whether or not codified.

*Continuing Target Warrant* means the Target's unexercised and outstanding warrant to subscribe for 15,000 shares of Target's common stock, par value \$0.001, that is not cancellable unilaterally by the Target in the Merger and which, upon exercise, either before or after the consummation of the Merger, shall entitle the holder of such warrant to the number of CPRs to which such holder would have been entitled if such warrant had been exercised prior to the closing of the Merger. Upon the exercise of the Continuing Target Warrant, the holder thereof shall become a *Holder* for all purposes of this Agreement.

*CPR Payment Amount* means, (i) in the event the First Milestone Event occurs on or after the date hereof but before the Termination Date, six million dollars (\$6,000,000) or such lesser cash amount paid by Genzyme



---

**Table of Contents**

less any of Buyer's or its Subsidiaries' out-of-pocket costs, damages, fines, penalties and expenses, including litigation expenses and Taxes, incurred in enforcing the rights of Target (or its successors and assigns) to receive the First Milestone Payment under the Assignment Agreement or in connection with consummating the Parkinson's Product Sale less any expenses paid by Buyer on or after June 30, 2010 pursuant to *Section 7.2(h)*, (ii) in the event of any Parkinson's Product Sale on or after the date hereof but before the Termination Date, fifty percent (50%) of the difference between (A) the proceeds received in cash by Buyer in respect of such Parkinson's Product Sale and (B) any of Buyer's or its Subsidiaries' out-of-pocket costs, damages, fines, penalties and expenses, including litigation expenses and Taxes, incurred in enforcing the rights of Target (or its successors and assigns) to receive the First Milestone Payment under the Assignment Agreement or in connection with consummating the Parkinson's Product Sale less any expenses paid by Buyer on or after June 30, 2010 pursuant to *Section 7.2(h)* and (iii) in the event of the termination of the Plan Trust, the Plan Trust Remainder less any of Buyer's or its Subsidiaries' out-of-pocket costs, damages, fines, penalties and expenses, including litigation expenses and Taxes, incurred in connection with terminating the Plan Trust. For the avoidance of doubt, CPR Payment Amount shall in no event include any amounts included in Genzyme Settlement Amount (as defined in the Merger Agreement).

*CPR Payment Date* has the meaning set forth in *Section 2.4(e)*.

*CPR Payment Deductions* has the meaning set forth in *Section 2.4(h)*.

*CPR Payment Event* means the occurrence of the (i) First Milestone Event, (ii) Parkinson's Product Sale or (iii) termination of the Plan Trust.

*CPR Payment Receipt* means any receipt in cash by Buyer, Target or any of their Subsidiaries of any portion of a CPR Payment Amount.

*CPR Register* has the meaning set forth in *Section 2.3(b)*.

*CPR Registrar* has the meaning set forth in *Section 2.3(b)*.

*CPRs* has the meaning set forth in the Recitals.

*Effective Time* has the meaning set forth in the Recitals.

*Exchange Act* means the Securities Exchange Act of 1934, as amended.

*First Milestone Event* means the occurrence of an event in Section 4.4 of the Assignment Agreement that would require Genzyme to pay the First Milestone Payment.

*First Milestone Payment* means the six million dollar (\$6,000,000) payment set forth in Part A of Schedule 3.2 of the Assignment Agreement.

*Genzyme* means Genzyme Corporation, a Massachusetts corporation, and its successors or assigns under the Assignment Agreement.

*Governmental Authority* means: (i) any government, state, province or other political subdivision thereof; (ii) any entity exercising executive, legislative, judicial, regulatory or administration functions of or pertaining to government; (iii) any government authority, agency, department, board, tribunal, commission or instrumentality of the United States of America, any foreign government, any state of the United States of America or any municipality or other political subdivision thereof; (iv) any court, tribunal or arbitrations of competent jurisdiction; and (v) any governmental or non-governmental self-regulatory organization, agency or authority.

**Table of Contents**

*Holder* means a Person in whose name a CPR is registered in the CPR Register.

*Holder Representative* means Andrew A. Sauter or any successor person appointed in accordance with *Section 7.3*.

*Merger* has the meaning set forth in the Recitals.

*Merger Agreement* has the meaning set forth in the Recitals.

*Merger Sub* has the meaning set forth in the Recitals.

*Notice of Objection* has the meaning set forth in *Section 2.4(d)*.

*Objection Period* had the meaning set forth in *Section 2.4(d)*.

*Officer's Certificate* means a certificate signed by the chief executive officer, president, chief financial officer, any vice president, the controller, the treasurer or the secretary, in each case of Buyer, in his or her capacity as such an officer, and delivered to the Rights Agent.

*Management Transition Plan Trust Agreement* means the management transition plan trust agreement dated as of December 15, 2008 by and between Target and Wells Fargo Bank, N.A.

*Parkinson's Product Sale* means, in the event the First Milestone Event has not occurred, the sale, license, transfer or other disposition by Buyer, Target or any of their Subsidiaries of the Parkinson's Product (as defined in the Assignment Agreement) if pursuant to Section 9.6 of the Assignment Agreement Genzyme causes the Parkinson's Product to revert to Target.

*Payment Notice* has the meaning set forth in *Section 2.4(a)*.

*Permitted Transfer* means: (i) the transfer of any or all of the CPRs (upon the death of the Holder) by will or intestacy; (ii) transfer by instrument to an inter vivos or testamentary trust in which the CPRs are to be passed to beneficiaries upon the death of the trustee; (iii) transfers made pursuant to a court order of a court of competent jurisdiction (such as in connection with divorce, bankruptcy or liquidation); or (iv) a transfer made by operation of law (including a consolidation or merger) or in connection with the dissolution, liquidation or termination of any corporation, limited liability company, partnership or other entity.

*Person* means any individual, corporation, partnership, joint venture, estate, trust, company (including any limited liability company or joint stock company), firm, Governmental Authority or other enterprise, association, organization or entity.

*Plan Trust* means the trust established pursuant to the Management Transition Plan Trust Agreement.

*Plan Trust Remainder* means the amount of money in the Plan Trust upon the termination of such trust less any payments required to be made under the Management Transition Plan Trust Agreement and less applicable Taxes and legal fees and other expenses paid or payable in connection with the Plan Trust. The Plan Trust Remainder currently is estimated to be \$550,000.

*Pro Rata Share* means, as of the close of business on the date of a CPR Payment Event, the quotient of the (i) sum of all of the CPRs held of record by such Holder on such date divided by (ii) sum of all outstanding CPRs.

---

**Table of Contents**

*Rights Agent* means the Rights Agent named in the Preamble, until a successor Rights Agent shall have become such pursuant to the applicable provisions of this Agreement, and thereafter *Rights Agent* shall mean such successor Rights Agent.

*Rights Agent Fee* means the fee of the Rights Agent to act in such capacity pursuant to the terms of this Agreement as set forth on *Schedule 1* hereto.

*SEC* means the Securities and Exchange Commission.

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

*Subsidiary* means any corporation, partnership, joint venture or other legal entity of which any Person (either alone or through or together with another Subsidiary), owns, directly or indirectly, more than 50% of the stock or other equity interests the holders of which are generally entitled to vote for the election of the board of directors or other governing body of such corporation or other legal entity.

*Surviving Person* has the meaning set forth in *Section 6.1(a)*.

*Target* has the meaning set forth in the Preamble.

*Target Common Stock* has the meaning set forth in the Recitals.

*Tax* means any and all taxes payable to any federal, state, local or foreign taxing authority or agency, including (i) income, franchise, profits, gross receipts, minimum, alternative minimum, estimated, ad valorem, value added, sales, use, service, real or personal property, capital stock, license, payroll, withholding, disability, employment, social security, workers compensation, unemployment, utility, severance, excise, stamp, windfall profits, transfer or other tax of any kind whatsoever, (ii) interest thereon and (iii) penalties and additions to tax imposed with respect thereto.

*Termination Date* the \_\_\_\_\_, 2011 [the 20 month anniversary of the date of this Agreement].

*Termination Certificate* has the meaning set forth in *Section 2.4(b)*.

**ARTICLE II**

**CONTINGENT PAYMENT RIGHTS**

**Section 2.1. Issuance of CPRs; Appointment of Rights Agent.**

(a) The CPRs shall be issued pursuant to the Merger Agreement at the time and in the manner set forth in the Merger Agreement. The registration and the administration of the CPRs shall be handled pursuant to this Agreement in the manner set forth in this Agreement.

(b) Buyer hereby appoints American Stock Transfer & Trust Company, LLC as the Rights Agent to act as Rights Agent for Buyer in accordance with the terms and conditions set forth in this Agreement, and the Rights Agent hereby accepts such appointment.

(c) By its receipt of the CPRs, each Holder hereby appoints the Holder Representative to act as the Holder Representative in accordance with the terms and conditions set forth in this Agreement and as shall be further specified to Holder Representative in writing by a majority in interest of the Holders, and the Holder Representative hereby accepts such appointment. Without limiting the generality of the foregoing, each Holder hereby authorizes Holder Representative to act on such Holder's behalf to enforce the terms of this Agreement.

---

## **Table of Contents**

### **Section 2.2. Nontransferable.**

The CPRs shall not be sold, assigned, transferred, pledged, encumbered or in any other manner transferred or disposed of, in whole or in part, other than through a Permitted Transfer.

### **Section 2.3. No Certificate; Registration; Registration of Transfer; Change of Address.**

(a) The CPRs shall not be evidenced by a certificate or other instrument.

(b) The Rights Agent shall keep a register (the *CPR Register*) for the registration of CPRs. The CPR Register shall set forth the name and address of each Holder, the number of CPRs held by such Holder and the Tax Identification Number of each Holder. A Holder may make a written request to the CPR Registrar to change such Holder's address of record in the CPR Register following receipt of which the CPR Registrar shall promptly record such change in the CPR Register. The Buyer may receive and inspect a copy of the CPR Register, from time to time, upon written request made to the CPR Registrar. Within five (5) Business Days after receipt of such request, the CPR Registrar shall deliver a copy of the CPR Register, as then in effect, to Buyer at the address set forth in *Section 8.1*. The Rights Agent is hereby appointed initial *CPR Registrar* for the purpose of registering CPRs and transfers of CPRs as herein provided.

(c) Subject to the restrictions on transferability set forth in *Section 2.2*, every request made to transfer a CPR must be in writing and accompanied by a written instrument or instruments of transfer and any other requested documentation in form reasonably satisfactory to Buyer and the CPR Registrar, properly completed and duly executed by the registered Holder or Holders thereof or by the duly appointed legal representative thereof or by a duly authorized attorney, such signature to be authenticated by a medallion signature guarantee. A request for a transfer of a CPR shall be accompanied by such documentation, including an opinion of counsel reasonably satisfactory to Buyer and the CPR Registrar, establishing satisfaction that the transfer is a Permitted Transfer as may be reasonably requested by Buyer and the CPR Registrar. Upon receipt of such written notice by Buyer and the CPR Registrar, the CPR Registrar shall, subject to the Buyer's confirmation in writing to the CPR Registrar that the transfer instrument is in proper form and the transfer otherwise complies with the other terms and conditions herein, register the transfer of the CPRs in the CPR Register. All duly transferred CPRs registered in the CPR Register shall be the valid and binding obligations of Buyer, evidencing the same rights, and entitling the transferee to the same benefits and rights under this Agreement as those held by the transferor. No transfer of a CPR shall be valid until registered in the CPR Register, and any transfer not duly registered in the CPR Register shall be void. Any transfer or assignment of the CPRs shall be without charge (other than the cost of any transfer Tax or other governmental charge which shall be the responsibility of the transferor) to the Holder.

### **Section 2.4. Payment Procedures.**

(a) Pursuant to each CPR Payment Event that occurs after the Merger Effective Time (as defined in the Merger Agreement) and prior to the Termination Date, upon any CPR Payment Receipt, Buyer shall within five (5) Business Days following the date of such CPR Payment Receipt deliver to the Rights Agent written notice (each such notice, a *Payment Notice*) specifying the date of the CPR Payment Receipt, the aggregate amount of the CPR Payment Receipt and the per-CPR amount of the portion of the CPR Payment Amount to be paid on the applicable CPR Payment Date (and the calculations relating thereto).

(b) If, prior to the Termination Date, both the First Milestone Event and Parkinson's Product Sale have not occurred and no amounts were payable to Buyer upon termination of the Plan Trust, no later than five (5) Business Days after the Termination Date, Buyer shall deliver to the Rights Agent a certificate (the *Termination Certificate*) certifying that the applicable CPR Payment Events have not occurred and that the CPRs have expired.

(c) The Rights Agent shall, within two (2) Business Days after receipt of a Payment Notice or Termination Certificate provided by Buyer, send each Holder and the holder of Continuing Target Warrant a copy thereof,

---

**Table of Contents**

together with a brief statement describing the information and objection rights set forth in *Section 2.4(d)*, at his, her or its address as reflected in the CPR Register as of the date the Rights Agent received such notice or certificate.

(d) After receipt of a Payment Notice or Termination Certificate, Buyer shall promptly furnish to Rights Agent and the Holder Representative any information and documentation in connection with this Agreement and the CPRs that the Rights Agent, the Holder Representative or any Holder or Holders of at least 5% of the outstanding CPRs may reasonably request in connection with the enforcement of the Holders' rights under this Agreement, the determination of whether a CPR Payment Event has occurred and the determination of CPR Payment Amount. Subject to execution by the Holders requesting such information of a customary confidentiality agreement, the Rights Agent shall forward any such information and documentation to such Holders. Notwithstanding the foregoing, Buyer shall not be required to disclose any information, the disclosure of which would result in the breach of any confidentiality obligations of Target under the Assignment Agreement; provided that Buyer and Target use commercially reasonable efforts to obtain the consent of Genzyme pursuant to Section 7.3 of the Assignment Agreement to any disclosure of the Assignment Agreement to the Rights Agent.

(e) Upon written notice by the Holder Representative or any Holders of at least 25% in the aggregate of the outstanding CPRs received by the Rights Agent within twenty (20) Business Days after distribution by the Rights Agent of a Payment Notice or a Termination Certificate (as such period may be extended to that date ten (10) Business Days following that date all information reasonably requested pursuant to *Section 2.4(d)* above shall have been delivered to the Holder Representative and the Holder) (the *Objection Period*), the Rights Agent shall forward such notice to Buyer, which notice must certify, as appropriate, that the notice is given by the Holder Representative or such Holders as hold at least 25% in the aggregate of the outstanding CPRs, and further shall specify that the Holder Representative or such Holders object to any determination of Buyer (i) that the First Milestone Event, the Parkinson's Product Sale or the termination of the Plan Trust has not occurred, as applicable, or (ii) of the aggregate portion of the applicable CPR Payment Amount payable to the Holders, as applicable (a *Notice of Objection*). Any dispute arising from a Notice of Objection related to a Payment Notice shall be resolved by Buyer, the Holder Representative and Holders in accordance with the procedures set forth in *Section 8.7*, which decision shall be binding on the parties hereto, the Holder Representative and the Holders, and Buyer, the Holder Representative and Holders shall provide the Rights Agent with joint written direction specifying the resolution of any dispute pursuant to this *Section 2.4(e)*, following which the Rights Agent shall act in accordance with such direction.

(f) If Buyer delivers a Payment Notice to the Rights Agent or if all or a portion of the applicable CPR Payment Amount is determined to be payable pursuant to *Section 2.4(e)* above, Buyer shall establish a CPR Payment Date that is within fifteen (15) Business Days of the date of the Payment Notice or the date of final determination pursuant to *Section 2.4(e)* above, as applicable, and shall notify the Rights Agent of such date in writing (the *CPR Payment Date*).

(g) Buyer shall deliver the applicable portion of the CPR Payment Amount, in immediately payable funds, to the Rights Agent at least three (3) Business Days prior to the CPR Payment Date; *provided* that if Buyer has received a Notice of Objection in regards to any portion of such CPR Payment Amount, Buyer shall have no obligation to provide any funds to the Rights Agent until after the date of final determination of the amount payable pursuant to *Section 2.4(e)* above.

(h) On any CPR Payment Date, the Rights Agent shall send to each Holder its Pro Rata Share of the applicable portion of the CPR Payment Amount, subject to any CPR Payment Deductions, (i) by check mailed to the address of each Holder (or any successor or permitted transferee or assignee thereof) as reflected in the CPR Register as of the close of business on the day that is five (5) Business Days prior to the date that the Rights Agent performs its obligations under this *Section 2.4*, or (ii) with respect to any Holder that is due payment in excess of five hundred thousand dollars (\$500,000) who has provided to the Rights Agent wire instructions, by wire transfer of immediately available funds in accordance with such wire instructions.

## **Table of Contents**

(i) The Rights Agent shall deduct and withhold, or cause to be deducted or withheld, from each Holder's Pro Rata Share of any CPR Payment Amount otherwise payable pursuant to this Agreement, the amounts, if any, that Buyer or a Subsidiary of Buyer is required to deduct and withhold with respect to the making of such payment under the Code or any state, local or foreign tax law; *provided*, that in determining the required amount to be withheld, the Rights Agent will give effect to any properly presented form (e.g., Form W-8 or W-9, as applicable) eliminating or reducing the amount required to be withheld. To the extent that amounts are so withheld or paid over to or deposited with the relevant Governmental Authority, such withheld amounts shall be treated for all purposes of this Agreement as having been paid to the Holder in respect of which such deduction and withholding was made (the *CPR Payment Deductions* ).

(j) The Rights Agent shall have no duty or obligation to verify or confirm the accuracy, validity or sufficiency of any amounts paid pursuant to this *Section 2.4* and shall have no duty or obligation to verify or confirm whether a CPR Payment Event has occurred.

(k) If no CPR Payment Event occurs prior to the Termination Date, subject to *Section 2.4(d)*, the CPRs shall expire worthless, and all rights thereunder and all rights in respect thereof under this Agreement shall cease in accordance with *Section 8.10*.

### **Section 2.5. No Voting, Dividends or Interest; No Equity or Ownership Interest in Buyer.**

The CPRs shall not have any voting or dividend rights, and interest shall not accrue on any amounts payable on the CPRs to any Holder. Furthermore, the CPRs shall not represent any equity or ownership interest in Buyer or in any constituent company to the Merger.

## **ARTICLE III**

### **THE RIGHTS AGENT**

#### **Section 3.1. Certain Duties and Responsibilities.**

The Rights Agent shall not have any liability for any actions taken or not taken in connection with this Agreement, except to the extent of its willful misconduct, bad faith or gross negligence. No provision of this Agreement shall require the Rights Agent to expend or risk its own funds or otherwise incur any financial liability in the performance of any of its duties hereunder or in the exercise of any of its rights or powers.

#### **Section 3.2. Certain Rights of Rights Agent.**

The Rights Agent undertakes to perform only such express duties and obligations as are specifically set forth in this Agreement, and no implied duties or obligations shall be read into this Agreement against the Rights Agent. In addition:

(a) the Rights Agent may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties;

(b) whenever the Rights Agent shall deem it necessary or desirable that a fact or matter be proved or established prior to taking, suffering or omitting any action hereunder, the Rights Agent may, in the absence of willful misconduct, bad faith or gross negligence on its part, rely upon an Officer's Certificate;

(c) the Rights Agent may consult with, and obtain advice from, legal counsel in the event of any question as to any of the provisions hereof or the duties hereunder, and it shall incur no liability and shall be deemed to be acting in accordance with the opinion and instructions of such counsel. The Rights Agent may perform any and all of its duties through its agents, representatives, attorneys, custodians and/or nominees;



## **Table of Contents**

(d) if the Rights Agent becomes involved in litigation on account of this Agreement, it shall have the right to retain counsel subject to the terms and conditions of this Agreement and shall be entitled to reimbursement for all reasonable documented costs and expenses related thereto as provided in *Section 3.2(i)* hereof; *provided, however*, that the Rights Agent shall not be entitled to any such reimbursement to the extent such litigation ultimately determines that the Rights Agent acted with willful misconduct, bad faith or gross negligence;

(e) in the event that conflicting demands are made upon the Rights Agent for any situation addressed or not addressed in this Agreement, the Rights Agent may withhold performance of the terms of this Agreement until such time as said conflicting demands shall have been withdrawn or the rights of the respective parties shall have been settled by court adjudication, arbitration, joint order or otherwise;

(f) the permissive rights of the Rights Agent to do things enumerated in this Agreement shall not be construed as a duty;

(g) the Rights Agent shall not be required to give any note or surety in respect of the execution of such powers or otherwise in respect of the premises;

(h) Buyer agrees to indemnify the Rights Agent for, and hold the Rights Agent harmless against, any loss, liability, claim, demands, suits or expense arising out of or in connection with the Rights Agent's duties under this Agreement, including the costs and expenses of defending the Rights Agent against any claims, charges, demands, suits or loss, unless such loss shall have been caused by the Rights Agent's willful misconduct, bad faith or gross negligence; and

(i) Notwithstanding anything to the contrary in this Agreement, Buyer only agrees to pay the fees and expenses of the Rights Agent in connection with this Agreement, as set forth on *Schedule 1* hereto. An invoice for the Rights Agent Fee will be rendered a reasonable time prior to, and paid on, the Effective Time. An invoice for any out-of-pocket expenses and per item fees realized (subject to the terms and conditions of this Agreement) will be rendered and payable within thirty (30) days after receipt by Buyer, except for postage and mailing expenses, which funds must be received by the Rights Agent one (1) Business Day prior to the scheduled mailing date.

### **Section 3.3. Resignation and Removal; Appointment of Successor.**

(a) The Rights Agent may resign at any time by giving written notice thereof to Buyer specifying a date when such resignation shall take effect, which notice shall be sent at least thirty (30) days prior to the date so specified.

(b) If the Rights Agent shall resign, be removed or become incapable of acting, Buyer, by way of a Board Resolution, shall promptly appoint a qualified successor Rights Agent who may be a Holder but shall not be an affiliate of Buyer. The successor Rights Agent so appointed shall, forthwith upon its acceptance of such appointment in accordance with this *Section 3.3(b)*, become the successor Rights Agent. The retiring Rights Agent shall deliver all relevant books and records to the successor Rights Agent. *Section 3.2(h)* shall survive any resignation or removal of any Rights Agent.

(c) Buyer shall give notice of each resignation and each removal of a Rights Agent and each appointment of a successor Rights Agent by issuing a press release, which shall include the name and address of the successor Rights Agent, within four (4) Business Days announcing such event. Failure to give any notice provided for in this *Section 3.3(c)*, however, or any defect therein, shall not affect the legality or validity of the resignation or removal of the Rights Agent or the appointment of a successor Rights Agent, as the case may be.

(d) If a successor Rights Agent has not been appointed and has not accepted such appointment by the end of the thirty (30) calendar day period after the resignation, removal or incapacity of the retiring Rights Agent, the

---

## **Table of Contents**

retiring Rights Agent may apply to a court of competent jurisdiction for the appointment of a successor Rights Agent, and the costs, expenses and reasonable attorneys' fees which are incurred in connection with such a proceeding shall be paid in accordance with *Section 3.2(i)* hereof. Any such successor to the retiring Rights Agent shall agree to be bound by the terms of this Agreement, and the retiring Rights Agent shall provide the successor Rights Agent with all relevant books and records. Upon delivery of all of the relevant books and records, pursuant to the terms of this *Section 3.3(d)* to a successor Rights Agent, the retiring Rights Agent shall thereafter be discharged from any further obligations hereunder and the successor Rights Agent shall become the Rights Agent hereunder. The Rights Agent is hereby authorized, in any and all events, to comply with and obey any and all final judgments, orders and decrees of any court of competent jurisdiction which may be filed, entered or issued, and all final arbitration awards and, if it shall so comply or obey, it shall not be liable to any other Person by reason of such compliance or obedience.

### **Section 3.4. Acceptance of Appointment by Successor.**

Every successor Rights Agent appointed hereunder shall execute, acknowledge and deliver to Buyer and to the retiring Rights Agent an instrument accepting such appointment and a counterpart of this Agreement, and thereupon such successor Rights Agent, without any further act, deed or conveyance, shall become vested with all the rights, powers, trusts and duties of the retiring Rights Agent; *provided*, that upon the request of Buyer or the successor Rights Agent, such retiring Rights Agent shall execute and deliver an instrument transferring to such successor Rights Agent all the rights, powers and trusts of the retiring Rights Agent.

## **ARTICLE IV**

### **COVENANTS**

#### **Section 4.1. List of Holders.**

(a) Buyer shall furnish or cause to be furnished to the Rights Agent and Holder Representative (i) in such form as Buyer receives from its transfer agent (or other agent performing similar services for Buyer), the names, addresses and shareholdings of the Holders within five (5) Business Days of the Effective Time, and (ii) at such other times as the Rights Agent or Holder Representative may request in writing, within five (5) days after receipt by Buyer of any such request, a list, in such form as Buyer receives from the CPR Registrar, of the names and the addresses of the Holders as of a date not more than fifteen (15) days prior to the time such list is furnished. Buyer shall also furnish or cause to be furnished to the Rights Agent with respect to the holder of the Continuing Target Warrant in such form as received from its transfer agent (or other agent performing similar services for Buyer), such holder's name, address and the number of CPRs issuable upon exercise of such Continuing Target Warrant.

(b) Buyer shall have no obligation to furnish or cause to be furnished required information pursuant to *Section 4.1(a)* to the Rights Agent to the extent that the Rights Agent serves as Buyer's transfer agent (or other agent performing similar services for Buyer) or the CPR Registrar, as applicable.

#### **Section 4.2. Ability to Make Prompt Payment.**

Neither Buyer, Target nor any of their respective Subsidiaries shall enter into any agreement that (i) would prohibit or restrict Buyer's or the Rights Agent's ability to pay the CPR Payment Amounts, subject to any CPR Payment Deductions, to the Holders under this Agreement, or (ii) in the case of Target or any such Subsidiary, restrict Target or such Subsidiary from distributing any CPR Payment Amounts.

#### **Section 4.3. No Assignment.**

Buyer shall not, in whole or in part, assign any of its rights or obligations under this Agreement other than in accordance with the terms of *Section 6.1*.

## **Table of Contents**

### **Section 4.4. Negative Pledge; Assignment Agreement.**

Buyer and Target shall not, and shall not permit any of their respective Subsidiaries to:

(a) except as permitted under *Section 4.5* or as contemplated by *Article VI*, transfer, assign, or otherwise dispose, or permit or suffer to exist any lien, pledge or other encumbrance, on any of their respective rights to receive the First Milestone Payment under the Assignment Agreement upon the occurrence of the First Milestone Event;

(b) take any action that would permit Genzyme to terminate, or that would otherwise excuse, delay, reduce or otherwise impair Genzyme's obligation to make the First Milestone Payment upon the occurrence of the First Milestone Event; or

(c) terminate, amend, supplement or otherwise modify the Assignment Agreement in a manner that would excuse, delay, reduce or otherwise impair the rights of Target to receive the First Milestone Payment upon the occurrence of a CPR Payment Event.

### **Section 4.5. Affirmative Covenants.**

Buyer and Target shall use commercially reasonable efforts (which may include the commencement of litigation against Genzyme) to enforce Target's (or its successors' and assigns') rights and remedies under the Assignment Agreement as such rights and remedies relate to the First Milestone Payment; provided, however that neither Buyer nor Target shall have any obligation to incur any out-of-pocket expenses in connection with such enforcement.

### **Section 4.6. Registration.**

If required pursuant to applicable U.S. securities laws, Buyer shall file a registration statement regarding the CPRs under the Securities Act, and Buyer covenants and agrees:

(a) to use its commercially reasonable efforts, subject to the SEC declaring the effectiveness of the registration statement, to cause the registration statement to remain effective until the Termination Date, including preparing and filing with the SEC such amendments and supplements to the registration statement and the prospectus used in connection therewith as may be necessary to effect the foregoing;

(b) to use its commercially reasonable efforts to register or qualify the CPRs under the securities or blue sky laws of each jurisdiction in which such registration or qualification is necessary.

In addition, the Rights Agent will not be under any duty or responsibility to insure compliance with any applicable federal or state securities laws, including but not limited to the Securities Act and the Exchange Act, in connection with the issuance, transfer, exchange, registration or qualification of the CPRs.

## **ARTICLE V**

### **AMENDMENTS**

#### **Section 5.1. Amendments Without Consent of Holders.**

(a) Without the consent of any Holders, Holder Representative or the Rights Agent, Buyer, when authorized by a Board Resolution, at any time and from time to time, may enter into one or more amendments hereto, for any of the following purposes:

(i) to evidence the succession of another Person to Buyer and the assumption by any such successor of the covenants and obligations of Buyer herein in a transaction contemplated by *Section 6.1* hereof; or

Table o