

Emisphere

A dark blue graphic element consisting of a horizontal bar that tapers to a point on the right. A small, light blue arrow points to the right from the bottom of the letter 'E' in the word 'Emisphere'.

ANNUAL REPORT
AND PROXY

2012



Emisphere's new leadership team has refocused the Company's operations and strategy to reemphasize the commercialization of Oral Eligen® B12, build new high-value partnerships, evaluate new Medical Foods commercial opportunities, reprioritize the product pipeline, and promote new uses for the Eligen® Technology.

Our pipeline includes product candidates that have reached clinical development as well as a variety of preclinical research and development programs. We are carrying out these programs both in collaboration with pharmaceutical and biotechnology companies and independently. Promising products in the pipeline include oral GLP-1 analogues for Type-2 Diabetes (in development with Novo Nordisk A/S) and an improved oral formulation of Vitamin B12 (which is being developed internally). Additionally we've refocused and reevaluated our business development efforts globally to take advantage of the Eligen® Technology's suitability to facilitate absorption of emerging peptides and biologics that are typically only available as injectibles.

Learn more about our product pipeline by visiting our website at: www.emisphere.com.



To Our Shareholders, Partners, and Employees:

Throughout 2012, the Company continued to face formidable challenges but has revitalized its efforts to develop commercial applications for its Eligen[®] Technology and to realize its value. Specifically, the Eligen[®] Technology has been reevaluated and our corporate strategy refocused on commercializing it as quickly as possible by building high-value partnerships and reprioritizing the product pipeline.

Notwithstanding the Company's optimism for its technology, the Company continues to face significant operational and financial challenges in 2013. Its most significant challenge continues to be meeting its liquidity requirements, including obtaining sufficient funds to meet its obligations to MHR Fund Management LLC and its various affiliated funds (collectively, "MHR"). Under the terms of various promissory notes issued to MHR, the Company owes MHR approximately \$34.6 million as of March 31, 2013, all of which is either past due or payable on demand. As a result of the past due amounts, MHR has the ability at any time to foreclose on substantially all of the Company's assets. To date, MHR has not demanded payment of the amounts due or exercised its rights to foreclose on our assets, and has continued discussions with the Company regarding proposals relating to payment of these amounts while reserving all of its rights under the terms of the notes and related agreements. Although these discussions are continuing, the Company cannot provide any assurances as to the outcome of such discussions.

The Company is considering several ideas to address its liquidity needs, none of which, however, may prove feasible. We hope to be able to report progress in this area soon.

In the face of these challenges, the Company took several important steps during 2012 including my appointment as President and Chief Executive Officer, attracting and engaging other new key management personnel, and naming Mr. Timothy G. Rothwell as Chairman of the Board of Directors. After evaluating the Company's operations and strategy, the new leadership team determined that the Company should refine its corporate strategy to focus on commercializing Oral Eligen[®] B12 in the US and in global markets, seeking other drug or medical food delivery opportunities using the Eligen[®] Technology, and securing broader applications of the Eligen[®] Technology to take advantage of its suitability to facilitate oral absorption of emerging peptides and biologics products, which are typically available only in injectible formulations. We believe that these new drugs, combined with Eligen[®] delivery, have the potential to improve the quality of life for those suffering with chronic diseases. We believe that Emisphere's new business direction will present opportunities for growth and value creation for the Company and its shareholders. Commensurate with our new course, spending has been redirected and aggressive cost control initiatives have been implemented.

The Company also remains focused on creating shareholder value by realizing the potential of its current Eligen[®] Technology pipeline, which includes a broad range of product candidates in

different stages of development. These products are being developed internally, such as our oral Eligen[®] B12 program, and by Novo Nordisk.

Novo Nordisk is using Emisphere's Eligen[®] Technology to develop and commercialize oral formulations of its insulins and GLP-1 receptor agonists, with a potential GLP-1 drug currently undergoing Phase I clinical trials.

The Company's oral formulation of Eligen[®] B12 (1000 mcg) for use by B12 deficient individuals will be ready to market once adequate funding is secured to support the product launch. Oral Eligen[®] B12 is protected by patent in the U.S. through approximately 2029 and the Company is pursuing intellectual property protection rights in other global markets.

As we move ahead in 2013, we remain laser focused on the goal of maximizing value for our shareholders. We will continue to work proactively with our current development partners; to develop new Eligen[®] Technology partnerships as meaningful opportunities arise; and to make real progress on commercializing our Oral Eligen[®] B12 program. All these initiatives increase our potential to achieve our stated business goals and objectives.

To achieve the full potential of its technology, execute its new business strategy effectively, and meet its financial obligations, the Company must secure significant additional funding. However, we cannot provide any assurances that the Company will be able to secure adequate funding to meet its current obligations and successfully pursue its new strategic direction. Furthermore, despite our optimism regarding the Eligen[®] Technology, even in the event that the Company is adequately funded, there is no guarantee that any of our products or product candidates will perform as hoped or that such products can be successfully commercialized.

On behalf of the leadership team, we value the continued support of our shareholders and look forward implementing the approaches outlined with the goal of creating new value and a profitable platform for business growth success.

Sincerely,

Alan L. Rubino

President and Chief Executive Officer

Forward-looking statements made in this letter, including statements regarding management's expectations relating to matters that are not historical facts (including without limitation those regarding the timing or potential outcomes of research collaborations or clinical trials, any market that might develop for any of Emisphere's product candidates and the sufficiency of Emisphere's cash and other capital resources) are forward-looking statements made pursuant to the safe harbor provisions of the Private Securities Litigation Reform Act of 1995, and involve risks and uncertainties, including, but not limited to, the likelihood that future research will prove successful, the likelihood that any product in the research pipeline will receive regulatory approval in the United States or abroad, the ability of Emisphere and/or its partners to develop, manufacture and commercialize products using Emisphere's drug delivery technology, Emisphere's ability to fund such efforts with or without partners, and other risks and uncertainties detailed in Emisphere's filings with the Securities and Exchange Commission.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 10-K

(Mark One)

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

For the fiscal year ended December 31, 2012

OR

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

For the transition period from _____ to _____
Commission file number 0-17758

EMISPHERE TECHNOLOGIES, INC.

(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of
incorporation or organization)

4 Becker Farm Road, Suite 103

Roseland, NJ

(Address of principal executive offices)

13-3306985

(I.R.S. Employer
Identification Number)

07068

(Zip Code)

(973) 532-8000

(Registrant's telephone number, including area code)

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

None

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

Common Stock — \$.01 par value

Preferred Stock Purchase Rights

Indicate by check mark if the Registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes No

Indicate by check mark if the Registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. Yes No

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

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§ 229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

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

Large accelerated filer Accelerated filer Non-accelerated filer Smaller reporting company
(Do not check if a smaller reporting company)

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

As of June 30, 2012 (the last business day of the registrant's most recently completed second quarter), the aggregate market value of the common stock held by non-affiliates of the Registrant (i.e. excluding shares held by executive officers, directors, and control persons) was \$5,910,598 computed at the closing price on that date.

The number of shares of the Registrant's common stock, \$.01 par value, outstanding as of March 1, 2013 was 60,687,478.

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PART I

SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS

Certain statements made under the captions “Business” (Item 1) and “Management’s Discussion and Analysis of Financial Condition and Results of Operations” (Item 7), the notes to our audited financial statements (Item 8) and elsewhere in this Annual Report on Form 10-K, as well as statements made from time to time by our representatives may constitute “forward-looking statements” within the meaning of the Private Securities Litigation Reform Act of 1995. These forward-looking statements include, without limitation, statements regarding planned or expected studies and trials of oral formulations that utilize our Eligen[®] Technology; the timing of the development and commercialization of our product candidates or potential products that may be developed using our Eligen[®] Technology; the potential market size, advantages or therapeutic uses of our potential products; variation in actual savings and operating improvements resulting from restructurings; and the sufficiency of our available capital resources to meet our funding needs. We do not undertake any obligation to publicly update any forward-looking statement, whether as a result of new information, future events, or otherwise, except as required by law. Such forward-looking statements involve known and unknown risks, uncertainties and other factors which may cause our actual results or achievements to be materially different from any future results or achievements expressed or implied by such forward-looking statements. Such factors include the factors described in Part I, Item 1A. “Risk Factors” and the other factors discussed in connection with any forward-looking statements.

ITEM 1. BUSINESS

Overview of Emisphere

Introduction and History

Emisphere Technologies, Inc. (“Emisphere,” “the Company,” “our,” “us,” or “we”) is a biopharmaceutical company that focuses on a unique and improved delivery of therapeutic molecules or nutritional supplements using its Eligen[®] Technology. These molecules could be currently available or are under development. Such molecules are usually delivered by injection; in many cases, their benefits are limited due to poor bioavailability, slow on-set of action or variable absorption. In those cases, our technology may increase the benefit of the therapy by improving bioavailability or absorption or by decreasing time to onset of action. The Eligen[®] Technology can be applied to the oral route of administration as well other delivery pathways, such as buccal, rectal, inhalation, intra-vaginal or transdermal. The Eligen[®] Technology can make it possible to deliver certain therapeutic molecules orally without altering their chemical form or biological activity. Eligen[®] delivery agents, or “carriers”, facilitate or enable the transport of therapeutic molecules across the mucous membranes of the gastrointestinal tract, to reach the tissues of the body where they can exert their intended pharmacological effect. Our development efforts are conducted internally or in collaboration with corporate development partners. Typically, the drugs that we target are at an advanced stage of development, or have already received regulatory approval, and are currently available on the market. Our website is www.emisphere.com. The contents of that website are not incorporated herein by reference. Investor related questions should be directed to info@emisphere.com.

Emisphere was originally founded as Clinical Technologies Associates, Inc. in 1986. We conducted an initial public offering in 1989 and were listed on NASDAQ under the ticker symbol “CTAI”. In 1990, we decided to focus on our oral drug delivery technology, now known as the Eligen[®] Technology. In 1991, we changed our name to Emisphere Technologies, Inc., and we continued to be listed on NASDAQ under the new ticker symbol “EMIS”. The Company’s securities were suspended from trading on the NASDAQ Capital Market effective at the open of business on Tuesday, June 9, 2009, and NASDAQ delisted the Company’s securities thereafter. The delisting resulted from the Company’s non-compliance with the minimum market value of listed securities requirement for continued listing. Simultaneously, the Company’s securities began trading on the Over-the-Counter Bulletin Board (the “OTCBB”), an electronic quotation service maintained by the Financial Industry Regulatory Authority, effective with the open of business on Tuesday, June 9, 2009. The Company’s trading symbol remains EMIS, however, it is our understanding that, for certain stock quote publication websites, investors may be required to key EMIS.OB to obtain quotes.

The Eligen[®] Technology

The Eligen[®] Technology is a broadly applicable proprietary oral drug delivery technology based on the use of proprietary synthetic chemical compounds known as EMISPHERE[®] delivery agents, or carriers. These delivery agents facilitate and enable the transport of therapeutic macromolecules (such as proteins, peptides, and polysaccharides) and poorly absorbed small molecules across biological membranes. The Eligen[®] Technology not only facilitates absorption, but it acts rapidly in the upper sections of the GI where absorption is thought to occur. With the Eligen[®] Technology, most of the molecules reach the general circulation in less than an hour post-dose. Rapid absorption can limit enzymatic degradation that typically affects macromolecules or can be advantageous in cases where time to onset of action is important (i.e. analgesics). Another characteristic that distinguishes Eligen[®] from the competition is absorption takes place through a transcellular, not paracellular, pathway. This underscores the safety of Eligen[®] as the passage of the Eligen[®] carrier and the molecule preserve the integrity of the tight junctions within the cell and reduces any likelihood of inflammatory processes and autoimmune gastrointestinal diseases. Furthermore, Eligen[®] Technology carriers are rapidly absorbed, distributed, metabolized and eliminated from the body, they do not accumulate in the organs and tissues and they are considered safe at anticipated doses and dosing regimens.

Results from two clinical studies published by F Hoffmann-La Roche Ltd illustrate important safety characteristics of Emisphere's Eligen[®] Technology. These studies were performed with novel oral ibandronate formulations using Emisphere's SNAC carrier, an Eligen[®] Technology compound. The first study (J Drug Del Technol 2011; 21: 521-5) showed that SNAC needs to be co-formulated with ibandronate and not simply co-dosed in order to increase ibandronate bioavailability. The second study (Arzneimittelforschung 2011; 61:707-13) demonstrated that co-dosing of a SNAC/ibandronate formulation with metformin, a drug widely used in Type 2 Diabetes patients, did not influence the absorption of metformin. Together, these studies support the hypothesis that Eligen[®] Technology facilitates oral absorption only when co-formulated with the intended active ingredient, and that co-dosing with other ingredients should not result in accidental or incidental absorption of unintended ingredients.

Another important safety characteristic of the Eligen[®] Technology was recently demonstrated by the results of three clinical safety studies conducted by Novartis International AG with the former osteoporosis and osteoarthritis treatment candidate SMC021. SMC021 used Emisphere's permeation enhancer 5-CNAC, an Eligen[®] Technology compound, in combination with salmon calcitonin ("SCT"). These studies addressed the potential for SMC021 drug interaction with several widely used drugs and found, in each case, no evidence to indicate a safety concern for drug interaction. Scientific posters describing the results of these clinical studies were presented at the annual meeting of the American Society of Clinical Pharmacology and Therapeutics on March 17 2012. The first study (The effect of esomeprazole on the pharmacokinetics and pharmacodynamics of SMC021 in healthy volunteers. Choi L et al.) concluded that pre-treatment with the proton pump inhibitor, esomeprazole, decreased SCT exposure by approximately 30%, without impacting the pharmacodynamic response to SCT. The second study (Pharmacokinetic interaction assessment between SMC021 and ibuprofen and between SMC021 and acetaminophen. Choi L et al.) concluded that ibuprofen and acetaminophen did not significantly alter the pharmacokinetics of SMC021 when used jointly with either of these analgesics. The third study (Pharmacokinetic interaction assessment between SMC021 and rosiglitazone. Choi L et al.) concluded that SMC021 did not inhibit the drug metabolizing enzyme CYP2C8 when SMC021 and rosiglitazone, a type II diabetes drug metabolized by CYP2C8, were administered together at expected clinical doses. Together, these studies support the hypothesis that Eligen[®] Technology does not pose a safety risk for drug interaction.

The Eligen[®] Technology was extensively reevaluated in 2007 by our scientists, senior management and expert consultants. Based on this analysis, we believe that our technology can enhance overall healthcare, including patient accessibility and compliance, while benefiting the commercial pharmaceutical marketplace and driving company valuation. The application of the Eligen[®] Technology is potentially broad and may provide for a number of opportunities across a spectrum of therapeutic modalities.

Implementing the Eligen[®] Technology is quite simple. It requires co-mixing a drug or nutritional supplement and an Eligen[®] carrier to produce an effective formulation. The carrier does not alter the chemical properties of the drug nor its biological activity. Some therapeutic molecules are better suited for use with the

Eligen[®] Technology than others. Drugs or nutritional supplements whose bioavailability is limited by poor membrane permeability or chemical or biological degradation, and which have a moderate-to-wide therapeutic index, appear to be the best candidates. Drugs with a narrow therapeutic window or high molecular weight may not be favorable with the technology.

We believe that our Eligen[®] Technology makes it possible to safely deliver a therapeutic macromolecule orally or increase the absorption of a poorly absorbed small molecule without altering its chemical composition or compromising the integrity of biological membranes. We believe that the key benefit of our Eligen[®] Technology is that it improves the ability of the body to absorb small and large molecules.

Emisphere Today

Since our inception in 1986, substantial efforts and resources have been devoted to understanding the Eligen[®] Technology and establishing a product development pipeline that incorporated this technology with selected molecules. Our core business strategy had been to develop oral forms of drugs or nutrients that are not currently available or have poor bioavailability in oral form, by applying the Eligen[®] Technology to those drugs or nutrients, and to commercialize the Company's Oral Eligen[®] B12 Product. During September 2012, the Company took two important steps to improve its strategic position: it hired Mr. Alan L. Rubino as President and Chief Executive Officer, and appointed Mr. Timothy G. Rothwell as Chairman of the Board of Directors. Mr. Rubino and Mr. Rothwell are seasoned industry executives with major and emerging pharmaceutical company experiences who form the core of a new leadership team that will implement the Company's strategic goals. After evaluating the Company's operations and strategy, the leadership team determined the Company should refocus its corporate strategy to reemphasize the commercialization of Oral Eligen[®] B12, build new high-value partnerships, evaluate new prescription Medical Foods commercial opportunities, reprioritize the product pipeline, and promote new uses for the Eligen[®] Technology. In furtherance of this new strategic direction, spending was redirected and aggressive cost control initiatives were implemented. To accelerate the commercialization of B12 and evaluate new prescription Medical Foods opportunities and other prescription products under development, the Company hired Mr. Carl V. Sailer to head its commercial efforts. Mr. Sailer has extensive experience in pharmaceuticals products marketing and supply chain management. He has a proven track record of launching new and enhancing financial performance of existing pharmaceutical products by implementing progressive marketing and distribution commercial models. These actions support the Company's decision to reposition Emisphere into a viable commercial-stage entity, anchored by the Eligen[®] Oral B12 product. As it transitions to this strategy, the Company remains dedicated to further realizing the full potential and commercial value of its platform Eligen[®] Technology. To that end, our new Chairman and Chief Executive Officer have sought to expand opportunities with existing partners and will continue to work to expand and explore new efforts to attract new delivery system, product development, and licensing partnerships. Furthermore, the Company engaged the consulting services of Dr. Carlos de Lecea, M.D., Ph.D., to expand its business development efforts globally. Dr. de Lecea has over 20 years experience in business development including in and out licensing pharmaceuticals products and delivery technologies in global markets. Dr. de Lecea will also work with Mr. Rubino to expand the application of the Eligen[®] Technology by taking advantage of its suitability to facilitate oral absorption of emerging peptides and biologics products that are typically only available as injectibles or are currently under development. We believe that these products represent tremendous promise for realizing improvements in healthcare and growth in the industry, and that the Eligen[®] Technology is well suited to deliver many of these molecules safely and efficiently.

As a result of our recent steps to refocus and prioritize our commercial opportunities, and promising trends in the industry that should provide new growth opportunities, we believe that Emisphere's new business strategy will present opportunities for growth and value creation for the Company and its shareholders. We recognize, however, that further development, exploration and commercialization of our technology entails substantial risk and requires significant operational expenses. We continue to refocus our efforts on strategic development initiatives to reduce non-strategic spending aggressively, and seek to obtain the funding necessary to implement our new corporate strategy. There can be no assurances, however, that the Company will be able to secure adequate funding to meet its current obligations and successfully pursue its strategic direction. Furthermore, despite our optimism regarding the Eligen[®] Technology, even in the event that the Company is adequately

funded, there is no guarantee that any of our products or product candidates will perform as hoped or that such products can be successfully commercialized. For further discussion, see part I, Item 1A “Risk Factors.”

We have limited capital resources and operations to date have been funded with the proceeds from collaborative research agreements, public and private equity and debt financings and income earned on investments. As of September 27, 2012, the Company is in default under the terms of the MHR Convertible Notes (described in Note 8 to the Financial Statements included in Item 8 of this Report) issued to MHR Fund Management LLC (together with its affiliates, “MHR”). The default is the result of the Company’s failure to pay MHR approximately \$30.5 million in principal and interest due and payable on September 26, 2012 under the terms of the MHR Convertible Notes. Pursuant to that certain Pledge and Security Agreement, dated as of September 26, 2005, between the Company and MHR (as amended to date, the “Security Agreement”), the MHR Convertible Notes are secured by a first priority lien in favor of MHR on substantially all of our assets. On October 4, 2012, the Company received notice from MHR that, as a result of the payment default described above, the default interest rate of 13% per annum will apply with respect to the MHR Convertible Notes, effective as of September 27, 2012.

The Company continues to be in default under the terms of the MHR Convertible Notes and, as a result of such default, MHR has the ability at any time to foreclose on substantially all of the Company’s assets under the terms of the Security Agreement. To date, MHR has not demanded payment under the MHR Convertible Notes or exercised its rights under the Security Agreement as a result of the default, and has continued discussions with the Company regarding proposals relating to the default while reserving all of its rights under the terms of the MHR Convertible Notes and Security Agreement. There can be no assurances as to the outcome of such discussions.

As of September 27, 2012, the Company is also in default under the terms of certain non-interest bearing promissory notes in the aggregate principal amount of \$600,000 issued to MHR on June 8, 2010 (the “2010 MHR Notes”). The 2010 MHR Notes were originally due and payable on June 8, 2012, but this maturity date was extended to September 26, 2012 by agreement with MHR. The default is the result of the Company’s failure to pay to MHR \$600,000 in principal due and payable on September 26, 2012 under the terms of the 2010 MHR Notes. As with the MHR Convertible Notes discussed above, MHR has not demanded payment under the 2010 MHR Notes, and has continued discussions with the Company regarding proposals relating to the 2010 MHR Notes and the Company’s default thereunder while reserving all of its rights under the 2010 MHR Notes. There can be no assurances as to the outcome of such discussions.

As more specifically described in Note 8 to the Financial Statements included in Item 8 of this Report, on October 17, 2012, the Company issued a promissory note (the “Bridge Note”) to MHR Institutional Partners IIA LP, MHR Institutional Partners II LP, MHR Capital Partners Master Account LP, and MHR Capital Partners (100) LP (collectively, the “Bridge Lender”) in the principal amount of \$1,400,000 to be advanced by the Bridge Lender to the Company pursuant to the terms thereof (the “Bridge Loan”). That amount was sufficient to support operations of the Company through approximately December 15, 2012. The Bridge Note is secured by a first priority lien on substantially all of our assets. The Bridge Note is payable on demand. As with the MHR Convertible Notes discussed above, MHR has not demanded payment under the Bridge Note, and has continued discussions with the Company regarding proposals relating to the repayment of the Bridge Note. There can be no assurances as to the outcome of such discussions.

As of December 31, 2012, the aggregate book value of MHR Convertible Notes, the 2010 MHR Notes, and the Bridge Note including outstanding principal and interest was \$33.6 million.

In December 2012, the Company received approximately \$1.5 million by participating in the Technology Business Tax Certificate Transfer Program, sponsored by the New Jersey Economic Development Authority. We anticipate that we will continue to generate significant losses from operations for the foreseeable future, and that our business will require substantial additional investment that we have not yet secured. As such, we anticipate that our existing capital resources will enable us to continue operations through approximately April 15, 2013, or earlier if unforeseen events or circumstances arise that negatively affect our liquidity.

Further, we do not have sufficient resources to develop fully any new products or technologies unless we are able to raise substantial additional financing on acceptable terms or secure funds from new or existing partners. We cannot assure that financing will be available on favorable terms or at all. Additionally, these conditions may increase the cost to raise capital. If additional capital is raised through the sale of equity or convertible debt securities, the issuance of such securities would result in dilution to our existing stockholders.

While our plan is to raise capital and/or to pursue partnering opportunities, we cannot be sure that our plans will be successful. If the Company fails to raise additional capital or obtain substantial cash inflows from existing or new partners prior to April 15, 2013, or if MHR demands payment under the terms of the MHR Convertible Notes, the 2010 MHR Notes or the Bridge Note, or exercises its rights under the Security Agreement, the Company could be forced to cease operations. These conditions raise substantial doubt about our ability to continue as a going concern. Consequently, the audit reports prepared by our independent registered public accounting firm relating to our financial statements for the years ended December 31, 2012, 2011 and 2010 include an explanatory paragraph expressing the substantial doubt about our ability to continue as a going concern. The Company is pursuing several courses of action to address its deficiency in capital resources including discussions with MHR, commercialization of B12, leveraging existing partnerships, and capital markets financings.

Overall Product Pipeline

Emisphere's product pipeline includes prescription drugs and medical food product candidates in varying stages of development. We have one prescription product in Phase I and a number of pre-clinical (research stage) projects. Some of the pre-clinical projects are partnered, while others are being pursued internally. We continue to assess therapeutic molecules for their potential compatibility with our technology and market need. Our intent is to continue to expand our pipeline with product candidates that demonstrate significant opportunities for growth. Our focus is on molecules that meet the criteria for success based on our increased understanding of our Eligen® Technology. Depending on the molecule, market potential and interest, we intend to pursue potential product development opportunities through development alliances or internal development.

Vitamin B12

The Company has developed an oral formulation of Eligen® B12 (1000 mcg) which can be marketed as a medical food for use by B12 deficient individuals. During the fourth quarter 2010, the Company completed a clinical trial which demonstrated that both oral Eligen® B12 (1000 mcg) and injectable B12 (current standard of care) can efficiently and quickly restore normal Vitamin B12 levels in deficient individuals. The manuscript summarizing the results from that clinical trial has been published in the July 2011 edition of the journal *Clinical Therapeutics* (Volume 33, pages 934 — 945). We also conducted market research to help assess the potential commercial opportunity for our potential Eligen® B12 (1000 mcg) product. On August 5, 2011, we received notice from the United States Patent Office that the U.S. patent application directed to the oral Eligen® B12 formulation (US Patent 8,022,048) was allowed. This new patent provides intellectual property protection for Eligen® B12 through approximately October 2029. Currently, we are evaluating the results of our clinical trials and market research and exploring alternative development and commercialization options with the purpose of maximizing the commercial and health benefits potential of our Eligen® B12 asset.

Vitamin B12 is an important nutrient that is poorly absorbed in the oral form. In most healthy people, Vitamin B12 is absorbed in a receptor-mediated pathway in the presence of an intrinsic factor. A large number of people take B12 supplements by the oral route, many in megadoses, and by injection. Currently, it is estimated that at least five million people in the U.S. are taking 40 million injections of Vitamin B12 per year to treat a variety of debilitating medical conditions. Another estimated five million people are consuming more than 600 million tablets of Vitamin B12 orally. The international market is larger than the U.S. market. Many B12 deficient patients suffer from pernicious anemia and neurological disorders and many of them are infirm or elderly. Vitamin B12 deficiency can cause severe and irreversible damage, especially to the brain and nervous system. At levels only slightly lower than normal, a variety of symptoms such as fatigue, depression, and poor memory may be experienced.

The data from our first pharmacokinetic study of our new Vitamin B12 formulation showed mean Vitamin B12 peak blood levels were more than 10 times higher for the Eligen® B12 5mg formulation than for the 5mg commercial formulation. The mean time to reach peak concentration (T_{max}) was reduced by over 90%, to 0.5 hours for the Eligen® B12 5mg from 6.8 hours for the commercial 5mg product. Improvement in bioavailability was approximately 240%, with absorption time at 30 minutes and a mean bioavailability of 5%. The study was conducted with a single administration of Eligen® B12. There were no adverse reactions, and Eligen® B12 was well-tolerated.

In May 2009, the Company was informed by an independent expert panel of scientists that its SNAC carrier had been provisionally designated as GRAS for its intended application in combination with nutrients added to food and dietary supplements. Following a comprehensive evaluation of research and toxicology data, Emisphere's SNAC was found to be safe at a dosage up to 250 mg per day when used in combination with nutrients to improve their dietary availability. In July 2009, concurrent with the publication of two papers in the July/August issue of the peer reviewed journal, *International Journal of Toxicology*, which describes the toxicology of its SNAC carrier, SNAC achieved GRAS status for its intended use in combination with nutrients added to food and dietary supplements. The publication of those two papers in the *International Journal of Toxicology* was the final, necessary step in the process of obtaining GRAS status for its SNAC carrier. Since SNAC achieved GRAS status, it is exempt from pre-market approval for its intended use in combination with nutrients added to food and dietary supplements. This opens the way for the potential commercialization of the Eligen® Technology with other substances such as vitamins.

We have obtained patents for the carrier we are using in the oral B12 formulation, the oral Eligen® B12 formulation (as described above), and have filed applications covering the combination of the carrier and many other compounds.

Phase I Programs

Emisphere has one product in Phase I and a number of pre-clinical (research stage) projects. Some of the pre-clinical projects are partnered and others were initiated by the Company.

For the treatment of diabetes, research using the Eligen® Technology and GLP-1 (Glucagon-Like Peptide-1), a potential treatment for Type 2 diabetes, is being conducted by Novo Nordisk. GLP-1 is a natural hormone involved in controlling blood sugar levels. It stimulates the release of insulin only when blood sugar levels become too high. GLP-1 secretion is often impaired in people with Type 2 diabetes. Emisphere had previously conducted extensive tests on native insulin and native GLP-1 which demonstrated that both macromolecules can be effectively delivered using the Eligen® Technology. With the progress that has been made in the development of second generation proteins, we concluded that a more productive pathway is to move forward with GLP-1 analogs, an oral form of which might be used to treat Type 2 diabetes and related conditions. Our research indicated that the development of oral formulations of Novo Nordisk proprietary GLP-1 receptor agonists may represent an opportunity for Emisphere. Consequently, on June 21, 2008 we entered into an exclusive Development and License Agreement with Novo Nordisk focused on the development of oral formulations of Novo Nordisk's proprietary GLP-1 receptor agonists (the "GLP-1 License Agreement"). Under the GLP-1 License Agreement, Emisphere could receive more than \$87 million in contingent product development and sales milestone payments including a \$10 million non-refundable license fee which was received during June 2008. Emisphere would also be entitled to receive royalties in the event Novo Nordisk commercializes products developed under the GLP-1 License Agreement. Under the terms of the agreement, Novo Nordisk is responsible for the development and commercialization of the products. Initially, Novo Nordisk is focusing on the development of oral formulations of its proprietary GLP-1 receptor agonists.

During January 2010, we announced that Novo Nordisk had initiated its first Phase I clinical trial with a long-acting oral GLP-1 analog (NN9924). This milestone released a \$2 million payment to Emisphere, whose proprietary Eligen® Technology is used in the formulation of NN9924. There are many challenges in developing an oral formulation of GLP-1, in particular obtaining adequate bioavailability. NN9924 addresses some of these key challenges by utilizing Emisphere's Eligen® Technology to facilitate absorption from the gastrointestinal tract. The first Phase I Trial investigated the safety, tolerability and bioavailability of NN9924 in healthy volunteers. The trial

enrolled 155 individuals and was completed in May 2010. Novo Nordisk also conducted a multiple-dose Phase I trial. This multiple-dose trial investigated safety, tolerability, pharmacokinetics and pharmacodynamics of NN9924 in healthy male subjects. The trial enrolled 96 individuals and was completed in July 2011.

In its annual report for 2012, Novo Nordisk reported that it is continuing to explore oral formulations in Phase 1 studies.

Preclinical Programs

Our other product candidates in development are in earlier or preclinical research phases, and we continue to assess them for their compatibility with our technology and market need. Some of these pre-clinical projects are partnered and others were initiated and by being pursued internally by the Company. Our intent is to seek partnerships with pharmaceutical and biotechnology companies for certain of these products as we continue to expand our pipeline with product candidates that demonstrate significant opportunities for growth. Our focus is on molecules that meet the criteria for success based on our increased understanding of our Eligen® Technology. Our preclinical programs focus on the development of oral formulations of potentially new treatments for diabetes and products in the areas of cardiovascular, appetite suppression and pain and on the development and potential expansion of nutritional supplement products.

Business Financing

Since our inception in 1986, we have generated significant losses from operations and we anticipate that we will continue to generate significant losses from operations for the foreseeable future.

As of December 31, 2012, our accumulated deficit was approximately \$467.8 million. Our loss from operations was \$6.8 million, \$8.1 million and \$11.5 million for the years ended December 31, 2012, 2011 and 2010, respectively. Our net loss was \$1.9 million for the year ended December 31, 2012, and our net income was \$15.1 million for the year ended December 31, 2011 and our net loss was \$56.9 million for the year ended December 31, 2010. Our net cash outlays from operations and capital expenditures were \$3.0 million, \$9.7 million and \$4.9 million for the years ended December 31, 2012, 2011 and 2010, respectively. Net cash outlays include receipts of deferred revenue of \$0.02 million, \$0.06 million, and \$7.1 million for 2012, 2011, and 2010, respectively. Our stockholders' deficit was \$66.1 million and \$64.5 million as of December 31, 2012 and 2011, respectively.

We have limited capital resources and operations to date have been funded with the proceeds from collaborative research agreements, public and private equity and debt financings and income earned on investments. As described above, as of September 27, 2012, the Company is in default under the terms of the MHR Convertible Notes (described in Note 8 to the Financial Statements included in Item 8 of this report) issued to MHR. The default is the result of the Company's failure to pay MHR approximately \$30.5 million in principal and interest due and payable on September 26, 2012 under the terms of the MHR Convertible Notes. Pursuant to the Security Agreement, the MHR Convertible Notes are secured by a first priority lien in favor of MHR on substantially all of our assets. On October 4, 2012, the Company received notice from MHR that, as a result of the payment default described above, the default interest rate of 13% per annum will apply with respect to the MHR Convertible Notes, effective as of September 27, 2012.

The Company continues to be in default under the terms of the MHR Convertible Notes and, as a result of such default, MHR has the ability at any time to foreclose on substantially all of the Company's assets under the terms of the Security Agreement. To date, MHR has not demanded payment under the MHR Convertible Notes or exercised its rights under the Security Agreement as a result of the default, and has continued discussions with the Company regarding proposals relating to the default while reserving all of its rights under the terms of the MHR Convertible Notes and Security Agreement. There can be no assurances as to the outcome of such discussions.

As of September 27, 2012, the Company is also in default under the terms of certain non-interest bearing promissory notes in the aggregate principal amount of \$600,000 issued to MHR on June 8, 2010 (the "2010 MHR Notes"). The 2010 MHR Notes were originally due and payable on June 8, 2012, but this maturity date was extended to September 26, 2012 by agreement with MHR. The default is the result of the Company's failure to

pay to MHR \$600,000 in principal due and payable on September 26, 2012 under the terms of the 2010 MHR Notes. As with the MHR Convertible Notes discussed above, MHR has not demanded payment under the 2010 MHR Notes, and has continued discussions with the Company regarding proposals relating to the 2010 MHR Notes and the Company's default thereunder while reserving all of its rights under the 2010 MHR Notes. There can be no assurances as to the outcome of such discussions.

As more specifically described above and in Note 8 to the Financial Statements included in Item 8 of this report, on October 17, 2012, the Company issued the Bridge Note to the Bridge Lender in the principal amount of \$1,400,000, which Note evidenced the Bridge Loan. That amount was sufficient to support operations through approximately December 15, 2012. The Bridge Note is secured by a first priority lien on substantially all of our assets and is payable on demand.

As of December 31, 2012, the aggregate book value of MHR Convertible Notes, the 2010 MHR Notes, and the Bridge Note including outstanding principal and interest was \$33.6 million.

In December 2012, the Company received \$1.5 million by participating in the Technology Business Tax Certificate Transfer Program, sponsored by the New Jersey Economic Development Authority. We anticipate that we will continue to generate significant losses from operations for the foreseeable future, and that our business will require substantial additional investment that we have not yet secured. As such, we anticipate that our existing capital resources will enable us to continue operations through approximately April 15, 2013, or earlier if unforeseen events or circumstances arise that negatively affect our liquidity.

Further, we do not have sufficient resources to develop fully any new products or technologies unless we are able to raise substantial additional financing on acceptable terms or secure funds from new or existing partners. We cannot assure that financing will be available on favorable terms or at all. Additionally, these conditions may increase the cost to raise capital. If additional capital is raised through the sale of equity or convertible debt securities, the issuance of such securities would result in dilution to our existing stockholders.

While our plan is to raise capital and/or to pursue partnering opportunities, we cannot be sure that our plans will be successful. If the Company fails to raise additional capital or obtain substantial cash inflows from existing or new partners prior to April 15, 2013, or if MHR demands payment under the terms of the MHR Convertible Notes, the 2010 MHR Notes or the Bridge Note, or exercises its rights under the Security Agreement, the Company could be forced to cease operations. These conditions raise substantial doubt about our ability to continue as a going concern. Consequently, the audit reports prepared by our independent registered public accounting firm relating to our financial statements for the years ended December 31, 2012, 2011 and 2010 include an explanatory paragraph expressing the substantial doubt about our ability to continue as a going concern. The Company is pursuing several courses of action to address its deficiency in capital resources including discussions with MHR, commercialization of B12, leveraging existing partnerships, and capital markets financings.

Even in the event that we are successful in raising additional capital to continue operations, our business will still require substantial additional investment that we have not yet secured. Further, we will not have sufficient resources to fully develop new products or technologies unless we are able to raise substantial additional financing on acceptable terms or secure funds from new or existing partners. We cannot assure you that financing will be available on favorable terms or at all. For further discussion, see Part I, Item 1A "Risk Factors."

Overview of Drug Delivery Industry

The drug delivery industry develops technologies for the improved administration of therapeutic molecules with the goal of expanding markets for existing products and extending drug franchises. Drug delivery companies also seek to develop products on their own that would be patent-protected by applying proprietary technologies to off-patent pharmaceutical products. Primarily, drug delivery technologies are focused on improving safety, efficacy, ease of patient use and/or patient compliance. Pharmaceutical and biotechnology companies consider improved drug delivery as a means of gaining competitive advantage over their peers.

Therapeutic macromolecules, of which proteins are the largest sub-class, are prime targets for the drug delivery industry for a number of reasons. Most therapeutic macromolecules must currently be administered by

injection (most common) or other device such as an inhaler or nasal spray system. Many of these compounds address large markets for which there is an established medical need. These drugs are widely used, as physicians are familiar with them and accustomed to prescribing them. Therapeutic macromolecules could be significantly enhanced through alternative delivery. These medicines are comprised of proteins and other large or highly charged molecules (carbohydrates, peptides, ribonucleic acids) that, if orally administered using traditional oral delivery methods, would degrade in the stomach or intestine before they are absorbed into the bloodstream. Also, these molecules are typically not absorbed following oral administration due to their poor permeability. Therefore, the vast majority are administered parenterally. However, for many reasons, parenteral administration is undesirable, including patient discomfort, inconvenience and risk of infection. Poor patient acceptance of parenteral therapies can lead to medical complications. In addition, parenteral therapies can often require incremental costs associated with administration in hospitals or doctors' offices.

Previously published research indicates that patient acceptance of and adherence to a dosing regimen is higher for orally delivered medications than it is for non-orally delivered medications. Our business strategy is partly based upon our belief that the development of an efficient and safe oral delivery system for therapeutic macromolecules represents a significant commercial opportunity. We believe that more patients will take orally delivered drugs more often, spurring market expansion.

Leading Current Approaches to Drug Delivery

Transdermal (via the skin) and "Needleless" Injection

The size of most macromolecules makes penetration into or through the skin inefficient or ineffective. Some peptides and proteins can be transported across the skin barrier into the bloodstream using high-pressure "needleless" injection devices. Needleless devices, which inject proteins through the skin into the body, have been in development for many years. We believe these devices have not been well accepted due to patient discomfort, relatively high cost, and the inconvenience of placing the drugs into the device.

Nasal (via the nose)

The nasal route (through the membranes of the nasal passage) of drug administration has been limited by low and variable bioavailability for proteins and peptides. As a result, penetration enhancers often are used with nasal delivery to increase bioavailability. These enhancers may cause local irritation to the nasal tissue and may result in safety concerns with long-term use. A limited number of peptides delivered nasally have been approved for marketing in the U.S., including MIACALCIN®, developed by Novartis as an osteoporosis therapy, a therapeutic area we have targeted.

Pulmonary (via the lung)

Pulmonary delivery (through the membranes of the lungs) of drugs is emerging as a delivery route for large molecules. Although local delivery of respiratory drugs to the lungs is common, the systemic delivery (i.e., delivery of the drugs to the peripheral vasculature) of macromolecular drugs is less common because it requires new formulations and delivery technologies to achieve efficient, safe and reproducible dosing. Only one protein using pulmonary delivery has been approved for marketing in the U.S., which is EXUBERA®, an insulin product developed by Pfizer and Nektar, as a diabetes therapy, a therapeutic area we have targeted. However after market acceptance of EXUBERA® was demonstrated to be limited, Pfizer withdrew from further commercialization of, and terminated its license with Nektar for, EXUBERA®.

Intraoral (via the membranes in the mouth)

Intraoral delivery is also emerging as a delivery route for large molecules. Buccal delivery (through the membrane of the cheek) and sublingual delivery (through the membrane under the tongue) are forms of intraoral delivery. Some Vitamin B12 manufacturers sell and distribute sublingual versions of their product.

Oral (via the mouth)

We believe that the oral method of administration is the most patient-friendly option, in that it offers convenience, is a familiar method of administration that enables increased compliance and, for some therapies,

may be considered the most physiologically appropriate. We, and other drug delivery and pharmaceutical companies, have developed or are developing technologies for oral delivery of drugs. We believe that our Eligen® Technology provides an important competitive advantage in the oral route of administration because it does not alter the chemical composition of the therapeutic macromolecules. We have conducted over 140,000 human dosings and have witnessed no serious adverse events that can be attributed to the EMISPHERE® delivery agents dosed or the mechanism of action of the Eligen® Technology.

In general, we believe that oral administration will be preferred to other methods of administration. However, such preference may be offset by possible negative attributes of orally administered drugs such as the quantity or frequency of the dosage, the physical size of the capsule or tablet being swallowed or the taste. For example, in our previous Phase III trial with heparin as an oral liquid formulation, patient compliance was hindered by patients' distaste for the liquid being administered. In addition, patients and the marketplace will more likely respond favorably to improvements in absorption, efficacy, safety, or other attributes of therapeutic molecules. It is possible that greater convenience alone may not lead to success.

Collaborative Agreements

We are a party to certain collaborative agreements with corporate partners to provide development and commercialization services relating to the products under collaboration. These agreements are in the form of research and development collaborations and licensing agreements. Under these agreements, we have granted licenses or the rights to obtain licenses to our oral drug delivery technology. In return, we are entitled to receive certain payments upon the achievement of milestones and royalties on the sales of the products should a product ultimately be commercialized. We also are entitled to be reimbursed for certain research and development costs that we incur.

All of our collaborative agreements are subject to termination by our corporate partners, without significant financial penalty to them. Under the terms of these agreements, upon a termination we are entitled to reacquire all rights in our technology at no cost and are free to re-license the technology to other collaborative partners.

Novo Nordisk A/S

GLP-1 Receptor Agonists Agreement

During June 2008, we entered into the GLP-1 License Agreement with Novo Nordisk, pursuant to which Novo Nordisk will develop and commercialize oral formulations of its proprietary GLP-1 receptor agonists in combination with Emisphere carriers. Under the GLP-1 License Agreement, Emisphere could receive more than \$87 million in contingent product development and sales milestone payments, including a \$10 million non-refundable license fee which was received in June 2008. Emisphere would also be entitled to receive royalties in the event Novo Nordisk commercializes products developed under such Agreement. Under the GLP-1 License Agreement, Novo Nordisk is responsible for the development and commercialization of the products. See "Phase I Program" above for a description of the Phase I activity conducted in connection with the GLP-1 License Agreement, and certain payments made to Emisphere as a result thereof.

In its annual report for 2012, Novo Nordisk reported that it is continuing to explore oral formulations in phase 1 studies.

Insulins License Agreement

During December 2010, the Company entered into an agreement with Novo Nordisk to develop and commercialize oral formulations of Novo Nordisk's insulins using Emisphere's Eligen® Technology (the "Insulins License Agreement"). The Insulins License Agreement includes \$57.5 million in potential product development and sales milestone payments to Emisphere, of which \$5 million was paid upon signing, as well as royalties on sales.

This extended partnership with Novo Nordisk has the potential to offer significant new solutions to millions of people with diabetes worldwide and it also serves to further validate our Eligen® Technology.

Novartis Pharma AG

Discontinued Oral Salmon Calcitonin Program for Osteoporosis and Osteoarthritis

We have collaborated with Novartis in connection with the development and testing of oral formulations of salmon calcitonin (“sCT”) to treat osteoarthritis and osteoporosis (the “Salmon Calcitonin Program”). We entered into a Research Collaboration and Option Agreement, dated as of December 3, 1997, as amended on October 20, 2000 (the “Salmon Calcitonin Option Agreement”) with Novartis to develop an oral form of sCT, which is a hormone that inhibits the bone-tissue resorbing activity of specialized bone cells called osteoclasts, enabling the bone to retain more of its mass and functionality. Pursuant to the Salmon Calcitonin Option Agreement, the Company granted Novartis the option to acquire from the Company a license to develop and commercialize oral sCT utilizing Emisphere’s Eligen® Technology and the right to commence research collaboration with the Company with respect to a second compound, in exchange for certain option exercise payments. Novartis also agreed to reimburse the Company with respect to certain research and development costs incurred by the Company in connection with the sCT Program. Furthermore, under the Salmon Calcitonin Option Agreement, the Company is obligated to help to manage this program through a joint “steering committee” with Novartis. The Salmon Calcitonin Option Agreement expires upon the expiration of the last to expire of the patents of the Company described therein, subject to certain early termination rights, including termination by either party for material breach of the other party and termination by Novartis in favor of a license executed thereunder.

In February 2000, Novartis agreed to execute its option under the Salmon Calcitonin Option Agreement to acquire a license to develop and commercialize oral sCT and as a result, Novartis made a \$2 million milestone payment to us. In March 2000, we entered into a License Agreement, dated as of March 8, 2000, with Novartis for the development of an oral sCT product for the treatment of osteoarthritis and osteoporosis (the “Salmon Calcitonin License Agreement”). Novartis paid us \$2.5 million to obtain the license to our technology for sCT, and to obtain an option to use the Eligen® Technology for a second compound. In addition, Novartis agreed to pay the Company certain milestone and royalty payments in the event that a calcitonin product was ultimately commercialized and to reimburse the Company for certain research and development costs incurred by the Company in connection with the sCT Program. The Salmon Calcitonin License Agreement expires upon the expiration of the last to expire of the patents of the Company described therein, subject to certain early termination rights, including termination by either party for material breach of the other party, and termination by Novartis on prior notice to us.

In February 2007, Novartis and its development partner Nordic Bioscience notified us of the initiation of a three year Phase III clinical trial for the treatment of osteoporosis (“OP”) with an oral form of salmon calcitonin (referred to as SMC021), a new drug candidate, using the Company’s Eligen® Technology. The Phase III program was a three year trial with enrollment of over 4,500 patients, and explored the safety and efficacy of salmon calcitonin and Emisphere’s proprietary Eligen® Technology in the treatment of vertebral fractures in postmenopausal women aged 60-80 with osteoporosis. It was conducted in North and South America, Europe and Asia.

In May 2007, Novartis and Nordic Bioscience notified the Company that they were initiating a Phase III clinical study of SMC021 for the treatment of osteoarthritis (“OA”) using the Company’s Eligen® Technology. A second Phase III study of SMC021 for the treatment of OA, designed to meet FDA requirements for U.S. registration, was initiated by Novartis and Nordic Bioscience in October 2008.

On December 1, 2004, we issued a \$10 million convertible note (the “Novartis Note”) to Novartis in connection with a research collaboration option relating to the development of PTH-1-34. The Novartis Note was originally due December 1, 2009, which date was subsequently extended to June 2010. On June 4, 2010, the Company and Novartis entered into a Master Agreement and Amendment (the “Novartis Agreement”). Pursuant to the Novartis Agreement, the Company was released and discharged from its obligations under the Novartis Note in exchange for: (i) the reduction of future royalty and milestone payments up to an aggregate amount of \$11.0 million due the Company under the Salmon Calcitonin Option Agreement and the Salmon Calcitonin License Agreement; (ii) the right for Novartis to evaluate the feasibility of using Emisphere’s Eligen® Technology with two new compounds to assess the potential for new product development opportunities; and (iii) other amendments to the Salmon Calcitonin Option Agreement and Salmon Calcitonin License Agreement. As of the date of the Novartis Agreement, the outstanding principal balance and accrued interest of the Novartis

Note was approximately \$13.0 million. The Company recognized the full value of the debt released as consideration for the transfer of the rights and other intangibles to Novartis and deferred the related revenue in accordance with applicable accounting guidance for the sale of rights to future revenue until the earnings process has been completed based on achievement of certain milestones or other deliverables.

On December 14, 2011, the Company announced that Novartis had informed the Company that it will not pursue further clinical development of the investigational drug SMC021 (oral calcitonin) as a treatment option in osteoarthritis and for post-menopausal osteoporosis and that it will not seek regulatory submission for SMC021 in either indication. Novartis advised the Company that its decision to stop the clinical program of SMC021 in both indications was based on analysis and evaluation of data from three Phase III clinical trials (two in osteoarthritis and one in osteoporosis) conducted by Nordic Bioscience showed that SMC021 failed to meet key efficacy endpoints in all three trials, despite displaying a favorable safety profile.

The potential aggregate milestones payable to the Company under the Salmon Calcitonin Program originally involved in excess of \$14 million. To date, we have received approximately \$12.4 million in payments from Novartis under the Salmon Calcitonin Program and in light of Novartis' decision not to pursue further clinical development or regulatory approval, we do not anticipate further payments. Under the terms of the Salmon Calcitonin Option Agreement and Salmon Calcitonin License Agreement, we were entitled to receive future royalties based on sales, in the event that an sCT product would be ultimately commercialized by Novartis. In light of Novartis' decision, we do not anticipate receiving any royalties in the future.

Although Novartis has not informed Emisphere of its intention to terminate the Salmon Calcitonin Option Agreement and the Salmon Calcitonin License Agreement, in the likely event that Novartis determines to terminate these agreements, we will reacquire the rights to our technology licensed to Novartis thereunder.

Oral PTH-1-34 Program

We have collaborated with Novartis in connection with the development and testing of oral formulations of PTH-1-34 ("PTH") to treat osteoarthritis and osteoporosis (the "PTH Program"). On December 1, 2004, we entered into a Research Collaboration Option and License Agreement with Novartis whereby Novartis obtained an option to license our existing technology to develop oral forms of PTH 1-34 (the "PTH Option Agreement"). On March 7, 2006, Novartis exercised its option to the license. PTH is produced by the parathyroid glands to regulate the amount of calcium and phosphorus in the body. Recombinant PTH, currently approved for the treatment of osteoporosis, is available only by injection. When used therapeutically, it increases bone density and bone strength to help prevent fractures. It is approved to treat osteoporosis, a disease associated with a gradual thinning and weakening of the bones that occurs most frequently in women after menopause. Untreated postmenopausal osteoporosis can lead to chronic back pain, disabling fractures, and lost mobility. During April 2010, we announced that Novartis initiated a second Phase I trial for an oral PTH-1-34 which uses Emisphere's Eligen® Technology, and was in development for the treatment of postmenopausal osteoporosis. On June 17, 2011, the Company announced that Novartis informed Emisphere of the results of its recently completed Proof of Concept study for an oral PTH1-34 using Emisphere's Eligen® Technology in post-menopausal women with osteoporosis or osteopenia. Novartis informed Emisphere that, although the study confirmed that oral PTH1-34 was both safe and well-tolerated, several clinical endpoints were not met. Based on the data analyzed, Novartis has terminated the study and anticipates no further work on the oral formulation of PTH1-34. The Company has requested additional information from Novartis in order to further analyze and evaluate the results of this trial. Although Novartis has not informed Emisphere of its intention to terminate the PTH Option Agreement in accordance with relevant terms thereunder, Emisphere would reacquire the rights to develop and/or commercialize the product should Novartis so terminate the Agreement.

Previously, Novartis had conducted a Phase I study in postmenopausal women to determine the safety and tolerability of oral PTH-1-34, a combination of human PTH-1-34 and Emisphere's delivery agent 5-CNAC ("5-CNAC"), for the treatment of postmenopausal osteoporosis. The study was designed to assess the bioavailability profile of increasing doses of PTH-1-34 combined with different amounts of 5-CNAC administered orally. The results from the single-center, partially-blinded, incomplete cross-over study were presented October 19, 2009 in a poster session at the 73rd Annual Scientific Meeting of the American College of Rheumatology in Philadelphia,

PA. The results demonstrated that a single dose of the novel oral parathyroid hormone PTH-1-34, which utilizes Emisphere's proprietary Eligen® drug delivery technology and absorption-enhancing carrier molecule 5-CNAC, achieved potentially therapeutically relevant exposure and safety profiles similar to those of the currently available injectable formulation in healthy postmenopausal women.

The potential aggregate sales and development milestones that might have become payable to the Company under the PTH Program originally involved in excess of \$25 million. Furthermore, Emisphere would have been entitled to receive future royalties based on sales, in the event that a PTH product would be ultimately commercialized by Novartis. However, in light of Novartis' decision not to pursue further clinical development; we do not anticipate further payments in connection with the achievement of future sales royalties or sales or development milestones. In the likely event that Novartis determines to terminate the PTH Option Agreement, we will reacquire the rights to our technology licensed to Novartis thereunder.

Terminated Oral Recombinant Human Growth Hormone Program

From 1998 through August 2003, we developed oral rhGH in collaboration with Eli Lilly and Company ("Lilly"). As of August 2003, Lilly returned to us all rights to the oral rhGH program pursuant to the terms of our license agreement. On September 23, 2004, we announced a new partnership with Novartis to develop our oral rhGH program (the "Oral HGH Program"). We entered into a Research and Collaboration Agreement with Novartis, dated September 22, 2004, whereby Novartis licensed the right to develop a convenient oral human growth hormone product using the Eligen® Technology (the "Oral HGH Agreement"). Under this agreement, Novartis had an exclusive worldwide license to develop, make, have made, use and sell products developed under this program. On May 1, 2006, we announced that Novartis initiated the development of an oral rhGH product using Emisphere's Eligen® Technology.

On August 3, 2011, the Company received notification from Novartis that Novartis terminated the Oral HGH Agreement. In connection with this termination, Emisphere has reacquired the rights to develop and/or commercialize the product. Emisphere has requested that Novartis provide the data generated from the collaboration that would be necessary for the Company to continue to develop and commercialize an oral human growth hormone product using the Eligen® Technology. The Company has not incurred any penalties in connection with the termination of the Oral HGH Agreement.

To date, we have received \$6 million in non-refundable payments from Novartis under the Oral HGH Program, including the \$5 million milestone payment received in 2006. Under the Oral HGH Agreement, Emisphere might have received up to \$28 million in additional development milestones that might have become payable to the Company under the Oral HGH Program. Furthermore, Emisphere would have been entitled to receive future royalties based on sales, in the event that an oral rhGH product had been ultimately commercialized by Novartis. However, in light of Novartis' decision to terminate the Oral HGH Agreement, we do not anticipate further payments in connection with the achievement of future sales royalties or sales or development milestones. In connection with Novartis' termination of the Oral HGH Agreement, Emisphere reacquired the rights to our technology licensed to Novartis thereunder.

Research and Development Costs

We have devoted substantially all of our efforts and resources to research and development conducted on our own behalf (self-funded) and in collaborations with corporate partners (partnered). Generally, research and development expenditures are allocated to specific research projects. Due to various uncertainties and risks, including those described in Part 1, Item 1A. "Risk Factors" below, relating to the progress of our product candidates through development stages, clinical trials, regulatory approval, commercialization and market acceptance, it is not possible to accurately predict future spending or time to completion by project or project category.

The following table summarizes research and development spending to date by project category:

	Year Ended December 31,			Cumulative Spending 2012(1)
	2012	2011	2010	
	(In thousands)			
Research(2)	\$ 81	\$ 90	\$ 50	\$ 52,139
Feasibility projects				
Self-funded	679	467	1,642	13,832
Partnered	17	39	34	4,314
Development projects				
Oral heparin (self-funded)	1	117	37	99,592
Oral insulin (self-funded)	4	1	—	21,292
Partnered	—	—	—	12,157
Other(3)	1,085	1,237	732	107,009
Total all projects	<u>\$1,867</u>	<u>\$1,951</u>	<u>\$2,495</u>	<u>\$310,335</u>

- (1) Cumulative spending from August 1, 1995 through December 31, 2012.
- (2) Research is classified as resources expended to expand the ability to create new carriers, to ascertain the mechanisms of action of carriers, and to establish computer based modeling capabilities, prototype formulations, animal models, and *in vitro* testing capabilities.
- (3) Other includes indirect costs such as rent, utilities, training, standard supplies and management salaries and benefits.

Patents and Other Forms of Intellectual Property

Our success depends, in part, on our ability to obtain patents, maintain trade secret protection, and operate without infringing the proprietary rights of others (please refer to Part I, Item 1A “**Risk Factors**” for further discussion of how our business will suffer if we cannot adequately protect our patent and proprietary rights”). We seek patent protection on various aspects of our proprietary chemical and pharmaceutical delivery technologies, including the delivery agent compounds and the structures which encompass Emisphere’s delivery agents, their method of preparation, the combination of our compounds with a pharmaceutical, and use of our compounds with therapeutic molecules to treat various disease states. We have patents and patent applications in the U.S. and certain foreign countries. As of March 1, 2013, Emisphere had been granted more than 110 U.S. patents and more than 200 foreign patents. Emisphere also has more than 50 pending U.S. patent applications as well as more than 200 counterpart applications pending in foreign countries.

We intend to file additional patent applications when appropriate and to aggressively prosecute, enforce, and defend our patents and other proprietary technology.

We have five trademarks granted by the U.S. Patent and Trademark office. They include EMISPHERE®, Elaprin® (oral heparin), the Emisphere logo, Emigent® and Eligen®.

We also rely on trade secrets, know-how, and continuing innovation in an effort to develop and maintain our competitive position. Patent law relating to the patentability and scope of claims in the biotechnology and pharmaceutical fields is evolving and our patent rights are subject to this additional uncertainty. Others may independently develop similar product candidates or technologies or, if patents are issued to us, design around any products or processes covered by our patents. We expect to continue, when appropriate, to file product and other patent applications with respect to our inventions. However, we may not file any such applications or, if filed, the patents may not be issued. Patents issued to or licensed by us may be infringed by the products or processes of others.

Defense and enforcement of our intellectual property rights can be expensive and time consuming, even if the outcome is favorable to us. It is possible that the patents issued to or licensed to us will be successfully challenged, that a court may find that we are infringing validly issued patents of third parties, or that we may have to alter or discontinue the development of our products or pay licensing fees to take into account patent rights of third parties.

Manufacturing

The primary raw materials used in making the delivery agents for our product candidates are readily available in large quantities from multiple sources. In the past we manufactured delivery agents internally using our own facilities on a small scale for research purposes and for early stage clinical supplies. We believe that our manufacturing capabilities complied with the FDA's current Good Manufacturing Practice ("GMP").

Currently, EMISPHERE® delivery agents are manufactured by third parties in accordance with GMP regulations. We have identified other commercial manufacturers meeting the FDA's GMP regulations that have the capability of producing EMISPHERE® delivery agents and we do not rely on any particular manufacturer to supply us with needed quantities.

During April 2009, we announced a strategic alliance with AAIPharma, Inc. intended to expand the application of Emisphere's Eligen® Technology and AAIPharma's drug development services. AAIPharma is a global provider of pharmaceutical product development services that enhance the therapeutic performance of its clients' drugs. AAIPharma works with many pharmaceutical and biotech companies and currently provides drug product formulation development services to Emisphere. This relationship expands our access to new therapeutic candidates for the Eligen® Technology, which potentially could lead to new products and to new alliance agreements as well.

Competition

Our success depends in part upon maintaining a competitive position in the development of product candidates and technologies in an evolving field in which developments are expected to continue at a rapid pace. We compete with other drug delivery, biotechnology and pharmaceutical companies, research organizations, individual scientists and non-profit organizations engaged in the development of alternative drug delivery technologies or new drug research and testing, and with entities developing new drugs that may be orally active. Our product candidates compete against alternative therapies or alternative delivery systems for each of the medical conditions our product candidates address, independent of the means of delivery. Many of our competitors have substantially greater research and development capabilities, experience, marketing, financial and managerial resources than we have. In many cases we rely on our development partners to develop and market our product candidates.

Oral Diabetes Competition — Type 2 Diabetes

In diabetes, there are a number of unmet needs which amplify the need for further product development in the area. There are three main areas of drug therapy, oral anti-diabetes, insulin, and injectable in which companies are attempting to develop innovative products for the treatment of patients.

There are four leading classes for new product development in the area of diabetes. All four seek to take advantage of the potential to improve upon currently available products:

1. GLP-1 Agonists
2. Pulmonary Insulin
3. DPP-IV Inhibitors
4. PPAR modulators.

The objective of our collaboration with Novo Nordisk is to develop an orally available GLP-1 agonist for the treatment of Type 2 diabetes and potentially obesity. A product with the benefits of glucose control, promotion of weight loss, low risk of hypoglycemia, and other benefits is expected to significantly improve therapeutic options and can be expected to perform as well as or better than the existing competition.

Oral Vitamin B12 Competition

Emisphere's potential competition in the Vitamin B12 market will depend on the direction the company takes in the development and commercialization of the product. In the event that Emisphere pursues the nutritional supplements market, competition would include a number of companies selling generic Vitamin B12 in a variety of dosage strengths and methods of delivery (e.g., oral, transdermal, nasal, sublingual) many of which have substantial distribution and marketing capabilities that exceed and will likely continue to exceed our own. In addition, our competition is likely to include many sellers, distributors, and others who are in the business of marketing, selling, and promoting multiple vitamins, vitamin-mineral, and specialized vitamin combinations. Many of these competitors are engaged in low cost, high volume operations that could provide substantial market barriers or other obstacles for a higher cost, potentially superior product that has no prior market history.

If Emisphere pursues the Vitamin B12 medical food market, the Company would need to successfully demonstrate to physicians, nurse-practitioners and payors that an oral dose would be safe, efficacious, readily accessible and improve compliance. These factors will likely require the Company to engage in a substantial educational and promotional product launch and a marketing outreach initiative, the time, cost, and outcome of which are uncertain.

Competition Summary

Although we believe that our oral formulations, if successful, will likely compete with well established injectable versions of the same drugs, we believe that we will enjoy a competitive advantage because physicians and patients prefer orally delivered forms of products over injectable forms. Oral forms of products enable improved compliance, and for many programs, the oral form of products enable improved therapeutic regimens.

Government Regulation

Our operations and product candidates under development are subject to extensive regulation by the FDA, other governmental authorities in the U.S. and governmental authorities in other countries.

The duration of the governmental approval process for marketing new pharmaceutical substances, from the commencement of pre-clinical testing to receipt of governmental approval for marketing a new product, varies with the nature of the product and with the country in which such approval is sought. The approval process for new chemical entities could take eight to ten years or more. The process for reformulations of existing drugs is typically shorter, although a combination of an existing drug with a currently unapproved carrier could require extensive testing. In either case, the procedures required to obtain governmental approval to market new drug products will be costly and time-consuming to us, requiring rigorous testing of the new drug product. Even after such time and effort, regulatory approval may not be obtained for our products.

The steps required before we can market or ship a new human pharmaceutical product commercially in the U.S. include pre-clinical testing, the filing of an Investigational New Drug Application ("IND"), the conduct of clinical trials and the filing with the FDA of either a New Drug Application ("NDA") for drugs or a Biologic License Application ("BLA") for biologics.

In order to conduct the clinical investigations necessary to obtain regulatory approval of marketing of new drugs in the U.S., we must file an IND with the FDA to permit the shipment and use of the drug for investigational purposes. The IND sets forth, in part, the results of pre-clinical (laboratory and animal) toxicology testing and the applicant's initial Phase I plans for clinical (human) testing. Unless notified that testing may not begin, the clinical testing may commence 30 days after filing an IND.

Under FDA regulations, the clinical testing program required for marketing approval of a new drug typically involves three clinical phases. In Phase I, safety studies are generally conducted on normal, healthy human volunteers to determine the maximum dosages and side effects associated with increasing doses of the substance being tested. Phase II studies are conducted on small groups of patients afflicted with a specific disease to gain preliminary evidence of efficacy, including the range of effective doses, and to determine common short-term side effects and risks associated with the substance being tested. Phase III involves large-scale trials conducted

on disease-afflicted patients to provide statistically significant evidence of efficacy and safety and to provide an adequate basis for product labeling. Frequent reports are required in each phase and if unwarranted hazards to patients are found, the FDA may request modification or discontinuance of clinical testing until further studies have been conducted. Phase IV testing is sometimes conducted, either to meet FDA requirements for additional information as a condition of approval. Our drug product candidates are and will be subjected to each step of this lengthy process from conception to market and many of those candidates are still in the early phases of testing.

Once clinical testing has been completed pursuant to an IND, the applicant files an NDA or BLA with the FDA seeking approval for marketing the drug product. The FDA reviews the NDA or BLA to determine whether the drug is safe, effective, and adequately labeled, and whether the applicant can demonstrate proper and consistent manufacture of the drug. The time required for initial FDA action on an NDA or BLA is set on the basis of user fee goals; for most NDA or BLAs the action date is 10 months from receipt of the NDA or BLA at the FDA. The initial FDA action at the end of the review period may be approval or a request for additional information that will be needed for approval depending on the characteristics of the drug and whether the FDA has concerns with the evidence submitted. Once our product candidates reach this stage, we will be subjected to these additional costs of time and money.

The FDA has different regulations and processes governing and regulating food products, including vitamin supplements and nutraceuticals. These products are variously referred to as “dietary supplements”, “food additives”, “dietary ingredients”, “medical foods”, and, most broadly, “food”. These foods products do not require the IND, NDA or BLA process outlined above.

The facilities of each company involved in the commercial manufacturing, processing, testing, control and labeling of pharmaceutical products must be registered with and approved by the FDA. Continued registration requires compliance with GMP regulations and the FDA conducts periodic establishment inspections to confirm continued compliance with its regulations. We are subject to various federal, state and local laws, regulations and recommendations relating to such matters as laboratory and manufacturing practices and the use, handling and disposal of hazardous or potentially hazardous substances used in connection with our research and development work.

While we do not currently manufacture any commercial products ourselves, if we did, we would bear additional cost of FDA compliance.

Employees

As of December 31, 2012, we had 12 employees, 6 of whom are engaged in scientific research and technical functions and 6 of whom are performing accounting, information technology, engineering, facilities maintenance, legal and regulatory and administrative functions. Of the 6 scientific employees, 3 hold Ph.D. and/or D.V.M. degrees. We believe our relations with our employees are good.

Available Information

Emisphere files annual, quarterly, and current reports, proxy statements, and other documents with the Securities and Exchange Commission, (the “SEC”) under the Securities Exchange Act of 1934 as amended (the “Exchange Act”). The public may read and copy any materials that we file with the SEC at the SEC’s Public Reference Room at 100 F Street, NE, Washington, D.C. 20549. The public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. Also, the SEC maintains an internet website that contains reports, proxy and information statements, and other information regarding issuers, including Emisphere, that file electronically with the SEC. The public can obtain any documents that Emisphere files with the SEC at www.sec.gov.

We also make available free of charge on or through our internet website (www.emisphere.com) our Annual Report on Form 10-K, Quarterly Reports on Form 10-Q, Current Reports on Form 8-K, Section 16 filings, and, if applicable, amendments to those reports filed or furnished pursuant to Section 13(a) or Section 16 of the Exchange Act as soon as reasonably practicable after we or the reporting person electronically files such material with, or furnishes it to, the SEC. Our internet website and the information contained therein or connected thereto are not intended to be incorporated into the Annual Report or this Form 10-K.

Our Board of Directors has adopted a Code of Business Conduct and Ethics which is posted on our website at <http://ir.emisphere.com/documentdisplay.cfm?DocumentID=4947>.

ITEM 1A. RISK FACTORS

Special Note Regarding Forward-Looking Statements

From time to time, information provided by us, statements made by our employees or information included in our filings with the SEC (including this Report) may contain statements that are not historical facts, so-called “forward-looking statements,” which involve risks and uncertainties. Such forward-looking statements are made pursuant to the safe harbor provisions of Section 21E of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). In some cases you can identify forward-looking statements by terminology such as “may,” “should,” “could,” “will,” “expect,” “intend,” “plans,” “predict,” “anticipate,” “estimate,” “continue,” “believe” or the negative of these terms or other similar words. These statements discuss future expectations, contain projections of results of operations or of financial condition or state other forward-looking information. When considering forward-looking statements, you should keep in mind the risk factors and other cautionary statements in this Report.

Our actual future results may differ significantly from those stated in any forward-looking statements. Factors that may cause such differences include, but are not limited to, the factors discussed below. Each of these factors, and others, are discussed from time to time in our filings with the SEC.

Risks Related to the Company

We have limited capital resources and we are in default on our obligations to MHR.

We have limited capital resources and operations to date have been funded with the proceeds from collaborative research agreements, public and private equity and debt financings and income earned on investments. We anticipate that we will continue to generate significant losses from operations for the foreseeable future, and that our business will require substantial additional investment that we have not yet secured. As such, we anticipate that our existing capital resources will enable us to continue operations through approximately April 15, 2013, or earlier if unforeseen events or circumstances arise that negatively affect our liquidity. Further, we have significant commitments and obligations. As of September 27, 2012, the Company is in default under the terms of the MHR Convertible Notes (described in Note 8 to the Financial Statements included in Item 8 of this report) issued to MHR Fund Management LLC (together with its affiliates, “MHR”). The default is the result of the Company’s failure to pay MHR approximately \$30.5 million in principal and interest due and payable on September 26, 2012 under the terms of the MHR Convertible Notes. Pursuant to that certain Pledge and Security Agreement, dated as of September 26, 2005, between the Company and MHR (as amended to date, the “Security Agreement”), the MHR Convertible Notes are secured by a first priority lien in favor of MHR on substantially all of our assets. On October 4, 2012, the Company received notice from MHR that, as a result of the payment default described above, the default interest rate of 13% per annum will apply with respect to the MHR Convertible Notes, effective as of September 27, 2012.

The Company continues to be in default under the terms of the MHR Convertible Notes and, as a result of such default, MHR has the ability at any time to foreclose on substantially all of the Company’s assets under the terms of the Security Agreement. To date, MHR has not demanded payment under the MHR Convertible Notes or exercised its rights under the Security Agreement as a result of the default, and has continued discussions with the Company regarding proposals relating to the default while reserving all of its rights under the terms of the MHR Convertible Notes and Security Agreement. There can be no assurances as to the outcome of these discussions.

As of September 27, 2012, the Company is also in default under the terms of certain non-interest bearing promissory notes in the aggregate principal amount of \$600,000 issued to MHR on June 8, 2010 (the “2010 MHR Notes”). The 2010 MHR Notes were originally due and payable on June 8, 2012, but this maturity date was extended to September 26, 2012 by agreement with MHR. The default is the result of the Company’s failure to pay to MHR \$600,000 in principal due and payable on September 26, 2012 under the terms of the 2010 MHR Notes. As with the MHR Convertible Notes discussed above, MHR has not demanded payment under the 2010

MHR Notes, and has continued discussions with the Company regarding proposals relating to the 2010 MHR Notes and the Company's default thereunder while reserving all of its rights under the 2010 MHR Notes. There can be no assurances as to the outcome of such discussions.

If MHR demands payment under the MHR Convertible Notes, the 2010 MHR Notes, or the Bridge Note described in Note 8 to the Financial Statements included in Item 8 to this Report, we will not have sufficient resources to make the required payments. In addition, our default under the 2010 MHR Convertible Notes and the 2010 MHR Notes enables MHR to foreclose on all or substantially all of our assets.

We do not have sufficient resources to meet our obligations under the MHR Convertible Notes, the 2010 MHR Notes, or the Bridge Note described in Note 8 to the Financial Statements included in Item 8 to this Report, or to develop fully any new products or technologies unless we are able to raise substantial additional financing on acceptable terms or secure funds from new or existing partners. We cannot assure that financing will be available on favorable terms or at all. Additionally, these conditions may increase the cost to raise capital. If additional capital is raised through the sale of equity or convertible debt securities, the issuance of such securities would result in dilution to our existing stockholders.

While our plan is to raise capital and/or to pursue partnering opportunities, we cannot be sure that our plans will be successful. If the Company fails to raise additional capital or obtain substantial cash inflows from existing or new partners prior to April 15, 2013, or if MHR demands payment under the terms of the MHR Convertible Notes, the 2010 MHR Notes or the Bridge Note, or exercises its rights under the Security Agreement, the Company could be forced to cease operations. Any of the foregoing events would have a material adverse effect on our business and on the value of our stockholders' investments in our common stock. These conditions raise substantial doubt about our ability to continue as a going concern. Consequently, the audit reports prepared by our independent registered public accounting firm relating to our financial statements for the years ended December 31, 2012, 2011 and 2010 include an explanatory paragraph expressing the substantial doubt about our ability to continue as a going concern.

We have a history of operating losses and we may never achieve profitability.

As of December 31, 2012, we had approximately \$1.5 million in cash and cash equivalents, approximately \$34.7 million in working capital deficiency, a stockholders' deficit of approximately \$66.1 million and an accumulated deficit of approximately \$467.8 million. Our operating loss for the twelve months ended December 31, 2012 was approximately \$6.8 million. Since our inception in 1986, we have generated significant losses from operations. We anticipate that we will continue to generate significant losses from operations for the foreseeable future, and that our business will require substantial additional investment that we have not yet secured. These conditions raise substantial doubt about our ability to continue as a going concern.

We anticipate that our existing capital resources will enable us to continue operations through approximately April 15, 2013, or earlier if unforeseen events or circumstances arise that negatively affect our liquidity. While our plan is to raise capital and/or to pursue product partnering opportunities to address our capital deficiencies, we cannot be sure how much we will need to spend in order to develop, market, and manufacture new products and technologies in the future. We expect to continue to spend substantial amounts on research and development, including amounts spent on conducting clinical trials for our product candidates. Further, we will not have sufficient resources to develop fully any new products or technologies unless we are able to raise substantial additional financing or to secure funds from new or existing partners. We cannot assure you that financing will be available when needed, or on favorable terms or at all. The current economic environment combined with a number of other factors pose additional challenges to the Company in securing adequate financing under acceptable terms. If additional capital is raised through the sale of equity or convertible debt securities, the issuance of such securities would result in dilution to our existing stockholders.

Additionally, these conditions may increase the costs to raise capital. Our failure to raise capital when needed would adversely affect our business, financial condition, and results of operations, and could force us to reduce or discontinue operations.

Our business will suffer if we fail or are delayed in commercializing an improved oral form of Vitamin B12.

We expended substantial resources on the development of an oral dosage form of Vitamin B12 which can be marketed as a medical food for use by B12 deficient individuals. We completed a clinical trial which demonstrated that both oral Eligen® B12 (1000 mcg) and injectable B12 (current standard of care) can efficiently and quickly restore normal Vitamin B12 levels in deficient individuals. During November 2009, the Company launched its first commercially available product, oral Eligen® B12 (100 mcg), which had been specifically developed to help improve Vitamin B12 absorption and bioavailability with a patented formulation. During the third quarter 2010, we terminated our distributor agreement for the marketing, distribution and sale of oral Eligen® B12 (100mcg) with Quality Vitamins and Supplements, Inc. to allow us to focus on the development of a higher dose, oral formulation of Eligen® B12 (1000 mcg) to be offered for B12 deficient patients. Our inability or delay in commercializing the B12 product candidate could have a significant material adverse effect on our business.

To commercialize this higher dose product candidate, we will be required to develop a market introduction plan, and possibly obtain financing to support our commercialization efforts, among other things. We cannot assure you that we will succeed in these efforts as these involve activities (or portions of activities) that we have not previously completed. In addition, if we succeed in these activities, Vitamin B12 is available at reasonably low prices both in injections and tablet forms (as well as other forms) through a variety of distributors, sellers, and other sources. We have no current commercial capabilities. Therefore, we would be entering a highly competitive market with an untested, newly-established commercial capability. This outline of risks involved in the commercialization of our B12 product candidate is not exhaustive, but illustrative. For example, it does not include additional competitive, intellectual property, commercial, product liability, and commercial risks involved in a launch of the B12 product candidate outside the U.S. or certain of such risks in the U.S.

We are highly dependent upon collaborative partners to develop and commercialize compounds using our delivery agents.

A key part of our strategy is to form collaborations with pharmaceutical companies that will assist us in developing, testing, obtaining government approval for and commercializing oral forms of therapeutic macromolecules using the Eligen® Technology. We currently have collaborative agreements for candidates in clinical development with Novartis and Novo Nordisk, although Novartis has indicated that it has ceased work on all of the programs it had entered into with us.

We negotiate specific ownership rights with respect to the intellectual property developed as a result of the collaboration with each partner. While ownership rights vary from program to program, in general we retain ownership rights to developments relating to our carrier and the collaborator retains rights related to the drug product developed.

Despite our existing agreements, we cannot make any assurances that:

- we will be able to enter into additional collaborative arrangements to develop products utilizing our drug delivery technology;
- any existing or future collaborative arrangements will be sustainable or successful;
- the product candidates in collaborative arrangements will be further developed by partners in a timely fashion;
- any collaborative partner will not infringe upon our intellectual property position in violation of the terms of the collaboration contract; or
- milestones in collaborative agreements will be met and milestone payments will be received.

If we are unable to obtain development assistance and funds from other pharmaceutical companies to fund a portion of our product development costs and to commercialize our product candidates, we may be unable to issue equity to allow us to raise sufficient capital to fund clinical development of our product candidates. Lack of funding would cause us to delay, curtail, or stop clinical development of one or more of our projects. The determination of the specific project to curtail would depend upon the relative future economic value to us of each program.

Our collaborative partners control the clinical development of the drug candidates and may terminate their efforts at will.

Novo Nordisk controls the clinical development of oral GLP-1 analogs. Novartis and Novo Nordisk control the decision-making for the design and timing of their clinical studies.

Moreover, the agreements with Novartis and Novo Nordisk provide that they may terminate their programs at will for any reason and without any financial penalty or requirement to fund any further clinical studies. Novartis has discontinued all active clinical programs with us, and it is likely that it will terminate all remaining collaboration and license agreements with us in connection with those programs. We cannot make any assurance that Novartis or Novo Nordisk will continue to advance the clinical development of the drug candidates subject to collaboration.

Our collaborative partners are free to develop competing products.

Aside from provisions preventing the unauthorized use of our intellectual property by our collaborative partners, there is nothing in our collaborative agreements that prevent our partners from developing competing products. If one of our partners were to develop a competing product, our collaboration could be substantially jeopardized.

Our product candidates are in various stages of development, and we cannot be certain that any will be suitable for commercial purposes.

To be profitable, we must successfully research, develop, obtain regulatory approval for, manufacture, introduce, market, and distribute our products under development, or secure a partner to provide financial and other assistance with these steps. The time necessary to achieve these goals for any individual pharmaceutical product is long and can be uncertain. Before we or a potential partner can sell any of the pharmaceutical products currently under development, pre-clinical (animal) studies and clinical (human) trials must demonstrate that the product is safe and effective for human use for each targeted indication. We have never successfully commercialized a drug or a nonprescription candidate and we cannot be certain that we or our current or future partners will be able to begin, or continue, planned clinical trials for our product candidates, or if we are able, that the product candidates will prove to be safe and will produce their intended effects.

Even if our products are safe and effective, the size of the solid dosage form, taste, and frequency of dosage may impede their acceptance by patients.

A number of companies in the drug delivery, biotechnology, and pharmaceutical industries have suffered significant setbacks in clinical trials, even after showing promising results in earlier studies or trials. Only a small number of research and development programs ultimately result in commercially successful drugs. Favorable results in any pre-clinical study or early clinical trial do not imply that favorable results will ultimately be obtained in future clinical trials. We cannot make any assurance that results of limited animal and human studies are indicative of results that would be achieved in future animal studies or human clinical studies, all or some of which will be required in order to have our product candidates obtain regulatory approval. Similarly, we cannot assure you that any of our product candidates will be approved by the FDA. Even if clinical trials or other studies demonstrate safety and effectiveness of any of our product candidates for a specific disease or condition and the necessary regulatory approvals are obtained, the commercial success of any of our product candidates will depend upon their acceptance by patients, the medical community, and third-party payers and on our partners' ability to successfully manufacture and commercialize our product candidates.

Our future business success depends heavily upon regulatory approvals, which can be difficult and expensive to obtain.

Our pre-clinical studies and clinical trials of our prescription drug and biologic product candidates, as well as the manufacturing and marketing of our product candidates, are subject to extensive, costly and rigorous regulation by governmental authorities in the U.S. and other countries. The process of obtaining required approvals from the FDA and other regulatory authorities often takes many years, is expensive, and can vary

significantly based on the type, complexity, and novelty of the product candidates. We cannot assure you that we, either independently or in collaboration with others, will meet the applicable regulatory criteria in order to receive the required approvals for manufacturing and marketing. Delays in obtaining U.S. or foreign approvals for our self-developed projects could result in substantial additional costs to us, and, therefore, could adversely affect our ability to compete with other companies. Additionally, delays in obtaining regulatory approvals encountered by others with whom we collaborate also could adversely affect our business and prospects. Even if regulatory approval of a product is obtained, the approval may place limitations on the intended uses of the product, and may restrict the way in which we or our partner may market the product.

The regulatory approval process for our prescription drug product candidates presents several risks to us:

- In general, pre-clinical tests and clinical trials can take many years, and require the expenditure of substantial resources. The data obtained from these tests and trials can be susceptible to varying interpretation that could delay, limit or prevent regulatory approval
- Delays or rejections may be encountered during any stage of the regulatory process based upon the failure of the clinical or other data to demonstrate compliance with, or upon the failure of the product to meet, a regulatory agency's requirements for safety, efficacy, and quality or, in the case of a product seeking an orphan drug indication, because another designee received approval first
- Requirements for approval may become more stringent due to changes in regulatory agency policy or the adoption of new regulations or guidelines
- New guidelines can have an effect on the regulatory decisions made in previous years
- The scope of any regulatory approval, when obtained, may significantly limit the indicated uses for which a product may be marketed and may impose significant limitations in the nature of warnings, precautions, and contraindications that could materially affect the profitability of the drug
- Approved drugs, as well as their manufacturers, are subject to continuing and ongoing review, and discovery of problems with these products or the failure to adhere to manufacturing or quality control requirements may result in restrictions on their manufacture, sale or use or in their withdrawal from the market
- Regulatory authorities and agencies may promulgate additional regulations restricting the sale of our existing and proposed products
- Once a product receives marketing approval, the FDA may not permit us to market that product for broader or different applications, or may not grant us clearance with respect to separate product applications that represent extensions of our basic technology. In addition, the FDA may withdraw or modify existing clearances in a significant manner or promulgate additional regulations restricting the sale of our present or proposed products

Additionally, we face the risk that our competitors may gain FDA approval for a product before we do. Having a competitor reach the market before we do would impede the future commercial success for our competing product because we believe that the FDA uses heightened standards of approval for products once approval has been granted to a competing product in a particular product area. We believe that this standard generally limits new approvals to only those products that meet or exceed the standards set by the previously approved product.

The regulatory approval process for nonprescription product candidates will likely vary by the nature of therapeutic molecule being delivered.

In particular, the European Medical Agency ("EMA") announced in January 2011 that its committee for Medicinal Products for Human Use has begun to review available data relevant to the potential for increased risk of prostate cancer progression and other types of malignancies in patients taking calcitonin-containing medicines for the prevention of acute bone loss. The announcement indicated that the decision to review followed review of two clinical trials which suggested an increased frequency of malignancies. The EMA indicated it intended to assess the data obtained in the balance of risks and benefits of calcitonin-containing medicines.

Our collaboration partner Novartis has indicated to us that it has responded to the EMA's request for information. Novartis notified us that it has informed the FDA of the EMA request, and has provided the FDA with relevant data regarding calcitonin at its request. Subsequent to these actions, Novartis announced that it is discontinuing the oral salmon calcitonin program.

On July 20, 2012, the European Medicines Agency's Committee for Medicinal Products for Human Use issued a press release in which it recommended that calcitonin-containing medicines should only be used for short-term treatment, because of evidence that long-term use of these medicines is associated with an increased risk of cancer.

Our business will suffer if we cannot adequately protect our patent and proprietary rights.

Although we have patents for some of our product candidates and have applied for additional patents, there can be no assurance that patents applied for will be granted, that patents granted to or acquired by us now or in the future will be valid and enforceable and provide us with meaningful protection from competition, or that we will possess the financial resources necessary to enforce any of our patents. Also, we cannot be certain that any products that we (or a licensee) develop will not infringe upon any patent or other intellectual property right of a third party.

We also rely upon trade secrets, know-how, and continuing technological advances to develop and maintain our competitive position. We maintain a policy of requiring employees, scientific advisors, consultants, and collaborators to execute confidentiality and invention assignment agreements upon commencement of a relationship with us. We cannot assure you that these agreements will provide meaningful protection for our trade secrets in the event of unauthorized use or disclosure of such information.

Part of our strategy involves collaborative arrangements with other pharmaceutical companies for the development of new formulations of drugs developed by others and, ultimately, the receipt of royalties on sales of the new formulations of those drugs. These drugs are generally the property of the pharmaceutical companies and may be the subject of patents or patent applications and other rights of protection owned by the pharmaceutical companies. To the extent those patents or other forms of rights expire, become invalid or otherwise ineffective, or to the extent those drugs are covered by patents or other forms of protection owned by third parties, sales of those drugs by the collaborating pharmaceutical company may be restricted, limited, enjoined, or may cease. Accordingly, the potential for royalty revenues to us may be adversely affected.

We may be at risk of having to obtain a license from third parties making proprietary improvements to our technology.

There is a possibility that third parties may make improvements or innovations to our technology in a more expeditious manner than we do. Although we are not aware of any such circumstance related to our product portfolio, should such circumstances arise, we may need to obtain a license from such third party to obtain the benefit of the improvement or innovation. Royalties payable under such a license would reduce our share of total revenue. Such a license may not be available to us at all or on commercially reasonable terms. Although we currently do not know of any circumstances related to our product portfolio which would lead us to believe that a third party has developed any improvements or innovation with respect to our technology, we cannot assure you that such circumstances will not arise in the future. We cannot reasonably determine the cost to us of the effect of being unable to obtain any such license.

We are dependent on third parties to manufacture and test our products.

Currently, we have no manufacturing facilities for production of our carriers or any therapeutic compounds under consideration as products. We have no facilities for clinical testing. The success of our self-developed programs is dependent upon securing manufacturing capabilities and contracting with clinical service and other service providers.

The availability of manufacturers is limited by both the capacity of such manufacturers and their regulatory compliance. Among the conditions for FDA approval is the requirement that the prospective manufacturer's quality control and manufacturing procedures continually conform with the FDA's current GMP (GMP are

regulations established by the FDA that govern the manufacture, processing, packing, storage and testing of drugs intended for human use). In complying with GMP, manufacturers must devote extensive time, money, and effort in the area of production and quality control and quality assurance to maintain full technical compliance. Manufacturing facilities and company records are subject to periodic inspections by the FDA to ensure compliance. If a manufacturing facility is not in substantial compliance with these requirements, regulatory enforcement action may be taken by the FDA, which may include seeking an injunction against shipment of products from the facility and recall of products previously shipped from the facility. Such actions could severely delay our ability to obtain product from that particular source.

The success of our clinical trials and our partnerships is dependent on the proposed or current partner's capacity and ability to adequately manufacture drug products to meet the proposed demand of each respective market. Any significant delay in obtaining a supply source (which could result from, for example, an FDA determination that such manufacturer does not comply with current GMP) could harm our potential for success. Additionally, if a current manufacturer were to lose its ability to meet our supply demands during a clinical trial, the trial may be delayed or may even need to be abandoned.

We may face product liability claims related to participation in clinical trials or future products.

We have product liability insurance with a policy limit of \$5.0 million per occurrence and in the aggregate. The testing, manufacture, and marketing of products for humans utilizing our drug delivery technology may expose us to potential product liability and other claims. These may be claims directly by consumers or by pharmaceutical companies or others selling our future products. We seek to structure development programs with pharmaceutical companies that would complete the development, manufacturing and marketing of the finished product in a manner that would protect us from such liability, but the indemnity undertakings for product liability claims that we secure from the pharmaceutical companies may prove to be insufficient.

We face rapid technological change and intense competition.

Our success depends, in part, upon maintaining a competitive position in the development of products and technologies in an evolving field in which developments are expected to continue at a rapid pace. We compete with other drug delivery, biotechnology and pharmaceutical companies, research organizations, individual scientists, and non-profit organizations engaged in the development of alternative drug delivery technologies or new drug research and testing, as well as with entities developing new drugs that may be orally active. Many of these competitors have greater research and development capabilities, experience, and marketing, financial, and managerial resources than we have, and, therefore, represent significant competition.

Our products, when developed and marketed, may compete with existing parenteral or other versions of the same drug, some of which are well established in the marketplace and manufactured by formidable competitors, as well as other existing drugs. For example, our salmon calcitonin product candidate, if developed and marketed, would compete with a wide array of existing osteoporosis therapies, including a nasal dosage form of salmon calcitonin, estrogen replacement therapy, selective estrogen receptor modulators, bisphosphonates, and other compounds in development.

Our competitors may succeed in developing competing technologies or obtaining government approval for products before we do. Developments by others may render our product candidates, or the therapeutic macromolecules used in combination with our product candidates, noncompetitive or obsolete. At least one competitor has notified the FDA that it is developing a competing formulation of salmon calcitonin. If our products are marketed, we cannot assure you that they will be preferred to existing drugs or that they will be preferred to or available before other products in development.

If a competitor announces a successful clinical study involving a product that may be competitive with one of our product candidates or an approval by a regulatory agency of the marketing of a competitive product, such announcement may have a material adverse effect on our operations or future prospects resulting from reduced sales of future products that we may wish to bring to market or from an adverse impact on the price of our common stock or our ability to obtain regulatory approval for our product candidates.

We are dependent on our key personnel and if we cannot recruit and retain leaders in our research, development, manufacturing, and commercial organizations, our business will be harmed.

We are dependent on our executive officers. The loss of one or more members of our executive officers or key employees could have an adverse effect on our business, financial condition and results of operations, given their specific knowledge related to our proprietary technology and personal relationships with our pharmaceutical company partners. If we are not able to retain our executive officers, our business may suffer. We do not maintain “key-man” life insurance policies for any of our executive officers.

There is intense competition in the biotechnology industry for qualified scientists and managerial personnel in the development, manufacture, and commercialization of drugs. We may not be able to continue to attract and retain the qualified personnel necessary for developing our business. Additionally, because of the knowledge and experience of our scientific personnel and their specific knowledge with respect to our drug carriers the continued development of our product candidates could be adversely affected by the loss of any significant number of such personnel.

Provisions of our corporate charter documents, Delaware law, and our stockholder rights plan may dissuade potential acquirers, prevent the replacement or removal of our current management and may thereby affect the price of our common stock.

Our Board of Directors has the authority to issue up to 2,000,000 shares of preferred stock and to determine the rights, preferences and privileges of those shares without any further vote or action by our stockholders. Of these 2,000,000 shares, the Board of Directors has the authority to designate that number of shares of Series A Junior Participating Cumulative Preferred Stock (“A Preferred Stock”) as is required under our stockholders rights plan described below. Those shares of preferred stock not designated as A Preferred Stock remain available for future issuance. Rights of holders of common stock may be adversely affected by the rights of the holders of any preferred stock that may be issued in the future.

We also have a stockholders rights plan, commonly referred to as a “poison pill,” in which A Preferred Stock purchase rights (the “Rights”) have been granted at the rate of one one-hundredth of a share of A Preferred Stock at an exercise price of \$80 for each share of our common stock. The Rights are not exercisable or transferable apart from the common stock, until the earlier of (i) ten days following a public announcement that a person or group of affiliated or associated persons have acquired beneficial ownership of 20% or more of our outstanding common stock or (ii) ten business days (or such later date, as defined) following the commencement of, or announcement of an intention to make a tender offer or exchange offer, the consummation of which would result in the beneficial ownership by a person, or group, of 20% or more of our outstanding common stock. If we enter into consolidation, merger, or other business combination, as defined in the stockholders rights plan, each Right would entitle the holder upon exercise to receive, in lieu of shares of A Preferred Stock, a number of shares of common stock of the acquiring company having a value of two times the exercise price of the Right, as defined in the stockholders rights plan. By potentially diluting the ownership of the acquiring company, our rights plan may dissuade prospective acquirers of our company. MHR is specifically excluded from the provisions of the plan.

The holders of A Preferred Stock would be entitled to a preferential cumulative quarterly dividend of the greater of \$1.00 per share or 100 times the per-share dividend declared on our stock and are also entitled to a liquidation preference, thereby hindering an acquirer’s ability to freely pay dividends or to liquidate the company following an acquisition. Each A Preferred Stock share will have 100 votes and will vote together with the common shares, effectively preventing an acquirer from removing existing management. The Rights contain anti-dilutive provisions and are redeemable at our option, subject to certain defined restrictions for \$.01 per Right. The Rights expire on April 7, 2016.

Provisions of our corporate charter documents, Delaware law and financing agreements may prevent the replacement or removal of our current management and members of our Board of Directors and may thereby affect the price of our common stock.

In connection with the MHR financing transaction in 2005, and after approval by our Board of Directors, Dr. Mark H. Rachesky was appointed to the Board of Directors by MHR (the “MHR Nominee”) and Dr. Michael

Weiser was appointed to the Board of Directors by both the majority of our Board of Directors and MHR (the “Mutual Director”), as contemplated by our bylaws and certificate of incorporation. Our certificate of incorporation provides that the MHR Nominee and the Mutual Director may be removed only by the affirmative vote of at least 85% of the shares of common stock outstanding and entitled to vote at an election of directors. Our certificate of incorporation also provides that the MHR Nominee may be replaced only by an individual designated by MHR unless the MHR Nominee has been removed for cause, in which case the MHR Nominee may be replaced only by an individual approved by both a majority of our Board of Directors and MHR. Furthermore, certain amendments to the bylaws and the certificate of incorporation provide that the rights granted to MHR by these amendments may not be amended or repealed without the unanimous vote or unanimous written consent of the Board of Directors or the affirmative vote of the holders of at least 85% of the shares of Common Stock outstanding and entitled to vote at the election of directors. The amendments to the bylaws and the certificate of incorporation will remain in effect as long as MHR holds at least 2% of the shares of fully diluted Common Stock. The amendments to the bylaws and the certificate of incorporation will have the effect of making it more difficult for a third party to gain control of our Board of Directors.

Additional provisions of our certificate of incorporation and bylaws could have the effect of making it more difficult for a third party to acquire a majority of our outstanding voting common stock. These include provisions that classify our Board of Directors, limit the ability of stockholders to take action by written consent, call special meetings, remove a director for cause, amend the bylaws or approve a merger with another company. We are subject to the provisions of Section 203 of the Delaware General Corporation Law which prohibits a publicly-held Delaware corporation from engaging in a “business combination” with an “interested stockholder” for a period of three years after the date of the transaction in which the person became an interested stockholder, unless the business combination is approved in a prescribed manner. For purposes of Section 203, a “business combination” includes a merger, asset sale or other transaction resulting in a financial benefit to the interested stockholder, and an “interested stockholder” is a person who, either alone or together with affiliates and associates, owns (or within the past three years, did own) 15% or more of the corporation’s voting stock.

Our stock price has been and may continue to be volatile.

The trading price for our common stock has been and is likely to continue to be highly volatile. The market prices for securities of drug delivery, biotechnology and pharmaceutical companies have historically been highly volatile.

Factors that could adversely affect our stock price include:

- fluctuations in our operating results;
- announcements of partnerships or technological collaborations and announcements of the results or further actions in respect of any partnerships or collaborations, including termination of same;
- innovations or new products by us or our competitors;
- governmental regulation;
- developments in patent or other proprietary rights;
- public concern as to the safety of drugs developed by us or others;
- the results of pre-clinical testing and clinical studies or trials by us, our partners or our competitors;
- litigation;
- general stock market and economic conditions;
- number of shares available for trading (float); and
- inclusion in or dropping from stock indexes.

As of December 31, 2012, our 52-week high and low closing market price for our common stock was \$0.43 and \$0.05, respectively.

Future sales of common stock or warrants, or the prospect of future sales, may depress our stock price.

Sales of a substantial number of shares of common stock or warrants, or the perception that sales could occur, could adversely affect the market price of our common stock. Additionally, as of December 31, 2012, there were outstanding options to purchase up to 1,111,606 shares of our common stock that are currently exercisable, and additional outstanding options to purchase up to 3,496,447 shares of common stock that are exercisable over the next several years. As of December 31, 2012, the MHR Convertible Notes were convertible into 8,353,518 shares of our common stock. As of December 31, 2012, there were outstanding warrants to purchase 17,443,728 shares of our stock. The holders of these options have an opportunity to profit from a rise in the market price of our common stock with a resulting dilution in the interests of the other shareholders. The existence of these options may adversely affect the terms on which we may be able to obtain additional financing. The weighted average exercise price of issued and outstanding options is \$1.07 and the weighted average exercise price of warrants is \$1.16, which compares to the \$0.16 market price at closing on December 31, 2012. Additionally, there may be additional shares available on the market if we are required to file additional re-sale registration statements on Form S-1, including if MHR exercises its registration rights under its Registration Rights Agreement with the Company dated September 26, 2005.

ITEM 1B. *UNRESOLVED STAFF COMMENTS*

None.

ITEM 2. *PROPERTIES*

We leased approximately 15,000 square feet of office space at 240 Cedar Knolls Road, Suite 200, Cedar Knolls, New Jersey for use as our corporate office. The lease for our corporate office expired on January 31, 2013.

In November 2012, we entered into a sub-lease agreement with New American Therapeutics, Inc. to lease approximately 4,100 square feet of office space at 4 Becker Farm Road, Suite 103, Roseland, New Jersey for use as our corporate office beginning February 1, 2013. The sub lease for this corporate office is set to expire on June 30, 2014.

In December 2012, we entered into a lease agreement with 4 Becker SPE LLC to initially lease approximately 2,000 square feet adjacent to the sub-lease office space beginning in December 2012. Upon expiration of the above referenced sub-lease on June 30, 2014, that approximately 4,100 square feet will become "additional premises" included in this lease agreement. This lease for our corporate office is set to expire on June 30, 2017.

ITEM 3. *LEGAL PROCEEDINGS*

None.

ITEM 4. *MINE SAFETY DISCLOSURES*

Not applicable.

PART II

ITEM 5. *MARKET FOR REGISTRANT'S COMMON EQUITY, RELATED STOCKHOLDER MATTERS AND ISSUER PURCHASES OF EQUITY SECURITIES*

The Company's securities began trading on the OTCQB, an electronic quotation service maintained by the Financial Industry Regulatory Authority, effective with the open of business on Tuesday, June 9, 2009. The Company's trading symbol has remained EMIS, however, it is our understanding that, for certain stock quote publication websites, investors may be required to key EMIS.QB to obtain quotes.

The following table sets forth the range of high and low intra-day sale prices as reported by the OTCQB, electronic quotation service for each period indicated:

	<u>High</u>	<u>Low</u>
2011		
First quarter	2.48	1.23
Second quarter	1.80	0.85
Third quarter	1.99	0.75
Fourth quarter	1.99	0.14
2012		
First quarter	0.44	0.17
Second quarter	0.39	0.16
Third quarter	0.38	0.05
Fourth quarter	0.28	0.14
2013		
First quarter (through March 1, 2013)	0.18	0.13

As of March 1, 2013 there were 213 stockholders of record, including record owners holding shares on behalf of an indeterminate number of beneficial owners, and 60,687,478 shares of common stock outstanding. The closing price of our common stock on March 1, 2013 was \$0.16.

We have never paid cash dividends and do not intend to pay cash dividends in the foreseeable future. We intend to retain earnings, if any, to finance the growth of our business.

Equity Compensation Plan Information

The following table provides information as of December 31, 2012 about the common stock that may be issued upon the exercise of options granted to employees, consultants or members of our board of directors under all of our existing equity compensation plans, including the 2000 Stock Option Plan, the 2002 Broad Based Plan, the 2007 Stock Award and Incentive Plan, (collectively the “Plans”), the Stock Incentive Plan for Outside Directors, and the Directors Deferred Compensation Plan:

<u>Plan Category</u>	<u>(a) Number of Securities to be Issued Upon Exercise of Outstanding Options</u>	<u>(b) Weighted Average Exercise Price of Outstanding Options</u>	<u>(c) Number of Securities Remaining Available for Future Issuance Under Equity Compensation Plans (Excluding Securities Reflected in Column (a))</u>
Equity Compensation Plans Approved by Security Holders			
The Plans	4,103,410	\$1.02	339,718
Stock Incentive Plan for Outside Directors	42,000	5.93	—
Equity Compensation Plans not approved by Security Holders(1)	<u>5,000</u>	<u>4.12</u>	<u>—</u>
Total	<u>4,150,410</u>	<u>\$1.07</u>	<u>339,718</u>

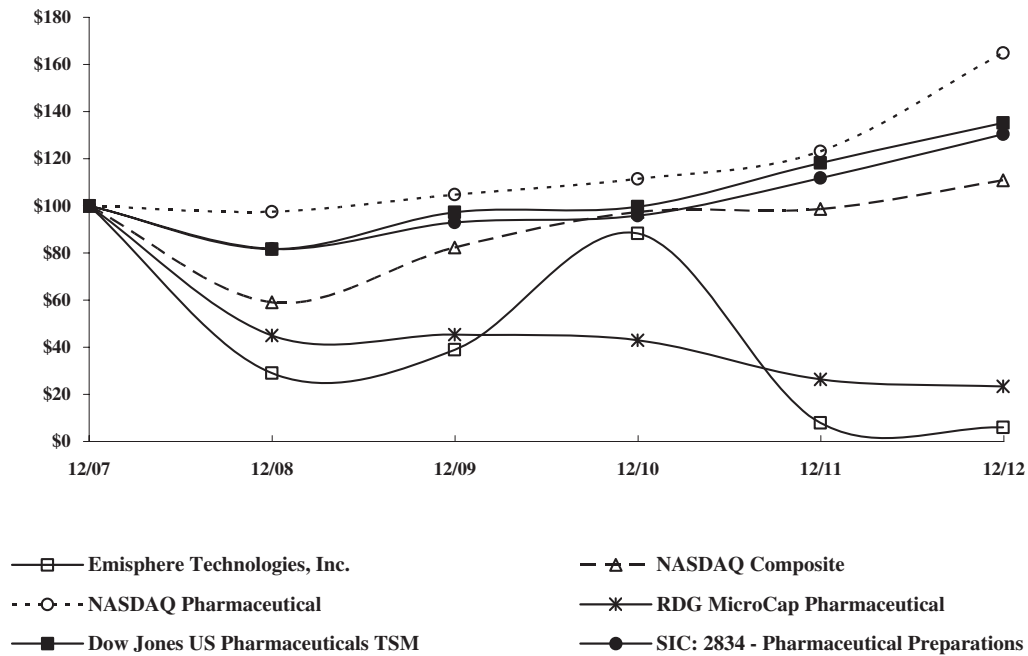
(1) Our Board of Directors has granted options which are currently outstanding for a former consultant. The Board of Directors determines the number and terms of each grant (option exercise price, vesting and expiration date). This grant was made on July 14, 2003.

Comparative Stock Performance Graph

The graph below compares the cumulative total stockholder return through December 31, 2012 on Emisphere's common stock with the cumulative total stockholder return of the NASDAQ Composite Index, the NASDAQ Pharmaceutical Index, the RDG MicroCap Pharmaceutical Index, the Dow Jones U.S. Pharmaceuticals Total Stock Market Index, and SIC Code: 2834 — Pharmaceutical Preparations, assuming an investment of \$100 on December 31, 2006 in the Company's common stock, and in the stocks comprising each index (with all dividends reinvested).

COMPARISON OF 5 YEAR CUMULATIVE TOTAL RETURN*

Among Emisphere Technologies, Inc.



*\$100 invested on 12/31/07 in stock or index, including reinvestment of dividends.
Fiscal year ending December 31.

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ITEM 6. SELECTED FINANCIAL DATA

The following selected financial data for the years ended December 31, 2012, 2011, 2010, 2009, and 2008 have been derived from the financial statements of Emisphere and notes thereto, which have been audited by our independent registered public accounting firm. We recognize expense for our share-based compensation in accordance with FASB ASC 718, "Compensation-Stock Compensation," which requires that the costs resulting from all stock based payment transactions be recognized in the financial statements at their fair values. Results from prior periods have not been restated.

	Year Ended December 31,				
	2012	2011	2010	2009	2008
	(in thousands, except per share data)				
Revenue	\$ —	\$ —	\$ 100	\$ 92	\$ 251
Cost of goods sold	—	—	22	15	—
Costs and expenses					
Research and development expenses	1,867	1,951	2,495	4,046	12,785
General and administrative expenses	4,935	5,310	7,963	10,068	9,176
Other costs and expenses	19	277	835	(422)	779
Impairment of intangible asset	—	598	—	—	—
Restructuring charge	—	—	50	(356)	3,831
(Income) expense from lawsuit, net	—	—	278	1,293	—
Total costs and expenses	6,821	8,136	11,621	14,629	26,571
Operating loss	(6,821)	(8,136)	(11,543)	(14,552)	(26,320)
Sale of patent	—	—	500	500	1,500
Other Income	45	—	—	—	—
Research and development tax credit	—	137	252	—	—
Change in fair value of derivative instruments	8,110	28,696	(23,651)	(2,473)	2,220
Interest expense	(6,236)	(5,646)	(3,595)	(659)	(2,956)
Loss on extinguishment of debt	—	—	(17,014)	—	—
Financing fees	—	—	(1,858)	—	—
Income (loss) before income tax benefit	(4,902)	15,051	(56,909)	(16,821)	(24,388)
Income tax benefit	2,974	—	—	—	—
Net income (loss)	(1,928)	15,051	(56,909)	(16,821)	(24,388)
Net income (loss) per share — basic	(0.03)	0.27	(1.23)	(0.49)	(0.80)
Net income (loss) per share — diluted	(0.03)	0.25	(1.23)	(0.49)	(0.80)

	December 31,				
	2012	2011	2010	2009	2008
	(In thousands)				
Balance Sheet Data:					
Cash, cash equivalents, restricted cash and investments	\$ 1,484	\$ 3,069	\$ 5,326	\$ 3,566	\$ 7,469
Working capital (deficit)	(34,745)	(33,221)	(20,568)	(20,441)	(7,954)
Total assets	2,176	4,221	7,276	5,587	10,176
Derivative instruments	2,089	10,199	34,106	10,780	267
Long-term liabilities and deferrals	31,614	31,597	51,966	11,669	31,531
Accumulated deficit	(467,820)	(465,892)	(480,943)	(424,034)	(433,688)
Stockholders' deficit	(66,066)	(64,527)	(82,520)	(35,227)	(37,028)

ITEM 7. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

Management's Discussion and Analysis of Financial Conditions and Results of Operations (MD&A) is provided to supplement the accompanying financial statements and notes incorporated herein to help provide an understanding of our financial condition, changes in our financial condition and results of operations. To supplement its audited financial statements presented in accordance with US GAAP, the company is providing a comparison of operating results describing net income and operating expenses which removed certain non-cash and one-time or nonrecurring charges and receipts. The Company believes that this presentation of net income and operating expense provides useful information to both management and investors concerning the approximate impact of the items above. The Company also believes that considering the effect of these items allows management and investors to better compare the Company's financial performance from period to period and to better compare the Company's financial performance with that of its competitors. The presentation of this additional information is not meant to be considered in isolation of, or as a substitute for, results prepared in accordance with US GAAP.

CAUTION CONCERNING FORWARD-LOOKING STATEMENTS

The following discussion and analysis contain forward-looking statements that involve risks and uncertainties. When used in this Report, the words, "intend," "anticipate," "believe," "estimate," "plan," "expect" and similar expressions as they relate to us are included to identify forward-looking statements. Our actual results could differ materially from those anticipated in these forward-looking statements as a result of factors, including those set forth under Item 1A. "Risk Factors" (above) and elsewhere in this Report. This discussion and analysis should be read in conjunction with the "Selected Financial Data" and the Financial Statements and notes thereto included in this Report.

Overview

During 2012, the Company faced formidable challenges, yet continued to focus on efforts to apply the Eligen[®] Technology and realize its value by developing profitable commercial applications. On September 13, 2012, the Company took two important steps to improve its strategic position: it hired Mr. Alan L. Rubino as President and Chief Executive Officer, and appointed Mr. Timothy G. Rothwell as Chairman of the Board of Directors. Mr. Rubino is a seasoned industry executive with major and emerging pharmaceutical company experience. Mr. Rubino and Mr. Rothwell form the core of a new leadership team that will focus on commercializing the Company's Eligen[®] Oral B12 product. These appointments support the Company's decision to pursue a new course to reposition Emisphere into a viable commercial-stage entity, anchored by the Eligen[®] Oral B12 product. As it transitions to this strategy, the Company remains dedicated to further realizing the full potential and commercial value of its platform Eligen[®] Technology. To that end, it will continue to work closely with existing partners and will also expand its efforts to attract new delivery system and product development/licensing partnerships. We believe that Emisphere's new business strategy will present opportunities for growth and value creation for the Company and its shareholders. We recognize, however, that further development, exploration and commercialization of its technology entails substantial risk and significant additional operational expenses. We continue to refocus our efforts on strategic development initiatives and cost control and continue to aggressively seek to reduce non-strategic spending and to obtain the funding necessary to implement our new corporate strategy. There can be no assurances, however, that the Company will be able to secure adequate funding to meet its current obligations and successfully pursue its strategic direction. Furthermore, despite our optimism regarding the Eligen Technology, even in the event that the Company is adequately funded, there is no guarantee that any of our products or product candidates will perform as hoped or that such products can be successfully commercialized. For further discussion, see part I, Item 1A "Risk Factors."

The application of the Eligen[®] Technology is potentially broad and may provide for a number of opportunities across a spectrum of therapeutic modalities or nutritional supplements. During 2012 we continued to develop our product pipeline utilizing the Eligen[®] Technology with prescription product candidates and prioritized our development efforts based on overall potential returns on investment, likelihood of success, and

market and medical needs. Our goal is to implement our Eligen[®] Technology to enhance overall healthcare, including patient accessibility and compliance, while benefiting the commercial pharmaceutical and healthcare marketplace and driving company valuation.

To accelerate commercialization of the Eligen[®] Technology, Emisphere focused on a two-pronged strategy during 2012. First, we concentrated on prescription molecules obtained through partnerships with other pharmaceutical companies for molecules where oral absorption is difficult yet substantially beneficial if proven. We are working to generate new interest in the Eligen[®] Technology with potential partners and attempting to expand our current collaborative relationships to take advantage of the critical knowledge that others have gained by working with our technology. Second, we continue to pursue commercialization of product candidates developed internally. We believe that these internal candidates need to be developed with reasonable investment in an acceptable time period and with a reasonable risk-benefit profile.

To support our internal development programs, the Company implemented its new commercialization strategy for the Eligen[®] Technology. Using extensive safety data available for its Sodium N-[8-(2-hydroxybenzoyl) Amino] Caprylate (“SNAC”) carrier, the Company obtained GRAS (“Generally Recognized as Safe”) status for its SNAC carrier, and then applied the Eligen[®] Technology with B12, another GRAS substance where bioavailability and absorption is difficult and improving such absorption would yield substantial benefit and value. Given sufficient time and resources, the Company intends to apply this strategy to develop other products. Examples of other GRAS substances that may be developed into additional commercial products using this strategy would include vitamins such as other B Vitamins, minerals such as iron, and other supplements such as the polyphenols and catechins, among others. A higher dose (1000 mcg) formulation of Eligen[®] B12, for use by patients who are Vitamin B12 deficient, is under development.

Funding required to continue developing our product pipeline may be partially paid by income-generating license arrangements whose value tends to increase as product candidates move from pre-clinical into clinical development. It is our intention that investments that may be required to fund our research and development will be approached incrementally in order to minimize disruption or dilution.

The Company also continues to focus on improving operational efficiency. Annual operating costs were reduced by approximately 80% from 2008 levels. Annual cash expenditures continued to be reduced during 2012, and the resulting cash burn rate to support continuing operations is less than \$6 million per year. Additionally, we expect to accelerate the commercialization of the Eligen[®] Technology in a cost effective way and to gain operational efficiencies by tapping into advanced scientific processes offered by independent contractors.

Emisphere’s product pipeline includes prescription drugs and medical food product candidates in varying stages of development. We have one prescription product in Phase I and a number of pre-clinical (research stage) projects. Some of the pre-clinical projects are partnered, while others were initiated by Emisphere. We continue to assess therapeutic molecules for their potential compatibility with our technology and market need. Our intent is to continue to expand our pipeline with product candidates that demonstrate significant opportunities for growth. Our focus is on molecules that meet the criteria for success based on our increased understanding of our Eligen[®] Technology. Depending on the molecule, market potential and interest, we intend to pursue potential product development opportunities through development alliances or internal development.

As previously described, the Company has developed and is focused on commercializing an oral formulation of Eligen[®] B12 (1000 mcg) which can be marketed as a medical food for use by B12-deficient individuals. For the treatment of type 2 diabetes, research using the Eligen[®] Technology and GLP-1 (Glucagon-Like Peptide-1), a potential treatment for Type 2 diabetes, is being conducted by Novo Nordisk.

We have collaborated with Novartis in connection with the development and testing of oral formulations of salmon calcitonin to treat osteoarthritis and osteoporosis, the development and testing of oral formulations of PTH-1-34 to treat osteoarthritis and osteoporosis, and the development of an oral rhGH product using Emisphere’s Eligen[®] Technology. Although all three of these development programs have either been terminated or discontinued by Novartis, Novartis still has the right to evaluate the feasibility of using Emisphere’s Eligen[®] Technology with two new compounds to assess the potential for new product development opportunities.

Novartis is considering its options accordingly. If Novartis chooses to develop oral formulations of these new compounds using the Eligen® Technology, the parties will negotiate additional agreements. In that case, Emisphere could be entitled to receive development milestone and royalty payments in connection with the development and commercialization of these potentially new products.

Our other product candidates in development are in earlier or preclinical research phases, and we continue to assess them for their compatibility with our technology and market need. Our intent is to seek partnerships with pharmaceutical and biotechnology companies for certain of these products as we continue to expand our pipeline with product candidates that demonstrate significant opportunities for growth. Our focus is on molecules that meet the criteria for success based on our increased understanding of our Eligen® Technology and prescription Medical Foods. Our preclinical programs focus on the development of oral formulations of potentially new treatments for diabetes and products in the areas of cardiovascular, appetite suppression and pain and on the development and potential expansion of nutritional supplement products.

Liquidity and Capital Resources

Since our inception in 1986, we have generated significant losses from operations and we anticipate that we will continue to generate significant losses from operations for the foreseeable future.

As of December 31, 2012, our working capital deficit was \$34.7 million, our accumulated deficit was approximately \$467.8 million and our stockholders deficit was \$66.1 million. Our operating loss was \$6.8 million, \$8.1 million and \$11.5 million for the years ended December 31, 2012, 2011, and 2010, respectively. Our net loss was \$1.9 million for the year ended December 31, 2012, our net income was \$15.1 million, for the year ended December 31, 2011, and our net loss was \$56.9 million for the year ended December 31, 2010. Our net cash outlays from operations and capital expenditures were \$3.0 million, \$9.7 million and \$4.9 million for the years ended December 31, 2012, 2011 and 2010, respectively. Net cash inflows include receipts of deferred revenue of \$0.02 million, \$0.1 million, and \$7.1 million for the years ended 2012, 2011 and 2010, respectively. On December 31, 2012 we had approximately \$1.5 million cash.

We have limited capital resources and operations to date have been funded with the proceeds from collaborative research agreements, public and private equity and debt financings and income earned on investments. As of September 27, 2012, the Company is in default under the terms of the MHR Convertible Notes (described in Note 8 to the Financial Statements included in Item 8 of this report) issued to MHR Fund Management LLC (together with its affiliates, "MHR"). The default is the result of the Company's failure to pay MHR approximately \$30.5 million in principal and interest due and payable on September 26, 2012 under the terms of the MHR Convertible Notes. Pursuant to that certain Pledge and Security Agreement, dated as of September 26, 2005, between the Company and MHR (as amended to date, the "Security Agreement"), the MHR Convertible Notes are secured by a first priority lien in favor of MHR on substantially all of our assets. On October 4, 2012, the Company received notice from MHR that, as a result of the payment default described above, the default interest rate of 13% per annum will apply with respect to the MHR Convertible Notes, effective as of September 27, 2012.

The Company continues to be in default under the terms of the MHR Convertible Notes and, as a result of such default, MHR has the ability at any time to foreclose on substantially all of the Company's assets under the terms of the Security Agreement. To date, MHR has not demanded payment under the MHR Convertible Notes or exercised its rights under the Security Agreement as a result of the default, and has continued discussions with the Company regarding proposals relating to the default while reserving all of its rights under the terms of the MHR Convertible Notes and Security Agreement. There can be no assurances as to the outcome of such discussions.

As of September 27, 2012, the Company is also in default under the terms of certain non-interest bearing promissory notes in the aggregate principal amount of \$600,000 issued to MHR on June 8, 2010 (the "2010 MHR Notes"). The 2010 MHR Notes were originally due and payable on June 8, 2012, but this maturity date was extended to September 26, 2012 by agreement with MHR. The default is the result of the Company's failure to pay to MHR \$600,000 in principal due and payable on September 26, 2012 under the terms of the 2010 MHR Notes. As with the MHR Convertible Notes discussed above, MHR has not demanded payment under the 2010

MHR Notes, and has continued discussions with the Company regarding proposals relating to the 2010 MHR Notes and the Company’s default thereunder while reserving all of its rights under the 2010 MHR Notes. There can be no assurances as to the outcome of such discussions.

As more specifically described in Note 8 to the Financial Statements included in Item 8 of this report, on October 17, 2012, the Company issued a promissory note (the “Bridge Note”) to MHR Institutional Partners IIA LP, MHR Institutional Partners II LP, MHR Capital Partners Master Account LP, and MHR Capital Partners (100) LP (collectively, the “Bridge Lender”) in the principal amount of \$1,400,000 to be advanced by the Bridge Lender to the Company pursuant to the terms thereof (the “Bridge Loan”). That amount was sufficient to support operations through approximately December 15, 2012. The Bridge Note is secured by a first priority lien on substantially all of our assets, and is payable on demand. The Bridge Loan has not been paid as of March 25, 2013, and MHR has not demanded payment.

As of December 31, 2012, the aggregate book value of MHR Convertible Notes, the 2010 MHR Notes, and the Bridge Note including outstanding principal and interest was \$33.6 million.

In December 2012, the Company received \$1.5 million by participating in the Technology Business Tax Certificate Transfer Program, sponsored by the New Jersey Economic Development Authority. We anticipate that we will continue to generate significant losses from operations for the foreseeable future, and that our business will require substantial additional investment that we have not yet secured. As such, we anticipate that our existing capital resources will enable us to continue operations through approximately April 15, 2013, or earlier if unforeseen events or circumstances arise that negatively affect our liquidity.

Further, we do not have sufficient resources to develop fully any new products or technologies unless we are able to raise substantial additional financing on acceptable terms or secure funds from new or existing partners. We cannot assure that financing will be available on favorable terms or at all. Additionally, these conditions may increase the cost to raise capital. If additional capital is raised through the sale of equity or convertible debt securities, the issuance of such securities would result in dilution to our existing stockholders.

While our plan is to raise capital and/or to pursue partnering opportunities, we cannot be sure that our plans will be successful. If the Company fails to raise additional capital or obtain substantial cash inflows from existing or new partners prior to April 15, 2013, or if MHR demands payment under the terms of the MHR Convertible Notes, the 2010 MHR Notes or the Bridge Note, or exercises its rights under the Security Agreement, the Company could be forced to cease operations. These conditions raise substantial doubt about our ability to continue as a going concern. Consequently, the audit reports prepared by our independent registered public accounting firm relating to our financial statements for the years ended December 31, 2012, 2011 and 2010 include an explanatory paragraph expressing the substantial doubt about our ability to continue as a going concern. The Company is pursuing several courses of action to address its deficiency in capital resources including discussions with MHR, commercialization of B12, leveraging existing partnerships, and capital markets financings.

Even if we are successful in raising additional capital to meet our obligations and otherwise continue operations, our business will still require substantial additional investment that we have not yet secured. For further discussion, see Part II, Item 1A “**Risk Factors**”.

During the year ended December 31, 2012, our cash liquidity (consisting of \$1.5 million cash at December 31, 2012) decreased as follows:

Cash and Cash Equivalents:

	(In thousands)
At December 31, 2011	\$ 3,069
At December 31, 2012	<u>1,484</u>
Decrease in cash and cash equivalents	<u><u>\$(1,585)</u></u>

The decrease in cash and cash equivalents is comprised of the following components for the years ended December 31, 2012 and 2011:

	<u>2012</u>	<u>2011</u>
	(In thousands)	
Proceeds, net, from issuance of equity securities	\$ —	\$ 7,500
Proceeds from notes payable	1,400	—
Proceeds from collaboration, technology business tax certificate transfer program and other projects	3,100	400
Sources of cash and cash equivalents	<u>4,500</u>	<u>7,900</u>
Uses of cash and cash equivalents	6,100	10,200
(Decrease) in cash and cash equivalents	<u>\$(1,600)</u>	<u>\$(2,300)</u>

During the year ended December 31, 2012, our working capital deficiency increased by \$1.5 million as follows:

	<u>December 31,</u>		
	<u>2012</u>	<u>2011</u>	<u>Change</u>
	(In thousands)		
Current assets	\$ 1,900	\$ 3,900	\$(2,000)
Current liabilities	36,600	37,100	500
Working capital (deficiency)	<u>\$(34,700)</u>	<u>\$(33,200)</u>	<u>\$(1,500)</u>

The decrease in current assets is driven primarily by the decrease in cash and cash equivalents. The increase in current liabilities is driven primarily by the accrued interest on MHR Convertible Notes, and the MHR Note Payable net of a reduction in derivative liabilities.

Primary Sources of Cash

During 2012, we received approximately \$3.0 million from the sale of NJ State Net Operating Losses from prior periods through the 2011 and 2012 Technology Business Tax Certificate Transfer Program, sponsored by the New Jersey Economic Development Authority. Additional funding of \$1.4 million was provided by MHR pursuant to the Bridge Note.

During 2011, we received net proceeds of \$7.2 million through the issuance of common stock and associated derivative instruments from an equity financing completed by the Company in July 2011 (the “July 2011 Financing”).

During 2010, we received net proceeds of \$6.7 million through the issuance of common stock and associated derivative instruments in connection with an equity financing completed in August 2010 (the “August 2010 Financing”). We also received \$5.0 million as an upfront payment from Novo Nordisk in connection with the development and license agreement to develop and commercialize oral formulations of Novo Nordisk’s insulins using the Company’s proprietary delivery agents pursuant to the Insulins License Agreement, and we received a \$2.0 million milestone payment from Novo Nordisk for their initiation of a Phase I clinical trial in connection with the GLP-1 License Agreement. Also during 2010, we received a \$0.5 million installment payment for sale of certain Emisphere patents and patent application relating to diketopiperazine technology to MannKind Corporation and \$0.5 million from MHR from the issuance of a note payable.

Results of Operations

Year Ended December 31, 2012 Compared to Year Ended December 31, 2011

	Year Ended December 31,		Change
	(In thousands)		
	2012	2011	
Revenue	\$ —	\$ —	\$ —
Operating expenses	\$ 6,821	\$ 8,136	\$ (1,315)
Operating loss	\$(6,821)	\$(8,136)	\$ 1,315
Change in fair value of derivative instruments	\$ 8,110	\$28,696	\$(20,586)
Interest expense	\$(6,236)	\$(5,646)	\$ (590)
Other non-operating income	\$ 45	\$ 137	\$ (92)
Income tax benefit	\$ 2,974	\$ —	\$ 2,974
Net loss (income)	\$(1,928)	\$15,051	\$(16,979)

Our principal operating costs include the following items as a percentage of total expense:

	Year Ended	
	December 31, 2012	December 31, 2011
Human resource costs, including benefits	38%	34%
Professional fees for legal, intellectual property, accounting and consulting	40%	39%
Clinical and laboratory costs	8%	3%
Occupancy costs	5%	4%
Depreciation and amortization	0%	4%
Other	9%	16%

Operating expenses, decreased by \$1.3 million (16%) as a result of the following items:

	(In thousands)
Decrease in human resource costs	\$ (200)
Decrease in professional and consulting fees	(400)
Increase in clinical and laboratory costs	300
Reduction in depreciation and amortization	(300)
All other	(700)
Net decrease	<u><u>\$(1,300)</u></u>

Human resource costs decreased approximately \$0.2 million due primarily to reductions in headcount.

Professional and consulting fees decreased approximately \$0.4 million due to a decrease of approximately \$0.3 million in legal fees, a \$0.1 million reduction in accounting fees and a \$0.2 decrease in recruitment fees incurred in 2011 offset by a \$0.2 million increase in consulting fees related to Eligen® B-12.

Clinical costs and lab fees increased approximately \$0.3 million due to a charge for the reduction of a prepaid asset offset by reduction in analytical testing performed in 2012.

Occupancy costs were substantially unchanged in 2012 compared to 2011.

Depreciation and amortization expense decreased approximately \$0.3 million as a result of the impairment of an intangible asset in December 2011.

All other operating costs decreased \$0.7 million primarily due to events in 2011 which included a \$0.6 million charge for the impairment of an intangible asset, and a net reduction of \$0.1 million in other operating costs in 2012.

As a result of the factors above, Emisphere's operating expenses were \$6.8 million for the year ended December 31, 2012, which represents a decrease of \$1.3 million or 16% compared to operating expenses for the year ended December 31, 2011.

Other non-operating income decreased by approximately \$21.3 million for the year ended December 31, 2012 in comparison to the same period last year due primarily to a \$20.6 million decrease in the change in the value of derivative instruments, a \$0.1 million decrease in investment and other income, a \$0.6 million increase in interest expense due primarily to the additional accrued interest on the MHR Convertible Notes following the default described above. The change in the fair value of derivative instruments for 2012 and 2011 is the result of a decrease in stock price from \$0.22 on December 31, 2011 to \$0.16 on December 31, 2012. Future gains and losses recognized in the Company's operating results from changes in value of the derivative instrument liability are based in part on the fair value of the Company's common stock which is outside the control of the Company. These potential future gains and losses could be material.

We recognized an approximate \$3.0 million state income tax benefit as a result of proceeds from the sale of \$36 million of New Jersey net operating losses through the Technology Business Certificate Transfer Program, sponsored by the New Jersey Economic Development Authority.

As a result of the above factors, we reported a net loss of \$1.9 million, which was \$17.0 million (113%) lower than the net income of \$15.1 million for the year ended December 31, 2011.

Year Ended December 31, 2011 Compared to Year Ended December 31, 2010

	Year Ended December 31,		Change
	(In thousands)		
	2011	2010	
Revenue	\$ —	\$ 100	\$ (100)
Operating expenses	\$ 8,136	\$ 11,643	\$ (3,507)
Operating loss	\$ (8,136)	\$ (11,543)	\$ 3,407
Change in fair value of derivative instruments	\$28,696	\$ (23,651)	\$ (52,347)
Interest expense	\$ (5,646)	\$ (3,595)	\$ (2,051)
Loss on extinguishment of debt	\$ —	\$ (17,014)	\$ 17,014
Financing fees	\$ —	\$ (1,858)	\$ 1,858
Other non-operating income (expenses)	\$ 137	\$ 752	\$ (615)
Net income (loss)	\$15,051	\$ (56,909)	\$ 71,960

Revenue decreased \$0.1 million for the year ended December 31, 2011 compared to December 31, 2010 due primarily to the termination of the Life Extension Foundation contract for the sale of Eligen® B12 (100 mcg), in 2010.

Our principal operating costs include the following items as a percentage of total expense:

	Year Ended	
	December 31, 2011	December 31, 2010
Human resource costs, including benefits	34%	36%
Professional fees for legal, intellectual property, accounting and consulting	39%	38%
Occupancy for our laboratory and operating space	4%	3%
Clinical costs	3%	7%
Depreciation and amortization	4%	3%
Other	16%	13%

Operating expenses decreased by \$3.5 million (30%) as a result of the following items:

	(In thousands)
Decrease in human resource costs	\$(1,500)
Decrease in professional and consulting fees	(1,200)
Decrease in clinical costs and laboratory fees	(500)
Decrease in all other	<u>(300)</u>
Net decrease	<u><u>\$(3,500)</u></u>

Human resource costs decreased approximately \$1.5 million due primarily to a \$1.0 million reduction in headcount and \$0.5 million in non-cash compensation resulting from headcount reductions.

Professional and consulting fees decreased approximately \$1.2 million due to a decrease of approximately \$1.0 million in legal fees, a \$0.4 million reduction in consulting fees, primarily attributable to the Eligen® B-12 program and research and development, offset by a \$0.2 million increase in recruitment fees.

Clinical costs and lab fees decreased approximately \$0.5 million due to the completion of our B-12 clinical trial in 2010.

Occupancy costs were unchanged in 2011 compared to 2010.

Depreciation and amortization expense were unchanged in 2011 compared to 2010.

All other operating costs decreased \$0.3 million primarily due to events in 2010 which included a \$0.5 million fee to terminate our Distributor Agreement for the marketing, distribution and sale of oral Eligen® B12 (100mcg) with Quality Vitamins and Supplements, Inc. during the third quarter 2010, by the incremental accrual of \$0.3 million expense in connection with the final ruling of the arbitrator awarding legal fees to Dr. Goldberg resolved in 2010 and an approximate \$0.1 million decrease in various other operating costs, offset by a \$0.6 million charge for the impairment of intangible asset.

As a result of the factors above, Emisphere’s operating expenses were \$8.1 million for the year ended December 31, 2011, which represents a decrease of \$3.5 million or 30% compared to operating expenses for the year ended December 31, 2010.

Other non-operating expense decreased by approximately \$68.6 million for the year ended December 31, 2011 in comparison to the same period last year due primarily to a \$52.3 million decrease in the change in the value of derivative instruments, a \$16.8 million decrease in interest expense due primarily to the extinguishment of debt of \$17.0 million and financing fees of \$1.9 million associated with warrants and promissory notes issued to MHR in connection with the Novartis Agreement and the letter agreement entered into with MHR in connection therewith (the “MHR Letter Agreement”) in 2010, a \$0.6 million decrease in other income primarily from \$0.5 million proceeds from the final installment on a sale of patent in 2009. Expense from the change in the fair value of derivative instruments for 2011 and 2010 is the result of a decrease in stock price from \$2.41 on December 31, 2010 to \$0.22 on December 31, 2011 and from the increase in stock price from \$1.06 on December 31, 2009 to \$2.41 on December 31, 2010, the addition of 6,020,612 warrants in connection with the July 2011 Financing, and 795,000 warrants to MHR for consent to the July 2011 offering. The change in value of derivative instruments and increases in value of the underlying shares of the Company’s common stock increases the liability which is recognized as a corresponding loss in the Company’s operating statement, while decreases in the value of the Company’s common stock decrease the value of the liability with a corresponding gain recognized in the Company’s operating statement. Future gains and losses recognized in the Company’s operating results from changes in value of the derivative instrument liability are based in part on the fair value of the Company’s common stock which is outside the control of the Company. These potential future gains and losses could be material.

As a result of the above factors, we reported a net income of \$15.1 million, which was \$72.0 million (126%) higher than the net loss of \$56.9 million for the year ended December 31, 2010.

Critical Accounting Estimates and New Accounting Pronouncements

Critical Accounting Estimates

The preparation of financial statements in accordance with accounting principles generally accepted in the U.S. requires management to make estimates and assumptions that affect reported amounts and related disclosures in the financial statements. Management considers an accounting estimate to be critical if:

- It requires assumptions to be made that were uncertain at the time the estimate was made, and
- Changes in the estimate or different estimates that could have been selected could have a material impact on our results of operations or financial condition.

Share-Based Payments — We recognize expense for our share-based compensation in accordance with FASB ASC 718, “*Compensation-stock Compensation*”, which establishes standards for share-based transactions in which an entity receives employee’s services for (a) equity instruments of the entity, such as stock options, or (b) liabilities that are based on the fair value of the entity’s equity instruments or that may be settled by the issuance of such equity instruments. FASB ASC 718 requires that companies expense the fair value of stock options and similar awards, as measured on the awards’ grant date. FASB ASC 718 applies to all awards granted after the date of adoption, and to awards modified, repurchased or cancelled after that date.

We estimate the value of stock option awards on the date of grant using the Black-Scholes-Merton (“Black-Scholes”) option-pricing model. The determination of the fair value of share-based payment awards on the date of grant is affected by our stock price as well as assumptions regarding a number of complex and subjective variables. These variables include our expected stock price volatility over the term of the awards, expected term, risk-free interest rate, expected dividends and expected forfeiture rates.

If factors change and we employ different assumptions in the application of FASB ASC 718 in future periods, the compensation expense that we record under FASB ASC 718 may differ significantly from what we have recorded in the current period. There is a high degree of subjectivity involved when using option pricing models to estimate share-based compensation under FASB ASC 718. Consequently, there is a risk that our estimates of the fair values of our share-based compensation awards on the grant dates may bear little resemblance to the actual values realized upon the exercise, expiration, early termination or forfeiture of those share-based payments in the future. Employee stock options may expire worthless or otherwise result in zero intrinsic value as compared to the fair values originally estimated on the grant date and reported in our financial statements. Alternatively, value may be realized from these instruments that are significantly in excess of the fair values originally estimated on the grant date and reported in our financial statements. During the year ended December 31, 2011, we do not believe that reasonable changes in the projections would have had a material effect on share-based compensation expense.

Revenue Recognition — Revenue includes amounts earned from sales of our oral Eligen[®] B12 (100 mcg) product, collaborative agreements and feasibility studies. Revenue earned from the sale of oral Eligen[®] B12 (100 mcg) was recognized when the product was shipped, when all revenue recognition criteria were met in accordance with Staff Accounting Bulletin No. 104, “Revenue Recognition” (codified under ASC 605 “Revenue Recognition”). Our Distributor Agreement for the marketing, distribution and sale of oral Eligen[®] B12 (100 mcg) with Quality Vitamins and Supplements, Inc. was terminated during the third quarter, 2010. Revenue from feasibility studies, which are typically short term in nature, is recognized upon delivery of the study, provided that all other revenue recognition criteria are met. Revenue from collaboration agreements are recognized using the proportional performance method provided that we can reasonably estimate the level of effort required to complete our performance obligations under an arrangement and such performance obligations are provided on a best effort basis and based on “expected payments.” Under the proportional performance method, periodic revenue related to nonrefundable cash payments is recognized as the percentage of actual effort expended to date as of that period to the total effort expected for all of our performance obligations under the arrangement. Actual effort is generally determined based upon actual hours incurred and include research and development (“R&D”) activities performed by us and time spent for joint steering committee (“JSC”) activities. Total expected effort is generally based upon the total R&D and JSC hours incorporated into the project plan that is agreed to by both parties to the collaboration. Significant management judgments and estimates are required in determining the

level of effort required under an arrangement and the period over which we expect to complete the related performance obligations. Estimates of the total expected effort included in each project plan are based on historical experience of similar efforts and expectations based on the knowledge of scientists for both the Company and its collaboration partners. The Company periodically reviews and updates the project plan for each collaborative agreement. The most recent reviews took place in January 2013. In the event that a change in estimate occurs, the change will be accounted for using the cumulative catch-up method which provides for an adjustment to revenue in the current period. Estimates of our level of effort may change in the future, resulting in a material change in the amount of revenue recognized in future periods.

Generally under collaboration arrangements, nonrefundable payments received during the period of performance may include time- or performance-based milestones. The proportion of actual performance to total expected performance is applied to the “expected payments” in determining periodic revenue. However, revenue is limited to the sum of (1) the amount of nonrefundable cash payments received and (2) the payments that are contractually due but have not yet been paid.

With regard to revenue recognition from collaboration agreements, the Company previously interpreted expected payments to equate to total payments subject to each collaboration agreement. On a prospective basis, the Company has revised its application of expected payments to equate to a “best estimate” of payments. Under this application, expected payments typically include (i) payments already received and (ii) those milestone payments not yet received but that the Company believes are “more likely than not” of receiving. Our support for the assertion that the next milestone is likely to be met is based on the (a) project status updates discussed at JSC meetings; (b) clinical trial/development results of prior phases; (c) progress of current clinical trial/development phases; (d) directional input of collaboration partners and (e) knowledge and experience of the Company’s scientific staff. After considering the above factors, the Company believes those payments included in “expected payments” are more likely than not of being received. While this interpretation differs from that used previously by the Company, it does not result in any change to previously recognized revenues in either timing or amount for periods through December 31, 2012.

With regard to revenue recognition in connection with the Insulins License Agreement and the GLP-1 License Agreements with Novo Nordisk, such agreements include multiple deliverables including license grants, several versions of the Company’s Eligen® Technology (or carriers), support services and manufacturing. Emisphere’s management reviewed the relevant terms of the Novo Nordisk agreements and determined such deliverables should be accounted for as a single unit of accounting in accordance with FASB ASC 605-25, “Multiple-Element Arrangements” since the delivered license and Eligen® Technology do not have stand-alone value and Emisphere does not have objective evidence of fair value of the undelivered Eligen® Technology or the manufacturing value of all the undelivered items. Such conclusion will be reevaluated as each item in the arrangement is delivered. Consequently, any payments received from Novo Nordisk pursuant to such agreements, including the initial \$10 million upfront payment and any payments received for support services in connection with the GLP-1 License Agreement and the \$5 million upfront payment from the Insulins License Agreement will be deferred and included in Deferred Revenue within our balance sheet. Management cannot currently estimate when all of such deliverables will be delivered nor can they estimate when, if ever, Emisphere will have objective evidence of the fair value for all of the undelivered items, therefore all payments from Novo Nordisk are expected to be deferred for the foreseeable future.

As of December 31, 2012 total deferred revenue from the GLP-1 License agreement was \$13.6 million, comprised of the \$12.0 million non-refundable license fee and \$1.6 million in support services; and total deferred revenue from the Insulins License Agreement was \$5 million.

With regard to revenue recognition in connection with Novartis’ discontinued oral salmon calcitonin program for osteoporosis and osteoarthritis, discontinued oral PTH-1-34 program for osteoporosis, and terminated oral recombinant human growth hormone program: all such agreements include(d) multiple deliverables including license grants, several versions of the Company’s Eligen® Technology (or carriers) and support services. Emisphere’s management reviewed the relevant terms of each development license agreement with Novartis and determined such deliverables should be accounted for as a single unit of accounting in accordance with FASB ASC 605-25, “Multiple-Element Arrangements” since the delivered license and Eligen® Technology do not have stand-alone value and Emisphere does not have objective evidence of fair value of the

undelivered Eligen® Technology. Such conclusion will be reevaluated as each item in the arrangement is delivered or the status of each agreement changes. Consequently, any payments received from Novartis pursuant to such agreements have been deferred and included in Deferred Revenue within our balance sheet.

During 2011, Novartis terminated its oral human growth hormone program and informed the Company of its intention not to continue development of its oral calcitonin and oral PTH programs involving Emisphere's Eligen® Technology. However, Novartis did not terminate its development license agreements in calcitonin or PTH. At such time that Novartis terminates its oral calcitonin and oral PTH agreements, or does not demonstrate reasonable commercial effort to continue developing oral calcitonin or oral PTH products, then the Company will recognize revenue in connection with past receipts of payments from Novartis derived from those agreements which are currently included in Deferred Revenue within our balance sheet. Management will pay close attention to Novartis actions and reevaluate circumstances that influence this determination in future.

As of December 31, 2012 total deferred revenue from all Novartis development license programs was approximately \$13.0 million, comprised of the principal value (\$10 million) plus interest (\$3.0 million) we recorded on June 4, 2010, upon executing the Novartis Agreement, pursuant to which the Company was released and discharged from its obligations under the Novartis Note described in Note 8 to the Financial Statements included herein.

Purchased Technology — Purchased technology represents the value assigned to patents and the rights to use, sell or license certain technology in conjunction with our proprietary carrier technology. These assets underlie our research and development projects related to various research and development projects. In December 2011, the Company reviewed its purchased technology in light of industry trends and advances in reformulating and stabilizing active pharmaceutical ingredients through the development of fractions and analogs, and determined that its technology is no longer applicable in the development of a potential future oral formulation of heparin. As a result the net book value of the purchased technology was not deemed recoverable and the Company realized an impairment charge of \$0.6 million.

Warrants and Conversion Feature of MHR Convertible Note — Warrants issued in connection with various equity financings and embedded conversion feature of the MHR Convertible Notes described above have been classified as liabilities due to certain provisions that may require cash settlement in certain circumstances. At each balance sheet date, we adjust the warrants to reflect their current fair value. We estimate the fair value of these instruments using the Black-Scholes model which takes into account a variety of factors, including historical stock price volatility, risk-free interest rates, remaining term and the closing price of our common stock. Changes in the assumptions used to estimate the fair value of these derivative instruments could result in a material change in the fair value of the instruments. The fair value of the embedded conversion feature of the MHR Convertible Notes and warrants that have exercise price reset features are estimated using an adjusted Black-Scholes model to account for possibilities that could occur due to various circumstances that could arise in connection with the contractual terms of said instruments. The Company weights each Black-Scholes model calculation based on its estimation of the likelihood of the occurrence of each circumstance and adjusts relevant Black-Scholes model input to calculate the value of the derivative at the reporting date. We believe the assumptions used to estimate the fair values of the warrants are reasonable. For a more complete discussion on the volatility in market value of derivative instruments, see Part I, Item 7A “**Quantitative and Qualitative Disclosures about Market Risk.**”

Equipment and Leasehold Improvements — Equipment and leasehold improvements are stated at cost. Depreciation and amortization are provided for on a straight-line basis over the estimated useful life of the asset. Leasehold improvements are amortized over the life of the lease or of the improvements, whichever is shorter. Expenditures for maintenance and repairs that do not materially extend the useful lives of the respective assets are charged to expense as incurred. The cost and accumulated depreciation or amortization of assets retired or sold are removed from the respective accounts and any gain or loss is recognized in operations.

Impairment of Long-Lived Assets — We review our long-lived assets for impairment whenever events and circumstances indicate that the carrying value of an asset might not be recoverable. An impairment loss, measured as the amount by which the carrying value exceeds the fair value, is triggered if the carrying amount exceeds estimated undiscounted future cash flows. Actual results could differ significantly from these estimates,

which would result in additional impairment losses or losses on disposal of the assets. In December 2011, the Company reviewed its purchased technology in light of industry trends and advances in reformulating and stabilizing active pharmaceutical ingredients through the development of fractions and analogs, and determined that its technology is no longer applicable in the development of a potential future oral formulation of heparin. As a result the net book value of the purchased technology was not deemed recoverable and the Company realized an impairment charge of \$0.6 million.

Clinical Trial Accrual Methodology — Clinical trial expenses represent obligations resulting from our contracts with various research organizations in connection with conducting clinical trials for our product candidates. We account for those expenses on an accrual basis according to the progress of the trial as measured by patient enrollment and the timing of the various aspects of the trial. Accruals are recorded in accordance with the following methodology: (i) the costs for period expenses, such as investigator meetings and initial start-up costs, are expensed as incurred based on management’s estimates, which are impacted by any change in the number of sites, number of patients and patient start dates; (ii) direct service costs, which are primarily on-going monitoring costs, are recognized on a straight-line basis over the life of the contract; and (iii) principal investigator expenses that are directly associated with recruitment are recognized based on actual patient recruitment. All changes to the contract amounts due to change orders are analyzed and recognized in accordance with the above methodology. Change orders are triggered by changes in the scope, time to completion and the number of sites. During the course of a trial, we adjust our rate of clinical expense recognition if actual results differ from our estimates.

New Accounting Pronouncements

In July 2012, the Financial Accounting Standards Board (“FASB”) issued ASU No. 2012-02, “*Testing Indefinite-Lived Intangible Assets for Impairment*” (“ASU 2012-02”). ASU 2012-02 gives entities an option to first assess qualitative factors to determine whether the existence of events and circumstances indicate that it is more likely than not that the indefinite-lived intangible asset impaired. If based on its qualitative assessment, an entity concludes that it is more likely than not that the fair value of an indefinite-lived intangible asset is less than its carrying amount, quantitative impairment testing is required. However, if an entity concludes otherwise, quantitative impairment testing is not required. ASU 2012-02 is effective for annual and interim impairment tests performed for fiscal years beginning after September 15, 2012, with early adoption permitted. ASU 2012-02 is not expected to have a material impact on the Company’s financial position or results of operations.

In December 2011, the FASB issued ASU No. 2011-11, “*Balance Sheet (Topic 210): Disclosures about Offsetting Assets and Liabilities*” (“ASU 2011-11”). ASU 2011-11 enhances current disclosures about financial instruments and derivative instruments that are either offset on the statement of financial position or subject to an enforceable master netting arrangement or similar agreement, irrespective of whether they are offset on the statement of financial position. Entities are required to provide both net and gross information for these assets and liabilities in order to facilitate comparability between financial statements prepared on the basis of U.S. GAAP and financial statements prepared on the basis of IFRS. ASU 2011-11 is effective for annual reporting periods beginning on or after January 1, 2013, and interim periods within those annual periods. ASU 2011-11 is not expected to have a material impact on the Company’s financial position or results of operations.

In September 2011, the FASB issued Accounting Standards Update No. 2011-08 (“ASU 2011-08”), which updates the guidance in ASC Topic 350, *Intangibles – Goodwill & Other*. The amendments in ASU 2011-08 permit an entity to first assess qualitative factors to determine whether it is more likely than not that the fair value of a reporting unit is less than the carrying amount as a basis for determining whether it is necessary to perform the two-step goodwill impairment test described in ASC Topic 350. The more-likely-than-not threshold is defined as having a likelihood of more than fifty percent. If, after assessing the totality of events or circumstances, an entity determines that it is more likely than not that the fair value of a reporting unit is less than its carrying amount, then performing the two-step impairment test is unnecessary. The amendments in ASU 2011-08 include examples of events and circumstances that an entity should consider in evaluating whether it is more likely than not that the fair value of a reporting unit is less than its carrying amount. However, the examples are not intended to be all-inclusive and an entity may identify other relevant events and circumstances to consider in making the determination. The examples in this ASU 2011-08 supersede the previous examples under ASC

Topic 350 of events and circumstances an entity should consider in determining whether it should test for impairment between annual tests, and also supersede the examples of events and circumstances that an entity having a reporting unit with a zero or negative carrying amount should consider in determining whether to perform the second step of the impairment test. Under the amendments in ASU 2011-08, an entity is no longer permitted to carry forward its detailed calculation of a reporting unit's fair value from a prior year as previously permitted under ASC Topic 350. ASU 2011-08 is effective for annual and interim goodwill impairment tests performed for fiscal years beginning after December 15, 2011. The adoption of ASU 2011-08 did not have a material impact on the Company's financial position or results of operations.

In May 2011, the FASB issued Accounting Standards Update 2011-04 ("ASU 2011-04"), which updated the guidance in ASC Topic 820, *Fair Value Measurement*. The amendments in ASU 2011-04 generally represent clarifications of Topic 820, but also include some instances where a particular principle or requirement for measuring fair value or disclosing information about fair value measurements has changed. ASU 2011-04 results in common principles and requirements for measuring fair value and for disclosing information about fair value measurements in accordance with U.S. GAAP and International Financial Reporting Standards. The amendments in ASU 2011-04 are to be applied prospectively. For public entities, the amendments are effective for interim and annual periods beginning after December 15, 2011. The adoption of ASU 2011-04 did not have a material impact on the Company's financial position or results of operations.

Management does not believe there would have been a material effect on the accompanying financial statements had any other recently issued, but not yet effective, accounting standards been adopted in the current period.

Off-Balance Sheet Arrangements

As of December 31, 2012, we had no material off-balance sheet arrangements.

In the ordinary course of business, we enter into agreements with third parties that include indemnification provisions which, in our judgment, are normal and customary for companies in our industry sector. These agreements are typically with business partners, clinical sites, and suppliers. Pursuant to these agreements, we generally agree to indemnify, hold harmless, and reimburse indemnified parties for losses suffered or incurred by the indemnified parties with respect to our product candidates, use of such product candidates, or other actions taken or omitted by us. The maximum potential amount of future payments we could be required to make under these indemnification provisions is unlimited. We have not incurred material costs to defend lawsuits or settle claims related to these indemnification provisions. As a result, the estimated fair value of liabilities relating to these provisions is minimal. Accordingly, we have no liabilities recorded for these provisions as of December 31, 2012.

In the normal course of business, we may be confronted with issues or events that may result in a contingent liability. These generally relate to lawsuits, claims, environmental actions or the actions of various regulatory agencies. We consult with counsel and other appropriate experts to assess the claim. If, in our opinion, we have incurred a probable loss as set forth by accounting principles generally accepted in the U.S., an estimate is made of the loss and the appropriate accounting entries are reflected in our financial statements.

Contractual Arrangements

Significant contractual obligations as of December 31, 2012 are as follows:

Type of Obligation	Total	Amount Due in			
		Less than 1 Year	1 to 3 Years	3 to 5 Years	More than 5 Years
		(In thousands)			
Notes Payable(1)(2)	\$33,607	\$33,607	\$ —	\$ —	\$—
Derivative liabilities(3)	2,089	2,089	—	—	—
Operating lease obligations	610	135	252	223	—
Total	<u>\$36,306</u>	<u>\$35,831</u>	<u>\$252</u>	<u>\$223</u>	<u>\$—</u>

(1) Amounts include both principal and related interest payments.

- (2) The Company is currently in default on \$31.6 million under the terms of the MHR Convertible Notes and the \$0.6 million 2010 MHR Notes, both of which are payable on demand. Additionally, the \$1.4 million Bridge Note is payable on demand. Please see Note 8 to the Financial Statements included in Item 8 of this Report for more information about the Company's debt obligations.
- (3) We have issued warrants to purchase shares of our common stock which contain provisions requiring us to make a cash payment to the holders of the warrant for any gain that could have been realized if the holders exercise the warrants and we subsequently fail to deliver a certificate representing the shares to be issued upon such exercise by the third trading day after such warrants have been exercised. As a result, these warrants have been recorded at their fair value and are classified as current liabilities. The value and timing of the actual cash payments, if any, related to these derivative instruments could differ materially from the amounts and periods shown.

ITEM 7A. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

Fair Value of Warrants and Derivative Liabilities. At December 31, 2012, the value of derivative instruments was \$2.1 million. We estimate the fair values of these instruments using the Black-Scholes model which takes into account a variety of factors, including historical stock price volatility, risk-free interest rates, remaining term and the closing price of our common stock. Furthermore, the Company computes the fair value of these instruments using multiple Black-Scholes model calculations to account for the various circumstances that could arise in connection with the contractual terms of said instruments. The Company weights each Black-Scholes model calculation based on its estimation of the likelihood of the occurrence of each circumstance and adjusts relevant Black-Scholes model input to calculate the value of the derivative at the reporting date. We are required to revalue this liability each quarter. We believe that the assumption that has the greatest impact on the determination of fair value is the closing price of our common stock. The following table illustrates the potential effect on the fair value of derivative instruments from changes in the assumptions made:

	<u>Increase/(Decrease)</u> <u>(In thousands)</u>
25% increase in stock price	\$ 555
50% increase in stock price	1,124
5% increase in assumed volatility	70
25% decrease in stock price	(537)
50% decrease in stock price	(1,047)
5% decrease in assumed volatility	(73)

ITEM 8. FINANCIAL STATEMENTS AND SUPPLEMENTARY DATA

EMISPHERE TECHNOLOGIES, INC.

FINANCIAL STATEMENTS

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REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

To the Board of Directors and Stockholders
Emisphere Technologies, Inc

We have audited the accompanying balance sheets of Emisphere Technologies, Inc. as of December 31, 2012 and 2011, and the related statements of operations, stockholders' deficit, and cash flows for each of the three years in the period ended December 31, 2012. These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Emisphere Technologies, Inc. as of December 31, 2012 and 2011, and the results of its operations and its cash flows for each of the three years in the period ended December 31, 2012, in conformity with U.S. generally accepted accounting principles.

We have also audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), Emisphere Technologies, Inc.'s internal control over financial reporting as of December 31, 2012, based on criteria established in *Internal Control — Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission, and our report dated March 28, 2013 expressed an unqualified opinion on the effectiveness of Emisphere Technologies, Inc.'s internal control over financial reporting.

The accompanying financial statements have been prepared assuming that the Company will continue as a going concern. As discussed in Note 1 to the financial statements, the Company has suffered recurring losses from operations, has a significant working capital deficiency, has limited cash availability and is in default under certain promissory notes. This raises substantial doubt about the Company's ability to continue as a going concern. Management's plans in regard to these matters are also described in Note 1. The financial statements do not include any adjustments that might result from the outcome of this uncertainty.

/s/ McGladrey LLP

New York, NY
March 28, 2013

EMISPHERE TECHNOLOGIES, INC.

BALANCE SHEETS

	December 31,	
	2012	2011
	(In thousands, except share data)	
ASSETS		
Current assets:		
Cash and cash equivalents	\$ 1,484	\$ 3,069
Accounts receivable, net of allowance of \$0 in 2012 and \$31 in 2011.	1	22
Inventories	249	258
Prepaid expenses and other current assets	149	581
Total current assets	1,883	3,930
Equipment and leasehold improvements, net	12	44
Restricted cash	247	247
Other assets	34	—
Total assets	\$ 2,176	\$ 4,221
LIABILITIES AND STOCKHOLDERS' DEFICIT		
Current liabilities:		
Notes payable, related party, including accrued interest and net of related discount in 2011	\$ 33,607	\$ 26,016
Accounts payable and accrued expenses	923	894
Derivative instruments:		
Related party	1,491	9,371
Others	598	828
Other current liabilities	9	42
Total current liabilities	36,628	37,151
Deferred revenue	31,614	31,593
Deferred lease liability and other liabilities	0	4
Total liabilities	68,242	68,748
Commitments and contingencies	—	—
Stockholders' deficit:		
Preferred stock, \$.01 par value; authorized 2,000,000 shares; issued and outstanding—none	—	—
Common stock, \$.01 par value; authorized 200,000,000 shares; issued 60,977,210 shares (60,687,478 outstanding) in 2012 and 2011	610	610
Additional paid-in capital	405,096	404,707
Accumulated deficit	(467,820)	(465,892)
Common stock held in treasury, at cost; 289,732 shares	(3,952)	(3,952)
Total stockholders' deficit	(66,066)	(64,527)
Total liabilities and stockholders' deficit	\$ 2,176	\$ 4,221

(See accompanying Notes to the Financials)

EMISPHERE TECHNOLOGIES, INC.
STATEMENTS OF OPERATIONS

	Year Ended December 31,		
	2012	2011	2010
	(In thousands, except share and per share data)		
Revenue	\$ —	\$ —	\$ 100
Cost of goods sold	—	—	22
Gross profit	—	—	78
Costs and expenses:			
Research and development	1,867	1,951	2,495
General and administrative	4,935	5,310	7,963
Gain on disposal of fixed assets	(10)	—	(1)
Restructuring charge	—	—	50
Depreciation and amortization	29	277	294
Impairment of intangible asset	—	598	—
Contract termination expense	—	—	542
Expense from settlement of lawsuit	—	—	278
Total costs and expenses	6,821	8,136	11,621
Operating loss	(6,821)	(8,136)	(11,543)
Other non-operating income (expense):			
Sale of patent	—	—	500
Investment and other income	45	137	252
Change in fair value of derivative instruments:			
Related party	7,880	21,957	(15,988)
Others	230	6,739	(7,663)
Interest expense:			
Related party	(6,236)	(5,631)	(3,201)
Others	—	(15)	(394)
Loss on extinguishment of debt	—	—	(17,014)
Financing fees	—	—	(1,858)
Total other non-operating income (expense)	1,919	23,187	(45,366)
Income (loss) before income tax benefit	(4,902)	15,051	(56,909)
Income tax benefit	2,974	—	—
Net income (loss)	\$ (1,928)	\$ 15,051	\$ (56,909)
Net income (loss) per share, basic	\$ (0.03)	\$ 0.27	\$ (1.23)
Net income (loss) per share, diluted	\$ (0.03)	\$ 0.25	\$ (1.23)
Weighted average shares outstanding, basic	60,687,478	56,292,511	46,206,803
Weighted average shares outstanding, diluted	60,687,478	59,281,325	46,206,803

(See accompanying Notes to the Financials)

EMISPHERE TECHNOLOGIES, INC.

STATEMENTS OF CASH FLOWS

	Year Ended December 31,		
	2012	2011	2010
	(In thousands)		
Cash flows from operating activities:			
Net income (loss)	\$(1,928)	\$ 15,051	\$(56,909)
Adjustments to reconcile net income (loss) to net cash used in operating activities:			
Depreciation and amortization	29	277	294
Non-cash interest expense:			
Related party	6,236	5,631	22,073
Others	—	—	394
Changes in the fair value of derivative instruments:			
Related party	(7,880)	(21,957)	15,988
Others	(230)	(6,739)	7,663
Non-cash compensation	344	315	799
Gain on disposal of fixed assets	(10)	—	(1)
Impairment of purchased technology	—	598	—
Provision for bad debts	31	31	—
Changes in assets and liabilities excluding non-cash charges:			
(Increase) decrease in accounts receivable	(10)	(39)	145
(Increase) decrease in inventories	9	2	(24)
(Increase) decrease in prepaid expenses and other current assets	432	(85)	(344)
(Increase) in security deposits	(34)	—	—
Increase (decrease) in accounts payable, accrued expenses and other	29	(2,488)	(1,554)
(Decrease) in other current liabilities	(33)	—	—
Increase in deferred revenue	21	58	7,072
Decrease in deferred lease and other liabilities	(4)	(42)	(35)
Decrease in restructuring charge	—	(300)	(450)
Total adjustments	(1,070)	(24,738)	52,020
Net cash used in operating activities	(2,998)	(9,687)	(4,889)
Cash flows from investing activities:			
Decrease (increase) in restricted cash	—	13	(1)
Proceeds from sale of fixed assets	13	—	1
Net cash provided by investing activities	13	13	—
Cash flows from financing activities:			
Proceeds from notes payable	1,400	—	500
Payments on notes payable	—	—	(525)
Proceeds from exercise of stock options and warrants	—	242	—
Net proceeds from issuance of common stock and warrants	—	7,175	6,674
Net cash provided by financing activities	1,400	7,417	6,649
Net increase (decrease) in cash and cash equivalents	(1,585)	(2,257)	1,760
Cash and cash equivalents, beginning of year	3,069	5,326	3,566
Cash and cash equivalents, end of year	\$ 1,484	\$ 3,069	\$ 5,326
Supplemental disclosure of cash flow information:			
Interest paid	\$ —	\$ 16	\$ 6
Non-cash investing and financing activities:			
Issuance of liability warrants in connection with common stock offering ...	\$ —	\$ 5,138	\$ 4,920
Reclassification of liability warrants to equity	\$ —	\$ 349	\$ —
Exchange of debt as deferred revenue (Note 8)	\$ —	\$ —	\$ 13,000
Common stock issued to settle accrued directors' compensation	\$ —	\$ —	\$ 10

(See accompanying Notes to the Financials)

EMISPHERE TECHNOLOGIES, INC.

STATEMENTS OF STOCKHOLDERS' DEFICIT
For the years ended December 31, 2012, 2011 and 2010

	<u>Common Stock</u>		<u>Additional Paid-in Capital</u>	<u>Accumulated Deficit</u>	<u>Common Stock Held in Treasury</u>		<u>Total</u>
	<u>Shares</u>	<u>Amount</u>			<u>Shares</u>	<u>Amount</u>	
	(In thousands except share data)						
Balance, December 31, 2009	42,360,133	\$424	\$392,335	\$(424,034)	289,732	\$(3,952)	\$(35,227)
Net Loss				(56,909)			(56,909)
Issuance of common stock to directors	13,674		10				10
Reclassification of derivative liability due to exercise of warrants			7,053				7,053
Exercise of warrants	2,809,971	28	(28)				—
Equity proceeds from issuance of common stock, net of share issuance expenses	6,995,056	70	1,684				1,754
Stock based compensation for employees			723				723
Stock based compensation for directors			76				76
Balance, December 31, 2010	<u>52,178,834</u>	<u>\$522</u>	<u>\$401,853</u>	<u>\$(480,943)</u>	<u>289,732</u>	<u>\$(3,952)</u>	<u>\$(82,520)</u>
Net Income				15,051			15,051
Reclassification of derivative liability due to exercise of warrants			349				349
Exercise of warrants	187,500	2	234				236
Equity proceeds from issuance of common stock, net of share issuance expenses	8,600,876	86	1,950				2,036
Exercise of options	10,000	—	6				6
Stock based compensation for employees			188				188
Stock based compensation for directors			127				127
Balance, December 31, 2011	<u>60,977,210</u>	<u>\$610</u>	<u>\$404,707</u>	<u>\$(465,892)</u>	<u>289,732</u>	<u>\$(3,952)</u>	<u>\$(64,527)</u>
Net Loss				(1,928)			(1,928)
Capital contributed from imputed interest			45				45
Stock based compensation for employees			176				176
Stock based compensation for directors			168				168
Balance, December 31, 2012	<u>60,977,210</u>	<u>\$610</u>	<u>\$405,096</u>	<u>\$(467,820)</u>	<u>289,732</u>	<u>\$(3,952)</u>	<u>\$(66,066)</u>

(See accompanying Notes to the Financials)

EMISPHERE TECHNOLOGIES, INC.
NOTES TO FINANCIAL STATEMENTS

1. Nature of Operations, Risks and Uncertainties and Liquidity

Nature of Operations. Emisphere Technologies, Inc. (“Emisphere”, “our”, “us”, the “company” or “we”) is a biopharmaceutical company that focuses on a unique and improved delivery of therapeutic molecules and pharmaceutical compounds using its Eligen[®] Technology. These molecules and compounds are currently available or are under development.

Our core business strategy is to pursue the commercialization of Oral Eligen[®] B12, build new high-value partnerships and continue to expand upon existing partnerships, evaluate new prescription Medical Foods commercial opportunities, reprioritize the product pipeline, and promote new uses for the Eligen[®] Technology.

Risks and Uncertainties. We have no prescription products currently approved for sale by the U.S. FDA. There can be no assurance that our research and development will be successfully completed, that any products developed will obtain necessary government regulatory approval or that any approved products will be commercially viable. In addition, we operate in an environment of rapid change in technology and are dependent upon the continued services of our current employees, consultants and subcontractors.

Liquidity. As of December 31, 2012, we had approximately \$1.5 million in cash, approximately \$34.7 million in working capital deficiency, a stockholders’ deficit of approximately \$66.1 million and an accumulated deficit of approximately \$467.8 million. Our net loss for the year ended December 31, 2012 was \$1.9 million and our operating loss for the year ended December 31, 2012 was approximately \$6.8 million. We anticipate that we will continue to generate significant losses from operations for the foreseeable future, and that in order to continue as a going concern, our business will require substantial additional investment that we have not yet secured.

Since our inception in 1986, we have generated significant losses from operations. We have limited capital resources and operations to date have been funded with the proceeds from collaborative research agreements, public and private equity and debt financings and income earned on investments. As of September 27, 2012, the Company is in default under the terms of the MHR Convertible Notes (described in Note 8 to these Financial Statements included in Item 8 of this Report) issued to MHR Fund Management LLC (together with its affiliates, “MHR”). The default is the result of the Company’s failure to pay MHR approximately \$30.5 million in principal and interest due and payable on September 26, 2012 under the terms of the MHR Convertible Notes. Pursuant to that certain Pledge and Security Agreement, dated as of September 26, 2005, between the Company and MHR (as amended to date, the “Security Agreement”), the MHR Convertible Notes are secured by a first priority lien in favor of MHR on substantially all of our assets. On October 4, 2012, the Company received notice from MHR that, as a result of the payment default described above, the default interest rate of 13% per annum will apply with respect to the MHR Convertible Notes, effective as of September 27, 2012.

The Company continues to be in default under the terms of the MHR Convertible Notes and, as a result of such default, MHR has the ability at any time to foreclose on substantially all of the Company’s assets under the terms of the Security Agreement. To date, MHR has not demanded payment under the MHR Convertible Notes or exercised its rights under the Security Agreement as a result of the default, and has continued discussions with the Company regarding proposals relating to the default while reserving all of its rights under the terms of the MHR Convertible Notes and Security Agreement. No assurances can be given as to the outcome of such discussions.

As of September 27, 2012, the Company is also in default under the terms of certain non-interest bearing promissory notes in the aggregate principal amount of \$600,000 issued to MHR on June 8, 2010 (the “2010 MHR Notes”). The 2010 MHR Notes were originally due and payable on June 8, 2012, but this maturity date was extended to September 26, 2012 by agreement with MHR. The default is the result of the Company’s failure to pay to MHR \$600,000 in principal due and payable on September 26, 2012 under the terms of the 2010 MHR Notes. As with the MHR Convertible Notes discussed above, MHR has not demanded payment under the 2010 MHR Notes, and has continued discussions with the Company regarding proposals relating to the 2010 MHR Notes and the Company’s default thereunder while reserving all of its rights under the 2010 MHR Notes. There can be no assurances as to the outcome of such discussions.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

As more specifically described in Note 8 to these Financial Statements, on October 17, 2012, the Company issued a promissory note (the “Bridge Note”) to MHR Institutional Partners IIA LP, MHR Institutional Partners II LP, MHR Capital Partners Master Account LP, and MHR Capital Partners (100) LP (collectively, the “Bridge Lender”) in the principal amount of \$1,400,000 to be advanced by the Bridge Lender to the Company pursuant to the terms thereof (the “Bridge Loan”). That amount was sufficient to support operations through approximately December 15, 2012. The Bridge Note is secured by a first priority lien on substantially all of our assets, is payable on demand.

As of December 31, 2012, the aggregate book value of MHR Convertible Notes, the 2010 MHR Notes, and the Bridge Note including outstanding principal and interest was \$33.6 million.

In December 2012, the Company received \$1.5 million by participating in the Technology Business Tax Certificate Transfer Program, sponsored by the New Jersey Economic Development Authority. That amount is sufficient to support the Company’s continuing operations for approximately three months. We anticipate that we will continue to generate significant losses from operations for the foreseeable future, and that our business will require substantial additional investment that we have not yet secured. As such, we anticipate that our existing capital resources will enable us to continue operations through approximately April 15, 2013, or earlier if unforeseen events or circumstances arise that negatively affect our liquidity.

Further, we do not have sufficient resources to develop fully any new products or technologies unless we are able to raise substantial additional financing on acceptable terms or secure funds from new or existing partners. We cannot assure that financing will be available on favorable terms or at all. Additionally, these conditions may increase the cost to raise capital. If additional capital is raised through the sale of equity or convertible debt securities, the issuance of such securities would result in dilution to our existing stockholders.

While our plan is to raise capital and/or to pursue partnering opportunities, we cannot be sure that our plans will be successful. If the Company fails to raise additional capital or obtain substantial cash inflows from existing or new partners prior to April 15, 2013, or if MHR demands payment under the terms of the MHR Convertible Notes, the 2010 MHR Notes or the Bridge Note, or exercises its rights under the Security Agreement, the Company could be forced to cease operations. These conditions raise substantial doubt about our ability to continue as a going concern. Consequently, the audit reports prepared by our independent registered public accounting firm relating to our financial statements for the years ended December 31, 2012, 2011 and 2010 include an explanatory paragraph expressing the substantial doubt about our ability to continue as a going concern. The Company is pursuing several courses of action to address its deficiency in capital resources including discussions with MHR, commercialization of B12, leveraging existing partnerships, and capital markets financings.

Even if we are successful in raising additional capital to meet our obligations and otherwise continue operations, our business will still require substantial additional investment that we have not yet secured. For further discussion, see Part II, Item 1A “**Risk Factors**”.

2. Summary of Significant Accounting Policies

Use of Estimates. The preparation of financial statements in accordance with accounting principles generally accepted in the U.S. involves the use of estimates and assumptions that affect the recorded amounts of assets and liabilities as of the date of the financial statements and the reported amounts of revenue and expenses and performance period for revenue recognition. Actual results may differ substantially from these estimates. Significant estimates include the fair value and recoverability of the carrying value of purchased technology, recognition of on-going clinical trial costs, estimated costs to complete research collaboration projects, accrued expenses, the variables and method used to calculate stock-based compensation, derivative instruments and deferred taxes.

Concentration of Credit Risk. Financial instruments, which potentially subject us to concentrations of credit risk, consist of cash, cash equivalents, restricted cash and investments. We invest excess funds in accordance with a

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

policy objective seeking to preserve both liquidity and safety of principal. We generally invest our excess funds in obligations of the U.S. government and its agencies, bank deposits, money market funds, and investment grade debt securities issued by corporations and financial institutions. We hold no collateral for these financial instruments.

Cash, Cash Equivalents, and Investments. We consider all highly liquid, interest-bearing instruments with original maturity of three months or less when purchased to be cash equivalents. Cash and cash equivalents may include demand deposits held in banks and interest bearing money market funds. Our investment policy requires that commercial paper be rated A-1, P-1 or better by either Standard and Poor's Corporation or Moody's Investor Services or another nationally recognized agency and that securities of issuers with a long-term credit rating must be rated at least "A" (or equivalent). As of December 31, 2012, we held no investments.

Inventory. Inventories are stated at the lower of cost or market determined by the first in, first out method.

Impairment of Long-Lived Assets. In accordance with FASB ASC 360-10-35, we review our long-lived assets, including purchased technology, for impairment whenever events and circumstances indicate that the carrying value of an asset might not be recoverable. An impairment loss, measured as the amount by which the carrying value exceeds the fair value, is recognized if the carrying amount exceeds estimated undiscounted future cash flows.

Equipment and Leasehold Improvements. Equipment and leasehold improvements are stated at cost. Depreciation and amortization are provided on a straight-line basis over the estimated useful life of the asset. Leasehold improvements are amortized over the term of the lease or useful life of the improvements, whichever is shorter. Expenditures for maintenance and repairs that do not materially extend the useful lives of the respective assets are charged to expense as incurred. The cost and accumulated depreciation or amortization of assets retired or sold are removed from the respective accounts and any gain or loss is recognized in operations.

Purchased Technology. Purchased technology represents the value assigned to patents and the right to use, sell or license certain technology in conjunction with our proprietary carrier technology that were acquired from Ebbisham Ltd. These assets are utilized in various research and development projects. Such purchased technology was being amortized on a straight line basis over 15 years, until 2014, which represents the average life of the patents acquired. In December 2011, the Company reviewed its purchased technology in light industry trends and advances in reformulating and stabilizing active pharmaceutical ingredients through the development of fractions and analogs, and determined that its technology is no longer applicable in the development of a potential future oral formulation of heparin. As a result the net book value of the purchased technology was not deemed recoverable and the Company realized an impairment charge of \$0.6 million.

Deferred Lease Liability. Our leases provide for rental holidays and escalations of the minimum rent during the lease term, as well as additional rent based upon increases in real estate taxes and common maintenance charges. We record rent expense from leases with rental holidays and escalations using the straight-line method, thereby prorating the total rental commitment over the term of the lease. Under this method, the deferred lease liability represents the difference between the minimum cash rental payments and the rent expense computed on a straight-line basis.

Revenue Recognition. We recognize revenue in accordance with FASB ASC 605-10-S99, *Revenue Recognition*. Revenue includes amounts earned from sales of our oral Eligen® B12 (100 mcg) product, collaborative agreements and feasibility studies. Revenue earned from the sale of oral Eligen® B12 (100 mcg) was recognized when the product was shipped, when all revenue recognition criteria were met in accordance with Staff Accounting Bulletin No. 104, "Revenue Recognition" (codified under ASC 605 "Revenue Recognition"). Our distributor agreement for the marketing, distribution and sale of oral Eligen® B12 (100 mcg) with Quality Vitamins and Supplements, Inc. was terminated during the third quarter, 2010. Revenue earned from collaborative agreements and feasibility studies is comprised of reimbursed research and development costs, as well as upfront and research and development milestone payments. Deferred revenue represents payments received which are related to future performance. Revenue from feasibility studies, which are typically short term

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

in nature, is recognized upon delivery of the study, provided that all other revenue recognition criteria are met.

Revenue from collaboration agreements are recognized using the proportional performance method provided that we can reasonably estimate the level of effort required to complete our performance obligations under an arrangement and such performance obligations are provided on a best effort basis and based on “expected payments.” Under the proportional performance method, periodic revenue related to nonrefundable cash payments is recognized as the percentage of actual effort expended to date as of that period to the total effort expected for all of our performance obligations under the arrangement. Actual effort is generally determined based upon actual hours incurred and include research and development (“R&D”) activities performed by us and time spent for Joint Steering Committee (“JSC”) activities. Total expected effort is generally based upon the total R&D and JSC hours incorporated into the project plan that is agreed to by both parties to the collaboration. Significant management judgments and estimates are required in determining the level of effort required under an arrangement and the period over which we expect to complete the related performance obligations. Estimates of the total expected effort included in each project plan are based on historical experience of similar efforts and expectations based on the knowledge of scientists for both the Company and its collaboration partners. The Company periodically reviews and updates the project plan for each collaborative agreement. The most recent reviews took place in January 2013. In the event that a change in estimate occurs, the change will be accounted for using the cumulative catch-up method which provides for an adjustment to revenue in the current period. Estimates of our level of effort may change in the future, resulting in a material change in the amount of revenue recognized in future periods.

Generally under collaboration arrangements, nonrefundable payments received during the period of performance may include time- or performance-based milestones. The proportion of actual performance to total expected performance is applied to the “expected payments” in determining periodic revenue. However, revenue is limited to the sum of (i) the amount of nonrefundable cash payments received and (ii) the payments that are contractually due but have not yet been paid.

With regard to revenue recognition in connection with development and license agreements that include multiple deliverables, Emisphere’s management reviews the relevant terms of the agreements and determines whether such deliverables should be accounted for as a single unit of accounting in accordance with FASB ASC 605-25, *Multiple-Element Arrangements*. If it is determined that a delivered license and Eligen® Technology do not have stand-alone value and Emisphere does not have objective evidence of fair value of the undelivered Eligen® Technology or the manufacturing value of all the undelivered items, then such deliverables are accounted for as a single unit of accounting and any payments received pursuant to such agreement, including any upfront or development milestone payments and any payments received for support services, will be deferred and included in deferred revenue within our balance sheet until such time as management can estimate when all of such deliverables will be delivered, if ever. Management reviews and reevaluates such conclusions as each item in the arrangement is delivered and circumstances of the development arrangement change. See Note 13 for more information about the Company’s accounting for revenue from specific development and license agreements.

Research and Development and Clinical Trial Expenses. Research and development expenses include costs directly attributable to the conduct of research and development programs, including the cost of salaries, payroll taxes, employee benefits, materials, supplies, maintenance of research equipment, costs related to research collaboration and licensing agreements, the cost of services provided by outside contractors, including services related to our clinical trials, clinical trial expenses, the full cost of manufacturing drug for use in research, pre-clinical development, and clinical trials. All costs associated with research and development are expensed as incurred.

Clinical research expenses represent obligations resulting from our contracts with various research organizations in connection with conducting clinical trials for our product candidates. We account for those expenses on an accrual basis according to the progress of the trial as measured by patient enrollment and the

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

timing of the various aspects of the trial. Accruals are recorded in accordance with the following methodology: (i) the costs for period expenses, such as investigator meetings and initial start-up costs, are expensed as incurred based on management's estimates, which are impacted by any change in the number of sites, number of patients and patient start dates; (ii) direct service costs, which are primarily ongoing monitoring costs, are recognized on a straight-line basis over the life of the contract; and (iii) principal investigator expenses that are directly associated with recruitment are recognized based on actual patient recruitment. All changes to the contract amounts due to change orders are analyzed and recognized in accordance with the above methodology. Change orders are triggered by changes in the scope, time to completion and the number of sites. During the course of a trial, we adjust our rate of clinical expense recognition if actual results differ from our estimates.

Income Taxes. Deferred tax liabilities and assets are recognized for the expected future tax consequences of events that have been included in the financial statements or tax returns. These liabilities and assets are determined based on differences between the financial reporting and tax basis of assets and liabilities measured using the enacted tax rates and laws that will be in effect when the differences are expected to reverse. A valuation allowance is recognized to reduce deferred tax assets to the amount that is more likely than not to be realized. In assessing the likelihood of realization, management considered estimates of future taxable income.

Stock-Based Employee Compensation. We recognize expense for our share-based compensation based on the fair value of the awards at the time they are granted. We estimate the value of stock option awards on the date of grant using the Black-Scholes model. The determination of the fair value of share-based payment awards on the date of grant is affected by our stock price as well as assumptions regarding a number of complex and subjective variables. These variables include our expected stock price volatility over the term of the awards, expected term, risk-free interest rate, expected dividends and expected forfeiture rates. The forfeiture rate is estimated using historical option cancellation information, adjusted for anticipated changes in expected exercise and employment termination behavior. Our outstanding awards do not contain market or performance conditions therefore we have elected to recognize share-based employee compensation expense on a straight-line basis over the requisite service period.

Fair Value of Financial Instruments. The carrying amounts for cash, cash equivalents, accounts payable, and accrued expenses approximate fair value because of their short-term nature. At December 31, 2012, the carrying value and accrued interest of the MHR Convertible Notes, 2010 MHR Notes, and Bridge Notes was \$33.6 million, which reflects its original cost plus accrued interest. See Note 8 for further discussion of the notes payable.

Derivative Instruments. Derivative instruments consist of common stock warrants, and certain instruments embedded in certain notes payable and related agreements. These financial instruments are recorded in the balance sheets at fair value as liabilities. Changes in fair value are recognized in earnings in the period of change.

Exit activities. We have adopted FASB ASC 420-10-05, *Exit or Disposal Cost Obligations*. This Standard addresses financial accounting and reporting for costs associated with exit or disposal activities. This Standard requires that a liability for a cost associated with an exit or disposal activity be recognized when the liability is incurred. This Standard also establishes that fair value is the objective for initial measurement of the liability. This Standard specifies that a liability for a cost associated with an exit or disposal activity is incurred when the definition of a liability is met, and that fair value is the measurement at the exit, disposal or cease use date.

Fair Value Measurements. The authoritative guidance for fair value measurements defines fair value as the price that would be received if an asset were to be sold or paid to transfer a liability in an orderly transaction between market participants on the measurement date. Market participants are buyers and sellers in the principal market that are (i) independent, (ii) knowledgeable, (iii) able to transact, and (iv) willing to transact. The guidance describes a fair value hierarchy based on the levels of inputs, of which the first two are considered observable and the last unobservable, that may be used to measure fair value which are the following:

- Level 1 — Quoted prices in active markets for identical assets or liabilities

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NOTES TO FINANCIAL STATEMENTS — (Continued)

- Level 2 — Inputs other than Level 1 that are observable, either directly or indirectly, such as quoted prices for similar assets or liabilities; quoted prices in markets that are not active; or other inputs that are observable or corroborated by observable market data for substantially the full term of the assets or liabilities
- Level 3 — Unobservable inputs that are supported by little or no market activity and that are significant to the value of the assets or liabilities

Future Impact of Recently Issued Accounting Standards

New Accounting Pronouncements

In July 2012, the Financial Accounting Standards Board (“FASB”) issued ASU No. 2012-02, “*Testing Indefinite-Lived Intangible Assets for Impairment*” (“ASU 2012-02”). ASU 2012-02 gives entities an option to first assess qualitative factors to determine whether the existence of events and circumstances indicate that it is more likely than not that the indefinite-lived intangible asset impaired. If based on its qualitative assessment an entity concludes that it is more likely than not that the fair value of an indefinite-lived intangible asset is less than its carrying amount, quantitative impairment testing is required. However, if an entity concludes otherwise, quantitative impairment testing is not required. ASU 2012-02 is effective for annual and interim impairment tests performed for fiscal years beginning after September 15, 2012, with early adoption permitted. ASU 2012-02 is not expected to have a material impact on the Company’s financial position or results of operations.

In December 2011, the Financial Accounting Standards Board (“FASB”) issued ASU No. 2011-11, “*Balance Sheet (Topic 210): Disclosures about Offsetting Assets and Liabilities*” (“ASU 2011-11”). ASU 2011-11 enhances current disclosures about financial instruments and derivative instruments that are either offset on the statement of financial position or subject to an enforceable master netting arrangement or similar agreement, irrespective of whether they are offset on the statement of financial position. Entities are required to provide both net and gross information for these assets and liabilities in order to facilitate comparability between financial statements prepared on the basis of U.S. GAAP and financial statements prepared on the basis of IFRS. ASU 2011-11 is effective for annual reporting periods beginning on or after January 1, 2013, and interim periods within those annual periods. ASU 2011-11 is not expected to have a material impact on the Company’s financial position or results of operations.

In September 2011, the FASB issued Accounting Standards Update No. 2011-08 (“ASU 2011-08”), which updates the guidance in ASC Topic 350, *Intangibles – Goodwill & Other*. The amendments in ASU 2011-08 permit an entity to first assess qualitative factors to determine whether it is more likely than not that the fair value of a reporting unit is less than the carrying amount as a basis for determining whether it is necessary to perform the two-step goodwill impairment test described in ASC Topic 350. The more-likely-than-not threshold is defined as having a likelihood of more than fifty percent. If, after assessing the totality of events or circumstances, an entity determines that it is more likely than not that the fair value of a reporting unit is less than its carrying amount, then performing the two-step impairment test is unnecessary. The amendments in ASU 2011-08 include examples of events and circumstances that an entity should consider in evaluating whether it is more likely than not that the fair value of a reporting unit is less than its carrying amount. However, the examples are not intended to be all-inclusive and an entity may identify other relevant events and circumstances to consider in making the determination. The examples in this ASU 2011-08 supersede the previous examples under ASC Topic 350 of events and circumstances an entity should consider in determining whether it should test for impairment between annual tests, and also supersede the examples of events and circumstances that an entity having a reporting unit with a zero or negative carrying amount should consider in determining whether to perform the second step of the impairment test. Under the amendments in ASU 2011-08, an entity is no longer permitted to carry forward its detailed calculation of a reporting unit’s fair value from a prior year as previously permitted under ASC Topic 350. ASU 2011-08 is effective for annual and interim goodwill impairment tests performed for fiscal years beginning after December 15, 2011. The adoption of ASU 2011-08 did not have a material impact on the Company’s financial position or results of operations.

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NOTES TO FINANCIAL STATEMENTS — (Continued)

In May 2011, the FASB issued Accounting Standards Update 2011-04 (“ASU 2011-04”), which updated the guidance in ASC Topic 820, *Fair Value Measurement*. The amendments in ASU 2011-04 generally represent clarifications of Topic 820, but also include some instances where a particular principle or requirement for measuring fair value or disclosing information about fair value measurements has changed. ASU 2011-04 results in common principles and requirements for measuring fair value and for disclosing information about fair value measurements in accordance with U.S. GAAP and International Financial Reporting Standards. The amendments in ASU 2011-04 are to be applied prospectively. For public entities, the amendments are effective for interim and annual periods beginning after December 15, 2011. The adoption of ASU 2011-04 did not have a material impact on the Company’s financial position or results of operations.

Management does not believe there would have been a material effect on the accompanying financial statements had any other recently issued, but not yet effective, accounting standards been adopted in the current period.

3. Inventory

Inventory consists of the following:

	<u>December 31,</u>	
	<u>2012</u>	<u>2011</u>
	<u>(In thousands)</u>	
Work in process	<u>\$249</u>	<u>\$258</u>

4. Prepaid Expenses and Other Current Assets

Prepaid expenses and other current assets consist of the following:

	<u>December 31,</u>	
	<u>2012</u>	<u>2011</u>
	<u>(In thousands)</u>	
Prepaid corporate insurance	\$ 84	\$ 36
Deposit on inventory	—	420
Prepaid expenses and other current assets	<u>65</u>	<u>125</u>
	<u>\$149</u>	<u>\$581</u>

5. Fixed Assets

Equipment and leasehold improvements, net, consists of the following:

		<u>December 31,</u>	
	<u>Useful Lives In Years</u>	<u>2012</u>	<u>2011</u>
		<u>(In thousands)</u>	
Equipment	3-7	\$1,306	\$1,370
Leasehold improvements	Term of lease	<u>61</u>	<u>61</u>
		1,367	1,431
Less, accumulated depreciation and amortization		<u>1,355</u>	<u>1,387</u>
		<u>\$ 12</u>	<u>\$ 44</u>

Depreciation expense for the years ended December 31, 2012, 2011 and 2010, was \$29 thousand, \$38 thousand and \$56 thousand, respectively.

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NOTES TO FINANCIAL STATEMENTS — (Continued)

6. Purchased Technology

The carrying value of the purchased technology is comprised as follows:

	December 31,	
	2012	2011
	(In thousands)	
Gross carrying amount	\$—	\$4,533
Less, accumulated amortization	—	3,695
Less, impairment	—	598
Net book value	\$—	\$ —

Annual amortization of purchased technology was \$0 for 2012 and \$0.2 million for 2011 and 2010, respectively.

The purchased technology is comprised of patents for one of the Company’s carriers underlying unfractionated heparin (“UFH”) in a liquid form, UFH in a solid form and solid low molecular weight heparin. The patents expire June 30, 2014. In December 2011, the Company’s management reviewed the purchased technology in light of industry trends and advances in reformulating and stabilizing active pharmaceutical ingredients through the development of fractions and analogs, and determined that its technology is no longer applicable in the development of a potential future oral formulation of heparin. As such, the Company recognized an impairment of \$0.6 million which represented the net book value at that time.

7. Accounts Payable and Accrued Expenses

Accounts payable and accrued expenses consist of the following:

	December 31,	
	2012	2011
	(In thousands)	
Accounts payable	\$380	\$318
Accrued legal, professional fees and other	522	513
Accrued vacation	21	24
Clinical trial expenses and contract research	—	39
	\$923	\$894

8. Notes Payable and Restructuring of Debt

Notes payable consist of the following:

	December 31,	
	2012	2011
	(In thousands)	
MHR Convertible Note	\$31,576	\$25,441
2012 MHR Bridge Loan	1,431	—
2010 MHR Promissory Notes	600	575
	\$33,607	\$26,016

MHR Convertible Notes. On September 26, 2005, we received net proceeds of approximately \$12.9 million under a \$15 million secured loan agreement (the “Loan Agreement”) executed with MHR. Under the Loan Agreement, MHR requested, and on May 16, 2006, we effected, the exchange of the loan from MHR

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

for senior secured convertible notes (the “MHR Convertible Notes”) with substantially the same terms as the Loan Agreement, except that the MHR Convertible Notes are convertible, at the sole discretion of MHR, into shares of our common stock at a price per share of \$3.78. As of December 31, 2012, the MHR Convertible Notes were convertible into 8,353,518 shares of our common stock. The MHR Convertible Notes were due on September 26, 2012, and are collateralized by a first priority lien in favor of MHR on substantially all of our assets. Interest is payable in the form of additional MHR Convertible Notes rather than in cash. As of September 27, 2012, the Company is in default under the terms of the MHR Convertible Notes. The default is the result of the Company’s failure to pay MHR approximately \$30.5 million in principal and interest due and payable on September 26, 2012 under the terms of the MHR Convertible Notes. As a result of the Company’s failure to pay all amounts due and payable under the MHR Convertible Notes as of September 26, 2012, MHR has the ability under the terms of our Security Agreement with MHR to foreclose on substantially all of the Company’s assets. On October 4, 2012, the Company received notice from MHR that, pursuant to the terms of the MHR Convertible Notes, the default interest rate of 13% per annum will apply with respect to the MHR Convertible Notes, effective as of September 27, 2012. MHR has not demanded payment under the MHR Convertible Notes nor exercised its other rights under the Security Agreement as a result of the default, and has continued discussions with the Company regarding proposals relating to the MHR Convertible Notes and the Company’s default thereunder while reserving all of its rights under the Security Agreement. There can be no assurances as to the outcome of such discussions.

Total issuance costs associated with the Loan Agreement were \$2.1 million, of which \$1.9 million were allocated to the MHR Convertible Notes, and \$0.2 million were allocated to the related derivative instruments. Of the \$1.9 million allocated to the MHR Convertible Notes, \$1.4 million represents reimbursement of MHR’s legal fees and \$0.5 million represents our legal and other transaction costs. The \$1.4 million paid on behalf of the lender has been recorded as a reduction of the face value of the note, while the \$0.5 million of our costs has been recorded as deferred financing costs.

In connection with the MHR Convertible Notes financing, the Company agreed to appoint a representative of MHR (“MHR Nominee”) and another person (the “Mutual Director”) to its Board of Directors. Further, the Company agreed to amend, and in January 2006 did amend, its certificate of incorporation to provide for continuity of the MHR Nominee and the Mutual Nominee on the Board, as described therein, so long as MHR holds at least 2% of the outstanding common stock of the Company.

Effective January 1, 2009, the Company adopted the provisions of the Financial Accounting Standards Board Accounting Codification Topic 815-40-15-5, *Evaluating Whether an Instrument Involving a Contingency is Considered Indexed to an Entity’s Own Stock* (“FASB ASC 815-40-15-5”). Under FASB ASC 815-40-15-5, the conversion feature embedded in the MHR Convertible Notes have been bifurcated from the host contract and accounted for separately as a derivative. The bifurcation of the embedded derivative increased the amount of debt discount thereby reducing the book value of the MHR Convertible Notes and increasing prospectively the amount of interest expense to be recognized over the life of the MHR Convertible Notes using the effective yield method. As consideration for its consent and limitation of rights in connection with the Novartis Agreement (as defined below), the Company granted MHR warrants to purchase 865,000 shares of its common stock (the “June 2010 MHR Warrants”) under the MHR Letter Agreement (as defined below). The Company estimated the fair value of the June 2010 MHR Warrants on the date of grant using Black-Scholes models to be \$1.9 million. The Company determined that the resulting modification of the MHR Convertible Notes was substantial in accordance with ASC 470-50, *Modifications and Extinguishments*. As such the modification of the MHR Convertible Notes was accounted for as an extinguishment and restructuring of the debt, and the warrants issued to MHR were expensed as a financing fee. The fair value of the MHR Convertible Notes, as of June 4, 2010 was estimated by calculating the present value of future cash flows discounted at a market rate of return for comparable debt instruments to be \$17.2 million. The Company recognized a loss on extinguishment of debt in the amount of \$17.0 million which represented the difference between the net carrying amount of the MHR Convertible Notes and their fair value as of the date of the Novartis Agreement and the MHR Letter Agreement.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

The book value of the MHR Convertible Notes is comprised of the following:

	December 31,	
	2012	2011
	(In thousands)	
Face value of the note (including accrued interest)	\$31,576	\$28,153
Discount (related to the warrant purchase option and embedded conversion feature)	—	(2,712)
	\$31,576	\$25,441

Novartis Note. On June 4, 2010, the Company and Novartis entered into a Master Agreement and Amendment (the “Novartis Agreement”), pursuant to which the Company was released and discharged from its obligations under that certain convertible note to Novartis (the “Novartis Note”) in exchange for (i) the reduction of future royalty and milestone payments up to an aggregate amount of \$11.0 million due the Company under the Research Collaboration and Option Agreement, dated as of December 3, 1997, as amended on October 20, 2000 (the “Research Collaboration and Option Agreement”), and the License Agreement, dated as of March 8, 2000, for the development of an oral salmon calcitonin product for the treatment of osteoarthritis and osteoporosis (the “Oral Salmon Calcitonin Agreement”); (ii) the right for Novartis to evaluate the feasibility of using Emisphere’s Eligen® Technology with two new compounds to assess the potential for new product development opportunities; and (iii) other amendments to the Research Collaboration and Option Agreement and License Agreement. As of the date of the Novartis Agreement, the outstanding principal balance and accrued interest of the Novartis Note was approximately \$13.0 million. The Company recognized the full value of the debt released as consideration for the transfer of the rights and other intangibles to Novartis and deferred the related revenue in accordance with applicable accounting guidance for the sale of rights to future revenue until the earnings process has been completed based on achievement of certain milestones or other deliverables.

2010 MHR Promissory Notes. In connection with the Novartis Agreement, the Company and MHR entered into a letter agreement (the “MHR Letter Agreement”), and MHR, the Company and Novartis entered into a non-disturbance agreement (the “Non-Disturbance Agreement”), which was a condition to Novartis’ execution of the Novartis Agreement. Pursuant to the MHR Letter Agreement, MHR agreed to limit certain rights and courses of action that it would have available to it as a secured party under the Senior Secured Term Loan Agreement and Pledge and Security Agreement (“Security Agreement”) between MHR and the Company. MHR also consented to the Novartis Agreement, which consent was required under the Security Agreement, and MHR also agreed to enter into a comparable agreement at some point in the future in connection with another potential Company transaction (the “Future Transaction Agreement”). The MHR Letter Agreement also provided for the Company to reimburse MHR for its legal fees incurred in connection with the Non-Disturbance Agreement for up to \$500,000 and up to \$100,000 in legal expenses incurred by MHR in connection the Future Transaction Agreement. The reimbursements were to be paid in the form of non-interest bearing promissory notes issued on the effective date of the MHR Letter Agreement. As such, the Company issued to MHR non-interest promissory notes for \$500,000 and \$100,000 on June 8, 2010 (collectively, the “2010 MHR Notes”). The Company received documentation that MHR expended more than the \$500,000 of legal fees in connection with the Non-Disturbance Agreement and \$100,000 of legal fees in connection with the Future Transaction Agreement, and, consequently, recorded the issuance of the \$500,000 and \$100,000 2010 MHR Notes and a corresponding charge to financing expenses. The 2010 MHR Notes were originally due and payable on June 4, 2012, but this maturity date was extended to September 26, 2012 by agreement with MHR. The Company imputed interest at the time of issuance at its incremental borrowing rate of 10%, and discounted the face amounts of the \$500,000 and \$100,000 promissory notes by \$21,000 and \$4,000, respectively.

As of September 27, 2012, the Company is in default under the terms of the 2010 MHR Notes. The default is the result of the Company’s failure to pay to MHR \$600,000 in principal due and payable on September 26,

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

2012 under the terms of the 2010 MHR Notes. As with the MHR Convertible Notes discussed above, MHR has not demanded payment under the 2010 MHR Notes and has indicated to the Company that it is prepared to continue discussions with the Company regarding proposals relating to the 2010 MHR Notes and the Company's default thereunder while reserving all of its rights under the terms of the 2010 MHR Promissory Notes. There can be no assurances as to the outcome of such discussions. The Company has imputed interest on the 2010 MHR Notes from June 9, 2012 through December 31, 2012 at a rate of 13% per annum. Imputed interest in the amount \$45,000 has been recorded as contributed capital.

2012 Bridge Loan. On October 17, 2012, the Company issued a promissory note (the "Bridge Note") to MHR Institutional Partners IIA LP, MHR Institutional Partners II LP, MHR Capital Partners Master Account LP, and MHR Capital Partners (100) LP (collectively, the "Bridge Lender") in the principal amount of \$1,400,000 to be advanced by the Bridge Lender to the Company pursuant to the terms thereof (the "Bridge Loan"). The Bridge Note provides for an interest rate of 13% per annum. Pursuant to the terms of the Bridge Note, the entire principal amount advanced by the Bridge Lender pursuant to the Bridge Note, plus all accrued interest thereon, is payable on demand. The obligations under the Bridge Note are secured by a first priority lien on substantially all of our assets pursuant to the terms of the Security Agreement, as further described below.

Also on October 17, 2012, in connection with the issuance of the Bridge Note, Emisphere and MHR entered into that certain Amendment to Pledge and Security Agreement (the "Amendment"). The Amendment amends the Security Agreement to, among other things, include the Bridge Loan as an obligation secured by the terms of the Security Agreement and to include the Bridge Lender as a beneficiary of the terms of the Security Agreement. Pursuant to the terms of the Novartis Agreement described above, the Amendment expressly excludes certain intellectual property licensed to Novartis from the collateral securing the Bridge Loan. In accordance with the terms of the MHR Convertible Notes, MHR also provided a written consent to allow for the issuance of the Bridge Note and related obligations provided under the Amendment.

9. Derivative Instruments

Derivative instruments consist of the following:

	December 31, 2012	December 31, 2011
	(in thousands)	
MHR Convertible Note	\$ 230	\$ 7,367
August 2007 Warrants	—	12
August 2009 Warrants	372	540
June 2010 MHR Warrants	79	351
August 2010 Warrants	535	735
August 2010 MHR Waiver Warrants	103	142
July 2011 Warrants	680	929
July 2011 MHR Waiver Warrants	90	123
	\$2,089	\$10,199

The fair value of the warrants that have exercise price reset features is estimated using an adjusted Black-Scholes model. The Company computes valuations each quarter, using Black-Scholes model calculations for such warrants to account for the various possibilities that could occur due to various circumstances that could arise in connection with the contractual terms of said instruments. The Company weights each Black-Scholes model calculation based on its estimation of the likelihood of the occurrence of each circumstance and adjusts relevant Black-Scholes model input to calculate the value of the derivative at the reporting date.

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Embedded Conversion Feature of MHR Convertible Notes. The MHR Convertible Notes contain a provision whereby the conversion price is adjustable upon the occurrence of certain events, including the issuance by Emisphere of common stock or common stock equivalents at a price which is lower than the current conversion price of the MHR Convertible Notes and lower than the current market price. However, the adjustment provision does not become effective until after the Company raises \$10 million through the issuance of common stock or common stock equivalents at a price which is lower than the current conversion price of the convertible note and lower than the current market price during any consecutive 24 month period. Under FASB ASC 815-40-15-5, the embedded conversion feature is not considered indexed to the Company's own stock and, therefore, does not meet the scope exception in FASB ASC 815-10-15 and thus needs to be accounted for as a derivative liability. The fair value of the embedded conversion feature is estimated, at the end of each quarterly reporting period, using Black-Scholes models. The assumptions used in computing the fair value as of December 31, 2012 are a closing stock price of \$0.16, conversion prices of \$3.78 and \$0.16, expected volatility of 189.86% over the expected remaining term of three months and a risk-free rate of 0.05%. The fair value of the embedded conversion feature decreased \$7.1 million for the year ended December 31, 2012 and decreased \$3.8 million and for the year ended December 31, 2011, and increased \$6.6 million for the year ended December 31, 2010, which amounts have been recognized in the accompanying statements of operations. The embedded conversion feature will be adjusted to estimated fair value for each future period the MHR Convertible Notes remain outstanding. See Note 8 for a further discussion of the MHR Convertible Notes.

August 2007 Warrants. In connection with an equity financing in August 2007 (the "August 2007 Financing"), Emisphere sold warrants to purchase up to 400,000 shares of common stock (the "August 2007 Warrants"). Of these 400,000 warrants, 91,073 were sold to MHR. Each of the August 2007 Warrants were issued with an exercise price of \$3.948 and expired on August 21, 2012. The August 2007 Warrants provide for certain anti-dilution protection as provided therein. Under the terms of the August 2007 Warrants, we have an obligation to make a cash payment to the holders of the August 2007 Warrants for any gain that could have been realized if the holders exercise the August 2007 Warrants and we subsequently fail to deliver a certificate representing the shares to be issued upon such exercise by the third trading day after such August 2007 Warrants have been exercised. Accordingly, the 2007 Warrants have been accounted for as a liability. The fair value of the August 2007 Warrants decreased \$0.01 million for the year ended December 31, 2012, and decreased \$0.5 million and \$0.3 million for the years ended December 31, 2011 and 2010, respectively, which has been recognized in the accompanying statements of operations. The August 2007 Warrants expired on August 21, 2012.

August 2009 Warrants. In connection with an equity financing in August 2009 (the "August 2009 Financing"), Emisphere sold warrants to purchase 6.4 million shares of common stock to MHR (3.7 million) and other unrelated investors (2.7 million) (the "August 2009 Warrants"). The August 2009 Warrants were issued with an exercise price of \$0.70 and expire on August 21, 2014. Under the terms of the August 2009 Warrants, we have an obligation to make a cash payment to the holders of the August 2009 Warrants for any gain that could have been realized if the holders exercise the August 2009 Warrants and we subsequently fail to deliver a certificate representing the shares to be issued upon such exercise by the third trading day after such August 2009 Warrants have been exercised. Accordingly, the August 2009 Warrants have been accounted for as a liability. The fair value of the August 2009 Warrants is estimated, at the end of each quarterly reporting period, using the Black-Scholes model. The assumptions used in computing the fair value as of December 31, 2012 are a closing stock price of \$0.16, expected volatility of 200.52% over the remaining term of one year and eight months and a risk-free rate of 0.25%. The fair value of the August 2009 Warrants decreased \$0.2 million for the year ended December 31, 2012, decreased \$7.3 million for the year ended December 31, 2011 and increased \$4.8 million for the year ended December 31, 2010. These fluctuations have been recognized in the accompanying statement of operations. The warrants will be adjusted to estimated fair value for each future period they remain outstanding. During the year ended December 31, 2010, the unrelated investors exercised their warrants to purchase up to 2,685,714 million shares of the Company's common stock at an exercise price of \$0.70, using the "cashless exercise" provision. The Company issued an aggregate of 1,966,937 shares to such holders in accordance with

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

the terms of the cashless exercise provision. The Company calculated the fair value of the 2,685,714 exercised warrants on their respective exercise dates using the Black-Scholes model. The weighted average assumptions used in computing the fair values were a closing stock price of \$1.91, expected volatility of 101.99% over the remaining contractual life of four years, three months and a risk-free rate of 1.46%. The fair value of the 2.7 million exercised warrants increased by \$2.2 million from January 1, 2010 through the date of exercise which has been recognized in the accompanying statements of operations. The fair value of the derivative liabilities at the exercise dates of \$4.3 million was reclassified to additional paid-in-capital. After these cashless exercises, warrants to purchase up to 3,729,323 shares of common stock, in the aggregate, remain outstanding.

June 2010 MHR Warrants. As consideration for its consent and limitation of rights in connection with the Novartis Agreement, the Company granted MHR warrants to purchase 865,000 shares of its common stock under the MHR Letter Agreement. The June 2010 MHR Warrants are exercisable at \$2.90 per share and will expire on August 21, 2014. The June 2010 MHR Warrants provide for certain anti-dilution protection as provided therein. We have an obligation to make a cash payment to the holders of the warrants for any gain that could have been realized if the holders exercise the June 2010 MHR Warrants and we subsequently fail to deliver a certificate representing the shares to be issued upon such exercise by the third trading day after such June 2010 MHR Warrants have been exercised. Accordingly, the June 2010 MHR Warrants have been accounted for as a liability. Their fair value is estimated, at the end of each quarterly reporting period, using the Black-Scholes model. The assumptions used in computing the fair value of the June 2010 MHR Warrants at December 31, 2012 are closing stock prices of \$0.16, exercise prices of \$0.16, \$2.90, expected volatility of 200.52% over the remaining one year and eight months, and a risk-free rate of 0.25%. The fair value of the June 2010 MHR Warrants decreased \$0.3 for the year ended December 31, 2012, and \$1.1 million for the year ended December 31, 2011, respectively and decreased \$0.4 million from the commitment date of June 21, 2010 through December 31, 2010. These fluctuations have been recognized in the accompanying statements of operations. The June 2010 MHR Warrants will be adjusted to estimated fair value for each future period they remain outstanding.

August 2010 Warrants. In connection with the August 2010 Financing, Emisphere sold warrants to purchase 5.2 million shares of common stock to MHR (2.6 million) and other unrelated investors (2.6 million) (the "August 2010 Warrants"). The August 2010 Warrants were issued with an exercise price of \$1.26 and expire on August 26, 2015. Under the terms of the August 2010 Warrants, we have an obligation to make a cash payment to the holders of the August 2010 Warrants for any gain that could have been realized if the holders exercise the August 2010 Warrants and we subsequently fail to deliver a certificate representing the shares to be issued upon such exercise by the third trading day after such August 2010 Warrants have been exercised. Accordingly, the August 2010 Warrants have been accounted for as a liability. The fair value of the warrants is estimated, at the end of each quarterly reporting period, using the Black-Scholes model. On January 12, 2011, one of the unrelated investors notified the Company of its intention to exercise 0.2 million warrants. The Company received proceeds of \$0.2 million from the exercise of these warrants. The Company calculated the fair value of the 0.2 million exercised warrants on January 12, 2011 using the Black-Scholes option pricing model. The assumptions used in computing the fair value as of January 12, 2011 are a closing stock price of \$2.25, expected volatility of 107.30% over the remaining contractual life of four years and seven months and a risk-free rate of 1.99%. The fair value of the 0.2 million exercised warrants decreased by approximately \$28,000 for the period from January 1, 2011 through January 12, 2011 which has been recognized in the accompanying statements of operations. The assumptions used in computing the fair value of the remaining August 2010 Warrants as of December 31, 2012 are a closing stock price of \$0.16, exercise price of \$1.26, expected volatility of 180.35% over the remaining term of two years and eight months, and a risk-free rate of 0.36%. The fair value of the August 2010 Warrants decreased \$0.2 million for the year ended December 31, 2012 and \$9.4 million for the year ended December 31, 2011, respectively and increased \$6.4 million from the commitment date of August 26, 2010 through December 31, 2010. These fluctuations have been recognized in the accompanying statements of operations. The August 2010 Warrants will be adjusted to estimated fair value for each future period they remain outstanding.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

August 2010 MHR Waiver Warrants. In connection with the August 2010 Financing, the Company entered into a waiver agreement with MHR, pursuant to which MHR waived certain anti-dilution adjustment rights under the MHR Convertible Notes and certain warrants issued by the Company to MHR that would otherwise have been triggered by the August 2010 Financing. As consideration for such waiver, the Company issued to MHR warrants to purchase 975,000 shares of its common stock (the “August 2010 MHR Waiver Warrants”). The August 2010 MHR Waiver Warrants are in the same form of warrant as the August 2010 Warrants issued to MHR described above. Accordingly, the August 2010 MHR Waiver Warrants have been accounted for as a liability. The fair value of the August 2010 MHR Waiver Warrants is estimated, at the end of each quarterly reporting period, using Black-Scholes models. The assumptions used in computing the fair value of the August 2010 MHR Waiver Warrants at December 31, 2012 are a closing stock price of \$0.16, exercise price of \$1.26, expected volatility of 180.35% over the term of two years and eight months, and a risk free rate of 0.36%. The fair value of the August 2010 MHR Waiver Warrants decreased by \$0.04 million for the year ended December 31, 2012 and \$1.8 million for the year ended December 31, 2011, and increased by \$1.2 million from the commitment date through December 31, 2010, which has been recognized in the accompanying statements of operations. The August 2010 MHR Waiver Warrants will be adjusted to estimated fair value for each future period they remain outstanding.

July 2011 Warrants. In connection with the July 2011 Financing, Emisphere sold warrants to purchase 6.02 million shares of common stock to MHR (3.01 million) and other unrelated investors (3.01 million) (the “July 2011 Warrants”). The July 2011 Warrants were issued with an exercise price of \$1.09 and expire on July 6, 2016. Under the terms of the July 2011 Warrants, we have an obligation to make a cash payment to the holders of the July 2011 Warrants for any gain that could have been realized if the holders exercise the July 2011 Warrants and we subsequently fail to deliver a certificate representing the shares to be issued upon such exercise by the third trading day after such July 2011 Warrants have been exercised. Accordingly, the July 2011 Warrants have been accounted for as a liability. The Company estimated the fair value of the warrants of the date of grant using Black-Scholes models to be \$4.5 million. The fair value of the warrants is estimated, at the end of each quarterly reporting period, using the Black-Scholes model. The assumptions used in computing the fair value of the July 2011 Warrants as of December 31, 2012 are a closing stock price of \$0.16, exercise price of \$1.09, expected volatility of 162.16% over the remaining term of three years and seven months, and a risk-free rate of 0.36%. The fair value of the July 2011 Warrants decreased \$0.3 million for the year ended December 31, 2012 and \$3.6 million from the commitment date of July 6, 2011 through December 31, 2011, which has been recorded in the statements of operations.

July 2011 MHR Waiver Warrants. In connection with the July 2011 Financing, the Company entered into a waiver agreement with MHR, pursuant to which MHR waived certain anti-dilution adjustment rights under the MHR Convertible Notes and certain warrants issued by the Company to MHR that would otherwise have been triggered by the July 2011 Financing. As consideration for such waiver, the Company issued to MHR warrants to purchase 795,000 shares of its common stock (the “July 2011 MHR Waiver Warrants”). The July 2011 MHR Waiver Warrants are in the same form of warrant as the July 2011 Warrants issued to MHR described above. Accordingly, the July 2011 MHR Waiver Warrants have been accounted for as a liability. The fair value of the July 2011 MHR Waiver Warrants is estimated, at the end of each quarterly reporting period, using Black-Scholes models. The Company estimated the fair value of the warrants on the date of grant using Black-Scholes models to be \$0.6 million. The assumptions used in computing the fair value of the July 2011 MHR Waiver Warrants at December 31, 2012 are a closing stock price of \$0.16, exercise price of \$1.09, expected volatility of 162.16% over the term of three years and seven months, and a risk free rate of 0.36%. The fair value of the July 2011 MHR Waiver Warrants decreased by \$0.03 million for the year ended December 31, 2012 and \$0.5 million from the commitment date of July 6, 2011 through December 31, 2011 which has been recorded in the statements of operations.

EMISPHERE TECHNOLOGIES, INC.
NOTES TO FINANCIAL STATEMENTS — (Continued)

10. Income Taxes

The components of our income tax expense in 2012 and 2011 are as follows:

	2012	2011
Current Tax Expense (Benefit)		
Federal	\$ —	\$—
State	<u>\$(2,974)</u>	<u>\$—</u>
	<u>\$(2,974)</u>	<u>\$—</u>
Deferred Tax Expense (Benefit)		
Federal	\$ —	\$—
State	<u>\$ —</u>	<u>\$—</u>
	<u>\$ —</u>	<u>\$—</u>
Total Tax Expense (Benefit)	<u><u>\$(2,974)</u></u>	<u><u>\$—</u></u>

We recognized an approximate \$3.0 million income tax benefit as a result of proceeds from the sale of \$36 million of New Jersey net operating losses through the Technology Business Certificate Transfer Program, sponsored by the New Jersey Economic Development Authority.

As of December 31, 2012, we have available unused federal net operating loss (NOL) carry-forwards of \$349.8 million, of which \$1.1 million and \$15.6 million will expire in 2012 and 2013, respectively, with the remainder expiring in various years from 2019 to 2032. We have New York State NOL carry-forwards of \$290.5 million, which will expire in 2013 through 2032. We have New Jersey NOL carry-forwards of \$26.4 million, which will expire in 2014 through 2019. As of December 31, 2012, we have research and development tax credit carry-forwards of \$11 million of which \$0.5 million and \$0.7 million will expire in various years from 2019 to 2032.

The effective rate differs from the statutory rate of 34% for 2012, 2011 and 2010 primarily due to the following:

	2012	2011	2010
Statutory Rate on pre-tax book loss	-34.00%	-34.00%	-34.00%
Stock option issuance	1.22%	-0.36%	0.19%
Disallowed interest	12.05%	-3.45%	9.96%
Derivatives	-56.26%	64.49%	14.13%
Expired net operating losses and credits	61.64%	-13.35%	1.53%
State Tax benefit of Sale of NJ NOL	-60.67%	0.00%	0.00%
True-ups and adjustments	5.29%	0.81%	0.01%
Change in federal valuation allowance	<u>10.06%</u>	<u>-14.14%</u>	<u>8.18%</u>
	<u>-60.67%</u>	<u>0.00%</u>	<u>0.00%</u>

EMISPHERE TECHNOLOGIES, INC.
NOTES TO FINANCIAL STATEMENTS — (Continued)

The tax effect of temporary differences, net operating loss carry-forwards, and research and experimental tax credit carry-forwards as of December 31, 2012 and 2011 is as follows:

	December 31,	
	2012	2011
	(in thousands)	
Deferred tax assets and valuation allowance:		
Current deferred tax asset:		
Accrued liabilities	\$ 59	\$ 48
Valuation allowance	(59)	(48)
Net current deferred tax asset	\$ —	\$ —
Non-current deferred tax assets:		
Fixed and intangible assets	\$ 392	\$ 522
Net operation loss carry-forwards	120,497	121,547
AMT credit carry-forwards	74	74
Capital loss and charitable carry-forwards	2,749	2,749
Research and experimental tax credits	10,986	11,468
Stock compensation	360	1,007
Deferred revenue	12,627	12,618
Interest	6,686	4,889
Valuation allowance	(154,371)	(154,874)
Net non-current deferred tax asset	\$ 0	\$ 0

Future ownership changes may limit the future utilization of these net operating loss and research and development tax credit carry-forwards as defined by the Internal Revenue Code. We performed an analysis and determined that the Net operating losses and research and development expenses are not limited under Section 382. The net deferred tax asset has been fully offset by a valuation allowance due to our history of taxable losses and uncertainty regarding our ability to generate sufficient taxable income in the future to utilize these deferred tax assets.

We apply the provisions of ASC 740-10-25. ASC 740-10-25 which provides recognition criteria and a related measurement model for uncertain tax positions taken or expected to be taken in income tax returns. ASC 740-10-25 requires that a position taken or expected to be taken in a tax return be recognized in the financial statements when it is more likely than not that the position would be sustained upon examination by tax authorities. Tax positions that meet the more likely than not threshold are then measured using a probability weighted approach recognizing the largest amount of tax benefit that is greater than 50% likely of being realized upon ultimate settlement. The Company had no tax positions relating to open income tax returns that were considered to be uncertain. Accordingly, we have not recorded a liability for unrecognized tax benefits upon adoption of ASC 740-10-25. There continues to be no liability related to unrecognized tax benefits at December 31, 2012.

The Company's 2009, 2010 and 2011 Federal, New York and New Jersey tax returns remain subject to examination by the respective taxing authorities. In addition, net operating losses and research tax credits arising from prior years are also subject to examination at the time that they are utilized in future years. Neither the Company's federal or state tax returns are currently under examination.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

11. Stockholders' Deficit

Our certificate of incorporation provides for the issuance of 2,000,000 shares of preferred stock with the rights, preferences, qualifications, and terms to be determined by our Board of Directors. As of December 31, 2012 and 2011, there were no shares of preferred stock outstanding.

We have a stockholder rights plan in which Preferred Stock Purchase Rights (the "Rights") have been granted at the rate of one one-hundredth of a share of Series A Junior Participating Cumulative Preferred Stock ("Series A Preferred Stock") at an exercise price of \$80 for each share of our common stock. The Rights expire on April 7, 2016.

The Rights are not exercisable, or transferable apart from the common stock, until the earlier of (i) ten days following a public announcement that a person or group of affiliated or associated persons have acquired beneficial ownership of 20% or more of our outstanding common stock or (ii) ten business days (or such later date, as defined) following the commencement of, or announcement of an intention to make a tender offer or exchange offer, the consummation of which would result in the beneficial ownership by a person, or group, of 20% or more of our outstanding common stock. MHR is specifically excluded from the provisions of the plan.

Furthermore, if we enter into consolidation, merger, or other business combinations, as defined, each Right would entitle the holder upon exercise to receive, in lieu of shares of A Preferred Stock, a number of shares of common stock of the acquiring company having a value of two times the exercise price of the Right, as defined. The Rights contain anti-dilutive provisions and are redeemable at our option, subject to certain defined restrictions for \$.01 per Right.

As a result of the Rights dividend, the Board of Directors designated 200,000 shares of preferred stock as Series A Preferred Stock and on June 5, 2012, the Company filed a Certificate of Increase of Series A Preferred Stock, increasing the number of shares of the Company's Series A Preferred Stock from 200,000 to 1,000,000. Holders of Series A Preferred Stock will be entitled to a preferential cumulative quarterly dividend of the greater of \$1.00 per share or 100 times the per share dividend declared on our common stock. Shares of Series A Preferred Stock have a liquidation preference, as defined, and each share will have 100 votes and will vote together with the common shares.

On June 5, 2012, the Company filed with the Secretary of the State of Delaware a Certificate of Amendment (the "Certificate of Amendment") to its Amended and Restated Certificate of Incorporation, increasing the number of authorized shares of common stock from 100,000,000 to 200,000,000 shares and increasing the number of authorized shares of preferred stock from 1,000,000 to 2,000,000 shares.

12. Stock-Based Compensation Plans

Total compensation expense recorded during the years ended December 31, 2012, 2011 and 2010 for share-based payment awards was \$0.3 million, \$0.3 million and \$0.8 million, respectively, of which \$0.1 million, \$0.06 million and \$0.1 million is recorded in research and development and \$0.2 million, \$0.2 million and \$0.7 million is recorded in general and administrative expenses in the statement of operations. At December 31, 2012, total unrecognized estimated compensation expense related to non-vested stock options granted prior to that date was approximately \$0.3 million, which is expected to be recognized over a weighted-average period of 2.0 years. No tax benefit was realized due to a continued pattern of operating losses. We have a policy of issuing new shares to satisfy share option exercises. No options were exercised during the year ended December 31, 2012 and ten thousand options were exercised during the year ended December 31, 2011. Cash received from options exercised totaled \$6 thousand for the year ended December 31, 2011.

During the year ended December 31, 2012, the Company granted 2,736,750 options which included 2,000,000 to Alan Rubino, 45,000 options to Michael Garone, 30,000 options to Gary Riley, 215,000 options to Timothy Rothwell, 90,000 options each to Timothy McInerney and Jacob Plotsker and 40,000 options each to Dr. Mark Rachesky, Dr. Michael Weiser, and John Harkey.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

Using the Black-Scholes model, we have estimated our stock price volatility using the historical volatility in the market price of our common stock for the expected term of the option. The risk-free interest rate is based on the yield curve of U.S. Treasury STRIP securities for the expected term of the option. We have never paid cash dividends and do not intend to pay cash dividends in the foreseeable future. Accordingly, we assumed a 0% dividend yield. The forfeiture rate is estimated using historical option cancellation information, adjusted for anticipated changes in expected exercise and employment termination behavior. Forfeiture rates and the expected term of options are estimated separately for groups of employees that have similar historical exercise behavior. The ranges presented below are the result of certain groups of employees displaying different behavior.

The following weighted-average assumptions were used for grants made under the stock option plans for the years ended December 31, 2012, 2011 and 2010:

	2012		
	Directors	Executives	Employees
Expected volatility	120.0-125.6%	121.9-131.1%	121.9%
Expected term	6.8 years	6.8 years	6.8 years
Risk-free interest rate	1.04-1.38%	0.99-1.07%	0.99%
Dividend yield	0%	0%	0%
Annual forfeiture rate	14.5%	14.5%	14.5%
	2011		
	Directors	Executives	Employees
Expected volatility	83.7%	82.7%	82.7%
Expected term	6.8 years	6.8 years	6.8 years
Risk-free interest rate	1.34%	2.10%	2.10%
Dividend yield	0%	0%	0%
Annual forfeiture rate	14.5%	14.5%	14.5%
	2010		
	Directors	Executives	Employees
Expected volatility	95.5%	85.7%	85.7%
Expected term	6.8 years	6.8 years	6.8 years
Risk-free interest rate	2.17%	3.14%	3.20%
Dividend yield	0%	0%	0%
Annual forfeiture rate	14.5%	14.5%	14.5%

Stock Option Plans. On April 20, 2007, the stockholders approved the 2007 Stock Award and Incentive Plan (the “2007 Plan”). The 2007 Plan provides for grants of options, stock appreciation rights, restricted stock, deferred stock, bonus stock and awards in lieu of obligations, dividend equivalents, other stock based awards and performance awards to executive officers and other employees of the Company, and non-employee directors, consultants and others who provide substantial service to us. The 2007 Plan provides for the issuance of 3,275,334 shares as follows: 2,500,000 new shares, 374,264 shares remaining and transferred from the Company’s 2000 Stock Option Plan (the “2000 Plan”) (which was then replaced by the 2007 Plan) and 401,070 shares remaining and transferred from the Company’s Stock Option Plan for Outside Directors (the “Directors Stock Plan”). In addition, shares cancelled, expired, forfeited, settled in cash, settled by delivery of fewer shares than the number underlying the award, or otherwise terminated under the 2000 Plan will become available for issuance under the 2007 Plan, once registered. As of December 31, 2012 189,878 shares remain available for issuance under the 2007 Plan. Generally, the options vest at the rate of 20% per year and expire within a five-to-ten-year period, as determined by the compensation committee of the Board of Directors and as defined by the Plans.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

The Company's other active Stock Option Plan is the 2002 Broad Based Plan (the "2002 Plan"). Under the 2002 Plan, a maximum of 160,000 shares are authorized for issuance to employees in the form of either incentive stock options ("ISOs"), as defined by the Internal Revenue Code, or non-qualified stock options, which do not qualify as ISOs. As of December 31, 2012, 160,000 shares remain available for issuance under the 2002 Plan.

The Company also has grants outstanding under its expired and terminated 2000 Stock Option Plan (the "2000 Plan"). Under our 2000 Plan a maximum of 1,945,236 shares of our common stock were available for issuance. The 2000 Plan was available to employees, directors and consultants. The 2000 Plan provides for the grant of either ISOs, as defined by the Internal Revenue Code, or non-qualified stock options, which do not qualify as ISOs. Generally, the options vest at the rate of 20% per year and expire within a five- to ten-year period, as determined by the compensation committee of the Board of Directors and as defined by the Plans.

Transactions involving stock options awarded under the Plans described above during the years ended December 31, 2012, 2011 and 2010 are summarized as follows:

	<u>Number of Shares</u>	<u>Weighted Average Exercise Price</u>	<u>Weighted Average Remaining Contractual Term in Years</u>	<u>Aggregate Intrinsic Value</u>
				(In thousands)
Outstanding at December 31, 2009	2,734,736	\$ 6.29	6.8	
Granted	662,750	\$ 1.41		
Expired	(183,500)	\$37.99		
Forfeited	<u>(48,120)</u>	\$ 1.31		
Outstanding at December 31, 2010	3,165,866	\$ 3.51	6.9	\$ 46
Granted	309,000	\$ 1.24		
Exercised	(10,000)	\$ 0.62		
Expired	(110,266)	\$13.92		
Forfeited	<u>(185,970)</u>	\$ 1.82		
Outstanding at December 31, 2011	3,168,630	\$ 3.03	3.4	\$ 18
Granted	2,736,750	\$ 0.43		
Expired	(1,709,020)	\$ 3.67		
Forfeited	<u>(45,950)</u>	\$ 1.30		
Outstanding at December 31, 2012	<u>4,150,410</u>	\$ 1.07	8.4	\$1,076
Vested and exercisable at December 31, 2012	<u>1,111,606</u>	\$ 2.54	5.4	\$ 16
Vested and expected to vest at December 31, 2012	<u>3,496,447</u>	\$ 1.14	8.2	\$ 952

The weighted-average grant date fair value of options granted during the years ended December 31, 2012, 2011 and 2010 was \$0.10, \$0.91 and \$1.26, respectively.

Outside Directors' Plan. We previously issued options to outside directors who are neither officers nor employees of Emisphere nor holders of more than 5% of our common stock under the Directors Stock Plan. As amended, a maximum of 725,000 shares of our common stock were available for issuance under the Outside Directors' Plan in the form of options and restricted stock. The Directors Stock Plan expired on January 29, 2007. Options and restricted stock are now granted to directors under the 2007 Plan discussed above.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

Transactions involving stock options awarded under the Directors Stock Plan during the years ended December 31, 2012, 2011 and 2010 are summarized as follows:

	<u>Number of Shares</u>	<u>Weighted Average Exercise Price</u>	<u>Weighted Average Remaining Contractual Term in Years</u>	<u>Aggregate Intrinsic Value (In thousands)</u>
Outstanding at December 31, 2009	121,000	\$15.59	2.7	
Expired	<u>(21,000)</u>	\$41.06		
Outstanding at December 31, 2010	100,000	\$10.24	2.2	
Expired	<u>(21,000)</u>	\$13.88		
Outstanding at December 31, 2011	79,000	\$ 9.27	1.7	
Expired	<u>(37,000)</u>	\$13.06		
Outstanding at December 31, 2012	<u>42,000</u>	\$ 5.93	1.9	
Vested and Exercisable at December 31, 2012	<u>42,000</u>	\$ 5.93	1.9	\$0

Directors' Deferred Compensation Stock Plan. The Directors' Deferred Compensation Stock Plan (the "Directors' Deferred Plan") ceased as of May 2004. Under the Director's Deferred Plan, directors who were neither officers nor employees of Emisphere had the option to elect to receive one half of the annual Board of Directors' retainer compensation, paid for services as a Director, in deferred common stock. An aggregate of 25,000 shares of our common stock has been reserved for issuance under the Directors' Deferred Plan. During the years ended December 31, 2004 and 2003, the outside directors earned the rights to receive an aggregate of 1,775 shares and 2,144 shares, respectively. Under the terms of the Directors' Deferred Plan, shares are to be issued to a director within six months after he or she ceases to serve on the Board of Directors. We recorded as an expense the fair market value of the common stock issuable under the plan. As of December 31, 2012, there are no shares issuable under this plan. No grants were awarded in 2012, 2011 and 2010, and none were outstanding as of December 31, 2012.

Non-Plan Options. Our Board of Directors has granted options ("Non-Plan Options"), which are currently outstanding for the accounts of two consultants. The Board of Directors determines the number and terms of each grant (option exercise price, vesting, and expiration date).

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

Transactions involving awards of Non-Plan Options during the year ended December 31, 2012, 2011 and 2010 are summarized as follows:

	<u>Number of Shares</u>	<u>Weighted Average Exercise Price</u>	<u>Weighted Average Remaining Contractual Term in Years</u>	<u>Aggregate Intrinsic Value</u> (In thousands)
Outstanding at December 31, 2009	10,000	\$3.64	2.0	
Expired	<u>—</u>	<u>—</u>		
Outstanding at December 31, 2010	10,000	\$3.64	2.0	
Expired	<u>—</u>	<u>—</u>		
Outstanding at December 31, 2011	10,000	\$3.64	2.0	
Expired	<u>(5,000)</u>	<u>3.15</u>		
Outstanding at December 31, 2012	<u>5,000</u>	\$4.12	0.5	
Vested and Exercisable at December 31, 2012	<u>5,000</u>	\$4.12	0.5	\$0

13. Collaborative Research Agreements

We are a party to collaborative agreements with corporate partners to provide development and commercialization services relating to the collaborative products. These agreements are in the form of research and development collaboration and licensing agreements. In connection with these agreements, we have granted licenses or the rights to obtain licenses to our oral drug delivery technology. In return, we are entitled to receive certain payments upon the achievement of milestones and will receive royalties on sales of products should they be commercialized. Under these agreements, we are entitled to also be reimbursed for research and development costs. We also have the right to manufacture and supply delivery agents developed under these agreements to our corporate partners.

We also perform research and development for others pursuant to feasibility agreements, which are of short duration and are designed to evaluate the applicability of our drug delivery agents to specific drugs. Under the feasibility agreements, we are generally reimbursed for the cost of work performed.

All of our collaborative agreements are subject to termination by our corporate partners without significant financial penalty to them. Milestone and upfront payments received in connection with these agreements was \$0.0 million, \$0.0 million and \$7.0 million in the years ended December 31, 2012, 2011 and, 2010, respectively. Expense reimbursements received in connection with these agreements was \$0.01 million, \$0.06 million and \$0.1 million for the years ended December 31, 2012, 2011 and 2010, respectively. There were no expenses incurred in connection with these agreements in the years ended December 31, 2012, 2011 and 2010, respectively. Significant agreements are described below.

Novo Nordisk Agreements

GLP-1 License Agreement

On June 21, 2008, we entered into an exclusive Development and License Agreement with Novo Nordisk pursuant to which Novo Nordisk will develop and commercialize oral formulations of Novo Nordisk proprietary products in combination with Emisphere carriers (the “GLP-1 License Agreement”). Under such the GLP-1 License Agreement, Emisphere could receive more than \$87.0 million in contingent product development and

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

sales milestone payments including a \$10.0 million non-refundable license fee which was received during June 2008. Emisphere would also be entitled to receive royalties in the event Novo Nordisk commercializes products developed under such agreement. Under the terms of the GLP-1 License Agreement, Novo Nordisk is responsible for the development and commercialization of the products. Initially Novo Nordisk is focusing on the development of oral formulations of its proprietary GLP-1 receptor agonists. In January 2010, Novo Nordisk had its first Phase I clinical trial with a long acting oral GLP-1 receptor agonist. This milestone released a \$2 million payment to Emisphere.

The GLP-1 License Agreement includes multiple deliverables including the license grant, several versions of the Company's Eligen[®] Technology (or carriers), support services and manufacturing. Emisphere management reviewed the relevant terms of the GLP-1 License Agreement and determined that such deliverables should be accounted for as a single unit of accounting in accordance with FASB ASC 605-25, *Multiple-Element Arrangements*, since the delivered license and Eligen[®] Technology do not have stand-alone value and Emisphere does not have objective evidence of fair value of the undelivered Eligen[®] Technology or the manufacturing value of all the undelivered items. Such conclusion will be reevaluated as each item in the arrangement is delivered. Consequently, any payments received from Novo Nordisk pursuant to such agreement, including the initial \$10 million upfront payment and any payments received for support services, will be deferred and included in Deferred Revenue within our balance sheet. Management cannot currently estimate when all of such deliverables will be delivered nor can they estimate when, if ever, Emisphere will have objective evidence of the fair value for all of the undelivered items, therefore all payments from Novo Nordisk are expected to be deferred for the foreseeable future.

As of December 31, 2012 total deferred revenue from the GLP-1 License Agreement was \$13.6 million, comprised of the \$10.0 million non-refundable license fee, \$2 million milestone payment and \$1.6 million in support services.

Insulins License Agreement

On December 20, 2010, we entered into an exclusive Development and License Agreement with Novo Nordisk, pursuant to which we granted to Novo Nordisk an exclusive license to develop and commercialize oral formulations of Novo Nordisk's insulins, using the Company's proprietary delivery agents (the "Insulins License Agreement"). The Insulins License Agreement includes \$57.5 million in potential product development and sales milestone payments including a \$5.0 million non-refundable, non-creditable license fee. Emisphere would also be entitled to receive royalties in the event Novo Nordisk commercializes products developed under such the Insulins License Agreement.

The Insulins License Agreement includes multiple deliverables including the license grant, several versions of the Company's Eligen[®] Technology (or carriers), support services and manufacturing. Emisphere management reviewed the relevant terms of the Novo Nordisk agreement and determined that such deliverables should be accounted for as a single unit of accounting in accordance with FASB ASC 605-25, *Multiple-Element Arrangements*, since the delivered license and Eligen[®] Technology do not have stand-alone value and Emisphere does not have objective evidence of fair value of the undelivered Eligen[®] Technology or the manufacturing value of all the undelivered items. Such conclusion will be reevaluated as each item in the arrangement is delivered. Consequently any payments received from Novo Nordisk pursuant to such agreement, including the initial \$5.0 million upfront payment and any payments received for support services, will be deferred and included in Deferred Revenue within our balance sheet. Management cannot currently estimate when all of such deliverables will be delivered nor can they estimate when, if ever, Emisphere will have objective evidence of the fair value for all of the undelivered items, therefore all payments from Novo Nordisk are expected to be deferred for the foreseeable future.

As of December 31, 2012 total deferred revenue from the Insulins License Agreement was \$5.0 million, comprised of the non-refundable, non-creditable license fee.

EMISPHERE TECHNOLOGIES, INC.
NOTES TO FINANCIAL STATEMENTS — (Continued)

Novartis Agreements

Salmon Calcitonin Agreements

We have collaborated with Novartis in connection with the development and testing of oral formulations of salmon calcitonin (“sCT”) to treat osteoarthritis and osteoporosis (the “Salmon Calcitonin Program”). We entered into a Research Collaboration and Option Agreement, dated as of December 3, 1997, as amended on October 20, 2000 (the “Salmon Calcitonin Option Agreement”) with Novartis to develop an oral form of sCT. Pursuant to the Salmon Calcitonin Option Agreement, the Company granted Novartis the option to acquire from the Company a license to develop and commercialize oral sCT utilizing Emisphere’s Eligen® Technology and the right to commence research collaboration with the Company with respect to a second compound, in exchange for certain option exercise payments. Novartis also agreed to reimburse the Company with respect to certain research and development costs incurred by the Company in connection with the sCT Program.

In February 2000, Novartis agreed to execute its option under the Salmon Calcitonin Option Agreement to acquire a license to develop and commercialize oral sCT and as a result, Novartis made a \$2 million milestone payment to us. In March 2000, we entered into a License Agreement, dated as of March 8, 2000, with Novartis for the development of an oral sCT product for the treatment of osteoarthritis and osteoporosis (the “Salmon Calcitonin License Agreement”). Novartis paid us \$2.5 million to obtain the license to our technology for sCT, and to obtain an option to use the Eligen® Technology for a second compound. In addition, Novartis agreed to pay the Company certain milestone and royalty payments in the event that a calcitonin product was ultimately commercialized and to reimburse the Company for certain research and development costs incurred by the Company in connection with the sCT Program.

On December 1, 2004, we issued a \$10 million convertible note (the “Novartis Note”) to Novartis in connection with a research collaboration option relating to the development of PTH-1-34. The Novartis Note was originally due December 1, 2009, which date was subsequently extended to June 2010. On June 4, 2010, the Company and Novartis entered into a Master Agreement and Amendment (the “Novartis Agreement”). Pursuant to the Novartis Agreement, the Company was released and discharged from its obligations under the Novartis Note in exchange for: (i) the reduction of future royalty and milestone payments up to an aggregate amount of \$11.0 million due the Company under the Salmon Calcitonin Option Agreement and the Salmon Calcitonin License Agreement; (ii) the right for Novartis to evaluate the feasibility of using Emisphere’s Eligen® Technology with two new compounds to assess the potential for new product development opportunities; and (iii) other amendments to the Salmon Calcitonin Option Agreement and Salmon Calcitonin License Agreement. As of the date of the Novartis Agreement, the outstanding principal balance and accrued interest of the Novartis Note was approximately \$13.0 million. The Company recognized the full value of the debt released as consideration for the transfer of the rights and other intangibles to Novartis and deferred the related revenue in accordance with applicable accounting guidance for the sale of rights to future revenue until the earnings process has been completed based on achievement of certain milestones or other deliverables. If Novartis chooses to develop oral formulations of these new compounds using the Eligen® Technology, the parties will negotiate additional agreements. In that case, Emisphere could be entitled to receive development milestone and royalty payments in connection with the development and commercialization of these potentially new products.

The potential aggregate milestones payable to the Company under the Salmon Calcitonin Program originally involved in excess of \$14 million. To date, we have received \$12.4 million in payments from Novartis under the Salmon Calcitonin Program and in light of Novartis’ 2011 decision not to pursue further clinical development or regulatory approval under the Salmon Calcitonin Program, we do not anticipate further payments. Under the terms of the Salmon Calcitonin Option Agreement and the Salmon Calcitonin License Agreement, we were entitled to receive future royalties based on sales, in the event that an sCT product would be ultimately commercialized by Novartis. In light of Novartis’ decision, we do not anticipate receiving any royalties in the future. In the likely event that Novartis determines to terminate the Salmon Calcitonin Option Agreement and the Salmon Calcitonin License Agreement, we will reacquire the rights to our technology licensed to Novartis thereunder.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

Oral PTH-1-34 Agreements

We have collaborated with Novartis in connection with the development and testing of oral formulations of PTH-1-34 to treat osteoarthritis and osteoporosis (the “PTH Program”). On December 1, 2004, we entered into a Research Collaboration Option and License Agreement with Novartis whereby Novartis obtained an option to license our existing technology to develop oral forms of PTH 1-34 (the “PTH Option Agreement”). On March 7, 2006, Novartis exercised its option to the license.

The potential aggregate sales and development milestones that might have become payable to the Company under the PTH Program originally involved in excess of \$25 million. Furthermore, Emisphere would have been entitled to receive future royalties based on sales, in the event that a PTH product would be ultimately commercialized by Novartis. However, in light of Novartis’ decision not to pursue further clinical development under the PTH Program, we do not anticipate further payments in connection with the achievement of future sales royalties or sales or development milestones. In the likely event that Novartis determines to terminate the PTH Option Agreement and the PTH License Agreement, we will reacquire the rights to our technology licensed to Novartis thereunder.

Genta Agreement.

In March 2006, we entered into a collaborative agreement with Genta to develop an oral formulation of a gallium-containing compound. Under the terms of the agreement, we would be eligible for future milestone payments totaling up to a maximum of \$24.3 million under this agreement. On August 2, 2012, Genta Incorporated filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. We will monitor circumstances to determine whether the agreement may still yield future value.

14. Defined Contribution Retirement Plan

We have a defined contribution retirement plan (the “Retirement Plan”), the terms of which, as amended, allow eligible employees who have met certain age and service requirements to participate by electing to contribute a percentage of their compensation to be set aside to pay their future retirement benefits, as defined by the Retirement Plan. We have agreed to make discretionary contributions to the Retirement Plan. For the years ended December 31, 2012, 2011 and 2010, we made contributions to the Retirement Plan totaling approximately \$0.04 million, \$0.07 million and \$0.07 million, respectively.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

15. Net Income (Loss) Per Share

The following table sets forth the information needed to compute basic and diluted earnings per share for the years ended December 31, 2012, 2011 and 2010:

	Year Ended December 31,		
	2012	2011	2010
	(In thousands, except per share amounts)		
Net (loss) income	\$ (1,928)	\$ 15,051	\$ (56,909)
Basic (loss) income per common share:			
Weighted average common shares outstanding, basic	60,687,478	56,292,511	46,206,803
Basic net (loss) income per share	\$ (0.03)	\$ 0.27	\$ (1.23)
Diluted (loss) income per common share:			
Weighted average common shares outstanding, basic	60,687,478	56,292,511	46,206,803
Options to purchase common shares	—	293,248	—
Outstanding warrants and options to purchase warrants	—	2,695,566	—
Weighted average common shares outstanding, diluted	60,687,478	59,281,325	46,206,803
Diluted net (loss) income per share	\$ (0.03)	\$ 0.25	\$ (1.23)

The following table sets forth the number of potential shares of common stock that have been excluded from diluted net (loss) income per share because their effect was anti-dilutive:

	Year Ended December 31,		
	2012	2011	2010
Options to purchase common shares	1,524,160	1,833,130	2,477,037
Outstanding warrants and options to purchase warrants . . .	17,443,727	1,265,000	11,832,826
MHR note payable	8,353,518	7,447,995	6,675,512
	27,321,407	10,546,125	20,985,375

16. Commitments and Contingencies

Commitments.

We lease office space at 240 Cedar Knolls Road, Cedar Knolls, NJ under a non-cancellable operating lease expiring in 2013.

We lease office space at 4 Becker Farm Road, Roseland, NJ under a non-cancellable operating lease expiring in 2017.

EMISPHERE TECHNOLOGIES, INC.
NOTES TO FINANCIAL STATEMENTS — (Continued)

As of December 31, 2012, future minimum rental payments are as follows:

<u>Years Ending December 31,</u>	<u>(In thousands)</u>
2013	\$135
2014	117
2015	136
2016	148
2017	<u>74</u>
Total	<u>\$610</u>

Rent expense for the years ended December 31, 2012, 2011 and 2010 was \$0.3 million, \$0.3 million and \$0.3 million, respectively. Additional charges under this lease for real estate taxes and common maintenance charges for the years ended December 31, 2012, 2011 and 2010, were \$0.01 million, \$0.03 million and \$0.3 million, respectively.

In accordance with the lease agreement in Cedar Knolls, NJ, the Company has entered into a standby letter of credit in the amount of \$246 thousand as a security deposit. The standby letter of credit is fully collateralized with a time certificate of deposit account in the same amount. The certificate of deposit has been recorded as a restricted cash balance in the accompanying financials. As of December 31, 2012, there are no amounts outstanding under the standby letter of credit.

The Company evaluates the financial consequences of legal actions periodically or as facts present themselves and records accruals to account for its best estimate of future costs accordingly.

Contingencies. In the ordinary course of business, we enter into agreements with third parties that include indemnification provisions which, in our judgment, are normal and customary for companies in our industry sector. These agreements are typically with business partners, clinical sites, and suppliers. Pursuant to these agreements, we generally agree to indemnify, hold harmless, and reimburse indemnified parties for losses suffered or incurred by the indemnified parties with respect to our product candidates, use of such product candidates, or other actions taken or omitted by us. The maximum potential amount of future payments we could be required to make under these indemnification provisions is unlimited. We have not incurred material costs to defend lawsuits or settle claims related to these indemnification provisions. As a result, the estimated fair value of liabilities relating to these provisions is minimal. Accordingly, we have no liabilities recorded for these provisions as of December 31, 2012.

In the normal course of business, we may be confronted with issues or events that may result in a contingent liability. These generally relate to lawsuits, claims, environmental actions or the action of various regulatory agencies. If necessary, management consults with counsel and other appropriate experts to assess any matters that arise. If, in our opinion, we have incurred a probable loss as set forth by accounting principles generally accepted in the U.S., an estimate is made of the loss and the appropriate accounting entries are reflected in our financial statements.

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

17. Summarized Quarterly Financial Data (Unaudited)

Following are summarized quarterly financial data (unaudited) for the years ended December 31, 2012 and 2011:

	2012			
	March 31	June 30	September 30	December 31
	(In thousands)			
Total revenue	\$ —	\$ —	\$ —	\$ —
Operating loss	(1,765)	(1,421)	(1,474)	(2,161)
Net income (loss)	<u>(736)</u>	<u>2,768</u>	<u>(4,587)</u>	<u>627</u>
Net income (loss) per share, basic	\$ (0.01)	\$ 0.05	\$ (0.08)	\$ 0.01
Net income (loss) per share, diluted	\$ (0.01)	\$ 0.05	\$ (0.08)	\$ 0.01

	2011			
	March 31	June 30	September 30	December 31
	(In thousands)			
Total revenue	\$ —	\$ —	\$ —	\$ —
Operating loss	(2,050)	(2,226)	(1,531)	(2,330)
Net income (loss)	<u>10,999</u>	<u>1,842</u>	<u>(17,606)</u>	<u>19,816</u>
Net income (loss) per share, basic	\$ 0.21	\$ 0.04	\$ (0.29)	\$ 0.33
Net income (loss) per share, diluted	\$ 0.19	\$ 0.03	\$ (0.29)	\$ 0.30

18. Fair Value

In accordance with FASB ASC 820, *Fair Value Measurements and Disclosures*, the following table represents the Company's fair value hierarchy for its financial liabilities measured at fair value on a recurring basis as of December 31, 2012 and 2011:

<u>December 31, 2012:</u>	<u>Level 2</u>	<u>Level 3</u>	<u>Total</u>
	(in thousands)	(in thousands)	(in thousands)
Derivative instruments	\$1,780	\$309	\$2,089
<u>December 31, 2011:</u>	<u>Level 2</u>	<u>Level 3</u>	<u>Total</u>
	(in thousands)	(in thousands)	(in thousands)
Derivative instruments	\$2,487	\$7,712	\$10,199

Level 3 financial instruments consist of common stock warrants common stock warrants and embedded conversion features. The fair value of these warrants and embedded conversion features that have exercise reset features are estimated using an adjusted Black-Scholes model. The Company computes valuations each quarter, using Black-Scholes model calculations to account for potential adjustments that could occur in connection with the contractual terms of said instruments, based on various circumstances that could arise during the remaining term of the instruments. The Company weights each Black-Scholes model calculation based on its estimation of the likelihood of the occurrence of each circumstance and adjusts relevant Black-Scholes model inputs to calculate the value of the derivative at the reporting date. The Company adopted the disclosure requirements of ASU 2011-04, Fair Value Measurements, during the quarter ended March 31, 2012. The unobservable input used by the Company was the estimation of the likelihood of a reset occurring on the MHR Convertible Notes and MHR 2010 Warrants, which was estimated to be 2% and 40%, respectively, at December 31, 2012 and 40% for both the MHR Convertible Notes and MHR 2010 Warrants at December 31, 2011. These estimates of the

EMISPHERE TECHNOLOGIES, INC.

NOTES TO FINANCIAL STATEMENTS — (Continued)

likelihood of completing an equity raise that would meet the criteria to trigger the reset provisions are based on numerous factors, including the remaining term of the financial instruments and the Company's overall financial condition.

The following table summarizes the changes in fair value of the Company's Level 3 financial instruments for the years ended December 31, 2012 and 2011:

	<u>Year Ended December 31,</u>	
	<u>2012</u>	<u>2011</u>
Beginning Balance	\$ 7,712	\$13,306
Change in fair value	<u>(7,403)</u>	<u>(5,594)</u>
Ending Balance	<u>\$ 309</u>	<u>\$ 7,712</u>

Changes in the unobservable input values would likely cause material changes in the fair value of the Company's Level 3 financial instruments. The significant unobservable input used in the fair value measurement is the estimation of the likelihood of the occurrence of a change to the contractual terms of the financial instruments. A significant increase (decrease) in this likelihood would result in a higher (lower) fair value measurement.

ITEM 9. CHANGES IN AND DISAGREEMENTS WITH ACCOUNTANTS ON ACCOUNTING AND FINANCIAL DISCLOSURE

None.

ITEM 9A. CONTROLS AND PROCEDURES

Evaluation of Disclosure Controls and Procedure

The Company's senior management is responsible for establishing and maintaining a system of disclosure controls and procedures (as defined in Rule 13a-15 and 15d-15 under the Securities Exchange Act of 1934 (the "Exchange Act")) designed to ensure that information required to be disclosed by the Company in the reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the Securities and Exchange Commission's rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the Exchange Act is accumulated and communicated to the issuer's management, including its principal executive officer or officers and principal financial officer or officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.

The Company has evaluated the effectiveness of the design and operation of its disclosure controls and procedures under the supervision of and with the participation of management, including its Chief Executive Officer and Chief Financial Officer, as of the end of December 31, 2012. Based on that evaluation, our Chief Executive Officer and Chief Financial Officer have concluded that our disclosure controls and procedures are effective.

Changes in Internal Control over Financial Reporting

There have been no changes in the Company's system of internal controls over financial reporting during the three month period ended December 31, 2012 that materially affected, or are reasonably likely to materially affect, our internal control over financial reporting.

Our management does not expect that our disclosure controls and procedures or internal controls over financial reporting will prevent all errors and all fraud. A control system, no matter how well conceived and operated, can provide only reasonable, not absolute, assurance that the objectives of the system are met and cannot detect all deviations. Because of the inherent limitations in all control systems, no evaluation of controls can provide absolute assurance that all control issues and instances of fraud or deviations, if any, within the company have been detected. Projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

Management's Report on Internal Control over Financial Reporting

Our management is responsible for establishing and maintaining adequate internal control over financial reporting, as such term is defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act. Our management has conducted an evaluation of the effectiveness of our internal control over financial reporting based on the framework established in *Internal Control — Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission. Based on that evaluation, our management has concluded that our internal control over financial reporting was effective as of December 31, 2012.

McGladrey LLP, our independent registered public accounting firm, has issued a report on the effectiveness of internal over financial reporting as of December 31, 2012, which report is included herein at page 47.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

ITEM 9B. OTHER INFORMATION

None.

PART III

ITEM 10. *DIRECTORS, EXECUTIVE OFFICERS AND CORPORATE GOVERNANCE*

Director and Executive Officer Information

Information regarding those directors serving unexpired terms and our current Executive Officers, as such term is defined in Regulation S-K under the Exchange Act, all of whom are currently serving open-ended terms, including their respective ages, the year in which each first joined the Company and their principal occupations or employment during the past five years, is provided below:

<u>Name</u>	<u>Age</u>	<u>Year Joined Emisphere</u>	<u>Position with the Company</u>
Alan L. Rubino(1)	58	2012	President and Chief Executive Officer, Class II Director
Michael R. Garone(2)	54	2007	Vice President, Chief Financial Officer and Corporate Secretary
John D. Harkey, Jr.	52	2006	Class I Director
Timothy McInerney	52	2012	Class II Director
Jacob M. Plotsker	45	2012	Class II Director
Mark H. Rachesky, M.D.	54	2005	Class III Director
Timothy G. Rothwell(3)	62	2009	Chairman of the Board of Directors, Class I Director
Michael Weiser, M.D., Ph.D.	50	2005	Class III Director

- (1) On September 13, 2012, Alan L. Rubino joined the Company as President and Chief Executive Officer and, in connection therewith, Mr. Rubino was appointed as a Class II Director of the Company.
- (2) On September 13, 2012, Michael R. Garone concluded his tenure as Interim Chief Executive Officer of the Company.
- (3) On September 13, 2012, Timothy G. Rothwell became Chairman of the Board of Directors of the Company

Alan L. Rubino joined the Emisphere on September 13, 2012 as President and Chief Executive Officer and, in connection therewith, was appointed as a Class II Director of the Company. His career spans over 30 years at every level of the biopharmaceutical industry. From October 2010 until July 2012, he served as Chief Executive Officer and President of New American Therapeutics, Inc., where he and his team presided over a venture that was focused on the acquisition, marketing, and ultimate sale of Denavir, a leading Rx topical therapeutic for HSV-1 cold sore treatment. From February 2008 to September 2010, Mr. Rubino was CEO and President of Akrimax Pharmaceuticals, where he acquired two Rx launch products, NitroMist and Tirosint, which are actively marketed and in growth phases today. Prior to 2008, he was President and Chief Operating Officer of the Pharmos Corporation, which was a development-stage publicly-held firm, where he led the transformation of the company through the acquisition of Vela Pharmaceuticals. Mr. Rubino also spent four years in senior executive leadership positions on the strategic services side at both Cardinal Health and PDI, Inc., both public companies that provided high-level outsourcing offerings to the pharmaceutical industry. A major portion of Mr. Rubino's career includes twenty-four years spent at Hoffmann-La Roche, where he served as a corporate officer and member of the US Executive Committee and held a variety of key senior executive positions with broad general management responsibilities leading major business units and operations, marketing, business development, alliance management, human resources, and supply chain/manufacturing. At Hoffmann-La Roche, Mr. Rubino led many key top level executive initiatives and presided over numerous commercial product launches across a spectrum of therapeutic areas, including the introduction of the world's first biological product in Roferon-A [alfa-interferon 2a]. Currently, Mr. Rubino serves of the Boards of Directors and is Chairman of the Compensation Committee of Aastrom Biosciences (NASDAQ: ASTM), and on the Board of Directors of Genisphere, Inc., and serves on the Rutgers Business School Board of Advisors.

Michael R. Garone joined Emisphere in 2007 as Vice President and Chief Financial Officer. Mr. Garone has also served as the Company's Corporate Secretary since October 2008. Mr. Garone previously served as Interim Chief Executive Officer and Chief Financial Officer of Astralis, Ltd. (OTCBB: ASTR.OB). Prior to that, Mr. Garone was with AT&T (NYSE: T) for 20 years, where he held several positions, including Chief Financial Officer of AT&T Alascom. Mr. Garone received an MBA from Columbia University and a BA in Mathematics from Colgate University. From February 28, 2011 until September 13, 2012, Michael R. Garone served as Interim Chief Executive Officer of the Company.

John D. Harkey, Jr. has been Director of the Company since April 2006. Mr. Harkey serves as Consolidated Restaurant Operations, Inc.'s (CRC) Chairman and Chief Executive Officer. He is the majority shareholder of privately-held CRC and its subsidiaries, related companies and joint ventures. CRC operates a total of 117 full-service restaurants including 28 franchise restaurants and employs 4,500 people in 18 states and in England, Dubai, Saudi Arabia, Abu Dhabi and Cairo, Egypt. CRC serves approximately 14 million meals per year. CRC currently operates and franchises casual dining restaurants Cantina Laredo, El Chico, Black Oak Grill, Good Eats and Lucky's, and fine dining steakhouses III Forks, Cool River Café and Silver Fox Steakhouse. Mr. Harkey has over 25 years experience as a private investor concentrating in the acquisition, consolidation and management of both public and private companies. He has also merged, acquired and/or operated companies in a variety of other industries including real estate, wholesale healthcare products, wholesale farm and ranch products, petrochemical services, self-storage warehousing, ATM processing services, telecommunications and software development. He currently serves on the Board of Directors and Audit Committees of Loral Space & Communications, Inc. (NASDAQ:LORL), and Energy Transfer Equity, LP (NYSE:ETE), and ETE's Compensation Committee, Board of Directors of Leap Wireless International, Inc. (NASDAQ:LEAP), serves as Chairman of the Board of Regency Energy Partners, (NYSE: RGP), and on the Board of Directors of the Baylor Health Care System Foundation. He also serves on the President's Development Council of Howard Payne University, the Executive Board of Circle Ten Council of the Boy Scouts of America, the CEO Advisory Board of Dallas Arboretum and is a member of the World Presidents' Organization. Mr. Harkey obtained a B.B.A. with honors in finance and, a J.D. from the University of Texas at Austin and a M.B.A. from Stanford University School of Business. Mr. Harkey's entrepreneurial background and his business and leadership experiences in a range of different industries make him an asset to our Board of Directors.

Timothy McInerney has been a Director of the Company since March 2012. Mr. McInerney is a principal at Two River and a Partner of Riverbank Capital Securities, Inc. From 1992 to March 2007, Mr. McInerney was a Managing Director of Paramount BioCapital, Inc. where he oversaw the overall distribution of Paramount's private equity product. Prior to 1992, Mr. McInerney was a research analyst focusing on the biotechnology industry at Ladenburg, Thalman & Co. Prior to that, Mr. McInerney held equity sales positions at Bear Stearns & Co. and Shearson Lehman Brothers, Inc. Mr. McInerney also worked in sales and marketing for Bristol-Myers Squibb. Mr. McInerney is currently Chairman of the Board of Directors of Insite Vision, Inc., (OTCBB: INSV), and is a member of the Board of Directors of ZIOPHARM, Inc., (NASDAQ: ZIOP), and Edgemont Pharmaceuticals, LLC. He formerly served on the Board of Directors of Manhattan Pharmaceuticals, Inc., (OTCBB: TGTX). Mr. McInerney received his B.S. in pharmacy from St. John's University at New York. He also completed a post-graduate residency at the New York University Medical Center in drug information systems. Mr. McInerney's knowledge of the pharmaceutical industry and capital markets, and affiliations with the financial community make him an asset to our Board of Directors.

Jacob Plotsker has been a director of the Company since March 2012. Mr. Plotsker is currently owner of Cambridge Sage Group, LLC, a consulting firm focused on strategic consulting to pharmaceutical companies. He previously served as Senior Director, Commercial Operations and Head of Marketing for Teva Pharmaceuticals Women's Health Division. Prior to joining Teva in 2009, Mr. Plotsker was Senior Director, US and Global Marketing at Schering-Plough Corp (previously Organon BioSciences prior to being acquired by Schering-Plough Corp, which was subsequently acquired by Merck & Co., Inc) where he was responsible for commercialization of marketed brands and launch strategy for brands in development. From 1990 to 2006, Mr. Plotsker served in various Finance and Marketing roles at Pfizer, Inc. including Director/Team Leader of the company's Antifungal Franchise. From 1989 to 1990, Mr. Plotsker was an Accountant at Deloitte & Touche. Mr. Plotsker holds a Bachelor of Arts degree in Accounting & Information Systems from Queens College of the

City University of New York, a Master of Business Administration in Marketing and Finance from New York University—Stern School of Business, and completed the Executive Development Program in General Management at the University of Chicago—Booth School of Business. Mr. Plotsker serves on the Board of Directors of Sharsheret, a nonprofit 501(c)3 organization providing support and resources to young women living with breast cancer. Mr. Plotsker's experiences in marketing and product commercialization in the pharmaceutical industry, and his affiliations with industry and healthcare related organizations make him an asset to our Board of Directors.

Mark H. Rachesky, M.D. has been a director of the Company since 2005. Dr. Rachesky is the President of MHR Fund Management LLC and investment manager of various private investment funds that invest in inefficient market sectors, including special situation equities and distressed investments. Dr. Rachesky is currently the Non-Executive Chairman of the Board of Directors of Loral Space & Communications Inc. (NASDAQ:LORL), Lions Gate Entertainment Corp. (NYSE: LGF), Leap Wireless International, Inc. (NASDAQ: LEAP) and Telesat Canada, and also serves on the Board of Directors of Navistar International Corporation (NYSE:NAV). He formerly served on the Board of Directors of Neose Technologies, Inc (NASDAQ: NTEC) and of Nationshealth, Inc. (formerly quoted on OTCBB:NHRX). Dr. Rachesky is a graduate of Stanford University School of Medicine and Stanford University School of Business. Dr. Rachesky graduated from the University of Pennsylvania with a major in Molecular Aspects of Cancer. Dr. Rachesky's extensive investing and financial background, his thorough knowledge of capital markets and his training as an M.D., make him an asset to our Board of Directors.

Timothy G. Rothwell, has been a director of the Company since November 2009 and Chairman of the Board of Directors since September 2012. Mr. Rothwell is the former Chairman of Sanofi-Aventis U.S. From February 2007 to October 2009, Mr. Rothwell served as Chairman of Sanofi-Aventis U.S. From September 2004 to February 2007, Mr. Rothwell was President and Chief Executive Officer of that company, overseeing all domestic commercial operations as well as coordination of Industrial Affairs and Research and Development activities. From May 2003 to September 2004, Mr. Rothwell was President and Chief Executive Officer of Sanofi-Synthelabo, Inc. and was instrumental in the formation of Sanofi-Aventis U.S. in 2004. Prior to that, from January 1998 to May 2003, he served in various capacities at Pharmacia, including as President of the company's Global Prescription Business. From January 1995 to January 1998, Mr. Rothwell served as worldwide President of Rhone-Poulenc Rorer Pharmaceuticals and President of the company's Global Pharmaceutical Operations. In his long career, Mr. Rothwell has also served as Chief Executive Officer of Sandoz Pharmaceuticals, Vice President, Global Marketing and Sales at Burroughs Wellcome, and Senior Vice President of Marketing and Sales for the U.S. for Squibb Corporation. Mr. Rothwell holds a Bachelor of Arts from Drew University and earned his J.D. from Seton Hall University. He formerly served on the PhRMA Board of Directors, as well as the Institute of Medicine's Evidence-Based Medicine roundtable, the CEO Roundtable on Cancer, the Healthcare Businesswomen's Association Advisory Board, the Board of Trustees for the Somerset Medical Center Foundation, the Board of Trustees for the HealthCare Institute of New Jersey, as a Trustee of the Corporate Council for America's Children at the Children's Health Fund, the Board of Directors of Agenus (NASDAQ: AGEN), the Board of Directors of New American Therapeutics, and on the Board of Visitors for Seton Hall Law School. Presently, he is Chairman of the Board of Directors of Archimedes Pharma Ltd., Chairman of the Board of Directors of the PheoPara Alliance, a nonprofit 501(c)3 organization. Mr. Rothwell's broad business and leadership experiences in the pharmaceutical industry and his affiliations with industry, educational and healthcare related organizations make him an asset to our Board of Directors.

Michael Weiser, M.D., Ph.D. has been a director of the Company since 2005. Dr. Weiser is currently founder and co-chairman of Actin Biomed, a New York based healthcare investment firm advancing the discovery and development of novel treatments for unmet medical needs. Prior to joining Actin Biomed, Dr. Weiser was the Director of Research at Paramount BioCapital where he was responsible for the scientific, medical and financial evaluation of biomedical technologies and pharmaceutical products under consideration for development. Dr. Weiser completed his Ph.D. in Molecular Neurobiology at Cornell University Medical College and received his M.D. from New York University School of Medicine. He performed his post-graduate medical training in the Department of Obstetrics and Gynecology at New York University Medical Center. Dr. Weiser also completed a Postdoctoral Fellowship in the Department of Physiology and Neuroscience at New York University School of Medicine and received his B.A. in Psychology from University of Vermont. Dr. Weiser is a

member of The National Medical Honor Society, Alpha Omega Alpha, American Society of Clinical Oncology, American Society of Hematology and Association for Research in Vision and Ophthalmology. In addition, Dr. Weiser has received awards for both academic and professional excellence and is published extensively in both medical and scientific journals. Dr. Weiser currently serves on the board of directors of Chelsea Therapeutics International, (NASDAQ: CHTP), and Ziopharm Oncology, Inc., (NASDAQ: ZIOP), as well as several privately held companies. Dr. Weiser formerly served on the Board of Directors of Manhattan Pharmaceuticals, Inc., (OTCBB: TGTX), Hana Biosciences, Inc., (currently know as Talon Therapeutics, Inc., OTCBB: TLON.OB), and Vioquest Pharmaceuticals, Inc., (VOQP:OTC US). Dr. Weiser has an M.D. and a Ph.D., and his scientific, business and financial experiences, as well as his knowledge of the healthcare industry, capital markets, pharmaceutical products and biomedical technology development make him an asset to our Board of Directors.

Section 16(a) Beneficial Ownership Reporting Compliance

Section 16(a) of the Exchange Act, and the rules of the SEC require our directors, Executive Officers and persons who own more than 10% of common stock to file reports of their ownership and changes in ownership of common stock with the SEC. Our employees sometimes prepare these reports on the basis of information obtained from each director and Executive Officer. Based on written representations of the Company's directors and Executive Officers and on confirmation that no Form 5 was required to be filed, we believe that all reports required by Section 16(a) of the Exchange Act to be filed by its directors, Executive Officers and greater than ten (10%) percent owners during the last fiscal year were filed on time.

Code of Conduct for Officers and Employees and Code of Business Conduct and Ethics for Directors

The Company has a Code of Conduct that applies to all of our officers (including our principal executive officer, principal financial officer, and principal accounting officer or controller, or persons performing similar functions) and employees as well as a Code of Business Conduct and Ethics that applies specifically to the members of the Board of Directors. The directors are surveyed annually regarding their compliance with the policies as set forth in the Code of Business Conduct and Ethics for Directors. The Code of Conduct and the Code of Business Conduct and Ethics for Directors are available on the Corporate Governance section of our website at www.emisphere.com. The contents of our website are not incorporated herein by reference and the website address provided in this annual report is intended to be an inactive textual reference only. The Company intends to disclose on its website any amendment to, or waiver of, a provision of the Code of Conduct that applies to the Chief Executive Officer, Chief Financial Officer, or Controller. Our Code of Conduct contains provisions that apply to our Chief Executive Officer, Chief Financial Officer and all other finance and accounting personnel. These provisions comply with the requirements of a company code of ethics for financial officers that were promulgated by the SEC pursuant to the Exchange Act.

Stockholder Communications

We have an Investor Relations Office for all stockholder inquiries and communications. The Investor Relations Office facilitates the dissemination of accurate and timely information to our stockholders. In addition, the Investor Relations Office ensures that outgoing information is in compliance with applicable securities laws and regulations. All investor queries should be directed to our internal Director of Corporate Communications or our Corporate Secretary.

Election of Directors

The Governance and Nominating Committee identifies director nominees by reviewing the desired experience, mix of skills and other qualities to assure appropriate Board composition, taking into consideration the current Board members and the specific needs of the Company and the Board. Among the qualifications to be considered in the selection of candidates, the Committee considers the following attributes and criteria of candidates: experience, knowledge, skills, expertise, diversity, personal and professional integrity, character, business judgment and independence. Although it has no formal policy, our Board recognizes that nominees for the Board should reflect a reasonable diversity of backgrounds and perspectives, including those backgrounds and perspectives with respect to business experience, professional expertise, age, gender and ethnic background.

Our Board is comprised of accomplished professionals who represent diverse and key areas of expertise including national and international business, operations, manufacturing, finance and investing, management, entrepreneurship, higher education and science, research and technology. We believe our directors' wide range of professional experiences and backgrounds, education and skills has proven invaluable to the Company and we intend to continue leveraging this strength.

Nominations for the election of directors may be made by the Board of Directors or the Governance and Nominating Committee. The committee did not reject any candidates recommended within the preceding year by a beneficial owner of, or from a group of security holders that beneficially owned, in the aggregate, more than five percent (5%) of the Company's voting stock.

Although it has no formal policy regarding stockholder nominees, the Governance and Nominating Committee believes that stockholder nominees should be viewed in substantially the same manner as other nominees. Stockholders may make a recommendation for a nominee by complying with the notice procedures set forth in our bylaws. The Governance and Nominating Committee will give nominees recommended by stockholders in compliance with these procedures the same consideration that it gives to any board recommendations. To date, we have not received any recommendation from stockholders requesting that the Governance and Nominating Committee (or any predecessor) consider a candidate for inclusion among the committee's slate of nominees in the Company's proxy statement.

To be considered by the committee, a director nominee must have broad experience at the strategy/policy-making level in a business, government, education, technology or public interest environment, high-level managerial experience in a relatively complex organization or experience dealing with complex problems. In addition, the nominee must be able to exercise sound business judgment and provide insights and practical wisdom based on experience and expertise, possess proven ethical character, be independent of any particular constituency, and be able to represent all stockholders of the Company.

The committee will also evaluate whether the nominee's skills are complementary to the existing Board members' skills; the board's needs for operational, management, financial, technological or other expertise; and whether the individual has sufficient time to devote to the interests of Emisphere. The prospective board member cannot be a board member or officer at a competing company nor have relationships with a competing company. He/she must be clear of any investigation or violations that would be perceived as affecting the duties and performance of a director.

The Governance and Nominating Committee identifies nominees by first evaluating the current members of the Board of Directors willing to continue in service. Current members of the Board with skills and experience that are relevant to the business and who are willing to continue in service are considered for re-nomination, balancing the value of continuity of service by existing members of the board with that of obtaining a new perspective. If any member of the board does not wish to continue in service, or if the Governance and Nominating Committee or the board decides not to nominate a member for re-election, the Governance and Nominating Committee identifies the desired skills and experience of a new nominee and discusses with the board suggestions as to individuals that meet the criteria.

The Audit Committee

The Company has a standing Audit Committee established in accordance with Section 3(a)(58)(A) of the Exchange Act. The Audit Committee operates under a written charter adopted by the Board of Directors. The Audit Committee has reviewed the relevant standards of the Sarbanes-Oxley Act of 2002, the rules of the SEC, and the corporate governance listing standards of the NASDAQ regarding committee policies. The committee intends to further amend its charter, if necessary, as the applicable rules and standards evolve to reflect any additional requirements or changes. The updated Audit Committee charter can be found on our website at www.emisphere.com. The contents of our website are not incorporated herein by reference and the website address provided in this Report is intended to be an inactive textual reference only.

The Audit Committee is currently comprised of Timothy McInerney, (chairman), who was appointed to the Committee on September 13, 2012, Jacob M. Plotsker, and Michael Weiser, M.D., Ph.D. All of the members of the Audit Committee meet the independence requirements under the applicable provisions of the Exchange Act

and regulations promulgated thereunder and the relevant NASDAQ Listing Rules. The Board of Directors has determined that the Company does not currently have an “audit committee financial expert,” as that term is defined in Item 407(d)(5)(ii) of Regulation S-K, serving on the Audit Committee, as a result of the recent resignation of the previously designated audit committee financial expert from the Audit Committee.

ITEM 11. EXECUTIVE COMPENSATION

Summary Compensation Table — 2012, 2011 and 2010

The following table sets forth information regarding the aggregate compensation Emisphere paid during 2012, 2011 and 2010 to our Principal Executive Officer, our Principal Financial Officer, and the two other highest paid Executive Officers:

Name and Principal Position(1)	Year	Salary (\$)	Bonus (\$)	Stock Awards (\$)	Option Awards \$(2)	All Other Compensation(\$)	Total (\$)
Alan L. Rubino(3) , President and CEO	2012	120,000	0	0	144,885	3,600(4)	268,485
Michael R. Garone , Chief Financial Officer and Corporate Secretary(5)	2012	244,785	0	0	7,982	0	252,767
	2011	243,214	0	0	27,600	0	270,814
	2010	241,374	0	0	19,445	0	260,819
M. Gary I. Riley DVM, PhD,(6) . . . VP of Non-Clinical Development and Applied Biology	2012	282,035	0	0	5,321	0	287,356
	2011	280,225	0	0	18,400	0	298,625
	2010	278,104	0	0	19,445	0	297,549

- (1) The named executive officers, as defined in Regulation S-K, Item 402(a)(3), of the Company for the year ended December 31, 2012 were as follows: Mr. Rubino, Mr. Garone and Mr. Riley.
- (2) Amounts shown in this column represent the aggregate grant date fair value of stock option awards granted during the respective year computed in accordance with Financial Accounting Standards Board ASC Topic 718. This compares to prior years, during which amounts in these columns have represented the expensed accounting value of such awards. For assumptions used in the valuation of these awards please see Note 12 to our Financial Statements for the fiscal year ended December 31, 2012.
- (3) On September 13, 2012 Mr. Rubino joined the company as President and Chief Executive Officer.
- (4) All other compensation for Mr. Rubino represents an allowance for the use of a personal automobile in accordance with the terms of his employment contract.
- (5) On September 13, 2012, Mr. Garone concluded his tenure as Interim Chief Executive Officer of the Company.
- (6) On December 31, 2012, Mr. Riley executed a separation agreement with the company and executed an independent consulting agreement with the company effective January 1, 2013.

Compensation Discussion And Analysis

Executive Summary—

The discussion that follows outlines the compensation awarded to, earned by or paid to the named executive officers of the Company including a review of the principal elements of compensation, the objectives of the Company’s compensation program, what the program is designed to reward and why and how each element of compensation is determined.

In general, the Company operates in a marketplace where competition for talented executives is significant. The Company is engaged in the long-term development of its technology and of drug candidates, without the benefit of significant current revenues, and therefore its operations require it to raise capital in order to continue its activities. Our operations entail special needs and risks and require that the Company attempt to implement

programs that promote strong individual and group performance and retention of excellent employees. The Company's compensation program for named executive officers consists of cash compensation as base salary, medical, basic life insurance, long term disability, flexible spending accounts, paid time off, and defined contribution retirement plans as well as long term equity incentives offered through stock option plans. This program is developed in part by benchmarking against other companies in the biotechnology/pharmaceutical sectors, as well as by the judgment and discretion of our Board of Directors.

Employee salaries are benchmarked against Radford survey information. Radford is part of the Aon family brands. For more than 30 years, Radford has been a leading provider of compensation market intelligence to the high-tech and life sciences industries. Radford emphasizes data integrity and online access to data, tools and resources, as well as client service geared towards life sciences. Radford includes more than 2,000 participating companies globally. Their services offer full compensation consulting, reliable, current data analysis and reporting, customized data for competitive insight, and web access to data via the Radford Network.

Discussion and Analysis —

Objectives of the compensation and reward program — The biopharmaceutical marketplace is highly competitive and includes companies with far greater resources than ours. Our work involves the difficult, unpredictable, and often slow development of our technology and of drug candidates. Continuity of scientific knowledge, management skills, and relationships are often critical success factors to our business. The objectives of our compensation program for named executive officers is to provide competitive cash compensation, competitive health, welfare and defined contribution retirement benefits as well as long-term equity incentives that offer significant reward potential for the risks assumed and for each individual's contribution to the long-term performance of the Company. Individual performance is measured against long-term strategic goals, short-term business goals, scientific innovation, regulatory compliance, new business development, development of employees, fostering of teamwork and other Emisphere values designed to build a culture of high performance. These policies and practices are based on the principle that total compensation should serve to attract and retain those executives critical to the overall success of Emisphere and are designed to reward executives for their contributions toward business performance that is designed to build and enhance stockholder value.

Elements of compensation and how they are determined — The key elements of the executive compensation package are base salary (as determined by the competitive market and individual performance), the executive long term disability plan and other health and welfare benefits and long-term incentive compensation in the form of periodic stock option grants. The base salary (excluding payment for accrued but unused vacation) for the named Executive Officers for 2013 ranged from \$265,000 for its Vice President and Chief Financial Officer to \$400,000 for its President and Chief Executive Officer. In determining the compensation for each named Executive Officer, the Company generally considers (i) data from outside studies and proxy materials regarding compensation of executive officers at companies believed to be comparable, (ii) the input of other directors and the President and Chief Executive Officer (other than for his own compensation) regarding individual performance of each named executive officer and (iii) qualitative measures of Emisphere's performance, such as progress in the development of the Company's technology, the engagement of corporate partners for the commercial development and marketing of products, effective corporate governance, fiscal responsibility, the success of Emisphere in raising funds necessary to conduct research and development, and the pace at which the Company continues to advance its technologies in various clinical trials. Our board of directors and Compensation Committee's consideration of these factors is subjective and informal. However, in general, it has determined that the compensation for executive officers should be competitive with market data reflected within the 50th-75th percentile of biotechnology companies for corresponding senior executive positions. Compensation levels were derived from the compensation plan set in 2006 and were based in part by information received from executive compensation consultants, Pearl Myer and Partners, based in New York, N.Y. Compensable factors benchmarked include market capitalization, head count and location. While the Company has occasionally paid cash bonuses in the past, there is no consistent annual cash bonus plan for named executive officers. When considering the compensation of the Company's President and Chief Executive Officer, the Company receives information and analysis prepared or secured by the Company's outside executive compensation experts and survey data prepared by human resources management personnel as well as any additional outside information it

may have available. In addition, the board of directors and Compensation Committee of the Company considered the approval by our stockholders, on an advisory basis, of the compensation of our named executive officers at our most recent annual meeting of stockholders on May 31, 2012 in determining that our executive compensation is in line with our competitive position in the marketplace and appropriately designed to reward executives for their contributions toward overall business performance that ultimately enhances stockholder value.

The compensation program also includes periodic awards of stock options. The stock option element is considered a long-term incentive that further aligns the interests of executives with those of our stockholders and rewards long-term performance and the element of risk. Stock option awards are made at the discretion of the Board of Directors based on its subjective assessment of the individual contribution of the executive to the attainment of short and long-term Company goals, such as collaborations with partners, attainment of successful milestones under such collaborations and other corporate developments which advance the progress of our technology and drug candidates. Option grants, including unvested grants, for our named executive officers range from 165,000 for our Vice President of Non-Clinical Development and Applied Biology, 190,000 for our current Vice President, Chief Financial Officer and Corporate Secretary, to 2,000,000 for our President and Chief Executive Officer, as indicated in the accompanying tables. Stock option grants to named executive officers in 2011 were made in connection with the annual compensation review. With the exception of grants made to the Company's President and Chief Executive Officer, Alan L. Rubino, (described below in "**Employment Agreements and Potential Payments Upon Termination or Change-in-Control**"), the Company's policy with respect to stock options granted to executives is that grant prices should be equal to the fair market value of the common stock on the date of grant, that employee stock options should generally vest over a three to five-year period and expire in ten years from date of grant, and that options previously granted at exercise prices higher than the current fair market value should not be re-priced. Once performance bonuses or awards are issued, there are currently no policies in place to reduce, restate or otherwise adjust awards if the relevant performance measures on which they are based are restated or adjusted. The Company has no policy to require its named executive officers to hold any specific equity interest in the Company. The Company does not offer its named executive officers any nonqualified deferred compensation, a defined benefit pension program or any post retirement medical or other benefits.

Section 162(m) of the Internal Revenue Code of 1986, as amended, provides that compensation in excess of \$1,000,000 paid to the Chief Executive Officer or to any of the other four most highly compensated executive officers of a publicly held company will not be deductible for federal income tax purposes, unless such compensation is paid pursuant to one of the enumerated exceptions set forth in Section 162(m). The Company's primary objective in designing and administering its compensation policies is to support and encourage the achievement of the Company's long-term strategic goals and to enhance stockholder value. In general, stock options granted under the Company's 2000 Plan and 2007 Plan are intended to qualify under and comply with the "performance based compensation" exemption provided under Section 162(m) thus excluding from the Section 162(m) compensation limitation any income recognized by executives at the time of exercise of such stock options. Because salary and bonuses paid to our Chief Executive Officer and four most highly compensated executive officers have been below the \$1,000,000 threshold, the Compensation Committee has elected, at this time, to retain discretion over bonus payments, rather than to ensure that payments of salary and bonus in excess of \$1,000,000 are deductible. The Compensation Committee intends to review periodically the potential impacts of Section 162(m) in structuring and administering the Company's compensation programs.

Grants of Plan-Based Awards — 2012

The following table sets forth information regarding grants of plan-based awards in 2012:

Name	Grant Date	All Other		
		Option Awards: Number of Securities Underlying Options (#)	Exercise or Base Price of Option Awards (\$/Sh)	Grant Date Fair Value of Option Awards
Alan L. Rubino, President and Chief Executive Officer(1)	9/13/2012	2,000,000(2)	\$0.5225	1,045,000
Michael R. Garone, VP, Chief Financial Officer and Corporate Secretary	5/31/2012	45,000(3)	\$0.1990	8,955
M. Gary I. Riley DVM, PhD. VP, Non-Clinical Development and Applied Biology	5/31/2012	30,000(4)	\$0.1990	5,970

- (1) On September 13, 2012, Alan L. Rubino joined the company as President and Chief Executive Officer.
- (2) 500,000 exercisable at \$0.09 as of January 1, 2013; 500,000 exercisable at \$0.25 as of September 13, 2014; 500,000 exercisable at \$0.75 as of September 13, 2015 and 500,000 exercisable at \$1.00 as of September 13, 2016.
- (3) 11,250 exercisable as of 5/31/2013 and 5/31/2014, respectively and 22,500 exercisable as of 5/31/2015.
- (4) 7,500 exercisable as of 5/31/2013 and 5/31/2014, respectively and 15,000 exercisable as of 5/31/2015.

Outstanding Equity Awards at Fiscal Year-End — 2012

The following table sets forth information as to the number and value of unexercised options held by the Executive Officers as of December 31, 2012. There are no outstanding stock awards with executive officers:

Name	Number of Shares Underlying Unexercised Options (#) Exercisable	Number of Securities Underlying Unexercised Unearned Options (#) Unexercisable	Equity Incentive Plan Awards:		Option Expiration Date
			Number of Securities Underlying Unexercised Unearned Options (#)	Option Exercise Price (\$)	
Alan L. Rubino President and Chief Executive Officer	0	500,000(1)	0	\$ 0.09	9/13/2022
	0	500,000(2)	0	\$ 0.25	9/13/2022
	0	500,000(3)	0	\$ 0.75	9/13/2022
	0	500,000(4)	0	\$ 1.00	9/13/2022
Michael R. Garone, VP, Chief Financial Officer, and Corporate Secretary	75,000	0	0	\$ 4.03	8/29/2017
	20,000	0	0	\$ 0.62	4/12/2019
	10,000	10,000(5)	0	\$ 1.25	1/19/2020
	7,500	22,500(6)	0	\$ 0.92	7/15/2021
	0	45,000(7)	0	\$0.199	5/31/2022
M. Gary I. Riley DVM,(8) PhD. VP, Non-Clinical Development and Applied Biology	75,000	—	—	\$ 4.03	11/6/2017
	20,000	—	0	\$ 0.62	4/12/2019
	10,000	10,000(8)	0	\$ 1.25	1/19/2020
	5,000	15,000(8)	0	\$ 0.92	7/15/2021
	0	30,000(8)	0	\$0.199	5/31/2022

- (1) 500,000 exercisable as of 1/13/2013.
- (2) 500,000 exercisable as of 9/13/2014
- (3) 500,000 exercisable as of 9/13/2015

- (4) 500,000 exercisable as of 9/13/2016
- (5) 10,000 exercisable as of 1/19/2013
- (6) 7,500 exercisable as of 7/15/2013 and 15,000 exercisable as of 7/15/2014.
- (7) 11,250 exercisable as of 5/31/2013 and 5/31/2014, respectively and 22,500 exercisable as of 5/31/2015.
- (8) Pursuant to a Consulting Agreement, dated December 31, 2012, between the Company and Mr. Riley (the “Consulting Agreement”), all stock options previously granted by the Company shall continue to be effective and vest during the term of the Consulting Agreement in accordance with their respective terms, subject to any forfeiture, termination, or cancellation provision or any limitation on exercisability applicable thereto. Upon termination or expiration of the Consulting Agreement, all such stock options shall immediately cease vesting, all such options that are unvested shall terminate immediately, and all vested options shall be subject to any forfeiture, termination, or cancellation provision or any limitation on exercisability applicable thereto.

Option Exercises and Stock Vested — 2012

There were no stock options exercised by named executive officers during 2012.

Employment Agreements and Potential Payments Upon Termination or Change-in-Control

Employment Agreement with Alan L. Rubino, President and Chief Executive Officer

On September 17, 2012, in connection with his appointment to the position of President and Chief Executive Officer of the Company, effective September 13, 2012, Mr. Rubino entered into an Employment Agreement with the Company dated September 13, 2012 (the “Rubino Employment Agreement”), which provides as follows:

- The initial term of the Rubino Employment Agreement is three years, and the agreement will automatically renew for additional one-year terms unless either party provides notice of non-renewal to the other party at least six months prior to the end of the initial term or any renewal terms.
- The Rubino Employment Agreement provides for an annual base salary of \$400,000, with eligibility to receive an annual bonus of up to \$200,000.
- Pursuant to the Rubino Employment Agreement, upon termination by the Company without Cause or by Mr. Rubino for Good Reason (as such terms are defined in the Rubino Employment Agreement), subject to the delivery by Mr. Rubino of a general release of claims in favor of the Company, Mr. Rubino is entitled to (i) severance payments equal to his base salary for 12 months, except in the case of termination by the Company without Cause or termination by Mr. Rubino for Good Reason within 12 months following a Change of Control (as such terms are defined in the Rubino Employment Agreement), in which case Mr. Rubino is entitled to severance payments equal to his base salary for 18 months, (ii) prorated annual bonus payments that Mr. Rubino would have received but for his termination, (iii) prorated equity compensation that Mr. Rubino would have received but for his termination, and (iv) the cost of family health insurance coverage at the same rate as contributed by the Company prior to the termination until the earlier of twelve (12) months or loss of COBRA entitlement. In addition, in the case of termination by the Company without Cause or termination by Mr. Rubino for Good Reason within 12 months following a Change of Control (as such terms are defined in the Rubino Employment Agreement), Mr. Rubino is entitled to the vesting of all 2,000,000 stock option grants awarded pursuant to the terms of the Rubino Employment, regardless of date or condition of vesting.

Employment Agreement with Michael R. Garone, Chief Financial Officer and Corporate Secretary.

On January 14, 2013, the Company entered into an Employment Agreement (the “Garone Employment Agreement”) with Michael R. Garone, the Company’s Vice President, Chief Financial Officer and Corporate Secretary. The Garone Employment Agreement provides as follows:

- The effective date of the Garone Employment Agreement is January 14, 2013. The initial term of the Garone Employment Agreement is three years, and the agreement will automatically renew for additional one-year terms unless either party provides notice of non-renewal to the other party at least six months prior to the commencement of any renewal terms.

- The Garone Employment Agreement provides for an annual base salary of \$265,000, with eligibility to receive an annual bonus of up to \$79,500.
- Pursuant to the Garone Employment Agreement, upon termination by the Company without Cause, or by Mr. Garone for Good Reason (as such terms are defined in the Garone Employment Agreement), subject to the delivery by Mr. Garone of a general release of claims in favor of the Company, Mr. Garone is entitled to (i) severance payments equal to his base salary for 6 months, except in the case of termination by the Company without Cause or termination by Mr. Garone for Good Reason within 12 months following a Change of Control (as defined in the Garone Employment Agreement), in which case Mr. Garone is entitled to severance payments equal to his base salary for 12 months, (ii) prorated annual bonus payments that Mr. Garone would have received but for his termination, (iii) prorated equity compensation that Mr. Garone would have received but for his termination, and (iv) the cost of family health insurance coverage at the same rate as contributed by the Company prior to the termination until the earlier of twelve (12) months or loss of COBRA entitlement. In addition, in the case of termination by the Company without Cause or termination by Mr. Garone for Good Reason within 12 months following a Change of Control (as such terms are defined in the Garone Employment Agreement), Mr. Garone is entitled to the vesting of all stock option grants awarded pursuant to the terms of the Rubino Employment, regardless of date or condition of vesting.

Compensation Committee Interlocks and Insider Participation.

The current members of the Compensation Committee are Mr. McInerney, Dr. Rachesky and Dr. Weiser. No member of the Compensation Committee is or has ever been an executive officer or employee of our company (or any of its subsidiaries) and no “compensation committee interlocks” existed during fiscal year 2012. For further information about our processes and procedures for the consideration and determination of executive and director compensation, please see “**Executive Compensation — Compensation Discussion and Analysis.**”

Compensation Committee Report

The Compensation Committee operates under a written charter adopted by the Board of Directors. The Compensation Committee charter can be found on our website at www.emisphere.com. The contents of our website are not incorporated herein by reference and the website address provided in this annual report is intended to be an inactive textual reference only.

The Compensation Committee is responsible for the consideration of stock plans, performance goals and incentive awards, and the overall coverage and composition of the compensation arrangements related to executive officers. The Compensation Committee may delegate any of the foregoing duties and responsibilities to a subcommittee of the Compensation Committee consisting of not less than two members of the committee. The Compensation Committee has the authority to retain, at the expense of the Company, such outside counsel, experts and other advisors as deemed appropriate to assist it in the full performance of its functions. The Company’s Chief Executive Officer is involved in making recommendations to the Compensation Committee for compensation of Executive Officers (except for himself) as well as recommending compensation levels for directors.

Our executive compensation program is administered by the Compensation Committee of the Board of Directors. The Compensation Committee, which is composed of non-employee independent directors, is responsible for reviewing with Company management and approving compensation policy and all forms of compensation for executive officers and directors in light of the Company’s current business environment and the Company’s strategic objectives. In addition, the Compensation Committee acts as the administrator of the Company’s stock option plans. The Compensation Committee’s practices include reviewing and establishing executive officers’ compensation to ensure that base pay and incentive compensation are competitive to attract and retain qualified executive officers, and to provide incentive systems reflecting both financial and operating performance, as well as an alignment with stockholder interests. These policies are based on the principle that total compensation should serve to attract and retain those executives critical to the overall success of Emisphere and should reward executives for their contributions to the enhancement of stockholder value.

The Compensation Committee oversees risk management as it relates to our compensation plans, policies and practices in connection with structuring our executive compensation programs and reviewing our incentive compensation programs for other employees. The committee considered risk when developing our compensation programs and believes that the design of our current compensation programs do not encourage excessive or inappropriate risk taking. Our base salaries provide competitive fixed compensation, while annual cash bonuses and equity-based awards encourage long-term consideration rather than short-term risk taking.

The Compensation Committee has reviewed and discussed the Compensation Discussion and Analysis presented herein with the management of the Company. Based on that review and discussion, the Compensation Committee recommended to the Board of Directors that the Compensation Discussion and Analysis be included in the Form 10-K and Proxy Statement of the Company.

The Members of the Compensation Committee

Michael Weiser, M.D., Ph.D. (Chairman)

Mark H. Rachesky, M.D.

Mr. Timothy McInerney

Audit Committee Report

The Audit Committee operates under a written charter adopted by the Board of Directors. The Audit Committee has reviewed the relevant standards of the Sarbanes-Oxley Act of 2002, the rules of the SEC, and the corporate governance listing standards of the NASDAQ Listing Rules regarding committee policies. The committee intends to further amend its charter, if necessary, as the applicable rules and standards evolve to reflect any additional requirements or changes. The updated Audit Committee charter can be found on our website at www.emisphere.com. The contents of our website are not incorporated herein by reference and the website address provided in this Proxy Statement is intended to be an inactive textual reference only.

The Audit Committee is currently comprised of Mr. Timothy McInerney, (chairman), Jacob M. Plotsker and Michael Weiser, M.D., Ph.D.

All of the members of the Audit Committee meet the independence requirements under the applicable provisions of the Exchange Act and regulations promulgated thereunder and the relevant NASDAQ Listing Rules. The Board of Directors has determined that the Company does not currently have an “audit committee financial expert,” as that term is defined in Item 407(d)(5)(ii) of Regulation S-K, serving on the Audit Committee, as a result of the recent resignation of the previously designated audit committee financial expert from the Audit Committee.

On January 6, 2010, with the approval of the Audit Committee of the Company, the Company engaged McGladrey, LLP (“McGladrey”) to act as its independent registered public accounting firm. During the year ended December 2009, and in the subsequent interim periods through December 31, 2012, neither the Company nor anyone acting on its behalf had consulted with McGladrey on any of the matters or events set forth in Item 304(a)(2) of Regulation S-K.

Management has primary responsibility for the Company’s financial statements and the overall reporting process, including the Company’s system of internal control over financial reporting. McGladrey, the Company’s independent registered public accountants, audit the annual financial statements prepared by management, express an opinion as to whether those financial statements fairly present the financial position, results of operations and cash flows of the Company in conformity with accounting principles generally accepted in the United States, and report on internal control over financial reporting. McGladrey reports to the Audit Committee as members of the Board of Directors and as representatives of the Company’s stockholders.

The Audit Committee meets with management periodically to consider the adequacy of the Company’s internal control over financial reporting and the objectivity of its financial reporting. The Audit Committee discusses these matters with the appropriate Company financial personnel. In addition, the Audit Committee has discussions with management concerning the process used to support certifications by the Company’s Chief Executive Officer and Chief Financial Officer that are required by the SEC and the Sarbanes-Oxley Act to accompany the Company’s periodic filings with the SEC.

On an as needed basis, the Audit Committee meets privately with McGladrey. The Audit Committee also appoints the independent registered public accounting firm, approves in advance their engagements to perform audit and any non-audit services and the fee for such services, and periodically reviews their performance and independence from management. In addition, when appropriate, the Audit Committee discusses with McGladrey plans for the audit partner rotation required by the Sarbanes-Oxley Act.

Pursuant to its charter, the Audit Committee assists the board in, among other things, monitoring and reviewing (i) our financial statements, (ii) our compliance with legal and regulatory requirements and (iii) the independence, performance and oversight of our independent registered public accounting firm. Under the Audit Committee charter, the Audit Committee is required to make regular reports to the board.

During the 2012 Fiscal Year, the Audit Committee of the Board of Directors reviewed and assessed:

- the quality and integrity of the annual audited financial statements with management, including issues relating to accounting and auditing principles and practices, as well as the adequacy of internal controls, and compliance with regulatory and legal requirements;
- the qualifications and independence of the independent registered public accounting firm; and
- management's, as well as the independent auditor's, analysis regarding financial reporting issues and judgments made in connection with the preparation of our financial statements, including those prepared quarterly and annually, prior to filing our quarterly reports on Form 10-Q and annual report on Form 10-K.

The Audit Committee has reviewed the audited financial statements and has discussed them with both management and McGladrey, the independent registered public accounting firm. The Audit Committee has discussed with the independent auditors matters required to be discussed by the applicable Auditing Standards as periodically amended (including significant accounting policies, alternative accounting treatments and estimates, judgments and uncertainties). In addition, the independent auditors provided to the Audit Committee the written disclosures required by the applicable requirements of the Public Company Accounting Oversight Board regarding the independent auditors' communications with the Audit Committee concerning independence, and the Audit Committee and the independent auditors have discussed the auditors' independence from the Company and its management, including the matters in those written disclosures. The Audit Committee also received reports from McGladrey regarding all critical accounting policies and practices used by the Company, any alternative treatments of financial information used, generally accepted accounting principles that have been discussed with management, ramifications of the use of alternative treatments and the treatment preferred by McGladrey and other material written communications between McGladrey and management, including management letters and schedules of adjusted differences.

In making its decision to select McGladrey as Emisphere's independent registered public accounting firm for 2012, the Audit Committee considered whether the non-audit services provided by McGladrey are compatible with maintaining the independence of McGladrey.

Based upon the review and discussions referenced above, the Audit Committee, as comprised at the time of the review and with the assistance of the Company's Chief Financial Officer, recommended to the Board of Directors that the audited financial statements be included in our Annual Report on Form 10-K for the fiscal year ended December 31, 2012 and be filed with the SEC.

The Members of the Audit Committee

Mr. Timothy McInerney (Chairman)

Mr. Jacob M. Plotsker

Dr. Michael Weiser, M.D., Ph.D.

Compensation of Non-Employee Directors

A director who is a full-time employee of the Company receives no additional compensation for services provided as a director. It is the Company's policy to provide competitive compensation and benefits necessary to attract and retain high quality non-employee directors and to encourage ownership of Company stock to further align their interests with those of stockholders. The following represents the compensation of the non-employee members of the Board of Directors:

- Prior to June 24, 2009, each non-employee director received, on the date of each regular annual stockholder's meeting, a stock option to purchase 7,000 shares of our common stock under the 2007 Plan. The stock options vest on the six month anniversary of the grant date provided the director continuously serves as a director from the grant date through such vesting date. Notwithstanding the foregoing, any director who held any stock options granted before April 1, 2004 which remained unvested was ineligible to receive the annual 7,000-share stock option grant described in this paragraph unless and until all such prior options had vested. Stock options granted in 2009 have a stated expiration date of ten years after the date of grant, and are subject to accelerated vesting upon a change in control of Emisphere. If the holder of an option ceases to serve as a director, all previously granted options may be exercised to the extent vested within six months after termination of directorship (one year if the termination is by reason of death), except that, after April 1, 2004 (unless otherwise provided in an option agreement), if a director becomes an "emeritus director" of Emisphere immediately following his Board service, the vested options may be exercised for six months after termination of service as an "emeritus director." All unvested options expire upon termination of service on the Board of Directors.
- On May 15, 2009, in recognition of the roles and responsibilities of the Board of Directors and current market data, the non-employee members of the Board of Directors' compensation was revised to include a special one-time grant of 50,000 options to purchase shares of common stock granted on May 15, 2009, an annual retainer of \$35,000, payable quarterly in cash, and an annual stock option grant of 40,000 options to purchase shares of common stock. The annual stock option grants are granted each year on the date of the annual meeting of stockholders of the Company. The director must be an eligible director on the dates the retainers are paid and the stock options are granted. The options subject to the special one-time stock option grant and annual stock option grant would vest over three years in equal amounts on each anniversary of the grant date provided the director continuously serves as a director from the grant date through such vesting date, subject to accelerated vesting upon a change in control of Emisphere. Such options, once vested, remain exercisable through the period of the option term.
- All newly appointed directors shall receive an initial stock option grant on the date of appointment of 50,000 options to purchase shares of common stock. The options subject to such initial stock option grant vest over three years in equal amounts on each anniversary of the grant date provided the director continuously serves as a director from the grant date through such vesting date, subject to accelerated vesting upon a change in control of Emisphere. Such options, once vested, remain exercisable through the period of the option term.
- On May 15, 2009, Messrs. Weiser, Harkey and Rachesky received a one-time special stock option grant of 25,000 shares of common stock and a one-time fee of \$10,000 in recognition for their length of service on the Board of Directors. The options subject to these one-time stock option grants vest over three years in equal amounts on each anniversary of the grant date provided the director continuously serves as a director from the grant date through such vesting date, subject to accelerated vesting upon a change in control of Emisphere. Such options, once vested, remain exercisable through the period of the option term.
- On September 13, 2012, in connection with the appointment of Timothy Rothwell as the Chairman of the Board of Directors, and upon the recommendation of the Compensation Committee, the Board of Directors approved the following compensation for Mr. Rothwell for his service as Chairman of the Board:

An annual fee of \$180,000, to be paid in twelve equal monthly installments of \$15,000 each.

- A grant on September 13, 2012 of a non-qualified option (the "Initial Rothwell Option") to purchase 175,000 shares of the Company's common stock (the "Common Stock") in accordance with the 2007

Plan at a purchase price equal to the market price of the Common Stock on the date of said grant, such options to vest on January 1, 2013.

- On each of the first, second, and third anniversary of the grant of the Initial Rothwell Option, an additional grant of a non-qualified option to purchase 175,000 shares of the Common Stock in accordance with the 2007 Plan, at a price equal to the market price of the Common Stock on the date of said grant, such options to vest immediately on such date.
- Additional committee and chairperson fees are paid as follows:
 - \$10,000 audit committee chairperson fee;
 - \$2,500 audit committee member fee;
 - \$5,000 compensation committee chairperson fee;
 - \$1,000 compensation committee member fee;
 - \$2,500 governance and nominating committee chairperson fee; and
 - \$500 governance and nominating committee member fee.

The director must be an eligible director on the dates such fees are paid.

Director Compensation Table — 2012

The table below represents the compensation paid to our non-employee directors during the year ended December 31, 2012:

<u>Name</u>	<u>Fees Earned or Paid in Cash (\$)</u>	<u>Stock Awards \$(1)</u>	<u>Option Awards \$(1)</u>	<u>All Other Compensation (\$)</u>	<u>Total (\$)</u>
John D. Harkey, Jr.	36,305	0	7,095	0	43,400
Timothy McInerney	22,521	0	19,078	0	41,599
Jacob M. Plotsker	20,720	0	19,078	0	39,798
Mark H. Rachesky, M.D.	36,500	0	7,095	0	43,595
Timothy G. Rothwell	98,315	0	21,299	0	120,314
Michael Weiser, M.D., Ph.D.	45,000	0	7,095	0	52,095

- (1) The value listed in the above table represents the fair value of the options recognized as expense under FASB ASC Topic 718 during 2012, including unvested options granted before 2012 and those granted in 2012. Fair value is calculated as of the grant date using the Black-Scholes Model. The determination of the fair value of share-based payment awards made on the date of grant is affected by our stock price as well as assumptions regarding a number of complex and subjective variables. Our assumptions in determining fair value are described in note 12 to our audited financial statements for the year ended December 31, 2012.

The following table summarizes the aggregate number of option awards and stock awards held by each non-employee director at December 31, 2012.

Name	Option Awards					Stock Awards	
	Number of Securities Underlying Unexercised Options (#) Exercisable	Number of Securities Underlying Unexercised Options (#) Unexercisable	Equity Incentive Plan Awards: Number of Securities Underlying Unexercised Options (#)	Option Exercise Price (\$)	Option Expiration Date	Number of Shares of Stock That Have not Vested (#)	Market Value of Shares or Units of Stock That Have not Vested (\$)
John D. Harkey, Jr.	7,000	0	0	8.97	5/26/2016	0	0
	7,000	0	0	3.76	4/20/2017		
	7,000	0	0	3.79	8/08/2018		
	75,000	0	0	0.93	5/15/2019		
	26,666	13,334(1)	0	1.20	9/16/2020		
	13,333	26,667(2)	0	1.53	9/19/2021		
	0	40,000(3)	0	0.199	5/31/2022		
Timothy McInerney	0	50,000(4)	0	0.27	3/01/2022	0	0
	0	40,000(3)	0	0.199	5/31/2022		
Jacob M. Plotsker	0	50,000(4)	0	0.27	3/01/2022	0	0
	0	40,000(3)	0	0.199	5/31/2022		
Mark H. Rachesky, M.D.	7,000	0	0	3.76	4/20/2017	0	0
	7,000	0	0	3.79	8/08/2018		
	75,000	0	0	0.93	5/15/2019		
	26,666	13,334(1)	0	1.20	9/16/2020		
	13,333	26,667(2)	0	1.53	9/19/2021		
	0	40,000(3)	0	0.199	5/31/2022		
Timothy G. Rothwell	50,000	0	0	0.70	11/5/2019	0	0
	26,666	13,334(1)	0	1.20	9/16/2020		
	13,333	26,667(2)	0	1.53	9/19/2021		
	0	40,000(3)	0	0.199	5/31/2022		
	0	175,000(5)		0.09	9/13/2022		
Michael Weiser, M.D., Ph.D.	7,000	0	0	8.97	5/26/2016	0	0
	7,000	0	0	3.76	4/20/2017		
	7,000	0	0	3.79	8/08/2018		
	75,000	0	0	0.93	5/15/2019		
	26,666	13,334(1)	0	1.20	9/16/2020		
	13,333	26,667(2)	0	1.53	9/19/2021		
	—	40,000(3)	0	0.199	5/31/2022		

(1) 13,334 exercisable as of 9/16/2013

(2) 13,333 exercisable as of 9/19/2013 and 13,334 exercisable as of 9/19/2014.

(3) 13,333 exercisable as of 5/31/2013 and 5/31/2014, respectively and 13,334 exercisable as of 5/31/2015.

(4) 16,666 exercisable as of 3/1/2013 and 16,667 exercisable 3/1/2014 and 3/1/2015, respectively

(5) 175,000 exercisable as of 1/1/2013.

ITEM 12. SECURITY OWNERSHIP OF CERTAIN BENEFICIAL OWNERS AND MANAGEMENT AND RELATED STOCKHOLDER MATTERS

Securities Available For Future Issuance Under Equity Plans

The following table provides information as of December 31, 2012 about the common stock that may be issued upon the exercise of options granted to employees, consultants or members of our Board of Directors under our existing equity compensation plans, including the 2000 Stock Option Plan, the 2002 Broad Based Plan, the 2007 Stock Award and Incentive Plan (collectively the “Plans”) the Stock Incentive Plan for Outside Directors and the Directors Deferred Compensation Plan. For a discussion of the material features of the Plans, please see Note 12 to the Financial Statements included in this Report.

<u>Plan Category</u>	<u>(a) Number of Securities to be Issued Upon Exercise of Outstanding Options</u>	<u>(b) Weighted Average Exercise Price of Outstanding Options</u>	<u>(c) Number of Securities Remaining Available for Future Issuance Under Equity Compensation Plans (Excluding Securities Reflected in Column (a))</u>
Equity Compensation Plans Approved by Security Holders			
The Plans	4,103,410	\$1.02	339,718
Stock Incentive Plan for Outside Directors	42,000	5.93	0
Equity Compensation Plans not approved by Security Holders(1)	<u>5,000</u>	<u>4.12</u>	<u>0</u>
Total	4,150,410	\$1.07	339,718

(1) Our Board of Directors has granted options which are currently outstanding for a former consultant. The Board of Directors determines the number and terms of each grant (option exercise price, vesting and expiration date). This grant was made on July 14, 2003.

Common Stock Ownership by Directors and Executive Officers and Principal Holders

Directors and Executive Officers

The following table sets forth certain information, as of March 1, 2013, regarding the beneficial ownership of the common stock by (i) each director; (ii) each named executive officer; (iii) all of our directors and named executive officers as a group. The number of shares beneficially owned by each director or Executive Officer is determined under the rules of the SEC, and the information is not necessarily indicative of beneficial ownership for any other purpose. Under these rules, beneficial ownership includes any shares as to which the individual has the sole or shared voting power (which includes power to vote, or direct the voting of, such security) or investment power (which includes power to dispose of, or direct the disposition of, such security). In computing the number of shares beneficially owned by a person and the percentage ownership of that person, shares of common stock subject to options, warrants or convertible notes held by that person that are currently exercisable or convertible into Common Stock or will become exercisable or convertible into common stock within 60 days after March 1, 2013 are deemed outstanding, while such shares are not deemed outstanding for purposes of computing percentage ownership of any other person. Unless otherwise indicated, all persons named as beneficial owners of common stock have sole voting power and sole investment power with respect to the shares indicated as beneficially owned:

<u>Name and Address(a)</u>	<u>Common Shares Beneficially Owned (b)</u>	<u>Common Shares Underlying Options</u>	<u>Percent Of Class</u>
Alan L. Rubino (e)	500,000	500,000	*
Michael R. Garone	262,500	162,500	*
Mark H. Rachesky, M.D.	39,331,867(c)	20,848,204(d)	48.2%
Timothy G. Rothwell (f)	264,999	264,999	*
Michael Weiser, M.D., Ph.D.	135,999	129,586	*
John D. Harkey, Jr.	135,999	129,586	*
Timothy McInerney	16,666	16,666	*
Jacob M. Plotsker	16,666	16,666	*
All directors and executive officers as a group	40,664,696	22,068,207	49.1%

* Less than 1%

- (a) Unless otherwise specified, the address of each beneficial owner is c/o Emisphere Technologies, Inc., 4 Becker Farm Road, Suite 103, Roseland, New Jersey,
- (b) The number of shares set forth for each Director and Executive Officer consists of direct and indirect ownership of shares, including stock options, deferred common share units, restricted stock and, in the case of Dr. Rachesky, shares of common stock that can be obtained upon conversion of convertible notes and exercise of warrants, as further described in footnotes (c) and (d) below.
- (c) This number consists of:
- 18,483,663 shares of common stock held for the accounts of the following entities:
 - 6,226,054 shares held for the account of MHR Capital Partners Master Account LP (“Master Account”)
 - 847,125 shares held for the account of MHR Capital Partners (100) LP (“Capital Partners (100)”)
 - 3,240,750 shares held for the account of MHR Institutional Partners II LP (“Institutional Partners II”)
 - 8,164,436 shares held for the account of MHR Institutional Partners IIA LP (“Institutional Partners IIA”)
 - 5,298 shares held directly by Mark H. Rachesky, M.D.
 - 8,721,429 shares of common stock that can be obtained by the following entities upon conversion of the Convertible Notes, including 367,909 shares of common stock issuable to the following entities as

payment for accrued but unpaid interest on the Convertible Notes since the most recent interest payment date (December 31, 2012) through the date that is 60 days after March 1, 2013:

- 1,756,213 shares held by Master Account
- 240,165 shares held by Capital Partners (100)
- 1,910,903 shares held by Institutional Partners II
- 4,814,148 shares held by Institutional Partners IIA
- 11,997,776 shares of common stock that can be obtained by the following entities upon exercise of warrants:
 - 2,704,898 shares held by Master Account
 - 368,479 shares held by Capital Partners (100)
 - 2,535,842 shares held by Institutional Partners II
 - 6,388,557 shares held by Institutional Partners IIA
- 7,000 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$3.76 per share
- 7,000 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$3.79 per share
- 75,000 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$0.93 per share.
- 26,666 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$1.20 per share.
- 13,333 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$1.53 per share.

MHR Advisors LLC (“Advisors”) is the general partner of each of Master Account and Capital Partners (100), and, in such capacity, may be deemed to beneficially own the shares of common stock held for the accounts of each of Master Account and Capital Partners (100). MHR Institutional Advisors II LLC (“Institutional Advisors II”) is the general partner of each of Institutional Partners II and Institutional Partners IIA, and, in such capacity, may be deemed to beneficially own the shares of common stock held for the accounts of each of Institutional Partners II and Institutional Partners IIA. MHR Fund Management LLC (“Fund Management”) is a Delaware limited liability company that is an affiliate of and has an investment management agreement with Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA, and other affiliated entities, pursuant to which it has the power to vote or direct the vote and to dispose or to direct the disposition of the shares of common stock held by such entities and, accordingly, Fund Management may be deemed to beneficially own the shares of common stock held for the account of each of Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA. Dr. Rachesky is the managing member of (i) MHRC LLC, the managing member of Advisors, (ii) MHRC II LLC, the managing member of Institutional Advisors II, and (iii) MHR Holding LLC, the managing member of Fund Management, and, in such capacity, may be deemed to beneficially own the shares of common stock held for the accounts of each of Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA.

- (d) This number consists of (i) 8,721, 429 shares of common stock that can be obtained by Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA upon conversion of the Convertible Notes, (ii) 11,997,776 shares of common stock that can be obtained by Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA upon exercise of warrants, (iii) 128,999 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options.

- (e) On September 13, 2012, Alan L. Rubino joined the Company as President and Chief Executive Officer, and was appointed as a Class II Director.
- (f) On September 13, 2012 Timothy Rothwell was elected Chairman of the Board of Directors of the Company.

Principal Holders of Common Stock

The following table sets forth information regarding beneficial owners of more than five (5%) percent of the outstanding shares of Common Stock as of March 1, 2013:

<u>Name and Address</u>	<u>Number of Shares Beneficially Owned</u>	<u>Percent Of Class(a)</u>
Bai Ye Feng 16A Li Dong Building No.9 Li Yuen Street East Central, Hong Kong	6,184,389(b)	9.87%
Mark H. Rachesky, M.D. 40 West 57th Street, 24th Floor New York, NY 10019	39,331,867(c)	48.2%
MHR Fund Management LLC 40 West 57th Street, 24th Floor New York, NY 10019	39,197,570(c)	48.2%
MHR Institutional Advisors II LLC 40 West 57th Street, 24th Floor New York, NY 10019	27,054,636(c)	35.4%
MHR Institutional Partners IIA LP 40 West 57th Street, 24th Floor New York, NY 10019	19,367,141(c)	26.9%
MHR Advisors LLC 40 West 57th Street, 24th Floor New York, NY 10019	12,142,934(c)	18.5%
MHR Capital Partners Master Account LP 40 West 57th Street, 24th Floor New York, NY 10019	10,687,165(c)	16.4%
MHR Institutional Partners II LP 40 West 57th Street, 24th Floor New York, NY 10019	7,687,495(c)	11.8%
MHRC LLC 40 West 57th Street, 24th Floor New York, NY 10019	12,142,935(c)	18.5%
MHRC II LLC 40 West 57th Street, 24th Floor New York, NY 10019	27,054,636(c)	35.4%
MHR Holdings LLC 40 West 57th Street, 24th Floor New York, NY 10019	39,197,570(c)	48.2%

- (a) Applicable percentage ownership is based on 60,687,478 shares of Common Stock outstanding as of March 1, 2013. In computing the number of shares beneficially owned by a person and the percentage ownership of that person, shares of Common Stock subject to options, warrants or convertible notes held by that person that are currently exercisable or convertible into Common Stock or will become exercisable or convertible into Common Stock within 60 days after March 1, 2013 are deemed outstanding, while such shares are not deemed outstanding for purposes of computing percentage ownership of any other person.

- (b) Information based on Mr. Feng's Schedule 13-G/A filed with the SEC on February 14, 2012. Mr. Feng beneficially owns an aggregate of 6,184,389 shares of common stock, consisting of 3,908,738 shares of common stock held by Mr. Feng, warrants to purchase up to 1,981,651 shares of common stock held by Mr. Feng, and 294,000 shares of common stock owned of record by Lighthouse Consulting Limited, a Hong Kong company of which Mr. Feng is a principal and therefore may be deemed to be a beneficial holder of such shares.
- (c) Information based on the beneficial owner's Amendment Number 19 to Schedule 13D/A, filed with the SEC on January 10, 2013. Please refer to footnote "c" in the table under "Directors and Executive Officers" (above).

ITEM 13. CERTAIN RELATIONSHIPS, RELATED TRANSACTIONS AND DIRECTOR INDEPENDENCE

Related Party Transaction Approval Policy

In February 2007, our Board of Directors adopted a written related party transaction approval policy, which sets forth our Company's policies and procedures for the review, approval or ratification of any transaction required to be reported in our filings with the SEC. The Company's policy with regard to related party transactions is that all material transactions non-compensation related are to be reviewed by the Audit Committee for any possible conflicts of interest. The Compensation Committee will review all material transactions that are related to compensation. All related party transactions approved by either the Audit Committee or Compensation Committee shall be disclosed to the Board of Directors at the next meeting.

Transactions with MHR

Mark H. Rachesky, M.D. is a director and member of the Company's Compensation Committee and its Governance and Nominating Committee. Dr. Rachesky is also the managing member of (i) MHRC LLC ("MHRC"), the managing member of MHR Advisors LLC ("Advisors"), which in turn is the general partner of MHR Capital Partners Master Account LP ("Master Account") and MHR Capital Partners (100) LP ("Capital Partners 100"); (ii) MHRC II LLC ("MHRC II"), the managing member of MHR Institutional Advisors II LLC ("Institutional Advisors II"), which is in turn the general partner of MHR Institutional Partners II LP ("Institutional Partners II") and MHR Institutional Partners IIA LP ("Institutional Partners IIA"); and (iii) MHR Holdings LLC ("MHR Holdings"), the managing member of MHR Fund Management LLC, ("Fund Management" and, together with MHRC, MHRC II, MHR Holdings, Advisors, Institutional Advisors II, Master Account, Capital Partners 100, Institutional Partners II, and Institutional Partners IIA, "MHR") which is an affiliate of and has an investment management agreement with Master Account, Capital Partners 100, Institutional Partners II, and Institutional Partners IIA. In each of the transactions below with MHR that occurred during 2009, 2010, 2011, or 2012, the Company was advised by an independent committee of the Company's Board of Directors.

August 2009 Financing

On August 19, 2009, the Company entered into a Securities Purchase Agreement with MHR to sell 6,015,037 shares of common stock and warrants to purchase 3,729,323 shares of common stock for gross proceeds of \$4,000,000. Each unit, consisting of one share of common stock and a warrant to purchase 0.62 of a share of common stock, was sold for a purchase price of \$0.665. The warrants to purchase additional shares are exercisable at an exercise price of \$0.70 per share and will expire on August 21, 2014. For a more detailed discussion, please see Notes 8 and 9 to our Financial Statements included herein.

June 2010 Notes and Warrants

In connection with the Company's agreement with Novartis entered in June 2010 (the "Novartis Agreement"), the Company, Novartis and MHR entered into a non-disturbance agreement (the "Non-Disturbance Agreement"), pursuant to which MHR agreed to limit certain rights and courses of action that it would have available to it as a secured party under its Senior Secured Term Loan Agreement and Pledge and Security Agreement with the Company (collectively, the "Loan and Security Agreement"). Additionally, Novartis and MHR entered into a license agreement pursuant to which MHR agreed to grant a license to Novartis upon the occurrence of certain events and subject to satisfaction of certain conditions. MHR also consented to the Company entering into the Novartis Agreement, which consent was required under the Loan and Security Agreement, and agreed to enter into an agreement comparable to the Non-Disturbance Agreement at some point in the future in connection with another potential Company transaction (the "Future Transaction Agreement"). For a more detailed discussion, please see Notes 8 and 9 to our Financial Statements included herein.

In consideration of the agreements and consent provided by MHR described in the foregoing paragraph, the Company entered into an agreement with MHR (the "MHR Letter Agreement") pursuant to which the Company agreed to reimburse MHR for its legal expenses incurred up to \$500,000 in connection with the agreements

entered into in connection with the Novartis transaction and up to \$100,000 in connection with the Future Transaction Agreement. These reimbursements were paid in the form of non-interest bearing promissory notes for \$500,000 and \$100,000 issued to MHR on June 4, 2010. Pursuant to the MHR Letter Agreement, the Company also granted to MHR warrants to purchase 865,000 shares of its common stock, with an exercise price of \$2.90 per share and an expiration date of August 21, 2014. For a more detailed discussion, please see Notes 8 and 9 to our Financial Statements included herein.

July 2010 Promissory Notes

On July 29, 2010, in consideration for \$500,000 in bridge financing funds provided to the Company, we issued to MHR promissory notes with an aggregate principal amount of \$525,000 (the “July 2010 MHR Notes”). The July 2010 MHR Notes provided for an interest rate of 15% per annum, and were due and payable on October 27, 2010. During the quarter ended September 30, 2010, certain conditions caused the maturity date of the July 2010 MHR Notes to accelerate, and the July 2010 MHR Notes were accordingly paid off. See Note 8 to our Financial Statements included herein for further discussion.

August 2010 Financing

On August 25, 2010, the Company entered into a securities purchase agreement with MHR (the “August 2010 MHR Financing”) pursuant to which the Company agreed to sell an aggregate of 3,497,528 shares of its common stock and warrants to purchase a total of 2,623,146 additional shares of its common stock for total gross proceeds of \$3,532,503. Each unit, consisting of one share of common stock and a warrant to purchase 0.75 shares of common stock, was sold at a purchase price of \$1.01. The warrants to purchase additional shares are exercisable at a price of \$1.26 per share and will expire on August 26, 2015. On the same date, the Company also entered into a securities purchase agreement with certain institutional investors to sell common stock and warrants for total gross proceeds of \$3,532,503 (collectively, with the August 2010 MHR Financing, the “August 2010 Financing”).

In connection with the August 2010 Financing, the Company entered into a waiver agreement with MHR, pursuant to which MHR waived certain anti-dilution adjustment rights under its 11% senior secured notes (the “MHR Convertible Notes”) and warrants issued by the Company to MHR in September 2006 that would otherwise have been triggered by the financings described above. As consideration for such waiver, the Company issued to MHR a warrant to purchase 975,000 shares of common stock and agreed to reimburse MHR for 50% of its legal fees up to a maximum reimbursement of \$50,000. The terms of such warrant are identical to the warrants issued to MHR in the August 2010 MHR Financing transaction described above. For further discussion, see Notes 8 and 9 to our Financial Statements included herein.

July 2011 Financing

On June 30, 2011, the Company entered into a purchase agreement with MHR, pursuant to which, on July 6, 2011, it sold an aggregate of 4,300,438 shares of its common stock and warrants to purchase a total of 3,010,307 shares of its common stock for gross proceeds, before deducting fees and expenses and excluding the proceeds, if any, from the exercise of the MHR Warrants of \$3,749,981.94. As part of the July 2011 Financing, the Company entered into the a waiver agreement with MHR, pursuant to which MHR waived certain anti-dilution adjustment rights under the MHR Convertible Notes and certain warrants issued by the Company to MHR that would otherwise have been triggered by the financing with other institutional investors described above. As consideration for such waiver, the Company issued to MHR warrants to purchase 795,000 shares of common stock and agreed to reimburse MHR for up to \$25,000 of its legal fees. Each unit, consisting of one share of common stock and a warrant to purchase 0.7 shares of common stock, were sold at a purchase price of \$0.872. The warrants are exercisable at an exercise price of \$1.09 per share and will expire July 6, 2016.

2012 Bridge Loan.

On October 17, 2012, the Company issued a promissory note (the “Bridge Note”) to Institutional Partners IIA, Institutional Partners II, Master Account, and Capital Partners 100 (collectively, the “Bridge Lender”) in the principal amount of \$1,400,000 to be advanced by the Bridge Lender to the Company pursuant to the terms

thereof (the “Bridge Loan”). The Bridge Note provides for an interest rate of 13% per annum. Pursuant to the terms of the Bridge Note, the entire principal amount advanced by the Bridge Lender pursuant to the Bridge Note, plus all accrued interest thereon, is payable on demand. The obligations under the Bridge Note are secured by a first priority lien on substantially all of our assets pursuant to the terms of the Security Agreement, as further described below.

Also on October 17, 2012, in connection with the issuance of the Bridge Note, Emisphere and MHR entered into that certain Amendment to Pledge and Security Agreement (the “Amendment”). The Amendment amends the Security Agreement to, among other things, include the Bridge Loan as an obligation secured by the terms of the Security Agreement and to include the Bridge Lender as a beneficiary of the terms of the Security Agreement. Pursuant to the terms of the Novartis Agreement described above, the Amendment expressly excludes certain intellectual property licensed to Novartis from the collateral securing the Bridge Loan. In accordance with the terms of the MHR Convertible Notes, MHR also provided a written consent to allow for the issuance of the Bridge Note and related obligations provided under the Amendment.

Ongoing Obligations Under Convertible Notes and Warrants

The MHR Convertible Notes contain provisions related to anti-dilution and redemption rights. In addition, MHR has certain rights regarding election of directors, participation in future equity financings and other related matters, which rights are set forth in the Company’s certificate of incorporation and bylaws, as amended. In addition to the warrants described above, the Company issued warrants to purchase common stock to MHR in 2007 which are still outstanding. These warrants provide for anti-dilution protection, and the fair value of the warrants is estimated at the end of each quarterly reporting period using Black-Sholes models. See Notes 8 and 9 to our Financial Statements included herein for a further discussion of MHR’s rights under the MHR Convertible Notes and warrants.

Transaction with Bai Ye Feng

Bai Ye Feng has been the beneficial owner of more than five (5%) percent of the outstanding shares of Common Stock since the August 2010 Financing. In the July 2011 Financing, Mr. Feng purchased 688,073 shares of Common Stock and warrants to purchase 481,651 shares of Common Stock, for an aggregate purchase price of \$600,000. The warrants are exercisable at an exercise price of \$1.09 per share and will expire July 6, 2016. The total dollar amount of the July 2011 Financing was \$3,749,982.

Information about Board of Directors

Our business is overseen by the Board of Directors. It is the duty of the Board of Directors to oversee the Chief Executive Officer and other senior management in the competent and ethical operation of the Company on a day-to-day basis and to assure that the long-term interests of the stockholders are being served. To satisfy this duty, our directors take a proactive, focused approach to their position, and set standards to ensure that the Company is committed to business success through maintenance of the highest standards of responsibility and ethics. The Board of Directors is kept advised of our business through regular verbal or written reports, Board of Directors meetings, and analysis and discussions with the Chief Executive Officer and other officers of the Company.

Members of the Board of Directors bring to us a wide range of experience, knowledge and judgment. Our governance organization is designed to be a working structure for principled actions, effective decision-making and appropriate monitoring of both compliance and performance.

The Board of Directors has affirmatively determined that Mr. John D. Harkey, Jr., Mr. Timothy McInerney, Mr. Jacob M. Plotsker, Dr. Mark H. Rachesky, Mr. Timothy G. Rothwell, and Dr. Michael Weiser are independent directors within the meaning of Rule 4200 of the NASDAQ Marketplace Rules. Mr. Rubino is the sole member of the Board of Directors who is not independent. The independent directors meet in separate sessions at the conclusion of board meetings and at other times as deemed necessary by the independent directors, in the absence of Mr. Rubino. Mr. Rothwell currently serves as Chairman. Matters are explored in Committee and brought to the full Board for discussion or action.

Committees of the Board of Directors

The Board of Directors has established an Audit Committee, a Compensation Committee and a Governance and Nominating Committee. Each of the committees of the Board of Directors acts pursuant to a separate written charter adopted by the Board of Directors.

The Audit Committee is currently comprised of Mr. McInerney (Chairman), who became a member of the Committee on March 23, 2012, and was appointed Chairman on September 13, 2012, Jacob M. Plotsker, and Dr. Weiser. All of the members of the Audit Committee meet the independence requirements under the applicable provisions of the Exchange Act and regulations promulgated thereunder and the relevant NASDAQ Listing Rules. The Board of Directors has determined that the Company does not currently have an “audit committee financial expert,” as that term is defined in Item 407(d)(5)(ii) of Regulation S-K, serving on the Audit Committee as a result of the recent resignation of the previously designated audit committee financial expert from the Audit Committee.

The Compensation Committee is currently comprised of Dr. Weiser (Chairman), Dr. Rachesky, and Mr. McInerney. All members of the Compensation Committee are independent within the meaning of Rule 4200 of the NASDAQ Marketplace Rules, non-employee directors within the meaning of the rules of the Securities and Exchange Commission and “outside” directors within the meaning set forth under Internal Revenue Code Section 162(m). The Compensation Committee’s responsibilities and duties are summarized in the report of the Compensation Committee and in the Compensation Committee charter also available on our website.

The Governance and Nominating Committee is currently comprised of Dr. Weiser (chairman), Dr. Rachesky, and Mr. Plotsker. All members of the Governance and Nominating Committee are independent within the meaning of Rule 4200 of the NASDAQ Marketplace Rules. The Governance and Nominating Committee’s responsibilities and duties are set forth in the Governance and Nominating Committee charter on our website. Among other things, the Governance and Nominating Committee is responsible for recommending to the board the nominees for election to our Board of Directors and the identification and recommendation of candidates to fill vacancies occurring between annual stockholder meetings.

The table below provides membership information for each committee of the Board of Directors as of March 15, 2013:

<u>Name</u>	<u>Board</u>	<u>Audit</u>	<u>Compensation</u>	<u>Governance and Nominating</u>
Alan L. Rubino(1)(4)	X			
Mark H. Rachesky, M.D.(2)	X		X	X
Michael Weiser, M.D., Ph.D.(2)	X	X	X*	X*
John D. Harkey, Jr.(3)	X			
Timothy G. Rothwell(3)	X*			
Timothy McInerney(4)	X	X*	X	
Jacob M. Plotsker(4)	X	X		X

* Chair

- (1) Joined the company as President, Chief Executive Officer and Class II Director as of September 13, 2012.
- (2) Class III directors: Term as director is expected to expire in 2014.
- (3) Class I directors: Term as director is expected to expire in 2015.
- (4) Class II directors. Term as director is expected to expire in 2013.

Board Involvement in Risk Oversight

Our Board of Directors is responsible for oversight of the Company’s risk assessment and management process. We believe risk can arise in every decision and action taken by the Company, whether strategic or operational. Our comprehensive approach is reflected in the reporting processes by which our management provides timely and fulsome information to the Board of Directors to support its role in oversight, approval and decision-making.

The Board of Directors closely monitors the information it receives from management and provides oversight and guidance to our management team concerning the assessment and management of risk. The Board of Directors approves the Company's high level goals, strategies and policies to set the tone and direction for appropriate risk taking within the business.

The Board of Directors delegated to the Compensation Committee basic responsibility for oversight of management's compensation risk assessment, and that committee reports to the board on its review. Our Board of Directors also delegated tasks related to risk process oversight to our Audit Committee, which reports the results of its review process to the Board of Directors. The Audit Committee's process includes a review, at least annually, of our internal audit process, including the organizational structure, as well as the scope and methodology of the internal audit process. The Governance and Nominating Committee oversees risks related to our corporate governance, including director performance, director succession, director education and governance documents.

In addition to the reports from the Board committees, our board periodically discusses risk oversight.

Meetings Attendance

During the 2012 fiscal year, our Board of Directors held 10 meetings. With the exception of Mr. Rothwell, Mr. Plotsker, and Mr. Harkey, who each attended 9 of 10 Board meetings, and Dr. Weiser, who attended 3 of 4 Audit Committee meetings held during 2012, each director attended 100 percent of the aggregate number of Board of Directors meetings and committee meetings of which he was a member that were held during the period of his service as a director.

The Audit Committee met 4 times during the 2012 fiscal year.

The Compensation Committee met 2 times during the 2012 fiscal year.

The Governance and Nominating Committee met 2 times during the 2012 fiscal year.

The Company does not have a formal policy regarding attendance by members of the Board of Directors at the Company's annual meeting of stockholders, although it does encourage attendance by the directors.

ITEM 14. *PRINCIPAL ACCOUNTANT FEES AND SERVICES*

The following table presents fees for professional audit services rendered by McGladrey for the audit of our annual financial statements for the years ended December 31, 2012 and December 31, 2011, respectively, and fees billed for other services rendered by McGladrey during the respective periods.

	<u>2012</u>	<u>2011</u>
Type of Fees		
Audit Fees(1)	\$267,000	\$254,600
Audit-Related Fees(2)	<u>11,000</u>	<u>30,000</u>
	\$278,000	\$284,600

(1) Audit fees for 2012 and 2011 were for professional services rendered for the audit of the Company's financial statements for the fiscal year, including attestation services required under Section 404 of the Sarbanes-Oxley Act of 2002, and reviews of the Company's quarterly financial statements included in its Form 10-Q filings.

(2) Audit related fees are for services related to our registration statement on Form S-1.

The Audit Committee has determined that the non-audit services provided by McGladrey during 2012 did not impair their independence. All decisions regarding selection of independent registered public accounting firm and approval of accounting services and fees are made by our Audit Committee in accordance with the provisions of the Sarbanes-Oxley Act of 2002 and related SEC rules.

The Audit Committee pre-approves all audit and permissible non-audit services provided by the independent registered public accounting firm. These services may include audit services, audit related services, tax services and other services. The committee has adopted a policy for the pre-approval of services provided by the independent registered public accounting firm, where pre-approval is generally provided for up to one year and any pre-approval is detailed as to the particular service or category of services and is subject to a specific budget. For each proposed service, the independent auditor is required to provide detailed communication at the time of approval. The committee may delegate pre-approval authority to one or more of its members, who must report same to the Committee members at the next meeting. The Audit Committee, after discussion with McGladrey, agreed that any additional audit fees could be paid by us, subject to the pre-approval of the Audit Committee chairman.

The Audit Committee intends to select McGladrey to serve as independent registered public accounting firm for the fiscal year ending December 31, 2013.

PART IV

ITEM 15. EXHIBITS AND FINANCIAL STATEMENT SCHEDULES

(a) *(1) Financial Statements*

A list of the financial statements filed as a part of this report appears on page 46.

(2) *Financial Statement Schedules*

Schedules have been omitted because the information required is not applicable or is shown in the Financial Statements or the corresponding Notes to the Financial Statements.

(3) *Exhibits*

A list of the exhibits filed as a part of this report appears on pages 109 thru 115.

(b) See Exhibits listed under the heading "Exhibit Index" set forth on page 109.

(c) Schedules have been omitted because the information required is not applicable or is shown in the Financial Statements or the corresponding Notes to the Financial Statements.

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) 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.

EMISPHERE TECHNOLOGIES, INC.

By: /s/ Alan L. Rubino
 Alan L. Rubino
 President and Chief Executive Officer

Date: March 28, 2013

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the dates indicated.

<u>Name and Signature</u>	<u>Title</u>	<u>Date</u>
/s/ Alan L. Rubino Alan L. Rubino	President and Chief Executive Officer and Director (principal executive officer)	March 28 2013
/s/ John D. Harkey, Jr. John D. Harkey, Jr.	Director	March 28, 2013
/s/ Timothy McInerney Timothy McInerney	Director	March 28, 2013
/s/ Jacob M. Plotsker Jacob M. Plotsker	Director	March 28, 2013
/s/ Mark H. Rachesky, M.D. Mark H. Rachesky, M.D.	Director	March 28, 2013
/s/ Timothy G. Rothwell Timothy G. Rothwell	Director	March 28, 2013
/s/ Michael Weiser, M.D., Ph.D. Michael Weiser, M.D., Ph.D.	Director	March 28, 2013
/s/ Michael R. Garone Michael R. Garone	Chief Financial Officer (principal financial and accounting officer)	March 28 2013

EXHIBIT INDEX

<u>Exhibit</u>	<u>Incorporated by Reference (1)</u>	
3.1(a)	Amended and Restated Certificate of Incorporation of Emisphere Technologies, Inc., as amended by the Certificate of Amendment of Amended and Restated Certificate of Incorporation of Emisphere Technologies, Inc., dated April 20, 2007	R
3.1(b)	Certificate of Increase of Series A Junior Participating Cumulative Preferred Stock of Emisphere Technologies, Inc., dated June 4, 2012	OO
3.1(c)	Certificate of Increase of Series A Junior Participating Cumulative Preferred Stock of Emisphere Technologies, Inc., dated June 4, 2012	OO
3.2(a)	By-Laws of Emisphere Technologies, Inc., as amended December 7, 1998 and September 23, 2005	A, L
3.2(b)	Amendment to the Amended By-Laws of Emisphere Technologies, Inc., effective as of September 11, 2007	V
4.1	Restated Rights Agreement dated as of April 7, 2006 between Emisphere Technologies, Inc. and Mellon Investor Services, LLC	P
10.1(a)	Stock Incentive Plan for Outside Directors, as amended	C (2)
10.1(b)	Amendment to the Amended and Restated Stock Incentive Plan for Outside Directors	Q (2)
10.2(a)	Directors Deferred Compensation Stock Plan	E (2)
10.2(b)	Amendment to the Directors Deferred Compensation Stock Plan	Q (2)
10.3(a)	Emisphere Technologies, Inc. 2000 Stock Option Plan	G (2)
10.3(b)	Amendment to Emisphere Technologies, Inc. 2000 Stock Option Plan	Q (2)
10.4(a)	Emisphere Technologies, Inc. 2002 Broadbased Stock Option Plan	H (2)
10.4(b)	Amendment to Emisphere Technologies, Inc. 2002 Broadbased Stock Option Plan	Q (2)
10.5	Emisphere Technologies, Inc. 2007 Stock Award and Incentive Plan	R (2)
10.6	Amended and Restated Employment Agreement, dated April 28, 2005, between Michael M. Goldberg and Emisphere Technologies, Inc.	N (2)
10.7	Employment Agreement dated April 6, 2007 between Michael V. Novinski and Emisphere Technologies, Inc.	S (2)
10.8	Nonqualified Stock Option Agreement dated April 6, 2007 between Michael V. Novinski and Emisphere Technologies, Inc.	R (2)
10.9	Form of Nonqualified Stock Option Agreement	R (2)
10.10	Form of Incentive Stock Option Agreement	R (2)
10.11	Form of Restricted Stock Option Agreement	R (2)
10.12	Research Collaboration and Option Agreement dated as of December 3, 1997 between Emisphere Technologies, Inc. and Novartis Pharma AG	D (3)
10.13	License Agreement dated as of September 23, 2004 between Emisphere Technologies, Inc. and Novartis Pharma AG, as amended on November 4, 2005	J (3)
10.14(a)	Research Collaboration Option and License Agreement dated December 1, 2004 by and between Emisphere Technologies, Inc. and Novartis Pharma AG	J (3)
10.14(b)	Convertible Promissory Note due December 1, 2009 issued to Novartis Pharma AG	J (3)
10.14(c)	Registration Rights Agreement dated as of December 1, 2004 between Emisphere Technologies, Inc. and Novartis Pharma AG	J
10.15	Development and License Agreement between Genta Incorporated and Emisphere Technologies, Inc., dated March 22, 2006	O
10.16(a)	Senior Secured Loan Agreement between Emisphere Technologies, Inc. and MHR, dated September 26, 2005, as amended on November 11, 2005	L

<u>Exhibit</u>		<u>Incorporated by Reference (1)</u>
10.16(b)	Investment and Exchange Agreement between Emisphere Technologies, Inc. and MHR, dated September 26, 2005	L
10.16(c)	Pledge and Security Agreement between Emisphere Technologies, Inc. and MHR, dated September 26, 2005	L
10.16(d)	Registration Rights Agreement between Emisphere Technologies, Inc. and MHR, dated September 26, 2005	L
10.16(e)	Amendment No. 1 to the Senior Secured Term Loan Agreement, dated November 11, 2005	M
10.16(f)	Form of 11% Senior Secured Convertible Note	L
10.16(g)	Form of Amendment to 11% Senior Secured Convertible Note	R
10.17	Warrant dated as of September 21, 2006 between Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP	Q
10.18	Warrant dated as of September 21, 2006 between Emisphere Technologies, Inc. and MHR Institutional Partners II LP	Q
10.19	Warrant adjustment notice between Emisphere Technologies, Inc. and MHR Capital Partners (100) LP, MHR Capital Partners Master Account, LP (formerly MHR Capital Partners (500) LP), MHR Institutional Partners IIA LP, MHR Institutional Partners II LP, MHR Capital Partners (100) LP and MHR Capital Partners Master Account LP	W
10.20	Warrant dated as of August 22, 2007 between Emisphere Technologies, Inc. and SF Capital Partners, Ltd.	W
10.21	Warrant dated as of August 22, 2007 between Emisphere Technologies, Inc. and Option Opportunities Corp.	W
10.22	Warrant dated as of August 22, 2007 between Emisphere Technologies, Inc. and Option Opportunities Corp.	W
10.23	Warrant dated as of August 22, 2007 between Emisphere Technologies, Inc. and Montaur Capital/Platinum Life Montaur Life Sciences Fund I LLC	W
10.24	Warrant dated as of August 22, 2007 between Emisphere Technologies, Inc. and MHR Institutional Partners II LP	W
10.25	Warrant dated as of August 22, 2007 between Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP	W
10.26	Emisphere Technologies, Inc.- Mankind Corporation Patent Purchase Agreement, dated February 8, 2008	X
10.27	Development and License Agreement, dated as of June 21, 2008, between Emisphere Technologies, Inc. and Novo Nordisk AS.	Y (3)
10.28(a)	Lease Termination Agreement, date April 29,2009, between Emisphere Technologies, Inc. and BMR-LANDMARK AT EASTVIEW LLC	Z
10.28(b)	First Amendment to Lease Termination Agreement, dated March 17, 2010, between Emisphere Technologies, Inc. and BMR-Landmark at Eastview LLC	NN
10.29	Form of Non-Employee Director Non-Qualified Stock Option Agreement	AA (2)
10.30	Placement Agency Agreement dated as of August 19, 2009, Between Emisphere Technologies, Inc. and Rodman & Renshaw, LLC	BB
10.31	Securities Purchase Agreement dated as of August 19, 2009, between Emisphere Technologies and the Purchasers named therein	BB
10.32	Securities Purchase Agreement dated as of August 19, 2009, between Emisphere Technologies and MHR Fund Management, LLC	BB
10.33	Warrant dated as of August 21, 2009 between Emisphere Technologies, Inc. and MHR Capital Partners Master Account LP	CC
10.34	Warrant dated as of August 21, 2009 between Emisphere Technologies, Inc. and MHR Capital Partners (100) LP	CC

<u>Exhibit</u>		<u>Incorporated by Reference (1)</u>
10.35	Warrant dated as of August 21, 2009 between Emisphere Technologies, Inc. and MHR Institutional Partners II LP	CC
10.36	Warrant dated as of August 21, 2009 between Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP	CC
10.37	Warrant dated as of August 21, 2009 between Emisphere Technologies, Inc. and Rodman & Renshaw, LLC	CC
10.38	Warrant dated as of August 21, 2009 between Emisphere Technologies, Inc. and Benjamin Bowen	CC
10.39	Warrant dated as of August 21, 2009 between Emisphere Technologies, Inc. and Noam Rubinstein	CC
10.40	Warrant adjustment notice between Emisphere Technologies, Inc. and Elan International Services, Ltd. dated October 20, 2009	CC
10.41	Agreement to Extend the Maturity Date of the Convertible Promissory Note Due December 1, 2009, between Emisphere Technologies and Novartis Pharma AG dated November 25, 2009	EE
10.42	Agreement to Extend the Maturity Date of the Convertible Promissory Note Due December 1, 2009, between Emisphere Technologies and Novartis Pharma AG dated February 23, 2010	EE
10.43	Form of Incentive Stock Option Agreement under the Emisphere Technologies, Inc. 2007 Stock Award and Incentive Plan	FF
10.44	Form of Non-Qualified Stock Option Agreement under the Emisphere Technologies, Inc. 2007 Stock Award and Incentive Plan	FF
10.45	Letter Agreement by and between Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP, dated June 8, 2010	GG
10.46	Form of Emisphere Technologies, Inc. Reimbursement Note	GG
10.47	Form of Emisphere Technologies, Inc. Second Reimbursement Note	GG
10.48	Research Master Agreement and Amendment by and between Emisphere Technologies, Inc. and Novartis Pharma AG, effective as of June 4, 2010	HH (3)
10.49	Securities Purchase Agreement by and among Emisphere Technologies, Inc. and the Buyers named therein, dated August 25, 2010	II
10.50	Securities Purchase Agreement by and among Emisphere Technologies, Inc. and the MHR Buyers named therein, dated August 25, 2010	II
10.51	Waiver Agreement, by and among Emisphere Technologies, Inc. and MHR, dated August 25, 2010	II
10.52	Registration Rights Agreement by and among Emisphere Technologies, Inc. and the Buyers named therein, dated August 26, 2010	JJ
10.53	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and Bai Ye Feng	JJ
10.54	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and Anson Investments Master Fund LP	JJ
10.55	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and Iroquois Master Fund, Ltd.	JJ
10.56	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and Hudson Bay Master Fund Ltd.	JJ
10.57	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and Cranshire Capital, L.P.	JJ
10.58	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and Freestone Advantage Partners, LP	JJ

<u>Exhibit</u>		<u>Incorporated by Reference (1)</u>
10.59	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and MHR Capital Partners Master Account LP	JJ
10.60	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and MHR Capital Partners (100) LP	JJ
10.61	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and MHR Institutional Partners II LP	JJ
10.62	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP	JJ
10.63	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and MHR Capital Partners Master Account LP	JJ
10.64	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and MHR Capital Partners (100) LP	JJ
10.65	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and MHR Institutional Partners II LP	JJ
10.66	Warrant dated as of August 26, 2010, between Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP	JJ
10.67	Development and License Agreement, dated December 20, 2010, between Emisphere Technologies, Inc. and Novo Nordisk A/S	KK (3)
10.68	Securities Purchase Agreement, dated June 30, 2011, by and among Emisphere Technologies, Inc. and the Buyers named therein.	LL
10.69	Securities Purchase Agreement, dated June 30, 2011, by and among Emisphere Technologies, Inc. and the MHR Buyer.	LL
10.70	Waiver Agreement, dated June 30, 2011, by and among Emisphere Technologies, Inc. and MHR.	LL
10.71	Registration Rights Agreement by and among Emisphere Technologies, Inc. and the Buyers named therein, dated July 6, 2011	MM
10.72	Warrant A-54 dated as of July 6, 2011, between Emisphere Technologies, Inc. and EOS Holdings LLC	MM
10.73	Warrant A-55 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Kingsbrook Opportunities Master Fund LP	MM
10.74	Warrant A-56 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Bai Ye Feng	MM
10.75	Warrant A-57 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Cranshire Capital, L.P.	MM
10.76	Warrant A-58 dated as of July 6, 2011, between Emisphere Technologies, Inc. and HF H VICTOR UW VICTOR ART 7	MM
10.77	Warrant A-59 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Freestone Advantage Partners, LP	MM
10.78	Warrant A-60 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Iroquois Master Fund Ltd.	MM
10.79	Warrant A-61 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Shipman & Goodwin LLP Profit Sharing Trust FBO James T. Betts	MM
10.80	Warrant A-62 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Son Nam Nguyen	MM
10.81	Warrant A-63 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Pine Lodge Capital Company Ltd.	MM
10.82	Warrant A-64 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Huaidong Wang	MM

<u>Exhibit</u>		<u>Incorporated by Reference (1)</u>
10.83	Warrant A-65 dated as of July 6, 2011, between Emisphere Technologies, Inc. and Anson Investments Master Fund LP	MM
10.84	Warrant A-66 dated as of July 6, 2011, between Emisphere Technologies, Inc. and MHR Capital Partners Master Account LP	MM
10.85	Warrant A-67 dated as of July 6, 2011, between Emisphere Technologies, Inc. and MHR Capital Partners (100) LP	MM
10.86	Warrant A-68 dated as of July 6, 2011, between Emisphere Technologies, Inc. and MHR Institutional Partners II LP	MM
10.87	Warrant A-69 dated as of July 6, 2011, between Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP	MM
10.88	Warrant A-70 dated as of July 6, 2011, between Emisphere Technologies, Inc. and MHR Capital Partners Master Account LP	MM
10.89	Warrant A-71 dated as of July 6, 2011, between Emisphere Technologies, Inc. and MHR Capital Partners (100) LP	MM
10.90	Warrant A-72 dated as of July 6, 2011, between Emisphere Technologies, Inc. and MHR Institutional Partners II LP	MM
10.91	Warrant A-73 dated as of July 6, 2011, between Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP	MM
10.92	License Agreement, dated March 8, 2000, by and between Emisphere Technologies, Inc. and Novartis Pharma AG	NN (3)
10.93	Draft Offer Letter Pending Emisphere Compensation Committee of the Board of Directors Approval, dated September 27, 2007, from Emisphere Technologies, Inc. to Gary I. Riley	NN (2)
10.94	Form of Reimbursement Note Extension, between the Company and MHR	PP
10.95	Form of Other Transaction Reimbursement Note Extension, between the Company and MHR	PP (3)
10.96	Employment Agreement, dated September 13, 2012, between Alan L. Rubino and the Company	QQ (2)
10.97	Incentive Stock Option Agreement, dated September 13, 2012, between Alan L. Rubino and the Company	QQ (2)
10.98	Senior Secured Promissory Note of Emisphere Technologies, Inc., dated October 17, 2012	RR
10.99	Amendment to Pledge and Security Agreement, by and among Emisphere Technologies, Inc. and MHR Institutional Partners IIA LP, dated October 17, 2012	RR
10.100	Employment Agreement, dated October 15, 2012, between Carl V. Sailer and Emisphere Technologies, Inc.	RR (2)
10.101	Incentive Stock Option Agreement, dated October 15, 2012, between Carl V. Sailer and Emisphere Technologies, Inc.	RR (2)
10.102	Employment Agreement, dated January 14, 2013, between Michael R. Garone and Emisphere Technologies, Inc.	SS (2)
10.103	Sublease Agreement, dated November 27, 2012, between New American Therapeutics, Inc. and Emisphere Technologies, Inc.*	
10.104	Lease Agreement, dated December 11, 2012, between 4 Becker SPE LLC and Emisphere Technologies, Inc.*	
14.1	Emisphere Technologies, Inc. Code of Business Conduct and Ethics	I
23.1	Consent of Independent Registered Public Accounting Firm — McGladrey, LLP*	
31.1	Certification of the Chief Executive Officer Pursuant to Rule 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002*	

<u>Exhibit</u>		<u>Incorporated by Reference (1)</u>
31.2	Certification of the Chief Financial Officer Pursuant to Rule 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.*	
32.1	Certification Pursuant to 18 U.S.C. Section 1350, As Adopted Pursuant to Section 906 of the Sarbanes-Oxley Act of 2002*	
101	Interactive Data File	**
*	Filed herewith	
**	Submitted electronically herewith. Users of this data are advised that, pursuant to Rule 406T of Regulation S-T, these interactive data files are deemed not filed or part of a registration statement or prospectus for purposes of Sections 11 or 12 of the Securities Act of 1933 or Section 18 of the Securities Exchange Act of 1934, and are otherwise not subject to liability under these sections.	
(1)	If not filed herewith, filed as an exhibit to the document referred to by letter as follows:	
A.	Quarterly Report on Form 10-Q for the quarterly period ended January 31, 1999 (SEC File No. 000-17758)	
B.	Annual Report on Form 10-K for the fiscal year ended July 31, 1995 (SEC File No. 000-17758)	
C.	Annual Report on Form 10-K for the fiscal year ended July 31, 1997 (SEC File No. 000-17758)	
D.	Quarterly Report on Form 10-Q for the quarterly period ended October 31, 1997 (SEC File No. 000-17758)	
E.	Annual Report on Form 10-K for the fiscal year ended July 31, 1998 (SEC File No. 000-17758)	
F.	Annual Report on Form 10-K for the fiscal year ended July 31, 1999 (SEC File No. 000-17758)	
G.	Annual Report on Form 10-K for the fiscal year ended July 31, 2000 (SEC File No. 000-17758)	
H.	Registration statement on Form S-8 dated and filed on November 27, 2002 (SEC File No. 333-101525)	
I.	Annual Report on Form 10-K for the year ended December 31, 2003 (SEC File No. 000-17758)	
J.	Registration on Form S-3/A dated and filed February 1, 2005 (SEC File No. 333-117230)	
K.	Quarterly Report on Form 10-Q for the quarterly period ended March 31, 2005 (SEC File No. 000-17758)	
L.	Current Report on Form 8-K, filed September 30, 2005 (SEC File No. 000-17758)	
M.	Current Report on Form 8-K, filed November 14, 2005 (SEC File No. 000-17758)	
N.	Current Report on Form 8-K filed May 4, 2005 (SEC File No. 000-17758)	
O.	Quarterly Report on Form 10-Q for the quarterly period ended March 31, 2006 (SEC File No. 000-17758)	
P.	Current Report on Form 8-K, filed April 10, 2006 (SEC File No. 000-17758)	
Q.	Annual Report on Form 10-K for the fiscal year ended December 31, 2006 (SEC File No. 000-17758)	
R.	Quarterly Report on Form 10-Q for the quarterly period ended March 31, 2007	
S.	Current Report on Form 8-K, filed April 11, 2007	
T.	Quarterly Report on Form 10-Q for the quarterly period ended June 30, 2007	
U.	Current Report on Form 8-K, filed June 29, 2007	
V.	Current Report on Form 8-K, filed September 14, 2007	
W.	Quarterly Report on Form 10-Q for the quarterly period ended September 30, 2007	
X.	Annual Report on Form 10-K for the fiscal year ended December 31, 2007	
Y.	Current Report on Form 8-K, filed August 11, 2008	
Z.	Current Report on Form 8-K, filed May 5, 2009	
AA.	Current Report on Form 8-K, filed May 21, 2009	
BB.	Current Report on Form 8-K, filed August 20, 2009	
CC.	Quarterly Report on Form 10-Q for the quarterly period ended September 30, 2009	
DD.	Current Report on Form 8-K, filed January 12, 2010	

- EE. Annual Report on Form 10-K for the fiscal year ended December 31, 2009
- FF. Quarterly Report on Form 10-Q for the quarterly period ended March 31, 2010
- GG. Current Report on Form 8-K, filed June 8, 2010
- HH. Quarterly Report on Form 10-Q for the quarterly period ended June 30, 2010
- II. Current Report on Form 8-K, filed August 25, 2010
- JJ. Registration Statement on Form S-1, filed on September 15, 2010
- KK. Current Report on Form 8-K, filed on December 21, 2010
- LL. Current Report on Form 8-K, filed on June 30, 2011 (SEC File No. 000-17758)
- MM. Registration Statement on Form S-1, filed on July 26, 2011 (SEC File No. 333-175794).
- NN. Amendment No. 1 on Form 10-K/A, filed January 19, 2012, to Annual Report on Form 10-K for the fiscal year ended December 31, 2010, originally filed on March 31, 2011
- OO Current Report on Form 8-K, filed on June 5, 2012 (SEC File No. 000-17758)
- PP Current Report on Form 8-K, filed on June 4, 2012 (SEC File No. 000-17758)
- QQ Current Report on Form 8-K, filed on September 17, 2012 (SEC File No. 000-17758)
- RR Current Report on Form 8-K, filed on October 19, 2012 (SEC File No. 000-17758)
- SS Current Report on Form 8-K, filed on January 17, 2013 (SEC File No. 000-17758)
- (2) Management contract or compensatory plan or arrangement
- (3) Confidential treatment has been granted for the redacted portions of this agreement. A complete copy of this agreement, including the redacted portions, has been filed separately with the Securities and Exchange Commission.
- (4) Confidential treatment has been requested for the redacted portions of this agreement. A complete copy of this agreement, including the redacted portions, has been filed separately with the Securities and Exchange Commission.

**NOTICE AND PROXY STATEMENT
2013**

EMISPHERE TECHNOLOGIES, INC.

**4 Becker Farm Road
Suite 103
Roseland, New Jersey 07068**

NOTICE OF ANNUAL MEETING OF STOCKHOLDERS TO BE HELD ON MAY 30, 2013

Roseland, NJ
April 16, 2013

Dear Stockholder:

You are cordially invited to attend the Annual Meeting of Stockholders (the "Annual Meeting") of Emisphere Technologies, Inc., a Delaware corporation (the "Company" or "Emisphere"), to be held on Thursday, May 30, 2013 at 10:00 AM EDT at Park Avenue Club, 184 Park Avenue, Florham Park, NJ for the following purposes:

1. To consider the election of three members of the Board of Directors for a term expiring at the third succeeding annual meeting of stockholders after their election;
2. To approve, on an advisory basis, the compensation of the Company's named executive officers, as disclosed pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in the Company's Proxy Statement;
3. To approve an amendment to the Company's 2007 Stock Award and Incentive Plan (the "2007 Stock Plan"), to increase the number of new shares authorized for issuance under the 2007 Stock Plan from 2,500,000 to 7,500,000 shares; and
4. To transact such other business as may properly come before the meeting or any adjournments or postponements thereof.

In addition, at the Annual Meeting, the Company's management will discuss the Company's 2012 performance and its current activities.

Only those stockholders of record at the close of business on Thursday, April 4, 2013 will be entitled to receive notice of, and vote at, the Annual Meeting. A list of stockholders entitled to vote at the Annual Meeting will be open for examination by any stockholder during the ten (10) days prior to the Annual Meeting at our principal offices located at 4 Becker Farm Road, Suite 103, Roseland, NJ 07068.

The Board of Directors appreciates and encourages stockholder participation in our Annual Meeting and looks forward to your attendance. It is important that your shares be represented, whether or not you choose to attend the meeting. Registered stockholders can vote their shares (a) via the Internet; or (b) by using a toll-free telephone number; or (c) by promptly completing, signing, dating and mailing a Proxy Card using the enclosed envelope; or (d) by voting your shares at the meeting in person. Instructions for using these convenient services appear on the notice mailed to stockholders of record, as well as on the Internet and on the Proxy Card. Proxy votes are tabulated by an independent agent appointed by the Company, and reported at the Annual Meeting. You may revoke your Proxy at any time prior to its exercise. Your prompt attention to the Proxy will be of assistance in preparing for the Annual Meeting. Your cooperation related to this matter is appreciated.

By order of the Board of Directors,

Alan L. Rubino
President and Chief Executive Officer

EMISPHERE TECHNOLOGIES, INC.

**4 Becker Farm Road
Suite 103
Roseland, New Jersey 07068**

PROXY STATEMENT

ANNUAL MEETING OF STOCKHOLDERS TO BE HELD ON MAY 30, 2013

GENERAL INFORMATION ABOUT THE ANNUAL MEETING AND VOTING

What is the purpose of this Proxy Statement?

This Proxy Statement (the “Proxy Statement”) and the Proxy Card (the “Proxy Card”) are made available and furnished to all stockholders of record of Emisphere Technologies, Inc., which we sometimes refer to as the “Company” or “Emisphere,” as of the close of business on April 4, 2013 in connection with the solicitation of Proxies on behalf of the Board of Directors for use at the Annual Meeting of Stockholders on Thursday, May 30, 2012 at 10:00 AM EDT at Park Avenue Club, 184 Park Avenue, Florham Park, NJ (the “Annual Meeting”).

This Proxy Statement and form of Proxy will be available to be mailed to stockholders at their request on or about April 19, 2013. It will also be available for review on the Internet. The information included in the Proxy Statement relates to the proposals to be voted on at the Annual Meeting, the voting process, the compensation for directors and our most highly paid executive officers, and other required information. Copies of our 2012 Annual Report to Stockholders and the Company’s Annual Report on Form 10-K for the fiscal year ended December 31, 2012 (the “2012 Fiscal Year”) are also available on the Internet and will be mailed at the request of a stockholder with a copy of this Proxy Statement, but are not incorporated herein by reference and should not be deemed to be part of the Proxy Statement.

Who can attend the Annual Meeting and who is entitled to vote?

All stockholders of the Company as of April 4, 2013 (the “Record Date”), their authorized representatives and guests of Emisphere will be able to attend the Annual Meeting.

All holders of record of Emisphere’s common stock, \$0.01 par value per share (“Common Stock”) on the Record Date will be entitled to vote at the Annual Meeting. Each share of Common Stock is entitled to one vote on each matter properly brought before the meeting. As of the Record Date, 60,687,478 shares of Common Stock were outstanding.

What proposals will be voted upon at the Annual Meeting?

The Annual Meeting has been called to consider and take action on the following items:

1. The election of Timothy McInerney, Jacob M. Plotsker, and Alan L. Rubino (the “Director Nominees”) as directors for a term expiring at the third succeeding annual meeting of stockholders after their election (Class II Directors);
2. To approve, on an advisory basis, of the compensation of the Company’s named executive officers, as disclosed pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this Proxy Statement;
3. To approve an amendment to the Company’s 2007 Stock Award and Incentive Plan (the “2007 Stock Plan”), to increase the number of new shares authorized for issuance under the 2007 Stock Plan from 2,500,000 to 7,500,000 shares; and

4. To transact such other business as may properly come before the meeting or any adjournments or postponements thereof.

What are the Board of Directors' voting recommendations with respect to the proposals to be voted at the Annual Meeting?

The Board of Directors recommends a vote:

- “FOR” the election of the Class II Director Nominees as directors for the term expiring at the third succeeding annual meeting of stockholders after their election.
- “FOR” the approval, on an advisory basis, of the compensation of the Company’s named executive officers, as disclosed pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this Proxy Statement.
- “FOR” the amendment to the 2007 Stock Plan, to increase the number of new shares authorized for issuance under the 2007 Stock Plan from 2,500,000 to 7,500,000 shares.

If any other matter is properly presented at the Annual Meeting or any adjournments or postponements thereof, your Proxy will be voted in accordance with the discretion of the person holding the Proxy. At the time this Proxy Statement went to press, Emisphere knew of no matters that needed to be acted on at the Annual Meeting other than those discussed in this Proxy Statement.

One Page Notice of Internet Availability of Proxy Materials

Pursuant to rules adopted by the U.S. Securities and Exchange Commission (the “SEC”), we have provided access to our Proxy materials over the Internet. Accordingly, we are sending a Notice of Internet Availability of Proxy Materials (the “Notice of Internet Availability”) to our stockholders. All stockholders will have the ability to access the Proxy materials on a website referred to in the Notice of Internet Availability or request to receive a printed set of the Proxy materials. Instructions on how to access the proxy materials over the Internet or to request a printed copy may be found in the Notice of Internet Availability. In addition, stockholders may request to receive Proxy materials in printed form by mail.

How do I vote in person?

If you plan to attend the Annual Meeting on May 30, 2013, please bring proof of identification and the enclosed Proxy Card. However, if your shares are held in the name of your broker, bank or other nominee, you must bring a Proxy executed by the broker, bank or other nominee that owns the shares of record for your benefit, authorizing you to vote the shares.

How do I vote by Proxy?

If you are a registered holder as of the Record Date, you can vote your Proxy via the Internet, by telephone, by mail or in person at the Annual Meeting on May 30, 2013.

If you are a beneficial stockholder, you have the right to direct your broker or nominee on how to vote your shares. You should complete a voting instruction card which your broker or nominee is obligated to provide you. If you wish to vote in person at the Annual Meeting, you must first obtain from the record holder a Proxy issued in your name.

How do I vote via the Internet?

If you wish to vote via the Internet, follow the Internet voting instructions enclosed with the Notice of Internet Availability. A control number, located on the mailing, is designated to verify your identity and allow you to vote the shares and confirm that the voting instructions have been recorded properly.

How do I vote via telephone?

If you wish to vote via telephone, use the toll-free telephone number enclosed with the Notice of Internet Availability, and follow the voting instructions located on the mailing. A control number, located on the Proxy Card, is designated to verify your identity, allow you to vote the shares and confirm that the voting instructions have been recorded properly.

How do I vote my shares on the Proxy Card?

If you are a registered stockholder, you can specify how you want your shares voted on each proposal by marking the appropriate boxes on the Proxy Card. Please review the voting instructions on the Proxy Card and read the entire text of the proposals. Please review the recommendations of the Board of Directors in the Proxy Statement prior to marking your vote.

If your Proxy Card is signed and returned without specifying a vote or an abstention on a proposal, it will be voted according to the recommendations of the Board of Directors on that proposal. That recommendation is shown for each proposal on the Proxy Card.

What constitutes a quorum?

As of the Record Date, 60,687,478 shares of Common Stock were outstanding. A majority of the total number of our outstanding shares present or represented by Proxy constitutes a quorum for the purpose of adopting proposals at the Annual Meeting. If you submit a properly executed Proxy, then you will be considered part of the quorum.

Who counts the vote?

Tabulation of Proxies and the votes cast at the meeting are conducted by an independent agent appointed by Emisphere and certified by an independent inspector of elections.

May I revoke my Proxy?

You may revoke your Proxy at any time before it is voted at the Annual Meeting by: (i) giving timely written notice of the revocation to the Secretary of the Company; (ii) executing and delivering a Proxy with a later date; or (iii) voting in person at the Annual Meeting. Attendance at the Annual Meeting will not in and of itself constitute revocation of a Proxy.

What vote is required to approve each proposal?

The presence, in person or by proxy, of at least a majority of the outstanding shares of Common Stock entitled to vote at the Annual Meeting is necessary to constitute a quorum for the transaction of business. The inspector of elections will treat abstentions and broker non-votes as shares of Common Stock that are present and entitled to vote for purposes of determining a quorum for the Annual Meeting.

A plurality of the votes cast at the Annual Meeting is required to elect the Director Nominees. Withheld votes and broker non-votes will have no effect on the election of the Director Nominees.

The affirmative vote of a majority of shares present, in person or represented by proxy, and voting on the approval of the executive compensation at our annual meeting is required to approve, on an advisory basis, the executive compensation as disclosed as disclosed pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this Proxy Statement. Abstentions and broker "non-votes" are not considered as shares voting or as votes cast with respect to the proposal to approve executive compensation on an advisory basis and will not have any effect on the proposal.

A majority of the votes cast at the Annual Meeting is required to approve an amendment to the Company's 2007 Stock Plan to increase the number of new shares authorized to be issued thereunder from 2,500,000 to

7,500,000 shares. The inspector of elections will treat abstentions and broker non-votes as shares of Common Stock that are present and entitled to vote for purposes of determining a quorum. Broker non-votes, if any, and abstentions will have no effect on the outcome of this proposal.

Who bears the cost of soliciting the Proxies?

We will pay all costs of preparing, assembling, printing and distributing the Proxy materials. We may solicit Proxies on behalf of the Board of Directors through the mail, in person, and by telecommunications. We will, upon request, reimburse brokerage firms and others for their reasonable expenses incurred for forwarding solicitation material to beneficial owners of stock.

Where are Emisphere’s Executive Offices?

Our principal executive offices are located at 4 Becker Farm Road, Suite 103, Roseland, NJ 07068 and our telephone number is (973) 532-8000.

How can I get additional information about Emisphere?

We will, upon written request of any stockholder, furnish without charge a copy of this Proxy Statement and our Annual Report on Form 10-K for the 2012 Fiscal Year, as filed with the SEC. Please address your requests to Emisphere Technologies, Inc., 4 Becker Farm Road, Suite 103, Roseland, NJ 07068, Attention: Investor Relations. Electronic copies of this Proxy Statement and the Company’s Annual Report on Form 10-K for the 2012 Fiscal Year are located within the Investor Relations section of our website at www.emisphere.com and are also available at the SEC’s website at www.sec.gov. The contents of our website are not incorporated herein by reference and the website address provided in this Proxy Statement is intended to be an inactive textual reference only.

If you are a beneficial owner and your shares are held in a stock brokerage account or by a bank or other nominee, please refer to the information provided by your broker, bank or nominee for instructions on how to elect to access future Proxy Statements and Annual Reports on the Internet. Most beneficial owners who elect electronic access will receive an e-mail message next year containing the Internet address for access to the Proxy Statement and Annual Report.

Emisphere is subject to the informational requirements of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), which require that the Company’s Annual Report on Form 10-K, the Proxy Statement and other information be filed with the SEC. These filings may be inspected and copied at the public reference facilities of the SEC. Call (800) SEC-0330 for more information regarding public reference facilities. Copies of the material may also be obtained upon request and upon payment of the appropriate fee from the Public Reference Section of the SEC, 100F Street N.E., Room 1580, Washington, DC 20549. In addition, the SEC maintains a website at www.sec.gov that contains reports, Proxy and information statements, as well as other information regarding registrants, including Emisphere, which file electronically with the SEC.

Householding of Annual Meeting Materials

Some banks, brokers and other nominee record holders may be participating in the practice of “householding” Proxy Statements and Annual Reports. This means that only one copy of our Notice of Internet Availability may have been sent to multiple stockholders in each household. We will promptly deliver a separate copy of the Proxy Materials and Annual Report to any stockholder upon written or oral request made to our Investor Relations Department, Emisphere Technologies, Inc., 4 Becker Farm Road, Suite 103, Roseland, NJ 07068, telephone: (973) 532-8000. Any stockholder who wants to receive separate copies of the Notice of Internet Availability of Proxy Materials or any stockholder who is receiving multiple copies and would like to receive only one copy per household must make an election on the Internet, telephone or Proxy card or contact the stockholder’s bank, broker, or other nominee record holder. Stockholders may also contact us at the above address and phone number with their election.

DIRECTORS AND EXECUTIVE OFFICERS

Our business is overseen by the Board of Directors. It is the duty of the Board of Directors to oversee the Chief Executive Officer and other senior management in the competent and ethical operation of the Company on a day-to-day basis and to assure that the long-term interests of the stockholders are being served. To satisfy this duty, our directors take a proactive, focused approach to their position, and set standards to ensure that the Company is committed to business success through maintenance of the highest standards of responsibility and ethics. The Board of Directors is kept advised of our business through regular verbal or written reports, Board of Directors meetings, and analysis and discussions with the Chief Executive Officer and other officers of the Company.

Members of the Board of Directors bring to us a wide range of experience, knowledge and judgment. Our governance organization is designed to be a working structure for principled actions, effective decision-making and appropriate monitoring of both compliance and performance.

The Board of Directors has affirmatively determined that Mr. John D. Harkey, Jr., Mr. Timothy McNerney, Mr. Jacob M. Plotsker, Dr. Mark H. Rachesky, Mr. Timothy G. Rothwell, and Dr. Michael Weiser are independent directors within the meaning of Rule 4200 of the NASDAQ Marketplace Rules. Mr. Alan L. Rubino is the sole member of the Board of Directors who is not independent. The independent directors meet in separate sessions at the conclusion of board meetings and at other times as deemed necessary by the independent directors, in the absence of Mr. Rubino. Mr. Rothwell currently serves as Chairman of the Board of Directors. Matters are explored in Committee and brought to the full Board for discussion or action.

The Board of Directors has established an Audit Committee, a Compensation Committee and a Governance and Nominating Committee. Each of the committees of the Board of Directors acts pursuant to a separate written charter adopted by the Board of Directors.

The Audit Committee is currently comprised of Mr. McNerney (Chairman), who became a member of the Committee on March 23, 2012, and was appointed Chairman on September 13, 2012, Jacob M. Plotsker, and Dr. Weiser. All of the members of the Audit Committee meet the independence requirements under the applicable provisions of the Exchange Act and regulations promulgated thereunder and the relevant NASDAQ Listing Rules. The Board of Directors has determined that the Company does not currently have an “audit committee financial expert,” as that term is defined in Item 407(d)(5)(ii) of Regulation S-K, serving on the Audit Committee as a result of the recent resignation of the previously designated audit committee financial expert from the Audit Committee. The Audit Committee’s responsibilities and duties are summarized in the report of the Audit Committee and in the Audit Committee charter which is available on our website (www.emisphere.com).

The Compensation Committee is currently comprised of Dr. Weiser (Chairman), Mr. McNerney, and Dr. Rachesky. All members of the Compensation Committee are independent within the meaning of Rule 4200 of the NASDAQ Marketplace Rules, non-employee directors within the meaning of the rules of the Securities and Exchange Commission and “outside” directors within the meaning set forth under Internal Revenue Code Section 162(m). The Compensation Committee’s responsibilities and duties are summarized in the report of the Compensation Committee and in the Compensation Committee charter also available on our website (www.emisphere.com).

The Governance and Nominating Committee is currently comprised of Dr. Weiser (chairman), Mr. Plotsker, and Dr. Rachesky. All members of the Governance and Nominating Committee are independent within the meaning of Rule 4200 of the NASDAQ Marketplace Rules. The Governance and Nominating Committee’s responsibilities and duties are set forth in the Governance and Nominating Committee charter on our website (www.emisphere.com). Among other things, the Governance and Nominating Committee is responsible for recommending to the board the nominees for election to our Board of Directors and the identification and recommendation of candidates to fill vacancies occurring between annual stockholder meetings.

The table below provides membership information for each committee of the Board of Directors as of March 15, 2013:

<u>Name</u>	<u>Board</u>	<u>Audit</u>	<u>Compensation</u>	<u>Governance and Nominating</u>
Alan L. Rubino(1)(4)	X			
Mark H. Rachesky, M.D.(2)	X		X	X
Michael Weiser, M.D., Ph.D.(2)	X	X	X*	X*
John D. Harkey, Jr.(3)	X			
Timothy G. Rothwell(3)	X*			
Timothy McNerney(4)	X	X*	X	
Jacob M. Plotsker(4)	X	X		X

* Chair

- (1) Joined the company as President, Chief Executive Officer and Class II Director as of September 13, 2012.
- (2) Class III directors: Term as director is expected to expire in 2014.
- (3) Class I directors: Term as director is expected to expire in 2015.
- (4) Class II directors. Term as director is expected to expire in 2013.

Board Involvement in Risk Oversight

Our Board of Directors is responsible for oversight of the Company’s risk assessment and management process. We believe risk can arise in every decision and action taken by the Company, whether strategic or operational. Our comprehensive approach is reflected in the reporting processes by which our management provides timely and fulsome information to the Board of Directors to support its role in oversight, approval and decision-making.

The Board of Directors closely monitors the information it receives from management and provides oversight and guidance to our management team concerning the assessment and management of risk. The Board of Directors approves the Company’s high level goals, strategies and policies to set the tone and direction for appropriate risk taking within the business.

The Board of Directors delegated to the Compensation Committee basic responsibility for oversight of management’s compensation risk assessment, and that committee reports to the board on its review. Our Board of Directors also delegated tasks related to risk process oversight to our Audit Committee, which reports the results of its review process to the Board of Directors. The Audit Committee’s process includes a review, at least annually, of our internal audit process, including the organizational structure, as well as the scope and methodology of the internal audit process. The Governance and Nominating Committee oversees risks related to our corporate governance, including director performance, director succession, director education and governance documents.

In addition to the reports from the Board committees, our board periodically discusses risk oversight.

Meetings Attendance

During the 2012 fiscal year, our Board of Directors held 10 meetings. With the exception of Mr. Rothwell, Mr. Plotsker, and Mr. Harkey, who each attended 9 of 10 Board meetings, and Dr. Weiser, who attended 3 of 4 Audit Committee meetings held during 2012, each director attended 100 percent of the aggregate number of Board of Directors meetings and committee meetings of which he was a member that were held during the period of his service as a director.

The Audit Committee met 4 times during the 2012 fiscal year.

The Compensation Committee met 2 times during the 2012 fiscal year.

The Governance and Nominating Committee met 2 times during the 2012 fiscal year.

The Company does not have a formal policy regarding attendance by members of the Board of Directors at the Annual Meeting, although it does encourage attendance by the directors. Last year, no members of the Board of Directors attended the Annual Meeting.

Code of Conduct for Officers and Employees and Code of Business Conduct and Ethics for Directors

The Company has a Code of Conduct that applies to all of our officers and employees as well as a Code of Business Conduct and Ethics that applies specifically to the members of the Board of Directors. The directors are surveyed annually regarding their compliance with the policies as set forth in the Code of Conduct for Directors. The Code of Conduct and the Code of Business Conduct and Ethics for Directors are available on the Corporate Governance section of our website at www.emisphere.com. The contents of our website are not incorporated herein by reference and the website address provided in this annual report is intended to be an inactive textual reference only. The Company intends to disclose on its website any amendment to, or waiver of, a provision of the Code of Conduct that applies to the Chief Executive Officer, Chief Financial Officer, or Controller. Our Code of Conduct contains provisions that apply to our Chief Executive Officer, Chief Financial Officer and all other finance and accounting personnel. These provisions comply with the requirements of a company code of ethics for financial officers that were promulgated by the SEC pursuant to the Exchange Act.

Stockholder Communications

We have an Investor Relations Office for all stockholder inquiries and communications, including communications to the Board of Directors or specified Board members. The Investor Relations Office facilitates the dissemination of accurate and timely information to our stockholders. In addition, the Investor Relations Office ensures that outgoing information is in compliance with applicable securities laws and regulations. All investor queries should be directed to our internal Director of Corporate Communications or our Corporate Secretary.

Compensation Committee Interlocks and Insider Participation

No member of the Compensation Committee is or has ever been an executive officer or employee of our company (or any of its subsidiaries) and no “compensation committee interlocks” existed during fiscal year 2012.

ELECTION OF DIRECTORS

The Governance and Nominating Committee identifies director nominees by reviewing the desired experience, mix of skills and other qualities to assure appropriate Board composition, taking into consideration the current Board members and the specific needs of the Company and the Board. Among the qualifications to be considered in the selection of candidates, the Committee considers the following attributes and criteria of candidates: experience, knowledge, skills, expertise, diversity, personal and professional integrity, character, business judgment and independence. Although it has no formal policy, our Board recognizes that nominees for the Board should reflect a reasonable diversity of backgrounds and perspectives, including those backgrounds and perspectives with respect to business experience, professional expertise, age, gender and ethnic background.

Our Board is comprised of accomplished professionals who represent diverse and key areas of expertise including national and international business, operations, manufacturing, finance and investing, management, entrepreneurship, higher education and science, research and technology. We believe our directors’ wide range of professional experiences and backgrounds, education and skills has proven invaluable to the Company and we intend to continue leveraging this strength.

Nominations for the election of directors may be made by the Board of Directors or the Governance and Nominating Committee. The committee did not reject any candidates recommended within the preceding year by a beneficial owner of, or from a group of security holders that beneficially owned, in the aggregate, more than five percent (5%) of the Company's voting stock.

Although it has no formal policy regarding stockholder nominees, the Governance and Nominating Committee believes that stockholder nominees should be viewed in substantially the same manner as other nominees. Stockholders may make a recommendation for a nominee by complying with the notice procedures set forth in our bylaws. Specifically, a stockholder of record who is entitled to vote for the election of directors may make a recommendation for a director nominee by providing the Company with a notice of nomination (a "Notice of Nomination") setting forth (i) the name and record address of the stockholder making the recommendation, (ii) the class and number of shares of Common Stock held of record, held beneficially, and represented by proxy held by such person as of the record date and as of the date of the notice, (iii) all information regarding the nominee required to be set forth in a definitive proxy statement filed with the SEC pursuant to Section 14 of the Exchange Act (including all information required to be filed with the SEC if the person submitting the notice were a participant in a solicitation subject to Section 14 of the Exchange Act), and (iv) the written consent of each such nominee to serve if elected. To be considered timely, a Notice of Nomination must be delivered to the Company at the Company's principal executive offices (addressed to the attention of the Secretary) not less than 30 or more than 60 days prior to the annual meeting to which the Notice of Nomination relates. The Governance and Nominating Committee will give nominees recommended by stockholders in compliance with these procedures the same consideration that it gives to any board recommendations. To date, we have not received any recommendation from stockholders requesting that the Governance and Nominating Committee (or any predecessor) consider a candidate for inclusion among the committee's slate of nominees in the Proxy Statement.

To be considered by the committee, a director nominee must have broad experience at the strategy/policy-making level in a business, government, education, technology or public interest environment, high-level managerial experience in a relatively complex organization or experience dealing with complex problems. In addition, the nominee must be able to exercise sound business judgment and provide insights and practical wisdom based on experience and expertise, possess proven ethical character, be independent of any particular constituency, and be able to represent all stockholders of the Company.

The committee will also evaluate whether the nominee's skills are complementary to the existing Board members' skills; the board's needs for operational, management, financial, technological or other expertise; and whether the individual has sufficient time to devote to the interests of Emisphere. The prospective board member cannot be a board member or officer at a competing company nor have relationships with a competing company. He/she must be clear of any investigation or violations that would be perceived as affecting the duties and performance of a director.

The Governance and Nominating Committee identifies nominees by first evaluating the current members of the Board of Directors willing to continue in service. Current members of the Board with skills and experience that are relevant to the business and who are willing to continue in service are considered for re-nomination, balancing the value of continuity of service by existing members of the board with that of obtaining a new perspective. If any member of the board does not wish to continue in service, or if the Governance and Nominating Committee or the board decides not to nominate a member for re-election, the Governance and Nominating Committee identifies the desired skills and experience of a new nominee and discusses with the board suggestions as to individuals that meet the criteria.

Compensation of Non-Employee Directors

A director who is a full-time employee of the Company receives no additional compensation for services provided as a director. It is the Company's policy to provide competitive compensation and benefits necessary to attract and retain high quality non-employee directors and to encourage ownership of Company stock to further align their interests with those of stockholders. The following represents the compensation of the non-employee members of the Board of Directors:

- Prior to June 24, 2009, each non-employee director received, on the date of each regular annual stockholder's meeting, a stock option to purchase 7,000 shares of our common stock under the 2007 Stock Plan. The stock options vest on the six month anniversary of the grant date provided the director continuously serves as a director from the grant date through such vesting date. Notwithstanding the foregoing, any director who held any stock options granted before April 1, 2004 which remained unvested was ineligible to receive the annual 7,000-share stock option grant described in this paragraph unless and until all such prior options had vested. Stock options granted in 2009 have a stated expiration date of ten years after the date of grant, and are subject to accelerated vesting upon a change in control of Emisphere. If the holder of an option ceases to serve as a director, all previously granted options may be exercised to the extent vested within six months after termination of directorship (one year if the termination is by reason of death), except that, after April 1, 2004 (unless otherwise provided in an option agreement), if a director becomes an "emeritus director" of Emisphere immediately following his Board service, the vested options may be exercised for six months after termination of service as an "emeritus director." All unvested options expire upon termination of service on the Board of Directors.
- On May 15, 2009, in recognition of the roles and responsibilities of the Board of Directors and current market data, the non-employee members of the Board of Directors' compensation was revised to include a special one-time grant of 50,000 options to purchase shares of common stock granted on May 15, 2009, an annual retainer of \$35,000, payable quarterly in cash, and an annual stock option grant of 40,000 options to purchase shares of common stock. The annual stock option grants are granted each year on the date of the annual meeting of stockholders of the Company. The director must be an eligible director on the dates the retainers are paid and the stock options are granted. The options subject to the special one-time stock option grant and annual stock option grant would vest over three years in equal amounts on each anniversary of the grant date provided the director continuously serves as a director from the grant date through such vesting date, subject to accelerated vesting upon a change in control of Emisphere. Such options, once vested, remain exercisable through the period of the option term.
- All newly appointed directors shall receive an initial stock option grant on the date of appointment of 50,000 options to purchase shares of common stock. The options subject to such initial stock option grant vest over three years in equal amounts on each anniversary of the grant date provided the director continuously serves as a director from the grant date through such vesting date, subject to accelerated vesting upon a change in control of Emisphere. Such options, once vested, remain exercisable through the period of the option term.
- On May 15, 2009, Messrs. Weiser, Harkey and Rachesky received a one-time special stock option grant of 25,000 shares of common stock and a one-time fee of \$10,000 in recognition for their length of service on the Board of Directors. The options subject to these one-time stock option grants vest over three years in equal amounts on each anniversary of the grant date provided the director continuously serves as a director from the grant date through such vesting date, subject to accelerated vesting upon a change in control of Emisphere. Such options, once vested, remain exercisable through the period of the option term.
- On September 13, 2012, in connection with the appointment of Timothy Rothwell as the Chairman of the Board of Directors, and upon the recommendation of the Compensation Committee, the Board of Directors approved the following compensation for Mr. Rothwell for his service as Chairman of the Board:
 - An annual fee of \$180,000, to be paid in twelve equal monthly installments of \$15,000 each.
 - A grant on September 13, 2012 of a non-qualified option (the "Initial Rothwell Option") to purchase 175,000 shares of the Company's common stock (the "Common Stock") in accordance with the 2007

Stock Plan at a purchase price equal to the market price of the Common Stock on the date of said grant, such options to vest on January 1, 2013.

- On each of the first, second, and third anniversary of the grant of the Initial Rothwell Option, an additional grant of a non-qualified option to purchase 175,000 shares of the Common Stock in accordance with the 2007 Stock Plan, at a price equal to the market price of the Common Stock on the date of said grant, such options to vest immediately on such date.
- Additional committee and chairperson fees are paid as follows:
 - \$10,000 audit committee chairperson fee;
 - \$2,500 audit committee member fee;
 - \$5,000 compensation committee chairperson fee;
 - \$1,000 compensation committee member fee;
 - \$2,500 governance and nominating committee chairperson fee; and
 - \$500 governance and nominating committee member fee.

The director must be an eligible director on the dates such fees are paid.

Director Compensation Table — 2012

The table below represents the compensation paid to our non-employee directors during the year ended December 31, 2012:

Name	Fees Earned or Paid in Cash (\$)	Stock Awards (\$)(1)	Option Awards (\$)(1)	All Other Compensation (\$)	Total (\$)
John D. Harkey, Jr.	36,305	0	7,095	0	43,400
Timothy McInerney	22,521	0	19,078	0	41,599
Jacob M. Plotsker	20,720	0	19,078	0	39,798
Mark H. Rachesky, M.D.	36,500	0	7,095	0	43,595
Timothy G. Rothwell	98,315	0	21,299	0	120,314
Michael Weiser, M.D., Ph.D.	45,000	0	7,095	0	52,095

- (1) The value listed in the above table represents the fair value of the options recognized as expense under FASB ASC Topic 718 during 2012, including unvested options granted before 2012 and those granted in 2012. Fair value is calculated as of the grant date using the Black-Scholes Model. The determination of the fair value of share-based payment awards made on the date of grant is affected by our stock price as well as assumptions regarding a number of complex and subjective variables. Our assumptions in determining fair value are described in note 12 to our audited financial statements for the year ended December 31, 2012 included in our Annual Report on Form 10-K for the year ended December 31, 2012.

The following table summarizes the aggregate number of option awards and stock awards held by each non-employee director at December 31, 2012.

Name	Option Awards					Stock Awards	
	Number of Securities Underlying Unexercised Options (#) Exercisable	Number of Securities Underlying Unexercised Unearned Options (#) Unexercisable	Equity Incentive Plan Awards: Number of Securities Underlying Unexercised Options (#)	Option Exercise Price (\$)	Option Expiration Date	Number of Shares of Stock That Have not Vested (#)	Market Value of Shares or Units of Stock That Have not Vested (\$)
John D. Harkey, Jr.	7,000	0	0	8.97	5/26/2016	0	0
	7,000	0	0	3.76	4/20/2017		
	7,000	0	0	3.79	8/08/2018		
	75,000	0	0	0.93	5/15/2019		
	26,666	13,334(1)	0	1.20	9/16/2020		
	13,333	26,667(2)	0	1.53	9/19/2021		
Timothy McInerney	0	40,000(3)	0	0.199	5/31/2022		
	0	50,000(4)	0	0.27	3/01/2022	0	0
Jacob M. Plotsker	0	40,000(3)	0	0.199	5/31/2022		
	0	50,000(4)	0	0.27	3/01/2022	0	0
Mark H. Rachesky, M.D.	0	40,000(3)	0	0.199	5/31/2022		
	7,000	0	0	3.76	4/20/2017	0	0
Timothy G. Rothwell	7,000	0	0	3.79	8/08/2018		
	75,000	0	0	0.93	5/15/2019		
	26,666	13,334(1)	0	1.20	9/16/2020		
	13,333	26,667(2)	0	1.53	9/19/2021		
	0	40,000(3)	0	0.199	5/31/2022		
	0	175,000(5)		0.09	9/13/2022		
Michael Weiser, M.D., Ph.D.	50,000	0	0	0.70	11/5/2019	0	0
	26,666	13,334(1)	0	1.20	9/16/2020		
	13,333	26,667(2)	0	1.53	9/19/2021		
	0	40,000(3)	0	0.199	5/31/2022		
	0	175,000(5)		0.09	9/13/2022		
	7,000	0	0	8.97	5/26/2016	0	0
Michael Weiser, M.D., Ph.D.	7,000	0	0	3.76	4/20/2017		
	7,000	0	0	3.79	8/08/2018		
	75,000	0	0	0.93	5/15/2019		
	26,666	13,334(1)	0	1.20	9/16/2020		
	13,333	26,667(2)	0	1.53	9/19/2021		
	—	40,000(3)	0	0.199	5/31/2022		

(1) 13,334 exercisable as of 9/16/2013

(2) 13,333 exercisable as of 9/19/2013 and 13,334 exercisable as of 9/19/2014.

(3) 13,333 exercisable as of 5/31/2013 and 5/31/2014, respectively and 13,334 exercisable as of 5/31/2015.

(4) 16,666 exercisable as of 3/1/2013 and 16,667 exercisable 3/1/2014 and 3/1/2015, respectively

(5) 175,000 exercisable as of 1/1/2013.

SECURITIES AVAILABLE FOR FUTURE ISSUANCE UNDER EQUITY PLANS

The following table provides information as of December 31, 2012 about the common stock that may be issued upon the exercise of options granted to employees, consultants or members of our Board of Directors under our existing equity compensation plans, including the 2000 Stock Option Plan, the 2002 Broad Based Plan, the 2007 Stock Award and Incentive Plan (collectively the “Plans”) the Stock Incentive Plan for Outside Directors and the Directors Deferred Compensation Plan. For a discussion of the material features of the Plans, please see Note 12 to the financial statements included in our Annual Report on Form 10-K for the year ended December 31, 2012.

<u>Plan Category</u>	<u>(a) Number of Securities to be Issued Upon Exercise of Outstanding Options</u>	<u>(b) Weighted Average Exercise Price of Outstanding Options</u>	<u>(c) Number of Securities Remaining Available for Future Issuance Under Equity Compensation Plans (Excluding Securities Reflected in Column (a))</u>
Equity Compensation Plans Approved by Security Holders			
The Plans	4,103,410	\$1.02	339,718
Stock Incentive Plan for Outside Directors	42,000	5.93	0
Equity Compensation Plans not approved by Security Holders(1)			
Holdings(1)	<u>5,000</u>	<u>4.12</u>	<u>0</u>
Total	4,150,410	\$1.07	339,718

(1) Our Board of Directors has granted options which are currently outstanding for a former consultant. The Board of Directors determines the number and terms of each grant (option exercise price, vesting and expiration date). This grant was made on July 14, 2003.

VOTING SECURITIES AND PRINCIPAL HOLDERS THEREOF

At the close of business on the Record Date, there were approximately 60,687,478 shares of Common Stock outstanding and entitled to vote at the Annual Meeting. The presence, either in person or by Proxy, of persons entitled to vote a majority of our outstanding Common Stock is necessary to constitute a quorum for the transaction of business at the Annual Meeting. Holders of Common Stock have one vote for each share on any matter that may be presented for consideration and action by the stockholders at the Annual Meeting.

**COMMON STOCK OWNERSHIP BY DIRECTORS AND EXECUTIVE OFFICERS AND
PRINCIPAL HOLDERS**

Directors and Executive Officers

The following table sets forth certain information, as of March 1, 2013, regarding the beneficial ownership of the common stock by (i) each director; (ii) each named executive officer; (iii) all of our directors and named executive officers as a group. The number of shares beneficially owned by each director or Executive Officer is determined under the rules of the SEC, and the information is not necessarily indicative of beneficial ownership for any other purpose. Under these rules, beneficial ownership includes any shares as to which the individual has the sole or shared voting power (which includes power to vote, or direct the voting of, such security) or investment power (which includes power to dispose of, or direct the disposition of, such security). In computing the number of shares beneficially owned by a person and the percentage ownership of that person, shares of common stock subject to options, warrants or convertible notes held by that person that are currently exercisable or convertible into Common Stock or will become exercisable or convertible into common stock within 60 days after March 1, 2013 are deemed outstanding, while such shares are not deemed outstanding for purposes of computing percentage ownership of any other person. Unless otherwise indicated, all persons named as beneficial owners of common stock have sole voting power and sole investment power with respect to the shares indicated as beneficially owned:

<u>Name and Address(a)</u>	<u>Common Shares Beneficially Owned (b)</u>	<u>Common Shares Underlying Options</u>	<u>Percent Of Class</u>
Alan L. Rubino (e)	500,000	500,000	*
Michael R. Garone	262,500	162,500	*
Mark H. Rachesky, M.D.	39,331,867(c)	20,848,204(d)	48.2%
Timothy G. Rothwell (f)	264,999	264,999	*
Michael Weiser, M.D., Ph.D.	135,999	129,586	*
John D. Harkey, Jr.	135,999	129,586	*
Timothy McNerney	16,666	16,666	*
Jacob M. Plotsker	16,666	16,666	*
All directors and executive officers as a group	40,664,696	22,068,207	49.1%

* Less than 1%

(a) Unless otherwise specified, the address of each beneficial owner is c/o Emisphere Technologies, Inc., 4 Becker Farm Road, Suite 103, Roseland, New Jersey,

(b) The number of shares set forth for each Director and Executive Officer consists of direct and indirect ownership of shares, including stock options, deferred common share units, restricted stock and, in the case of Dr. Rachesky, shares of common stock that can be obtained upon conversion of convertible notes and exercise of warrants, as further described in footnotes (c) and (d) below.

(c) This number consists of:

- 18,483,663 shares of common stock held for the accounts of the following entities:
 - 6,226,054 shares held for the account of MHR Capital Partners Master Account LP (“Master Account”)
 - 847,125 shares held for the account of MHR Capital Partners (100) LP (“Capital Partners (100)”)
 - 3,240,750 shares held for the account of MHR Institutional Partners II LP (“Institutional Partners II”)
 - 8,164,436 shares held for the account of MHR Institutional Partners IIA LP (“Institutional Partners IIA”)
 - 5,298 shares held directly by Mark H. Rachesky, M.D.

- 8,721,429 shares of common stock that can be obtained by the following entities upon conversion of the Convertible Notes, including 367,909 shares of common stock issuable to the following entities as payment for accrued but unpaid interest on the Convertible Notes since the most recent interest payment date (December 31, 2012) through the date that is 60 days after March 1, 2013:
 - 1,756,213 shares held by Master Account
 - 240,165 shares held by Capital Partners (100)
 - 1,910,903 shares held by Institutional Partners II
 - 4,814,148 shares held by Institutional Partners IIA
- 11,997,776 shares of common stock that can be obtained by the following entities upon exercise of warrants:
 - 2,704,898 shares held by Master Account
 - 368,479 shares held by Capital Partners (100)
 - 2,535,842 shares held by Institutional Partners II
 - 6,388,557 shares held by Institutional Partners IIA
- 7,000 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$3.76 per share
- 7,000 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$3.79 per share
- 75,000 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$0.93 per share.
- 26,666 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$1.20 per share.
- 13,333 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options at a price of \$1.53 per share.

MHR Advisors LLC (“Advisors”) is the general partner of each of Master Account and Capital Partners (100), and, in such capacity, may be deemed to beneficially own the shares of common stock held for the accounts of each of Master Account and Capital Partners (100). MHR Institutional Advisors II LLC (“Institutional Advisors II”) is the general partner of each of Institutional Partners II and Institutional Partners IIA, and, in such capacity, may be deemed to beneficially own the shares of common stock held for the accounts of each of Institutional Partners II and Institutional Partners IIA. MHR Fund Management LLC (“Fund Management”) is a Delaware limited liability company that is an affiliate of and has an investment management agreement with Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA, and other affiliated entities, pursuant to which it has the power to vote or direct the vote and to dispose or to direct the disposition of the shares of common stock held by such entities and, accordingly, Fund Management may be deemed to beneficially own the shares of common stock held for the account of each of Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA. Dr. Rachesky is the managing member of (i) MHRC LLC, the managing member of Advisors, (ii) MHRC II LLC, the managing member of Institutional Advisors II, and (iii) MHR Holding LLC, the managing member of Fund Management, and, in such capacity, may be deemed to beneficially own the shares of common stock held for the accounts of each of Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA.

- (d) This number consists of (i) 8,721,429 shares of common stock that can be obtained by Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA upon conversion of the Convertible Notes, (ii) 11,997,776 shares of common stock that can be obtained by Master Account, Capital Partners (100), Institutional Partners II and Institutional Partners IIA upon exercise of warrants, (iii) 128,999 shares of common stock that can be obtained by Dr. Rachesky upon the exercise of currently vested stock options.

- (e) On September 13, 2012, Alan L. Rubino joined the Company as President and Chief Executive Officer, and was appointed as a Class II Director.
- (f) On September 13, 2012 Timothy Rothwell was elected Chairman of the Board of Directors of the Company.

Principal Holders of Common Stock

The following table sets forth information regarding beneficial owners of more than five (5%) percent of the outstanding shares of Common Stock as of March 1, 2013:

<u>Name and Address</u>	<u>Number of Shares Beneficially Owned</u>	<u>Percent Of Class(a)</u>
Bai Ye Feng 16A Li Dong Building No.9 Li Yuen Street East Central, Hong Kong	6,184,389(b)	9.87%
Mark H. Rachesky, M.D. 40 West 57th Street, 24th Floor New York, NY 10019	39,331,867(c)	48.2%
MHR Fund Management LLC 40 West 57th Street, 24th Floor New York, NY 10019	39,197,570(c)	48.2%
MHR Institutional Advisors II LLC 40 West 57th Street, 24th Floor New York, NY 10019	27,054,636(c)	35.4%
MHR Institutional Partners IIA LP 40 West 57th Street, 24th Floor New York, NY 10019	19,367,141(c)	26.9%
MHR Advisors LLC 40 West 57th Street, 24th Floor New York, NY 10019	12,142,934(c)	18.5%
MHR Capital Partners Master Account LP 40 West 57th Street, 24th Floor New York, NY 10019	10,687,165(c)	16.4%
MHR Institutional Partners II LP 40 West 57th Street, 24th Floor New York, NY 10019	7,687,495(c)	11.8%
MHRC LLC 40 West 57th Street, 24th Floor New York, NY 10019	12,142,935(c)	18.5%
MHRC II LLC 40 West 57th Street, 24th Floor New York, NY 10019	27,054,636(c)	35.4%
MHR Holdings LLC 40 West 57th Street, 24th Floor New York, NY 10019	39,197,570(c)	48.2%

(a) Applicable percentage ownership is based on 60,687,478 shares of Common Stock outstanding as of March 1, 2013. In computing the number of shares beneficially owned by a person and the percentage ownership of that person, shares of Common Stock subject to options, warrants or convertible notes held by that person that are currently exercisable or convertible into Common Stock or will become exercisable or convertible into Common Stock within 60 days after March 1, 2013 are deemed outstanding, while such shares are not deemed outstanding for purposes of computing percentage ownership of any other person.

- (b) Information based on Mr. Feng's Schedule 13-G/A filed with the SEC on February 14, 2012. Mr. Feng beneficially owns an aggregate of 6,184,389 shares of common stock, consisting of 3,908,738 shares of common stock held by Mr. Feng, warrants to purchase up to 1,981,651 shares of common stock held by Mr. Feng, and 294,000 shares of common stock owned of record by Lighthouse Consulting Limited, a Hong Kong company of which Mr. Feng is a principal and therefore may be deemed to be a beneficial holder of such shares.
- (c) Information based on the beneficial owner's Amendment Number 19 to Schedule 13D/A, filed with the SEC on January 10, 2013. Please refer to footnote "c" in the table under "Directors and Executive Officers" (above).

COMPENSATION COMMITTEE REPORT ON EXECUTIVE COMPENSATION

The Compensation Committee operates under a written charter adopted by the Board of Directors. The Compensation Committee charter can be found on our website at www.emisphere.com. The contents of our website are not incorporated herein by reference and the website address provided in this annual report is intended to be an inactive textual reference only.

The Compensation Committee is responsible for the consideration of stock plans, performance goals and incentive awards, and the overall coverage and composition of the compensation arrangements related to executive officers. The Compensation Committee may delegate any of the foregoing duties and responsibilities to a subcommittee of the Compensation Committee consisting of not less than two members of the committee. The Compensation Committee has the authority to retain, at the expense of the Company, such outside counsel, experts and other advisors as deemed appropriate to assist it in the full performance of its functions. The Company's Chief Executive Officer is involved in making recommendations to the Compensation Committee for compensation of Executive Officers (except for himself) as well as recommending compensation levels for directors.

Our executive compensation program is administered by the Compensation Committee of the Board of Directors. The Compensation Committee, which is composed of non-employee independent directors, is responsible for reviewing with Company management and approving compensation policy and all forms of compensation for executive officers and directors in light of the Company's current business environment and the Company's strategic objectives. In addition, the Compensation Committee acts as the administrator of the Company's stock option plans. The Compensation Committee's practices include reviewing and establishing executive officers' compensation to ensure that base pay and incentive compensation are competitive to attract and retain qualified executive officers, and to provide incentive systems reflecting both financial and operating performance, as well as an alignment with stockholder interests. These policies are based on the principle that total compensation should serve to attract and retain those executives critical to the overall success of Emisphere and should reward executives for their contributions to the enhancement of stockholder value.

The Compensation Committee oversees risk management as it relates to our compensation plans, policies and practices in connection with structuring our executive compensation programs and reviewing our incentive compensation programs for other employees. The committee considered risk when developing our compensation programs and believes that the design of our current compensation programs do not encourage excessive or inappropriate risk taking. Our base salaries provide competitive fixed compensation, while annual cash bonuses and equity-based awards encourage long-term consideration rather than short-term risk taking.

The Compensation Committee has reviewed and discussed the Compensation Discussion and Analysis presented herein with the management of the Company. Based on that review and discussion, the Compensation Committee recommended to the Board of Directors that the Compensation Discussion and Analysis be included in the Form 10-K and Proxy Statement of the Company.

The Members of the Compensation Committee

Michael Weiser, M.D., Ph.D. (Chairman)
Mr. Timothy McInerney
Mark H. Rachesky, M.D.

AUDIT COMMITTEE REPORT

The Audit Committee operates under a written charter adopted by the Board of Directors. The Audit Committee has reviewed the relevant standards of the Sarbanes-Oxley Act of 2002, the rules of the SEC, and the corporate governance listing standards of the NASDAQ Listing Rules regarding committee policies. The committee intends to further amend its charter, if necessary, as the applicable rules and standards evolve to reflect any additional requirements or changes. The updated Audit Committee charter can be found on our website at www.emisphere.com. The contents of our website are not incorporated herein by reference and the website address provided in this Proxy Statement is intended to be an inactive textual reference only.

The Audit Committee is currently comprised of Mr. Timothy McInerney, (chairman), Jacob M. Plotsker and Michael Weiser, M.D., Ph.D.

All of the members of the Audit Committee meet the independence requirements under the applicable provisions of the Exchange Act and regulations promulgated thereunder and the relevant NASDAQ Listing Rules. The Board of Directors has determined that the Company does not currently have an “audit committee financial expert,” as that term is defined in Item 407(d)(5)(ii) of Regulation S-K, serving on the Audit Committee, as a result of the recent resignation of the previously designated audit committee financial expert from the Audit Committee.

On January 6, 2010, with the approval of the Audit Committee of the Company, the Company engaged McGladrey LLP (“McGladrey”) to act as its independent registered public accounting firm. McGladrey served as the Company’s independent registered public accounting firm for fiscal years ended December 31, 2012 and 2011, and the Audit Committee intends to select McGladrey as the Company’s independent registered public accounting firm for the fiscal year ended December 31, 2013. The Company expects that representatives from McGladrey (the “Representatives”) will be present at the Annual Meeting, that the Representatives will have the opportunity to make a statement if they desire to do so, and that the Representatives will be available to respond to appropriate questions.

Management has primary responsibility for the Company’s financial statements and the overall reporting process, including the Company’s system of internal control over financial reporting. McGladrey, the Company’s independent registered public accountants, audit the annual financial statements prepared by management, express an opinion as to whether those financial statements fairly present the financial position, results of operations and cash flows of the Company in conformity with accounting principles generally accepted in the United States, and report on internal control over financial reporting. McGladrey reports to the Audit Committee as members of the Board of Directors and as representatives of the Company’s stockholders.

The Audit Committee meets with management periodically to consider the adequacy of the Company’s internal control over financial reporting and the objectivity of its financial reporting. The Audit Committee discusses these matters with the appropriate Company financial personnel. In addition, the Audit Committee has discussions with management concerning the process used to support certifications by the Company’s Chief Executive Officer and Chief Financial Officer that are required by the SEC and the Sarbanes-Oxley Act to accompany the Company’s periodic filings with the SEC.

On an as needed basis, the Audit Committee meets privately with McGladrey. The Audit Committee also appoints the independent registered public accounting firm, approves in advance their engagements to perform audit and any non-audit services and the fee for such services, and periodically reviews their performance and independence from management. In addition, when appropriate, the Audit Committee discusses with McGladrey plans for the audit partner rotation required by the Sarbanes-Oxley Act.

Pursuant to its charter, the Audit Committee assists the board in, among other things, monitoring and reviewing (i) our financial statements, (ii) our compliance with legal and regulatory requirements and (iii) the independence, performance and oversight of our independent registered public accounting firm. Under the Audit Committee charter, the Audit Committee is required to make regular reports to the board.

During the 2012 Fiscal Year, the Audit Committee of the Board of Directors reviewed and assessed:

- the quality and integrity of the annual audited financial statements with management, including issues relating to accounting and auditing principles and practices, as well as the adequacy of internal controls, and compliance with regulatory and legal requirements;
- the qualifications and independence of the independent registered public accounting firm; and
- management's, as well as the independent auditor's, analysis regarding financial reporting issues and judgments made in connection with the preparation of our financial statements, including those prepared quarterly and annually, prior to filing our quarterly reports on Form 10-Q and annual report on Form 10-K.

The Audit Committee has reviewed the audited financial statements and has discussed them with both management and McGladrey, the independent registered public accounting firm. The Audit Committee has discussed with the independent auditors matters required to be discussed by the applicable Auditing Standards as periodically amended (including significant accounting policies, alternative accounting treatments and estimates, judgments and uncertainties). In addition, the independent auditors provided to the Audit Committee the written disclosures required by the applicable requirements of the Public Company Accounting Oversight Board regarding the independent auditors' communications with the Audit Committee concerning independence, and the Audit Committee and the independent auditors have discussed the auditors' independence from the Company and its management, including the matters in those written disclosures. The Audit Committee also received reports from McGladrey regarding all critical accounting policies and practices used by the Company, any alternative treatments of financial information used, generally accepted accounting principles that have been discussed with management, ramifications of the use of alternative treatments and the treatment preferred by McGladrey and other material written communications between McGladrey and management, including management letters and schedules of adjusted differences.

In making its decision to select McGladrey as Emisphere's independent registered public accounting firm for 2012, the Audit Committee considered whether the non-audit services provided by McGladrey are compatible with maintaining the independence of McGladrey.

Based upon the review and discussions referenced above, the Audit Committee, as comprised at the time of the review and with the assistance of the Company's Chief Financial Officer, recommended to the Board of Directors that the audited financial statements be included in our Annual Report on Form 10-K for the fiscal year ended December 31, 2012 and be filed with the SEC.

The Members of the Audit Committee

Mr. Timothy McInerney (Chairman)

Mr. Jacob M. Plotsker

Dr. Michael Weiser, M.D., Ph.D.

INDEPENDENT AUDITOR FEES

The following table presents fees for professional audit services rendered by McGladrey LLP (“McGladrey”) for the audit of our annual financial statements for the years ended December 31, 2012 and December 31, 2011, respectively, and fees billed for other services rendered by McGladrey during the respective periods.

	2012	2011
Type of Fees		
Audit Fees(1)	\$267,000	\$254,600
Audit-Related Fees(2)	11,000	30,000
	\$278,000	\$284,600

(1) Audit fees for 2012 and 2011 were for professional services rendered for the audit of the Company’s financial statements for the fiscal year, including attestation services required under Section 404 of the Sarbanes-Oxley Act of 2002, and reviews of the Company’s quarterly financial statements included in its Form 10-Q filings.

(2) Audit-related fees are for services related to our registration statement on Form S-1.

The Audit Committee has determined that the non-audit services provided by McGladrey during 2012 did not impair their independence. All decisions regarding selection of independent registered public accounting firm and approval of accounting services and fees are made by our Audit Committee in accordance with the provisions of the Sarbanes-Oxley Act of 2002 and related SEC rules.

The Audit Committee pre-approves all audit and permissible non-audit services provided by the independent registered public accounting firm. These services may include audit services, audit related services, tax services and other services. The committee has adopted a policy for the pre-approval of services provided by the independent registered public accounting firm, where pre-approval is generally provided for up to one year and any pre-approval is detailed as to the particular service or category of services and is subject to a specific budget. For each proposed service, the independent auditor is required to provide detailed communication at the time of approval. The committee may delegate pre-approval authority to one or more of its members, who must report same to the Committee members at the next meeting. All of the audit-related fees disclosed above were approved by the Audit Committee pursuant to this pre-approval policy. The Audit Committee, after discussion with McGladrey, agreed that any additional audit fees could be paid by us, subject to the pre-approval of the Audit Committee chairman.

COMPENSATION DISCUSSION AND ANALYSIS

Executive Summary —

The discussion that follows outlines the compensation awarded to, earned by or paid to the named executive officers of the Company including a review of the principal elements of compensation, the objectives of the Company’s compensation program, what the program is designed to reward and why and how each element of compensation is determined.

In general, the Company operates in a marketplace where competition for talented executives is significant. The Company is engaged in the long-term development of its technology and of drug candidates, without the benefit of significant current revenues, and therefore its operations require it to raise capital in order to continue its activities. Our operations entail special needs and risks and require that the Company attempt to implement programs that promote strong individual and group performance and retention of excellent employees. The Company’s compensation program for named executive officers consists of cash compensation as base salary, medical, basic life insurance, long term disability, flexible spending accounts, paid time off, and defined contribution retirement plans as well as long term equity incentives offered through stock option plans. This program is developed in part by benchmarking against other companies in the biotechnology/pharmaceutical sectors, as well as by the judgment and discretion of our Board of Directors.

Employee salaries are benchmarked against Radford survey information. Radford is part of the Aon family brands. For more than 30 years, Radford has been a leading provider of compensation market intelligence to the high-tech and life sciences industries. Radford emphasizes data integrity and online access to data, tools and resources, as well as client service geared towards life sciences. Radford includes more than 2,000 participating companies globally. Their services offer full compensation consulting, reliable, current data analysis and reporting, customized data for competitive insight, and web access to data via the Radford Network.

Discussion and Analysis —

Objectives of the compensation and reward program — The biopharmaceutical marketplace is highly competitive and includes companies with far greater resources than ours. Our work involves the difficult, unpredictable, and often slow development of our technology and of drug candidates. Continuity of scientific knowledge, management skills, and relationships are often critical success factors to our business. The objectives of our compensation program for named executive officers is to provide competitive cash compensation, competitive health, welfare and defined contribution retirement benefits as well as long-term equity incentives that offer significant reward potential for the risks assumed and for each individual's contribution to the long-term performance of the Company. Individual performance is measured against long-term strategic goals, short-term business goals, scientific innovation, regulatory compliance, new business development, development of employees, fostering of teamwork and other Emisphere values designed to build a culture of high performance. These policies and practices are based on the principle that total compensation should serve to attract and retain those executives critical to the overall success of Emisphere and are designed to reward executives for their contributions toward business performance that is designed to build and enhance stockholder value.

Elements of compensation and how they are determined — The key elements of the executive compensation package are base salary (as determined by the competitive market and individual performance), the executive long term disability plan and other health and welfare benefits and long-term incentive compensation in the form of periodic stock option grants. The base salary (excluding payment for accrued but unused vacation) for the named Executive Officers for 2013 ranged from \$265,000 for its Vice President and Chief Financial Officer to \$400,000 for its President and Chief Executive Officer. In determining the compensation for each named Executive Officer, the Company generally considers (i) data from outside studies and proxy materials regarding compensation of executive officers at companies believed to be comparable, (ii) the input of other directors and the President and Chief Executive Officer (other than for his own compensation) regarding individual performance of each named executive officer and (iii) qualitative measures of Emisphere's performance, such as progress in the development of the Company's technology, the engagement of corporate partners for the commercial development and marketing of products, effective corporate governance, fiscal responsibility, the success of Emisphere in raising funds necessary to conduct research and development, and the pace at which the Company continues to advance its technologies in various clinical trials. Our board of directors and Compensation Committee's consideration of these factors is subjective and informal. However, in general, it has determined that the compensation for executive officers should be competitive with market data reflected within the 50th-75th percentile of biotechnology companies for corresponding senior executive positions. Compensation levels were derived from the compensation plan set in 2006 and were based in part by information received from executive compensation consultants, Pearl Myer and Partners, based in New York, N.Y. Compensable factors benchmarked include market capitalization, head count and location. While the Company has occasionally paid cash bonuses in the past, there is no consistent annual cash bonus plan for named executive officers. When considering the compensation of the Company's President and Chief Executive Officer, the Company receives information and analysis prepared or secured by the Company's outside executive compensation experts and survey data prepared by human resources management personnel as well as any additional outside information it may have available. In addition, the board of directors and Compensation Committee of the Company considered the approval by our stockholders, on an advisory basis, of the compensation of our named executive officers at our most recent annual meeting of stockholders on May 31, 2012 in determining that our executive compensation is in line with our competitive position in the marketplace and appropriately designed to reward executives for their contributions toward overall business performance that ultimately enhances stockholder value.

The compensation program also includes periodic awards of stock options. The stock option element is considered a long-term incentive that further aligns the interests of executives with those of our stockholders and rewards long-term performance and the element of risk. Stock option awards are made at the discretion of the Board of Directors based on its subjective assessment of the individual contribution of the executive to the attainment of short and long-term Company goals, such as collaborations with partners, attainment of successful milestones under such collaborations and other corporate developments which advance the progress of our technology and drug candidates. Option grants, including unvested grants, for our named executive officers range from 165,000 for our Vice President of Non-Clinical Development and Applied Biology, 190,000 for our current Vice President, Chief Financial Officer and Corporate Secretary, to 2,000,000 for our President and Chief Executive Officer, as indicated in the accompanying tables. Stock option grants to named executive officers in 2012 were made in connection with the annual compensation review. With the exception of grants made to the Company's President and Chief Executive Officer, Alan L. Rubino, (described below under the heading "**Employment Agreements and Potential Payments Upon Termination or Change-in-Control**"), the Company's policy with respect to stock options granted to executives is that grant prices should be equal to the fair market value of the common stock on the date of grant, that employee stock options should generally vest over a three to five-year period and expire in ten years from date of grant, and that options previously granted at exercise prices higher than the current fair market value should not be re-priced. Once performance bonuses or awards are issued, there are currently no policies in place to reduce, restate or otherwise adjust awards if the relevant performance measures on which they are based are restated or adjusted. The Company has no policy to require its named executive officers to hold any specific equity interest in the Company. The Company does not offer its named executive officers any nonqualified deferred compensation, a defined benefit pension program or any post retirement medical or other benefits.

Section 162(m) of the Internal Revenue Code of 1986, as amended, provides that compensation in excess of \$1,000,000 paid to the Chief Executive Officer or to any of the other four most highly compensated executive officers of a publicly held company will not be deductible for federal income tax purposes, unless such compensation is paid pursuant to one of the enumerated exceptions set forth in Section 162(m). The Company's primary objective in designing and administering its compensation policies is to support and encourage the achievement of the Company's long-term strategic goals and to enhance stockholder value. In general, stock options granted under the Company's 2000 Plan and 2007 Stock Plan are intended to qualify under and comply with the "performance based compensation" exemption provided under Section 162(m) thus excluding from the Section 162(m) compensation limitation any income recognized by executives at the time of exercise of such stock options. Because salary and bonuses paid to our Chief Executive Officer and four most highly compensated executive officers have been below the \$1,000,000 threshold, the Compensation Committee has elected, at this time, to retain discretion over bonus payments, rather than to ensure that payments of salary and bonus in excess of \$1,000,000 are deductible. The Compensation Committee intends to review periodically the potential impacts of Section 162(m) in structuring and administering the Company's compensation programs.

Summary Compensation Table — 2012, 2011 and 2010

The following table sets forth information regarding the aggregate compensation Emisphere paid during 2012, 2011 and 2010 to our “named executive officers” (as defined in Item 402(a)(3) of Regulation S-K):

<u>Name and Principal Position(1)</u>	<u>Year</u>	<u>Salary (\$)</u>	<u>Bonus (\$)</u>	<u>Stock Awards (\$)</u>	<u>Option Awards (\$)(2)</u>	<u>All Other Compensation (\$)</u>	<u>Total (\$)</u>
Alan L. Rubino(3) , President and CEO	2012	120,000	0	0	144,885	3,600(4)	268,485
Michael R. Garone , Chief Financial Officer and Corporate Secretary(5)	2012	244,785	0	0	7,982	0	252,767
	2011	243,214	0	0	27,600	0	270,814
	2010	241,374	0	0	19,445	0	260,819
M. Gary I. Riley DVM, PhD,(6) VP of Non-Clinical Development and Applied Biology	2012	282,035	0	0	5,321	0	287,356
	2011	280,225	0	0	18,400	0	298,625
	2010	278,104	0	0	19,445	0	297,549

- (1) The named executive officers, as defined in Regulation S-K, Item 402(a)(3), of the Company for the year ended December 31, 2012 were as follows: Mr. Rubino, Mr. Garone and Mr. Riley.
- (2) Amounts shown in this column represent the aggregate grant date fair value of stock option awards granted during the respective year computed in accordance with Financial Accounting Standards Board ASC Topic 718. This compares to prior years, during which amounts in these columns have represented the expensed accounting value of such awards. For assumptions used in the valuation of these awards please see Note 12 to our Financial Statements for the fiscal year ended December 31, 2012 included in our Annual Report on Form 10-K for the year ended December 31, 2012.
- (3) On September 13, 2012, Mr. Rubino joined the company as President and Chief Executive Officer.
- (4) All other compensation for Mr. Rubino represents an allowance for the use of a personal automobile in accordance with the terms of his employment contract.
- (5) On September 13, 2012, Mr. Garone concluded his tenure as Interim Chief Executive Officer of the Company.
- (6) On December 31, 2012, Mr. Riley executed a separation agreement with the company and executed an independent consulting agreement with the company effective January 1, 2013.

Grants of Plan-Based Awards — 2012

The following table sets forth information regarding grants of plan-based awards in 2012:

Name	Grant Date	All Other		
		Option Awards: Number of Securities Underlying Options (#)	Exercise or Base Price of Option Awards (\$/Sh)	Grant Date Fair Value of Option Awards
Alan L. Rubino, President and Chief Executive Officer(1)	9/13/2012	2,000,000(2)	\$0.5225	1,045,000
Michael R. Garone, VP, Chief Financial Officer and Corporate Secretary	5/31/2012	45,000(3)	\$0.1990	8,955
M. Gary I. Riley DVM, PhD. VP, Non-Clinical Development and Applied Biology	5/31/2012	30,000(4)	\$0.1990	5,970

- (1) On September 13, 2012, Alan L. Rubino joined the company as President and Chief Executive Officer.
- (2) 500,000 exercisable at \$0.09 as of January 1, 2013; 500,000 exercisable at \$0.25 as of September 13, 2014; 500,000 exercisable at \$0.75 as of September 13, 2015 and 500,000 exercisable at \$1.00 as of September 13, 2016.
- (3) 11,250 exercisable as of 5/31/2013 and 5/31/2014, respectively and 22,500 exercisable as of 5/31/2015.
- (4) 7,500 exercisable as of 5/31/2013 and 5/31/2014, respectively and 15,000 exercisable as of 5/31/2015.

Outstanding Equity Awards at Fiscal Year-End — 2012

The following table sets forth information as to the number and value of unexercised options held by the named executive officers as of December 31, 2012. There are no outstanding stock awards with executive officers:

Name	Number of Shares Underlying Unexercised Options (#) Exercisable	Number of Securities Underlying Unexercised Unearned Options (#) Unexercisable	Equity Incentive Plan Awards: Number of Securities Underlying Unexercised Unearned Options (#)	Option Exercise Price (\$)	Option Expiration Date
Alan L Rubino President and Chief Executive Officer	0	500,000(1)	0	\$ 0.09	9/13/2022
	0	500,000(2)	0	\$ 0.25	9/13/2022
	0	500,000(3)	0	\$ 0.75	9/13/2022
	0	500,000(4)	0	\$ 1.00	9/13/2022
Michael R. Garone, VP, Chief Financial Officer, and Corporate Secretary	75,000	0	0	\$ 4.03	8/29/2017
	20,000	0	0	\$ 0.62	4/12/2019
	10,000	10,000(5)	0	\$ 1.25	1/19/2020
	7,500	22,500(6)	0	\$ 0.92	7/15/2021
	0	45,000(7)	0	\$0.199	5/31/2022
M. Gary I. Riley DVM,(8) PhD. VP, Non-Clinical Development and Applied Biology	75,000	—		\$ 4.03	11/6/2017
	20,000	—	0	\$ 0.62	4/12/2019
	10,000	10,000(8)	0	\$ 1.25	1/19/2020
	5,000	15,000(8)	0	\$ 0.92	7/15/2021
	0	30,000(8)	0	\$0.199	5/31/2022

- (1) 500,000 exercisable as of 1/13/2013.
- (2) 500,000 exercisable as of 9/13/2014

- (3) 500,000 exercisable as of 9/13/2015
- (4) 500,000 exercisable as of 9/13/2016
- (5) 10,000 exercisable as of 1/19/2013
- (6) 7,500 exercisable as of 7/15/2013 and 15,000 exercisable as of 7/15/2014.
- (7) 11,250 exercisable as of 5/31/2013 and 5/31/2014, respectively and 22,500 exercisable as of 5/31/2015.
- (8) Pursuant to a Consulting Agreement, dated December 31, 2012, between the Company and Mr. Riley (the "Consulting Agreement"), all stock options previously granted by the Company shall continue to be effective and vest during the term of the Consulting Agreement in accordance with their respective terms, subject to any forfeiture, termination, or cancellation provision or any limitation on exercisability applicable thereto. Upon termination or expiration of the Consulting Agreement, all such stock options shall immediately cease vesting, all such options that are unvested shall terminate immediately, and all vested options shall be subject to any forfeiture, termination, or cancellation provision or any limitation on exercisability applicable thereto.

Option Exercises and Stock Vested — 2012

There were no stock options exercised by Executive Officers during 2012.

TRANSACTIONS WITH RELATED PERSONS

Employment Agreements and Potential Payments Upon Termination or Change-in-Control

Employment Agreement with Alan L. Rubino, President and Chief Executive Officer

On September 17, 2012, in connection with his appointment to the position of President and Chief Executive Officer of the Company, effective September 13, 2012, Mr. Rubino entered into an Employment Agreement with the Company dated September 13, 2012 (the "Rubino Employment Agreement"), which provides as follows:

- The initial term of the Rubino Employment Agreement is three years, and the agreement will automatically renew for additional one-year terms unless either party provides notice of non-renewal to the other party at least six months prior to the end of the initial term or any renewal terms.
- The Rubino Employment Agreement provides for an annual base salary of \$400,000, with eligibility to receive an annual bonus of up to \$200,000.
- Pursuant to the Rubino Employment Agreement, Mr. Rubino received a qualified stock option (the "Option") to purchase up to 2,000,000 shares of the Company's common stock ("Rubino Option Shares") in accordance with the Company's 2007 Stock Award and Incentive Plan (the "2007 Plan"). A total of 500,000 Rubino Option Shares vested on January 1, 2013, and have an exercise price equal to the fair market value of a share of the Company's common stock on September 13, 2012, the date of the grant. A total of 500,000 Rubino Option Shares will vest on September 13, 2014, and have an exercise price of \$0.25 per share. A total of 500,000 Rubino Option Shares will vest on September 13, 2015, and have an exercise price of \$0.75 per share. The final 500,000 Rubino Option Shares will vest on September 13, 2016, and have an exercise price of \$1.00 per share. The vesting of the Rubino Option Shares is subject to Mr. Rubino's continued employment with the Company, except in the event of his termination by the Company without Cause or by Mr. Rubino for Good Reason within 12 months of a Change of Control (as such terms are defined in the Rubino Employment Agreement), in which case all of the Rubino Option Shares vest immediately and remain exercisable for the remainder of the originally scheduled term.
- Pursuant to the Rubino Employment Agreement, upon termination by the Company without Cause or by Mr. Rubino for Good Reason (as such terms are defined in the Rubino Employment Agreement), subject to the delivery by Mr. Rubino's of a general release of claims in favor of the Company, Mr. Rubino is entitled to (i) severance payments equal to his base salary for 12 months, except in the case of termination

by the Company without Cause or termination by Mr. Rubino for Good Reason within 12 months following a Change of Control (as such terms are defined in the Rubino Employment Agreement), in which case Mr. Rubino is entitled to severance payments equal to his base salary for 18 months, (ii) prorated annual bonus payments that Mr. Rubino would have received but for his termination, (iii) prorated equity compensation that Mr. Rubino would have received but for his termination, and (iv) the cost of family health insurance coverage at the same rate as contributed by the Company prior to the termination until the earlier of twelve (12) months or loss of COBRA entitlement. In addition, in the case of termination by the Company without Cause or termination by Mr. Rubino for Good Reason within 12 months following a Change of Control (as such terms are defined in the Rubino Employment Agreement), Mr. Rubino is entitled to the vesting of all 2,000,000 stock option grants awarded pursuant to the terms of the Rubino Employment Agreement, regardless of date or condition of vesting.

Employment Agreement with Michael R. Garone, Chief Financial Officer and Corporate Secretary.

On January 14, 2013, the Company entered into an Employment Agreement (the “Garone Employment Agreement”) with Michael R. Garone, the Company’s Vice President, Chief Financial Officer and Corporate Secretary. The Garone Employment Agreement provides as follows:

- The effective date of the Garone Employment Agreement is January 14, 2013. The initial term of the Garone Employment Agreement is three years, and the agreement will automatically renew for additional one-year terms unless either party provides notice of non-renewal to the other party at least six months prior to the commencement of any renewal terms.
- The Garone Employment Agreement provides for an annual base salary of \$265,000, with eligibility to receive an annual bonus of up to \$79,500.
- Pursuant to the Garone Employment Agreement, Mr. Garone received a qualified stock option (the “Initial Option”) to purchase up to 40,000 shares of the Company’s common stock (the “Common Stock”) in accordance with the 2007 Plan. The Initial Option fully vested on the grant date of January 14, 2013 (the “Initial Grant Date”), and has an exercise price equal to the closing price of a share of the Common Stock on the Initial Grant Date.
- Pursuant to the Employment Agreement, on each of the first, second, and third anniversary of the Initial Grant Date, the Company agreed to make additional grants of incentive stock options to purchase 40,000 shares of Common Stock in accordance with the 2007 Plan (each, an “Additional Option”), at a price equal to the closing price of the Common Stock on the date of said grant, such options to vest on the one-year anniversary of such grant dates. Each Additional Option is subject to Mr. Garone’s continued employment as of the applicable grant date.
- Pursuant to the Garone Employment Agreement, upon termination by the Company without Cause, or by Mr. Garone for Good Reason (as such terms are defined in the Garone Employment Agreement), subject to the delivery by Mr. Garone of a general release of claims in favor of the Company, Mr. Garone is entitled to (i) severance payments equal to his base salary for 6 months, except in the case of termination by the Company without Cause or termination by Mr. Garone for Good Reason within 12 months following a Change of Control (as defined in the Garone Employment Agreement), in which case Mr. Garone is entitled to severance payments equal to his base salary for 12 months, (ii) prorated annual bonus payments that Mr. Garone would have received but for his termination, (iii) prorated equity compensation that Mr. Garone would have received but for his termination, and (iv) the cost of family health insurance coverage at the same rate as contributed by the Company prior to the termination until the earlier of twelve (12) months or loss of COBRA entitlement. In addition, in the case of termination by the Company without Cause or termination by Mr. Garone for Good Reason within 12 months following a Change of Control (as such terms are defined in the Garone Employment Agreement), Mr. Garone is entitled to the vesting of all stock option grants awarded pursuant to the terms of the Garone Employment Agreement, regardless of date or condition of vesting.

Transactions with MHR

Mark H. Rachesky, M.D. is a director and member of the Company's Compensation Committee and its Governance and Nominating Committee. Dr. Rachesky is also the managing member of (i) MHRC LLC ("MHRC"), the managing member of MHR Advisors LLC ("Advisors"), which in turn is the general partner of MHR Capital Partners Master Account LP ("Master Account") and MHR Capital Partners (100) LP ("Capital Partners 100"); (ii) MHRC II LLC ("MHRC II"), the managing member of MHR Institutional Advisors II LLC ("Institutional Advisors II"), which is in turn the general partner of MHR Institutional Partners II LP ("Institutional Partners II") and MHR Institutional Partners IIA LP ("Institutional Partners IIA"); and (iii) MHR Holdings LLC ("MHR Holdings"), the managing member of MHR Fund Management LLC, ("Fund Management" and, together with MHRC, MHRC II, MHR Holdings, Advisors, Institutional Advisors II, Master Account, Capital Partners 100, Institutional Partners II, and Institutional Partners IIA, "MHR") which is an affiliate of and has an investment management agreement with Master Account, Capital Partners 100, Institutional Partners II, and Institutional Partners IIA. In each of the transactions below with MHR that occurred during 2009, 2010, 2011, or 2012, the Company was advised by an independent committee of the Company's Board of Directors.

August 2009 Financing

On August 19, 2009, the Company entered into a Securities Purchase Agreement with MHR to sell 6,015,037 shares of common stock and warrants to purchase 3,729,323 shares of common stock for gross proceeds of \$4,000,000. Each unit, consisting of one share of common stock and a warrant to purchase 0.62 of a share of common stock, was sold for a purchase price of \$0.665. The warrants to purchase additional shares are exercisable at an exercise price of \$0.70 per share and will expire on August 21, 2014. For a more detailed discussion, please see Notes 8 and 9 to our Financial Statements included in our Annual Report on Form 10-K for the year ended December 31, 2012.

June 2010 Notes and Warrants

In connection with the Company's agreement with Novartis entered in June 2010 (the "Novartis Agreement"), the Company, Novartis and MHR entered into a non-disturbance agreement (the "Non-Disturbance Agreement"), pursuant to which MHR agreed to limit certain rights and courses of action that it would have available to it as a secured party under its Senior Secured Term Loan Agreement and Pledge and Security Agreement with the Company (collectively, the "Loan and Security Agreement"). Additionally, Novartis and MHR entered into a license agreement pursuant to which MHR agreed to grant a license to Novartis upon the occurrence of certain events and subject to satisfaction of certain conditions. MHR also consented to the Company entering into the Novartis Agreement, which consent was required under the Loan and Security Agreement, and agreed to enter into an agreement comparable to the Non-Disturbance Agreement at some point in the future in connection with another potential Company transaction (the "Future Transaction Agreement"). For a more detailed discussion, please see Notes 8 and 9 to our Financial Statements included in our Annual Report on Form 10-K for the year ended December 31, 2012.

In consideration of the agreements and consent provided by MHR described in the foregoing paragraph, the Company entered into an agreement with MHR (the "MHR Letter Agreement") pursuant to which the Company agreed to reimburse MHR for its legal expenses incurred up to \$500,000 in connection with the agreements entered into in connection with the Novartis transaction and up to \$100,000 in connection with the Future Transaction Agreement. These reimbursements were paid in the form of non-interest bearing promissory notes for \$500,000 and \$100,000 issued to MHR on June 4, 2010. Pursuant to the MHR Letter Agreement, the Company also granted to MHR warrants to purchase 865,000 shares of its common stock, with an exercise price of \$2.90 per share and an expiration date of August 21, 2014. For a more detailed discussion, please see Notes 8 and 9 to our Financial Statements included in our Annual Report on Form 10-K for the year ended December 31, 2012.

July 2010 Promissory Notes

On July 29, 2010, in consideration for \$500,000 in bridge financing funds provided to the Company, we issued to MHR promissory notes with an aggregate principal amount of \$525,000 (the “July 2010 MHR Notes”). The July 2010 MHR Notes provided for an interest rate of 15% per annum, and were due and payable on October 27, 2010. During the quarter ended September 30, 2010, certain conditions caused the maturity date of the July 2010 MHR Notes to accelerate, and the July 2010 MHR Notes were accordingly paid off. See Note 8 to our Financial Statements included in our Annual Report on Form 10-K for the year ended December 31, 2012 for further discussion.

August 2010 Financing

On August 25, 2010, the Company entered into a securities purchase agreement with MHR (the “August 2010 MHR Financing”) pursuant to which the Company agreed to sell an aggregate of 3,497,528 shares of its common stock and warrants to purchase a total of 2,623,146 additional shares of its common stock for total gross proceeds of \$3,532,503. Each unit, consisting of one share of common stock and a warrant to purchase 0.75 shares of common stock, was sold at a purchase price of \$1.01. The warrants to purchase additional shares are exercisable at a price of \$1.26 per share and will expire on August 26, 2015. On the same date, the Company also entered into a securities purchase agreement with certain institutional investors to sell common stock and warrants for total gross proceeds of \$3,532,503 (collectively, with the August 2010 MHR Financing, the “August 2010 Financing”).

In connection with the August 2010 Financing, the Company entered into a waiver agreement with MHR, pursuant to which MHR waived certain anti-dilution adjustment rights under its 11% senior secured notes (the “MHR Convertible Notes”) and warrants issued by the Company to MHR in September 2006 that would otherwise have been triggered by the financings described above. As consideration for such waiver, the Company issued to MHR a warrant to purchase 975,000 shares of common stock and agreed to reimburse MHR for 50% of its legal fees up to a maximum reimbursement of \$50,000. The terms of such warrant are identical to the warrants issued to MHR in the August 2010 MHR Financing transaction described above. For further discussion, see Notes 8 and 9 to our Financial Statements included in our Annual Report on Form 10-K for the year ended December 31, 2012.

July 2011 Financing

On June 30, 2011, the Company entered into a purchase agreement with MHR, pursuant to which, on July 6, 2011, it sold an aggregate of 4,300,438 shares of its common stock and warrants to purchase a total of 3,010,307 shares of its common stock for gross proceeds, before deducting fees and expenses and excluding the proceeds, if any, from the exercise of the MHR Warrants of \$3,749,981.94. As part of the July 2011 Financing, the Company entered into the a waiver agreement with MHR, pursuant to which MHR waived certain anti-dilution adjustment rights under the MHR Convertible Notes and certain warrants issued by the Company to MHR that would otherwise have been triggered by the financing with other institutional investors described above. As consideration for such waiver, the Company issued to MHR warrants to purchase 795,000 shares of common stock and agreed to reimburse MHR for up to \$25,000 of its legal fees. Each unit, consisting of one share of common stock and a warrant to purchase 0.7 shares of common stock, were sold at a purchase price of \$0.872. The warrants are exercisable at an exercise price of \$1.09 per share and will expire July 6, 2016.

2012 Bridge Loan.

On October 17, 2012, the Company issued a promissory note (the “Bridge Note”) to Institutional Partners IIA, Institutional Partners II, Master Account, and Capital Partners 100 (collectively, the “Bridge Lender”) in the principal amount of \$1,400,000 to be advanced by the Bridge Lender to the Company pursuant to the terms thereof (the “Bridge Loan”). The Bridge Note provides for an interest rate of 13% per annum. Pursuant to the terms of the Bridge Note, the entire principal amount advanced by the Bridge Lender pursuant to the Bridge Note, plus all accrued interest thereon, is payable on demand. The obligations under the Bridge Note are secured by a first priority lien on substantially all of our assets pursuant to the terms of the Security Agreement, as further described below.

Also on October 17, 2012, in connection with the issuance of the Bridge Note, Emisphere and MHR entered into that certain Amendment to Pledge and Security Agreement (the "Amendment"). The Amendment amends the Security Agreement to, among other things, include the Bridge Loan as an obligation secured by the terms of the Security Agreement and to include the Bridge Lender as a beneficiary of the terms of the Security Agreement. Pursuant to the terms of the Novartis Agreement described above, the Amendment expressly excludes certain intellectual property licensed to Novartis from the collateral securing the Bridge Loan. In accordance with the terms of the MHR Convertible Notes, MHR also provided a written consent to allow for the issuance of the Bridge Note and related obligations provided under the Amendment.

Ongoing Obligations Under Convertible Notes and Warrants

The MHR Convertible Notes contain provisions related to anti-dilution and redemption rights. In addition, MHR has certain rights regarding election of directors, participation in future equity financings and other related matters, which rights are set forth in the Company's certificate of incorporation and bylaws, as amended. In addition to the warrants described above, the Company issued warrants to purchase common stock to MHR in 2007 which are still outstanding. These warrants provide for anti-dilution protection, and the fair value of the warrants is estimated at the end of each quarterly reporting period using Black-Sholes models. See Notes 8 and 9 to our Financial Statements included in our Annual Report on Form 10-K for the year ended December 31, 2012 for a further discussion of MHR's rights under the MHR Convertible Notes and warrants.

Transaction with Bai Ye Feng

Bai Ye Feng has been the beneficial owner of more than five (5%) percent of the outstanding shares of Common Stock since the August 2010 Financing. In the July 2011 Financing, Mr. Feng purchased 688,073 shares of Common Stock and warrants to purchase 481,651 shares of Common Stock, for an aggregate purchase price of \$600,000. The warrants are exercisable at an exercise price of \$1.09 per share and will expire July 6, 2016. The total dollar amount of the July 2011 Financing was \$3,749,982.

SECTION 16(a) BENEFICIAL OWNERSHIP REPORTING COMPLIANCE

Section 16(a) of the Exchange Act, and the rules of the SEC require our directors, Executive Officers and persons who own more than 10% of common stock to file reports of their ownership and changes in ownership of common stock with the SEC. Our employees sometimes prepare these reports on the basis of information obtained from each director and Executive Officer. Based on written representations of the Company's directors and Executive Officers and on confirmation that no Form 5 was required to be filed, we believe that all reports required by Section 16(a) of the Exchange Act to be filed by its directors, Executive Officers and greater than ten (10%) percent owners during the last fiscal year were filed on time.

RELATED PARTY TRANSACTION APPROVAL POLICY

In February 2007, our Board of Directors adopted a written related party transaction approval policy, which sets forth our Company's policies and procedures for the review, approval or ratification of any transaction required to be reported in our filings with the SEC. The Company's policy with regard to related party transactions is that all material transactions non-compensation related are to be reviewed by the Audit Committee for any possible conflicts of interest. The Compensation Committee will review all material transactions that are related to compensation. All related party transactions approved by either the Audit Committee or Compensation Committee shall be disclosed to the Board of Directors at the next meeting.

PROPOSAL 1: ELECTION OF DIRECTORS

(Item #1 on the Proxy Card)

Our Board of Directors is currently comprised of seven (7) members and is divided into three classes with staggered terms so that the term of one class expires at each annual meeting of stockholders.

Each of our Class II Directors whose term is expiring at the Annual Meeting has been nominated by the Board of Directors for election at the Annual Meeting for a term expiring at the third succeeding annual meeting of stockholders after his election and until his successor is duly elected and qualified. At the recommendation of our governance and nominating committee, Timothy McInerney, Jacob M. Plotsker, and Alan L. Rubino have been nominated for election.

The Proxies given pursuant to this solicitation will be voted, unless authority is withheld, in favor of the Director Nominees. The Director Nominees have consented to be named and, if elected, to serve. In the event that a Director Nominee is unable or declines to serve as a director at the time of the Annual Meeting, the Proxies may be voted in the discretion of the persons acting pursuant to the Proxy for the election of other nominees. Proxies cannot be voted for a greater number of persons than the number of nominees named.

Voting

The Director Nominees receiving a plurality of the votes cast at the Annual Meeting will be elected as a director.

The Board of Directors deems the election of Timothy McInerney, Jacob M. Plotsker, and Alan L. Rubino as directors for a term expiring at the third succeeding annual meeting of stockholders after their election (Class II Director) to be in the best interest of Emisphere and its stockholders and recommends a vote “FOR” their election.

Information Concerning Director Nominees, Continuing Directors and Executive Officers

Information regarding the Director Nominees, those directors serving unexpired terms, and our current Executive Officers, all of who are currently serving open-ended terms, including their respective ages, the year in which each first joined the Company and their principal occupations or employment during the past five years, is provided below:

<u>Name</u>	<u>Age</u>	<u>Year Joined Emisphere</u>	<u>Position with the Company</u>
Alan L. Rubino (1)	58	2012	President and Chief Executive Officer, Class II Director
Michael R. Garone (2)	54	2007	Vice President, Chief Financial Officer and Corporate Secretary
John D. Harkey, Jr.	52	2006	Class I Director
Timothy McInerney	52	2012	Class II Director
Jacob M. Plotsker	45	2012	Class II Director
Mark H. Rachesky, M.D.	54	2005	Class III Director
Timothy G. Rothwell (3)	62	2009	Chairman of the Board of Directors, Class I Director
Michael Weiser, M.D., Ph.D.	50	2005	Class III Director

(1) On September 13, 2012, Alan L. Rubino joined the Company as President and Chief Executive Officer and, in connection therewith, Mr. Rubino was appointed as a Class II Director of the Company.

(2) On September 13, 2012, Michael R. Garone concluded his tenure as Interim Chief Executive Officer of the Company.

(3) On September 13, 2012, Timothy G. Rothwell became Chairman of the Board of Directors of the Company

Alan L. Rubino joined Emisphere on September 13, 2012 as President and Chief Executive Officer and, in connection therewith, was appointed as a Class II Director of the Company. His career spans over 30 years at every level of the biopharmaceutical industry. From October 2010 until July 2012, he served as Chief Executive Officer and President of New American Therapeutics, Inc., where he and his team presided over a venture that was focused on the acquisition, marketing, and ultimate sale of Denavir, a leading Rx topical therapeutic for HSV-1 cold sore treatment. From February 2008 to September 2010, Mr. Rubino was CEO and President of Akrimax Pharmaceuticals, where he acquired two Rx launch products, NitroMist and Tirosint, which are actively marketed and in growth phases today. Prior to 2008, he was President and Chief Operating Officer of the Pharms Corporation, which was a development-stage publicly-held firm, where he led the transformation of the company through the acquisition of Vela Pharmaceuticals. Mr. Rubino also spent four years in senior executive leadership positions on the strategic services side at both Cardinal Health and PDI, Inc., both public companies that provided high-level outsourcing offerings to the pharmaceutical industry. A major portion of Mr. Rubino's career includes twenty-four years spent at Hoffmann-La Roche, where he served as a corporate officer and member of the US Executive Committee and held a variety of key senior executive positions with broad general management responsibilities leading major business units and operations, marketing, business development, alliance management, human resources, and supply chain/manufacturing. At Hoffmann-La Roche, Mr. Rubino led many key top level executive initiatives and presided over numerous commercial product launches across a spectrum of therapeutic areas, including the introduction of the world's first biological product in Roferon-A [alfa-interferon 2a]. Currently, Mr. Rubino serves of the Boards of Directors and is Chairman of the Compensation Committee of Aastrom Biosciences (NASDAQ: ASTM), and on the Board of Directors of Genisphere, Inc., and serves on the Rutgers Business School Board of Advisors.

Michael R. Garone joined Emisphere in 2007 as Vice President and Chief Financial Officer. Mr. Garone has also served as the Company's Corporate Secretary since October 2008. Mr. Garone previously served as Interim Chief Executive Officer and Chief Financial Officer of Astralis, Ltd. (OTCBB: ASTR.OB). Prior to that, Mr. Garone was with AT&T (NYSE: T) for 20 years, where he held several positions, including Chief Financial Officer of AT&T Alascom. Mr. Garone received an MBA from Columbia University and a BA in Mathematics from Colgate University. From February 28, 2011 until September 13, 2012, Michael R. Garone served as Interim Chief Executive Officer of the Company.

John D. Harkey, Jr. has been Director of the Company since April 2006. Mr. Harkey serves as Consolidated Restaurant Operations, Inc.'s (CRC) Chairman and Chief Executive Officer. He is the majority shareholder of privately-held CRC and its subsidiaries, related companies and joint ventures. CRC operates a total of 117 full-service restaurants including 28 franchise restaurants and employs 4,500 people in 18 states and in England, Dubai, Saudi Arabia, Abu Dhabi and Cairo, Egypt. CRC serves approximately 14 million meals per year. CRC currently operates and franchises casual dining restaurants Cantina Laredo, El Chico, Black Oak Grill, Good Eats and Lucky's, and fine dining steakhouses III Forks, Cool River Café and Silver Fox Steakhouse. Mr. Harkey has over 25 years experience as a private investor concentrating in the acquisition, consolidation and management of both public and private companies. He has also merged, acquired and/or operated companies in a variety of other industries including real estate, wholesale healthcare products, wholesale farm and ranch products, petrochemical services, self-storage warehousing, ATM processing services, telecommunications and software development. He currently serves on the Board of Directors and Audit Committees of Loral Space & Communications, Inc. (NASDAQ:LORL), and Energy Transfer Equity, LP (NYSE:ETE), and ETE's Compensation Committee, Board of Directors of Leap Wireless International, Inc. (NASDAQ:LEAP), serves as Chairman of the Board of Regency Energy Partners, (NYSE: RGP), and on the Board of Directors of the Baylor Health Care System Foundation. He also serves on the President's Development Council of Howard Payne University, the Executive Board of Circle Ten Council of the Boy Scouts of America, the CEO Advisory Board of Dallas Arboretum and is a member of the World Presidents' Organization. Mr. Harkey obtained a B.B.A. with honors in finance and, a J.D. from the University of Texas at Austin and a M.B.A. from Stanford University School of Business. Mr. Harkey's entrepreneurial background and his business and leadership experiences in a range of different industries make him an asset to our Board of Directors.

Timothy McInerney has been a Director of the Company since March 2012. Mr. McInerney is a principal at Two River and a Partner of Riverbank Capital Securities, Inc. From 1992 to March 2007, Mr. McInerney was a Managing Director of Paramount BioCapital, Inc. where he oversaw the overall distribution of Paramount's private equity product. Prior to 1992, Mr. McInerney was a research analyst focusing on the biotechnology industry at Ladenburg, Thalman & Co. Prior to that, Mr. McInerney held equity sales positions at Bear Stearns & Co. and Shearson Lehman Brothers, Inc. Mr. McInerney also worked in sales and marketing for Bristol-Myers Squibb. Mr. McInerney is currently Chairman of the Board of Directors of Insite Vision, Inc., (OTCBB: INSV), and is a member of the Board of Directors of ZIOPHARM, Inc., (NASDAQ: ZIOP), and Edgemont Pharmaceuticals, LLC. He formerly served on the Board of Directors of Manhattan Pharmaceuticals, Inc., (OTCBB: TGTX). Mr. McInerney received his B.S. in pharmacy from St. John's University at New York. He also completed a post-graduate residency at the New York University Medical Center in drug information systems. Mr. McInerney's knowledge of the pharmaceutical industry and capital markets, and affiliations with the financial community make him an asset to our Board of Directors.

Jacob Plotsker has been a director of the Company since March 2012. Mr. Plotsker is currently owner of Cambridge Sage Group, LLC, a consulting firm focused on strategic consulting to pharmaceutical companies. He previously served as Senior Director, Commercial Operations and Head of Marketing for Teva Pharmaceuticals Women's Health Division. Prior to joining Teva in 2009, Mr. Plotsker was Senior Director, US and Global Marketing at Schering-Plough Corp (previously Organon BioSciences prior to being acquired by Schering-Plough Corp, which was subsequently acquired by Merck & Co., Inc) where he was responsible for commercialization of marketed brands and launch strategy for brands in development. From 1990 to 2006, Mr. Plotsker served in various Finance and Marketing roles at Pfizer, Inc. including Director/Team Leader of the company's Antifungal Franchise. From 1989 to 1990, Mr. Plotsker was an Accountant at Deloitte & Touche. Mr. Plotsker holds a Bachelor of Arts degree in Accounting & Information Systems from Queens College of the City University of New York, a Master of Business Administration in Marketing and Finance from New York University — Stern School of Business, and completed the Executive Development Program in General Management at the University of Chicago — Booth School of Business. Mr. Plotsker serves on the Board of Directors of Sharsheret, a nonprofit 501(c)3 organization providing support and resources to young women living with breast cancer. Mr. Plotsker's experiences in marketing and product commercialization in the pharmaceutical industry, and his affiliations with industry and healthcare related organizations make him an asset to our Board of Directors.

Mark H. Rachesky, M.D. has been a director of the Company since 2005. Dr. Rachesky is the President of MHR Fund Management LLC and investment manager of various private investment funds that invest in inefficient market sectors, including special situation equities and distressed investments. Dr. Rachesky is currently the Non-Executive Chairman of the Board of Directors of Loral Space & Communications Inc. (NASDAQ:LORL), Lions Gate Entertainment Corp. (NYSE: LGF), Leap Wireless International, Inc. (NASDAQ: LEAP) and Telesat Canada, and also serves on the Board of Directors of Navistar International Corporation (NYSE:NAV). He formerly served on the Board of Directors of Neose Technologies, Inc (NASDAQ: NTEC) and of Nationshealth, Inc. (formerly quoted on OTCBB:NHRX). Dr. Rachesky is a graduate of Stanford University School of Medicine and Stanford University School of Business. Dr. Rachesky graduated from the University of Pennsylvania with a major in Molecular Aspects of Cancer. Dr. Rachesky's extensive investing and financial background, his thorough knowledge of capital markets and his training as an M.D., make him an asset to our Board of Directors.

Timothy G. Rothwell, has been a director of the Company since November 2009 and Chairman of the Board of Directors since September 2012. Mr. Rothwell is the former Chairman of Sanofi-Aventis U.S. From February 2007 to October 2009, Mr. Rothwell served as Chairman of Sanofi-Aventis U.S. From September 2004 to February 2007, Mr. Rothwell was President and Chief Executive Officer of that company, overseeing all domestic commercial operations as well as coordination of Industrial Affairs and Research and Development activities. From May 2003 to September 2004, Mr. Rothwell was President and Chief Executive Officer of Sanofi-Synthelabo, Inc. and was instrumental in the formation of Sanofi-Aventis U.S. in 2004. Prior to that, from January 1998 to May 2003, he served in various capacities at Pharmacia, including as President of the company's Global Prescription Business. From January 1995 to January 1998, Mr. Rothwell served as worldwide President

of Rhone-Poulenc Rorer Pharmaceuticals and President of the company's Global Pharmaceutical Operations. In his long career, Mr. Rothwell has also served as Chief Executive Officer of Sandoz Pharmaceuticals, Vice President, Global Marketing and Sales at Burroughs Wellcome, and Senior Vice President of Marketing and Sales for the U.S. for Squibb Corporation. Mr. Rothwell holds a Bachelor of Arts from Drew University and earned his J.D. from Seton Hall University. He formerly served on the PhRMA Board of Directors, as well as the Institute of Medicine's Evidence-Based Medicine roundtable, the CEO Roundtable on Cancer, the Healthcare Businesswomen's Association Advisory Board, the Board of Trustees for the Somerset Medical Center Foundation, the Board of Trustees for the HealthCare Institute of New Jersey, as a Trustee of the Corporate Council for America's Children at the Children's Health Fund, the Board of Directors of Agenus (NASDAQ: AGEN), the Board of Directors of New American Therapeutics, and on the Board of Visitors for Seton Hall Law School. Presently, he is Chairman of the Board of Directors of Archimedes Pharma Ltd., Chairman of the Board of Directors of the PheoPara Alliance, a nonprofit 501(c)3 organization. Mr. Rothwell's broad business and leadership experiences in the pharmaceutical industry and his affiliations with industry, educational and healthcare related organizations make him an asset to our Board of Directors.

Michael Weiser, M.D., Ph.D. has been a director of the Company since 2005. Dr. Weiser is currently founder and co-chairman of Actin Biomed, a New York based healthcare investment firm advancing the discovery and development of novel treatments for unmet medical needs. Prior to joining Actin Biomed, Dr. Weiser was the Director of Research at Paramount BioCapital where he was responsible for the scientific, medical and financial evaluation of biomedical technologies and pharmaceutical products under consideration for development. Dr. Weiser completed his Ph.D. in Molecular Neurobiology at Cornell University Medical College and received his M.D. from New York University School of Medicine. He performed his post-graduate medical training in the Department of Obstetrics and Gynecology at New York University Medical Center. Dr. Weiser also completed a Postdoctoral Fellowship in the Department of Physiology and Neuroscience at New York University School of Medicine and received his B.A. in Psychology from University of Vermont. Dr. Weiser is a member of The National Medical Honor Society, Alpha Omega Alpha, American Society of Clinical Oncology, American Society of Hematology and Association for Research in Vision and Ophthalmology. In addition, Dr. Weiser has received awards for both academic and professional excellence and is published extensively in both medical and scientific journals. Dr. Weiser currently serves on the board of directors of Chelsea Therapeutics International, (NASDAQ: CHTP), and Ziopharm Oncology, Inc., (NASDAQ: ZIOP), as well as several privately held companies. Dr. Weiser formerly served on the Board of Directors of Manhattan Pharmaceuticals, Inc., (OTCBB: TGTX), Hana Biosciences, Inc., (currently know as Talon Therapeutics, Inc., OTCBB: TLON.OB), and Vioquest Pharmaceuticals, Inc., (VOQP:OTC US). Dr. Weiser has an M.D. and a Ph.D., and his scientific, business and financial experiences, as well as his knowledge of the healthcare industry, capital markets, pharmaceutical products and biomedical technology development make him an asset to our Board of Directors.

PROPOSAL NO. 2: ADVISORY APPROVAL OF EXECUTIVE COMPENSATION

(Item #2 on the Proxy Card)

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), and Section 14A of the Securities Exchange Act, as amended, enables our stockholders to vote to approve, on an advisory (nonbinding) basis, the compensation of our named executive officers, as disclosed pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in the Company's Proxy Statement.

This proposal, commonly known as a "say-on-pay" proposal, gives you as a stockholder the opportunity to endorse or not endorse our executive pay program through the following resolution:

"RESOLVED, that the Company's stockholders approve, on an advisory basis, the compensation of the named executive officers, as disclosed in the Company's Proxy Statement for the 2013 Annual Meeting of Stockholders pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the Compensation Discussion and Analysis, the 2012 Summary Compensation Table and the other related tables and disclosure."

The Dodd-Frank Act and Section 14A also enable our stockholders to indicate how frequently we should seek an advisory vote on the compensation of our named executive officers. At the Company's annual meeting of stockholders held on May 24, 2011, the stockholders of the Company approved the frequency of once every year as the frequency with which the stockholders are provided an advisory vote on the compensation of our named executive officers. Accordingly, following this proposal, the next such advisory vote shall occur at next year's annual stockholder meeting.

Vote Required

The affirmative vote of a majority of shares present, in person or represented by Proxy, and voting on the approval of the executive compensation at our annual meeting is required to approve, on an advisory basis, the executive compensation as disclosed in this Proxy Statement. Abstentions and broker "non-votes" are included in the number of shares present or represented for purposes of quorum, but are not considered as shares voting or as votes cast with respect to any matter presented at the annual meeting. As a result, abstentions and broker "non-votes" will not have any effect on the proposal to approve executive compensation as disclosed in this Proxy Statement. Because your vote is advisory, it will not be binding upon the Board. However, the Compensation Committee will take into account the outcome of the vote when considering future executive compensation arrangements.

Recommendation of the Board

Our Board of Directors unanimously recommends that you vote "FOR" the approval of this resolution.

PROPOSAL 3: APPROVAL OF AMENDMENT TO THE COMPANY'S 2007 STOCK PLAN

(Item #3 on the Proxy Card)

Introduction

At the Annual Meeting the stockholders will be asked to consider and act upon a proposal to authorize the addition of 5,000,000 shares of Common Stock ("Additional Shares") to the Company's 2007 Stock Award and Incentive Plan (the "2007 Stock Plan" or the "Plan"). The 2007 Stock Plan was originally adopted by the Board of Directors on February 12, 2007 and approved by the stockholders of the Company on April 20, 2007, and the number of shares of Common Stock authorized for issuance thereunder, including shares remaining available for new grants under the Company's 2000 Stock Option Plan (the "2000 Plan") and the Company's Stock Incentive Plan for Outside Directors (the "Directors Stock Plan") was 3,265,562. The resolution recommending the Additional Shares was originally adopted by the Board of Directors on March 8, 2013, subject to stockholder approval at the Annual Meeting.

The biopharmaceutical marketplace is highly competitive and includes companies with far greater resources than ours. Our work involves the difficult, unpredictable, and often slow development of our technology and of drug candidates. Continuity of scientific knowledge, management skills, and relationships are often critical success factors to our business. The objectives of our compensation program for named executive officers and other employees is to provide competitive cash compensation, competitive health, welfare and defined contribution retirement benefits as well as long-term equity incentives that offer significant reward potential for the risks assumed and for each individual's contribution to the long-term performance of the Company. Individual performance is measured against long-term strategic goals, short-term business goals, scientific innovation, regulatory compliance, new business development, development of employees, fostering of teamwork and other Emisphere values designed to build a culture of high performance. These policies and practices are based on the principle that total compensation should serve to attract and retain those executives critical to the overall success of Emisphere and are designed to reward executives for their contributions toward business performance that is designed to build and enhance stockholder value.

Our Compensation Committee and our Board of Directors believe that our future success depends, in large part, upon our ability to maintain a competitive position in attracting, retaining and motivating key personnel. The 2007 Stock Plan is a key component of our total compensation package to executives and employees. At

current levels of participation, all shares available for issuance under the 2007 Stock Plan, prior to the amendment, will be issued no later than May 2013. The Board of Directors believes that the approval of the Additional Shares is necessary to continue to allow the Company to offer equity compensation to its employees, consultants, advisors, officers and directors.

The following is a summary description of the 2007 Stock Plan and is qualified in its entirety by reference to the full text of the 2007 Stock Plan, a copy of which is attached to this Proxy Statement as Appendix A, and the First Amendment to the 2007 Stock Plan adopted by the Board of Directors on March 8, 2013, subject to stockholder approval at the Annual Meeting, a copy of which is attached to this Proxy Statement as Appendix B.

Description of the 2007 Stock Plan

The following is a brief description of the material features of the 2007 Stock Plan. This description, including information summarized above, is qualified in its entirety by reference to the full text of the proposed 2007 Stock Plan, a copy of which is attached to this Proxy Statement as Appendix A, and the First Amendment to the 2007 Stock Plan adopted by the Board of Directors on March 8, 2013, subject to stockholder approval at the Annual Meeting, a copy of which is attached to this Proxy Statement as Appendix B.

Shares Available under the 2007 Stock Plan. If the Additional Shares are approved by our stockholders, 7,500,000 shares of Common Stock will be reserved for delivery to participants, plus an additional 765,562 shares, an amount equal to the shares remaining available for new grants under the 2000 Plan and the Directors Stock Plan (measured immediately before the expiration of the Directors Stock Plan on January 29, 2007), for a total of 8,265,562 shares, plus any shares recaptured from outstanding awards under the 2000 Plan. Shares used for awards assumed in an acquisition do not count against the shares reserved under the 2007 Stock Plan. The shares reserved may be used for any type of award under the 2007 Stock Plan (each, as more specifically described below, an “Award”, and collectively, “Awards”).

Only the number of shares actually issued to participants in connection with an award after all restrictions have lapsed or an option has been exercised will be counted against the number of shares reserved under the 2007 Stock Plan. Thus, shares remain available for new awards if an award expires or is forfeited, canceled or settled in cash, if shares are withheld or separately surrendered to pay the exercise price of an option or to satisfy tax withholding obligations relating to an award, if fewer shares are delivered upon exercise of a stock appreciation right (“SAR”) than the number of shares covered by the SAR, or if shares that had been issued as restricted stock are forfeited.

These same rules apply to options outstanding under the 2000 Plan and the Directors Stock Plan, so that shares may become available under the 2007 Stock Plan to the extent that shares are not in fact delivered to participants in connection with those options. Under the 2007 Stock Plan, awards may be outstanding relating to a greater number of shares than the aggregate remaining available under the 2007 Stock Plan so long as the Committee ensures that awards will not result in delivery and vesting of shares in excess of the number then available under the 2007 Stock Plan. Shares delivered under the 2007 Stock Plan may be either authorized and unissued shares or treasury shares.

On April 10, 2013, the last reported sale price of our Common Stock in composite transactions as quoted on the Over the Counter Bulletin Board was \$0.12 per share.

Per-Person Award Limitations. The 2007 Stock Plan includes a limitation on the amount of awards that may be granted to any one participant in a given year in order to qualify awards as “performance-based” compensation not subject to the limitation on deductibility under Section 162(m) of the Internal Revenue Code of 1986, as amended (the “Code”). Under this annual per-person limitation, no participant may in any year be granted share-denominated awards under the 2007 Stock Plan relating to more than his or her “Annual Limit”. The Annual Limit equals 1.5 million shares plus the amount of the participant’s unused Annual Limit relating to share-based awards as of the close of the previous year, subject to adjustment for splits and other extraordinary corporate events. In the case of cash-denominated Awards, the 2007 Stock Plan limits performance Awards that may be earned by a participant to the participant’s defined Annual Limit, which for this purpose equals \$3 million plus the amount of the participant’s unused cash Annual Limit as of the close of the previous year. The per-person

limit for cash-denominated performance awards does not operate to limit the amount of share-based awards, and vice versa. These limits apply only to awards under the 2007 Stock Plan, and do not limit our ability to enter into compensation arrangements outside of the 2007 Stock Plan.

Adjustments. Adjustments to the number and kind of shares delivered in connection with Awards, subject to the share limitations and specified in the share-based Annual Limit described above, are authorized in the event of a large and non-recurring dividend or other distribution, recapitalization, stock split, stock dividend, reorganization, business combination, or other similar corporate transaction, equity restructuring as defined under applicable accounting rules, or other similar event affecting the Common Stock. We are also obligated to adjust outstanding awards upon the occurrence of these types of events to preserve, without enlarging, the rights of Plan participants with respect to their Awards. The Committee (as defined below) shall adjust performance conditions and other terms of awards in response to these kinds of events or to changes in applicable laws, regulations, or accounting principles, except that (i) adjustments to awards intended to qualify as “performance-based” generally must conform to requirements imposed by Section 162(m) of the Code and the Treasury Regulations promulgated thereunder, and (ii) the Committee cannot change targets (as defined under applicable Treasury Regulations) under performance goals relating to options or SARs intended to qualify as “performance-based compensation under Section 162(m).

Eligibility. Executive officers and other employees of Emisphere and its subsidiaries (including employee directors), non-employee directors, consultants and others who provide substantial services to us, are eligible to be granted Awards under the 2007 Stock Plan. In the case of non-employee directors, in contrast to the Directors Stock Plan, there will be no restriction on grants to persons who beneficially own five percent or more of our Common Stock. As a result, Dr. Rachesky will be eligible for grants of equity awards. In addition, any person who has been offered employment by us may be granted awards, but such prospective grantee may not receive any payment or exercise any right relating to the award until he or she has commenced employment or the providing of services. As of April 10, 2013, approximately 13 persons would be potentially eligible for awards under the 2007 Stock Plan. As of April 10, 2013, Awards currently outstanding under the 2007 Stock Plan are held by a total of 13 Emisphere employees, consultants and directors. As of April 10, 2013, awards currently outstanding under the 2000 Plan are held by a total of 1 Emisphere employee and awards currently outstanding under the Directors Stock Plan are held by 2 current non-employee directors.

Administration. The Compensation Committee administers the 2007 Stock Plan, except that the Board itself may act to administer the Plan. The Board must perform the functions of the Compensation Committee for purposes of granting awards to non-employee directors. References to the “Committee” herein mean the Compensation Committee or the full Board exercising authority with respect to a given award. The 2007 Stock Plan provides that the composition and governance of the Committee shall be established in the Committee’s charter adopted by the Board. Subject to the terms and conditions of the 2007 Stock Plan, the Committee is authorized to select participants, determine the type and number of awards to be granted and the number of shares to which awards will relate or the amount of a performance award, specify times at which awards will be exercisable or settled, including performance conditions that may be required as a condition thereof, set other terms and conditions of such awards, prescribe forms of award agreements, interpret and specify rules and regulations relating to the 2007 Stock Plan, and make all other determinations which may be necessary or advisable for the administration of the 2007 Stock Plan. Nothing in the 2007 Stock Plan precludes the Committee from authorizing payment of other compensation, including bonuses based upon performance, to officers and employees, including the executive officers, outside of the Plan. The 2007 Stock Plan authorizes the Committee to delegate authority to executive officers to the extent permitted by applicable law, but such delegation will not authorize grants of awards to executive officers without direct participation by the Committee. The 2007 Stock Plan provides that members of the Committee and the Board shall not be personally liable, and shall be fully indemnified, in connection with any action or determination taken or made in good faith under the Plan.

Stock Options and SARs. The Committee is authorized to grant stock options, including both incentive stock options (“ISOs”), which may result in potentially favorable tax treatment to the participant, and non-qualified stock options. SARs may also be granted, entitling the participant to receive the excess of the fair market value of a share on the date of exercise over the SAR’s designated “base price.” The exercise price of an option and the base price of an SAR are determined by the Committee, but may not be less than the fair market value of the

shares on the date of grant. The maximum term of each option or SAR will be ten years. Subject to this limit, the times at which each option or SAR will be exercisable and provisions requiring forfeiture of unexercised options (and in some cases gains realized upon an earlier exercise) at or following termination of employment or upon the occurrence of other events generally are fixed by the Committee. Options may be exercised by payment of the exercise price in cash, shares having a fair market value equal to the exercise price or surrender of outstanding awards, or other property having a fair market value equal to the exercise price. These exercise methods may include withholding of option shares to pay the exercise price if that would not result in additional accounting expense. Broker-assisted cashless exercises are permitted under the 2007 Stock Plan. We may impose limits on any of these methods of exercise and settlement and implement other methods, for both options and SARs. SARs may be exercisable for shares or for cash, as determined by the Committee. Options and SARs may be granted on terms that cause such awards not to be subject to Code Section 409A (“Section 409A”), or with terms that cause those awards to be deferral arrangements subject to Section 409A.

Restricted and Deferred Stock/Restricted Stock Units. The Committee is authorized to grant restricted stock, deferred stock and restricted stock units. Prior to the end of the restricted period, shares granted as restricted stock may not be sold, and will be forfeited in the event of termination of employment in specified circumstances. The Committee establishes the length of the restricted period for awards of restricted stock. Aside from the risk of forfeiture and non-transferability, an award of restricted stock entitles the participant to the rights of a stockholder of Emisphere, including the right to vote the shares and to receive dividends, which dividends could be either forfeitable or non-forfeitable, subject to any mandatory reinvestment or other requirement imposed by the Committee. Any of these rights may be limited by the Committee.

Deferred stock gives a participant the right to receive shares at the end of a specified deferral period. Deferred stock subject to forfeiture conditions may be denominated as an award of “restricted stock units” or otherwise designated by the Committee. The Committee establishes any vesting requirements for deferred stock/restricted stock units granted for continuing services. One advantage of restricted stock units, as compared to restricted stock, is that the period during which the award is deferred as to settlement can be extended past the date the award becomes non-forfeitable, so the Committee can require or permit a participant to continue to hold an interest tied to Common Stock on a tax-deferred basis. Under such deferral circumstances, the deferral arrangement must conform to the requirements of Section 409A, as further discussed below under the heading “**Federal Income Tax Implications of the 2007 Stock Plan.**” Prior to settlement, deferred stock awards, including restricted stock units, carry no voting or dividend rights or other rights associated with stock ownership, but the Committee may choose to authorize payment of dividend equivalents, which may be forfeitable or non-forfeitable, in connection with these awards.

Other Stock-Based Awards, Stock Bonus Awards, and Awards in Lieu of Other Obligations. The 2007 Stock Plan authorizes the Committee to grant awards that are denominated or payable in, valued in whole or in part by reference to, or otherwise based on or related to Common Stock. The Committee will determine the terms and conditions of such awards, including the consideration to be paid to exercise awards in the nature of purchase rights, the periods during which awards will be outstanding, and any forfeiture conditions and restrictions on awards. In addition, the Committee is authorized to grant shares as a bonus free of restrictions, or to grant shares or other awards in lieu of obligations under other plans or compensatory arrangements, subject to such terms as the Committee may specify.

Performance-Based Awards. The Committee may grant performance awards, which may be awards of a specified cash amount, share-based awards, or specified number of other Awards (or a combination) as determined by the Committee. Generally, performance awards require satisfaction of pre-established performance goals, consisting of one or more business criteria and a targeted performance level with respect to such criteria as a condition of awards being granted or becoming exercisable or settleable, or as a condition to accelerating the timing of such events. Performance may be measured over a period of any length specified by the Committee. Therefore, for example, annual incentive awards may be granted under the 2007 Stock Plan, payable in cash or in shares. If so determined by the Committee, in order to avoid the limitations on tax deductibility under Section 162(m) of the Code, the business criteria used by the Committee in establishing performance goals applicable to performance awards to the named executive officers will be selected from among the following:

- gross revenue or sales measures;
- operating income, earnings from operations, earnings before or after taxes, earnings before or after interest, depreciation, amortization, or extraordinary or special items;
- net income or net income per common share (basic or diluted);
- return on assets, return on investment, return on capital, or return on equity;
- cash flow, free cash flow, cash flow return on investment, or net cash provided by operations;
- interest expense after taxes;
- economic profit or value created;
- operating margin;
- stock price or total stockholder return; and
- implementation, completion or attainment of measurable objectives with respect to research, development, products or projects, production volume levels, acquisitions and divestitures of subsidiaries, affiliates, joint ventures or other assets, market penetration, total market capitalization and enterprise value, business retention, new product generation, cost controls and targets (including cost of capital), customer satisfaction, employee satisfaction, agency ratings, management of employment practices and employee benefits, supervision of litigation and information technology, implementation of business process controls, and recruiting and retaining personnel.

The Committee retains discretion to set the level of performance for a given business criteria that will result in the earning of a specified amount under a performance award. These goals may be set with fixed, quantitative targets, targets relative to our past performance, or targets compared to the performance of other companies, such as a published or special index or a group of companies selected by the Committee for comparison. The Committee may specify that these performance measures will be determined before payment of bonuses, capital charges, non-recurring or extraordinary income or expense, or other financial and general and administrative expenses for the performance period, if so specified by the Committee.

Other Terms of Awards. Awards may be settled in cash, shares, other awards or other property, in the discretion of the Committee subject, as applicable, to restrictions imposed by applicable law (including Section 409A of the Code). The Committee may require or permit participants to defer the settlement of all or part of an award, including shares issued upon exercise of an option subject to compliance with Section 409A, in accordance with such terms and conditions as the Committee may establish, including payment or crediting of interest or dividend equivalents on any deferred amounts. The 2007 Stock Plan allows vested but deferred awards to be paid out to the participant in the event of an unforeseeable emergency within the meaning of Section 409A. The Committee is authorized to place cash, shares or other property in trusts or make other arrangements to provide for payment of our obligations under the 2007 Stock Plan. The Committee may condition awards on the payment of taxes, and may provide for mandatory withholding of a portion of the shares or other property to be distributed in order to satisfy tax withholding obligations, or may permit a participant to elect to satisfy these tax obligations by having us withhold shares. Awards granted under the Plan generally may not be pledged or otherwise encumbered and are not transferable except by will or by the laws of descent and distribution, or to a des-

ignated beneficiary upon the participant's death, except that the Committee may permit transfers of awards other than incentive stock options on a case-by-case basis; such transfers will be allowed for estate-planning purposes but may not include transfers to other third parties for value.

The 2007 Stock Plan authorizes the Committee to provide for forfeiture of awards and award gains in the event a participant fails to comply with conditions relating to non-competition, non-solicitation, confidentiality, non-disparagement and other requirements for the protection of the our business, or in the event that our financial statements must be restated due to a material failure to comply with an applicable financial reporting requirement. Awards under the 2007 Stock Plan may be granted without a requirement that the participant pay consideration in the form of cash or property for the grant (as distinguished from the exercise), except to the extent required by law. The Committee may, however, grant awards in substitution for, exchange for or as a buyout of other awards under any our plans, or other rights to payment from us, and may exchange or buy out outstanding awards for cash or other property, subject to the requirement that repricing transactions must be approved by stockholders. The Committee also may grant Awards in addition to and in tandem with other awards or rights. In granting a new Award, the Committee may determine that the in-the-money value or fair value of any surrendered Award may be applied to reduce the purchase price of any new Award, subject to the requirement that repricing transactions must be approved by stockholders.

Dividend Equivalents. The Committee may grant dividend equivalents. These are rights to receive payments equal in value to the amount of dividends paid on a specified number of shares of Common Stock while an award is outstanding. These amounts may be in the form of cash or rights to receive additional awards or additional shares of Common Stock having a value equal to the cash amount. The awards may be granted on a stand-alone basis or in conjunction with another Award, and the Committee may specify whether the dividend equivalents will be forfeitable or non-forfeitable. Typically, rights to dividend equivalents are granted in connection with restricted stock units or deferred stock, so that the participant can earn amounts equal to dividends paid on the number of shares covered by the award while the award is outstanding.

Vesting, Forfeitures, and Related Award Terms. The Committee determines the vesting schedule of options, restricted stock and other awards, the circumstances resulting in forfeiture of awards, the post-termination exercise periods of options and similar awards, and the events resulting in acceleration of the right to exercise and the lapse of restrictions, or the expiration of any deferral period, on any award. This could include terms providing for accelerated vesting of awards upon the occurrence of a change in control or upon a termination of a participant's employment after a change in control.

Amendments to the 2007 Stock Plan and Awards and Termination of the 2007 Stock Plan. The Board may amend, suspend, discontinue, or terminate the 2007 Stock Plan or the Committee's authority to grant awards thereunder without stockholder approval, except that amendments to the 2007 Stock Plan shall be submitted to the Company's stockholders if required by law or regulation or under the rules of the Nasdaq Marketplace Rules or any other stock exchange or automated quotation system on which the shares subject to the 2007 Stock Plan may then be listed or quoted or if such amendment would materially increase the number of shares available for issuance and delivery under the Plan. The Board may, in its discretion, determine to submit amendments not requiring stockholder approval to the stockholders of the Company. The Committee is authorized to amend outstanding Awards, except that the Board and Committee may not amend outstanding Awards (including by means of an amendment to the 2007 Stock Plan) without the consent of an affected participant if such amendment would materially and adversely affect the rights of such participant with respect to the outstanding Award. Actions that alter the timing of federal income taxation will not be deemed "material" for these purposes unless resulting in an income tax penalty on the participant. The Committee will not amend or replace previously granted options or SARs in a transaction that constitutes a "repricing" (meaning (i) lowering the exercise price of the option or SAR after it is granted, (ii) any other acted treated as a repricing under GAAP, and (iii) the canceling of an option or SAR when the exercise price exceeds the fair market value of the underlying Common Stock in exchange for another option or SAR, restricted stock, or other equity, cash, or property) without the approval of stockholders, except as otherwise authorized under the Plan, which authorization includes repricing if pursuant to an adjustment in the event of any large and non-recurring dividend or other distribution, recapitalization, stock split, stock dividend, reorganization, business combination, or other similar corporate transaction, equity restructuring as defined under applicable accounting rules, or other similar event affecting the Common Stock.

Unless earlier terminated, the authority of the Committee to make grants under the 2007 Stock Plan will terminate ten years after the latest stockholder approval of the 2007 Stock Plan, and the 2007 Stock Plan will terminate when no shares remain available and we have no further obligation with respect to any outstanding Award.

Federal Income Tax Implications of the 2007 Stock Plan

We believe that under current law the following Federal income tax consequences generally would arise with respect to awards under the 2007 Stock Plan.

Options and SARs are not deemed to be deferral arrangements subject to Section 409A if: (i) the options are ISOs; (ii) the options are options other than ISOs that are issued with an exercise price that may never be less than the fair market value of the underlying stock on the date of grant and such options do not include any additional deferral feature; or (iii) the SARs are nondiscounted appreciation rights that do not include any additional deferral feature. Options and SARs that are not deemed to be deferral arrangements under Section 409A would have the following tax consequences: The grant of an option or an SAR will create no federal income tax consequences for the participant or Emisphere. A participant will not recognize taxable income upon exercising an option that is an ISO, except that the alternative minimum tax may apply. Upon exercising an option that is not an ISO, the participant generally must recognize ordinary income equal to the difference between the exercise price and the fair market value of the freely transferable or non-forfeitable shares acquired on the date of exercise. Upon exercising an SAR, the participant must generally recognize ordinary income equal to the cash or the fair market value of the shares received.

An option holder will recognize taxable income upon the disposition of the shares received upon exercise of an ISO. Any gain recognized upon a disposition that is not a “disqualifying disposition” will be taxable as long-term capital gain. A “disqualifying disposition” means any disposition of shares acquired on the exercise of an incentive stock option within two years of the date the option was granted or within one year of the date the shares were issued to the option holder. The use of shares acquired pursuant to the exercise of an incentive stock option to pay the option price under another stock option is treated as a disposition for this purpose. In general, if an option holder makes a disqualifying disposition, an amount equal to the excess of (a) the lesser of (i) the fair market value of the shares on the date of exercise or (ii) the amount actually realized on the disposition over (b) the option exercise price, will be taxable as ordinary income and the balance of the gain recognized, if any, will be taxable as long-term capital gain if the option holder holds the shares for more than one year or short-term capital gain if the option holder holds the shares for one year or less. The holding period for the shares generally would begin on the date the shares were acquired and would not include the period of time during which the option was held.

Otherwise, a participant’s sale of shares acquired by exercise of any nonstatutory stock option (i.e., a stock option other than an ISO) generally will result in short-term or long-term capital gain or loss measured by the difference between the sale price and the participant’s tax basis in such shares. The tax basis generally is the exercise price plus any amount he or she recognized as ordinary income in connection with the option’s exercise. A participant’s sale of shares acquired by exercise of an SAR generally will result in short-term or long-term capital gain or loss measured by the difference between the sale price and the tax basis in the shares, which normally is the amount he or she recognized as ordinary income in connection with the SAR’s exercise.

We generally can claim a tax deduction equal to the amount recognized as ordinary income by a participant in connection with the exercise of an option or SAR, but no tax deduction relating to a participant’s capital gains. Accordingly, we will not be entitled to any tax deduction with respect to an ISO if the participant holds the shares for the applicable ISO holding periods prior to selling the shares.

Awards other than options and SARs that result in a transfer to the participant of cash or shares or other property generally will be structured under the 2007 Stock Plan to meet applicable requirements under Section 409A. If no restriction on transferability or substantial risk of forfeiture applies to amounts distributed to a participant, the participant generally must recognize ordinary income equal to the cash or the fair market value of shares actually received. Thus, for example, if we grant an award of restricted stock units that has vested or requires or permits deferral of receipt of cash or shares under a vested award, the participant should not become subject to income tax until the time at which shares or cash are actually distributed, and we will become entitled to claim a tax deduction at that time.

On the other hand, if a restriction on transferability and substantial risk of forfeiture applies to shares or other property actually distributed to a participant under an award (such as, for example, a grant of restricted stock), the participant generally must recognize ordinary income equal to the fair market value of the transferred amounts at the earliest time either the transferability restriction or risk of forfeiture lapses. In all cases, we can claim a tax deduction in an amount equal to the ordinary income recognized by the participant, except as discussed below. A participant may elect to be taxed at the time of grant of restricted stock or other property rather than upon lapse of restrictions on transferability or the risk of forfeiture. However, if property for which an election is in effect is forfeited while substantially non-vested, such forfeiture shall be treated as a sale or exchange upon which a loss is recognized equal to the excess (if any) of: (1) the amount paid (if any) for such property, over, (2) the amount realized (if any) upon such forfeiture.

Any award that is deemed to be a deferral arrangement (excluding certain exempted short-term deferrals) will be subject to Section 409A. Participant elections to defer compensation under such awards and as to the timing of distributions relating to such awards must meet requirements under Section 409A in order for income taxation to be deferred upon vesting of the award and tax penalties avoided by the participant. If a non-qualified deferred compensation plan subject to Section 409A fails to meet, or is not operated in accordance with, Section 409A requirements, then all compensation deferred under the plan is immediately taxable to the extent that it is not subject to a substantial risk of forfeiture and was not previously taxable. The tax imposed as a result of these rules would be increased by interest (at a rate equal to the rate imposed upon tax underpayments plus one percentage point) and an additional penalty tax equal to 20% of the compensation.

Some options and SARs may be subject to Section 409A, which regulates deferral arrangements. In such case, the distribution to the participant of shares or cash relating to the award would have to be restricted in order for the participant not to be subject to tax and a tax penalty at the time of vesting. In particular, the participant's discretionary exercise of the option or SAR could not be permitted over a period extending more than a year in most cases. If the distribution and other award terms meet applicable requirements under Section 409A, the participant would recognize ordinary income at the time of distribution of shares or cash rather than exercise, with the amount of ordinary income equal to the distribution date value of the shares or cash less any exercise price actually paid. We would not be entitled to a tax deduction at the time of exercise, but would become entitled to a tax deduction at the time shares are delivered at the end of the deferral period.

As discussed above, compensation that qualifies as "performance-based" compensation is excluded from the \$1 million deductibility cap of Section 162(m), and therefore remains fully deductible by the company that pays it. Under the 2007 Stock Plan, options and SARs granted with an exercise price or base price at least equal to 100% of fair market value of the underlying stock at the date of grant, performance awards to employees the Committee expects to be named executive officers at the time compensation is received, and certain other awards which are conditioned upon achievement of performance goals are intended to qualify as such "performance-based" compensation. A number of requirements must be met in order for particular compensation to so qualify, however, so there can be no assurance that such compensation under the 2007 Stock Plan will be fully deductible under all circumstances. In addition, other awards under the 2007 Stock Plan, such as non-performance-based restricted stock and restricted stock units, generally will not so qualify, so that compensation paid to certain executives in connection with such awards may, to the extent it and other compensation subject to Section 162(m)'s deductibility cap exceed \$1 million in a given year, not be deductible by Emisphere as a result of Section 162(m). Compensation to certain employees resulting from vesting of awards in connection with a change in control or termination following a change in control also may be non-deductible under the "Golden Parachute" rules of Code Sections 4999 and 280G.

The foregoing provides only a general description of the application of federal income tax laws to certain awards under the 2007 Stock Plan. This discussion is intended for the information of stockholders considering how to vote at the Special Meeting and not as tax advice or guidance to participants in the 2007 Stock Plan, as the consequences may vary with the types of awards made, the identity of the recipients and the method of payment or settlement. Different tax rules may apply, including in the case of variations in transactions that are permitted under the 2007 Stock Plan (such as payment of the exercise price of an option by surrender of previously acquired shares). The summary does not address in any detail the effects of other federal taxes (including possible "golden parachute" excise taxes) or taxes imposed under state, local or foreign tax laws.

IRS Circular 230 Disclosure: To ensure compliance with U.S. Treasury Regulations governing tax practice, we inform you that any U.S. tax advice contained in this statement was not written to be used for and cannot be used for (i) purposes of avoiding any tax related penalties that may be imposed under Federal tax law, or (ii) the promotion, marketing or recommending to another party of any transaction or matter addressed herein.

New Plan Benefits

Because future awards under the 2007 Stock Plan are generally be granted in the discretion of the Committee, the type, number, recipients, and other terms of such awards cannot be determined at this time. Information regarding our recent practices with respect to annual and long-term incentive awards and stock-based compensation under existing plans is presented in the “Summary Compensation Table — 2012, 2011 and 2010” and these related tables: “Outstanding Equity Awards at Fiscal Year-End — 2012,” and “Securities Available for Future Issuance Under Equity Plans” elsewhere in this Proxy Statement, and in our financial statements for the fiscal year ended December 31, 2012 included in our most recent Annual Report on Form 10-K , which is available to stockholders upon request.

Vote Required

The affirmative vote of a majority of shares present, in person or represented by Proxy, and voting on the approval of the amendment to the 2007 Stock Plan at the Annual Meeting is required to approve the amendment as disclosed in this Proxy Statement. Broker non-votes, if any and abstentions will have the no effect on the outcome of this proposal. No rights of appraisal or similar rights of dissenters exist with respect to this matter.

Recommendation of the Board

Our Board of Directors deems the amendment to the 2007 Stock Plan to be in the best interest of Emisphere and its stockholders and recommends that you vote “FOR” the approval of this proposal.

PROPOSALS OF STOCKHOLDERS FOR 2014 ANNUAL MEETING

Stockholders may submit proposals on matters appropriate for stockholder action, including stockholder nominees for election to the Board of Directors, at our annual stockholder meetings. To be considered for inclusion in next year’s Proxy Statement, stockholder proposals, including stockholder nominees for election to the Board of Directors, must be received by us at our principal executive office no later than December 20, 2013.

For any proposal that is not submitted for inclusion in next year’s Proxy Statement (as described in the preceding paragraph), but is instead sought to be presented directly at next year’s annual stockholder meeting (the “2014 Annual Meeting”), the stockholder must also give Emisphere written notice of the proposal. Our By-Laws provide that in order to be timely, a stockholders’ notice must be received by Emisphere at the principal executive offices not less than 30 days or more than 60 days prior to the 2014 Annual Meeting.

Notice of intention to present proposals at the 2014 Annual Meeting should be addressed to: Corporate Secretary, Emisphere Technologies, Inc., 4 Becker Farm Road, Suite 103, Roseland, NJ, 07068.

OTHER BUSINESS

The Board of Directors knows of no other business to be acted upon at the meeting. However, if any other business properly comes before the meeting, it is the intention of the persons named in the enclosed Proxy to vote on such matters in their discretion.

The prompt return of your Proxy will be appreciated and helpful in obtaining the necessary vote. Therefore, whether or not you intend to attend the meeting, please vote your shares by internet, by phone, or by signing the Proxy and returning it in the enclosed envelope.

By order of the Board of Directors

Michael R. Garone
Secretary

APPENDIX A

EMISPHERE TECHNOLOGIES, INC.

2007 STOCK AWARD AND INCENTIVE PLAN

1. **Purpose.** The purpose of this 2007 Stock Award and Incentive Plan (the “Plan”) is to aid Emisphere Technologies, Inc., a Delaware corporation (together with its successors and assigns, the “Company”), in attracting, retaining, motivating and rewarding employees, non-employee directors, and other service providers of the Company or its subsidiaries or affiliates, to provide for equitable and competitive compensation opportunities, to recognize individual contributions and reward achievement of Company goals, and promote the creation of long-term value for stockholders by closely aligning the interests of Participants with those of stockholders. The Plan authorizes the Company to issue stock-based and cash-based incentives to Participants.

2. **Definitions.** In addition to the terms defined in Section 1 above and elsewhere in the Plan, the following capitalized terms used in the Plan have the respective meanings set forth in this Section:

(a) “Annual Limit” shall have the meaning specified in Section 5(b).

(b) “Award” means any Option, SAR, Restricted Stock, Deferred Stock, Stock granted as a bonus or in lieu of another award, Dividend Equivalent, Other Stock-Based Award, Performance Award, together with any related right or interest, granted to a Participant under the Plan.

(c) “Beneficiary” means the legal representatives of the Participant’s estate entitled by will or the laws of descent and distribution to receive the benefits under a Participant’s Award upon a Participant’s death, provided that, if and to the extent authorized by the Committee, a Participant may be permitted to designate a Beneficiary, in which case the “Beneficiary” instead will be the person, persons, trust or trusts (if any are then surviving) which have been designated by the Participant in his or her most recent written and duly filed beneficiary designation to receive the benefits specified under the Participant’s Award upon such Participant’s death. Unless otherwise determined by the Committee, any designation of a Beneficiary other than a Participant’s spouse shall be subject to the written consent of such spouse.

(d) “Board” means the Company’s Board of Directors.

(e) “Code” means the Internal Revenue Code of 1986, as amended. References to any provision of the Code or regulation thereunder shall include any successor provisions and regulations, and reference to regulations includes any applicable guidance or pronouncement of the Department of the Treasury and Internal Revenue Service.

(f) “Committee” means the Compensation Committee of the Board, the composition and governance of which is established in the Committee’s Charter as approved from time to time by the Board and subject to other corporate governance documents of the Company. No action of the Committee shall be void or deemed to be without authority due to the failure of any member, at the time the action was taken, to meet any qualification standard set forth in the Committee Charter or this Plan. The full Board may perform any function of the Committee hereunder (except to the extent limited under applicable Nasdaq Marketplace Rules), in which case the term “Committee” shall refer to the Board.

(g) “Covered Employee” means an Eligible Person who is a Covered Employee as specified in Section 10(j).

(h) “Deferred Stock” means a right, granted under this Plan, to receive Stock or other Awards or a combination thereof at the end of a specified deferral period.

(i) “Dividend Equivalent” means a right, granted under this Plan, to receive cash, Stock, other Awards or other property equal in value to all or a specified portion of the dividends paid with respect to a specified number of shares of Stock.

(j) “Effective Date” means the effective date specified in Section 10(p).

(k) “Eligible Person” has the meaning specified in Section 5.

(l) “Exchange Act” means the Securities Exchange Act of 1934, as amended. References to any provision of the Exchange Act or rule (including a proposed rule) thereunder shall include any successor provisions and rules.

(m) “Fair Market Value” means the fair market value of Stock, Awards or other property as determined in good faith by the Committee or under procedures established by the Committee. Unless otherwise determined by the Committee, the Fair Market Value of Stock on a given day shall be the closing sales price per share for such Stock (or the average of the closing bid and asked price, if no sales were reported) as quoted on such exchange or system for the on the date of issuance, as reported in The Wall Street Journal or such other source as the Plan administrator deems reliable. Fair Market Value relating to the exercise price or base price of any Non-409A Option or SAR and relating to the market value of Stock measured at the time of exercise shall conform to requirements under Code Section 409A.

(n) “409A Awards” means Awards that constitute a deferral of compensation under Code Section 409A and regulations thereunder. “Non-409A Awards” means Awards other than 409A Awards. Although the Committee retains authority under the Plan to grant Options, SARs and Restricted Stock on terms that will qualify those Awards as 409A Awards, Options, SARs, and Restricted Stock are intended to be Non-409A Awards unless otherwise expressly specified by the Committee.

(o) “Incentive Stock Option” or “ISO” means any Option designated as an incentive stock option within the meaning of Code Section 422 and qualifying thereunder.

(p) “Option” means a right to purchase Stock granted under Section 6(b).

(q) “Other Stock-Based Awards” means Awards granted to a Participant under Section 6(h).

(r) “Participant” means a person who has been granted an Award under the Plan which remains outstanding, including a person who is no longer an Eligible Person.

(s) “Performance Award” means a conditional right, granted to a Participant under Sections 6(i) or 7, to receive cash, Stock or other Awards or payments.

(t) “Preexisting Plans” mean the Company’s 2000 Stock Option Plan and Stock Incentive Plan for Outside Directors.

(u) “Restricted Stock” means Stock granted under this Plan which is subject to certain restrictions on transferability and to a substantial risk of forfeiture.

(v) “Stock” means the Company’s Common Stock, par value \$.01 per share and any other equity securities of the Company that may be substituted or resubstituted for Stock pursuant to Section 10(c).

(w) “Stock Appreciation Rights” or “SAR” means a right granted to a Participant under Section 6(c).

3. Administration.

(a) *Authority of the Committee.* The Plan shall be administered by the Committee, which shall have full and final authority, in each case subject to and consistent with the provisions of the Plan, to select Eligible Persons to become Participants; to grant Awards; to determine the type and number of Awards, the number and class of shares of Stock to which an Award may relate, the dates on which Awards may be exercised and on which the risk of forfeiture or deferral period relating to Awards shall lapse or terminate, the acceleration of any such dates (including in connection with a change in control of the Company), the expiration date of any Award, whether, to what extent, and under what circumstances an Award may be settled, or the exercise price of an Award may be paid, in cash, Stock, other Awards, or other property, and other terms and conditions of, and all other matters relating to, Awards; to prescribe documents evidencing or setting terms of Awards (such Award documents need not be identical for each Participant or each Award), amendments thereto, and rules and regulations for the administration of the Plan and amendments thereto; to construe and interpret the Plan and Award documents and correct defects, supply omissions or reconcile inconsistencies therein; and to make all other decisions and determinations as the Committee may deem necessary or advisable for the administration of the Plan. Decisions of the Committee with respect to the administration and interpretation of the Plan shall be final, con-

clusive, and binding upon all persons interested in the Plan, including Participants, Beneficiaries, transferees under Section 10(b) and other persons claiming rights from or through a Participant, and stockholders. The foregoing notwithstanding, the Board shall perform the functions of the Committee for purposes of granting Awards under the Plan to non-employee directors (the functions of the Committee with respect to other aspects of non-employee director awards is not exclusive to the Board, however).

(b) ***Manner of Exercise of Committee Authority.*** The express grant of any specific power to the Committee, and the taking of any action by the Committee, shall not be construed as limiting any power or authority of the Committee. The Committee may act through subcommittees, including for purposes of perfecting exemptions under Rule 16b-3 or qualifying Awards under Code Section 162(m) as performance-based compensation, in which case the subcommittee shall be subject to and have authority under the charter applicable to the Committee, and the acts of the subcommittee shall be deemed to be acts of the Committee hereunder. The Committee may delegate to one or more officers or managers of the Company or any subsidiary or affiliate, or committees thereof, the authority, subject to such terms as the Committee shall determine, to perform such functions, including administrative functions, as the Committee may determine, to the extent that such delegation (i) will not result in the loss of an exemption under Rule 16b-3(d) for Awards granted to Participants subject to Section 16 of the Exchange Act in respect of the Company, (ii) will not cause Awards intended to qualify as “performance-based compensation” under Code Section 162(m) will fail to so qualify, and (iii) will not result in a related-party transaction with an executive officer required to be disclosed under Item 404(a) of Regulation S-K under the Exchange Act, and (iv) is permitted under Section 157 and other applicable provisions of the Delaware General Corporation Law.

(c) ***Limitation of Liability.*** The Committee and each member thereof, and any person acting pursuant to authority delegated by the Committee, shall be entitled, in good faith, to rely or act upon any report or other information furnished by any executive officer, other officer or employee of the Company or a subsidiary or affiliate, the Company’s independent auditors, consultants or any other agents assisting in the administration of the Plan. Members of the Committee, any person acting pursuant to authority delegated by the Committee, and any officer or employee of the Company or a subsidiary or affiliate acting at the direction or on behalf of the Committee or a delegee shall not be personally liable for any action or determination taken or made in good faith with respect to the Plan, and shall, to the extent permitted by law, be fully indemnified and protected by the Company with respect to any such action or determination.

4. Stock Subject To Plan.

(a) ***Overall Number of Shares Available for Delivery.*** Subject to adjustment as provided in Section 10(c), the total number of shares of Stock reserved and available for delivery in connection with Awards under the Plan shall be (i) two million five hundred thousand (2,500,000) shares of Stock plus (ii) seven hundred sixty-five thousand five hundred sixty two (765,562) shares of stock, the number of shares that, immediately before the Effective Date, remain available for new awards under the Preexisting Plans (or, in the case of the Stock Incentive Plan for Outside Directors, remained available immediately prior to that plan’s expiration on January 29, 2007) and become available in accordance with Section 4(b) after the Effective Date; provided, however, that the total number of shares of Stock with respect to which ISOs may be granted shall not exceed the number specified in clause (i) above. Any shares of Stock delivered under the Plan shall consist of authorized and unissued shares or treasury shares.

(b) ***Share Counting Rules.*** The Committee may adopt reasonable counting procedures to ensure appropriate counting, avoid double counting (as, for example, in the case of tandem or substitute awards) and make adjustments in accordance with this Section 4(b). Shares shall be counted against those reserved to the extent such shares have been delivered and are no longer subject to a risk of forfeiture. Accordingly, (i) to the extent that an Award under the Plan or an award under the 2000 Stock Option Plan is canceled, expired, forfeited, settled in cash, settled by delivery of fewer shares than the number underlying the Award or award, or otherwise terminated without delivery of shares to the Participant, the shares retained by or returned to the Company will not be deemed to have been delivered under the Plan, and will be available for Awards under the Plan; and (ii) shares that are withheld from such an Award or award or separately surrendered by the Participant in payment of the exercise price or taxes relating to such an Award or award shall be deemed to constitute shares not

delivered and will be available under the Plan. The Committee may determine that Awards may be outstanding that relate to more shares than the aggregate remaining available under the Plan so long as Awards will not in fact result in delivery and vesting of shares in excess of the number then available under the Plan. In addition, in the case of any Award granted in assumption of or in substitution for an award of a company or business acquired by the Company or a subsidiary or affiliate or with which the Company or a subsidiary or affiliate combines, shares delivered or deliverable in connection with such assumed or substitute Award shall not be counted against the number of shares reserved under the Plan.

5. Eligibility; Per-Person Award Limitations.

(a) *Eligibility.* Awards may be granted under the Plan only to Eligible Persons. For purposes of the Plan, an “Eligible Person” means (i) an employee of the Company or any subsidiary or affiliate, including any executive officer or employee director of the Company or a subsidiary or affiliate, (ii) any person who has been offered employment by the Company or a subsidiary or affiliate, provided that such prospective employee may not receive any payment or exercise any right relating to an Award until such person has commenced employment with the Company or a subsidiary or affiliate, (iii) any non-employee director of the Company, and (iv) any person who provides substantial services to the Company or a subsidiary or affiliate. An employee on leave of absence may be considered as still in the employ of the Company or a subsidiary or affiliate for purposes of eligibility for participation in the Plan. For purposes of the Plan, a joint venture in which the Company or a subsidiary has a substantial direct or indirect equity investment shall be deemed an affiliate, if so determined by the Committee. Holders of awards granted by a company or business acquired by the Company or a subsidiary or affiliate, or with which the Company or a subsidiary or affiliate combines, are eligible for grants of substitute awards granted in assumption of or in substitution for such outstanding awards previously granted under the Plan in connection with such acquisition or combination transaction.

(b) *Per-Person Award Limitations.* In each calendar year during any part of which the Plan is in effect, an Eligible Person may be granted Awards intended to qualify as “performance-based compensation” under Code Section 162(m) under the Plan relating to up to his or her Annual Limit. A Participant’s Annual Limit, in any year during any part of which the Participant is then eligible under the Plan, shall equal 1.5 million shares plus the amount of the Participant’s unused Annual Limit relating to the same type of Award as of the close of the previous year, subject to adjustment as provided in Section 10(c). In the case of an Award which is not valued in a way in which the limitation set forth in the preceding sentence would operate as an effective limitation satisfying applicable law (including Treasury Regulation 1.162-27(e)(4)), an Eligible Person may not be granted Awards authorizing the earning during any calendar year of an amount that exceeds the Eligible Person’s Annual Limit, which for this purpose shall equal \$3.0 million plus the amount of the Eligible Person’s unused cash Annual Limit as of the close of the previous year (this limitation is separate and not affected by the number of Awards granted during such calendar year subject to the limitation in the preceding sentence). For this purpose, (i) “earning” means satisfying performance conditions so that an amount becomes payable, without regard to whether it is to be paid currently or on a deferred basis or continues to be subject to any service requirement or other non-performance condition, (ii) a Participant’s Annual Limit is used to the extent an amount or number of shares may be potentially earned or paid under an Award, regardless of whether such amount or shares are in fact earned or paid, and (iii) the Annual Limit applies to Dividend Equivalents under Section 6(g) only if such Dividend Equivalents are granted separately from and not as a feature of another Award.

6. Specific Terms of Awards.

(a) *General.* Awards may be granted on the terms and conditions set forth in this Section 6. In addition, the Committee may impose on any Award or the exercise thereof, at the date of grant or thereafter (subject to Sections 10(e) and 10(k)), such additional terms and conditions, not inconsistent with the provisions of the Plan, as the Committee shall determine, including terms requiring forfeiture of Awards in the event of termination of employment or service by the Participant and terms permitting a Participant to make elections relating to his or her Award. The Committee shall retain full power and discretion with respect to any term or condition of an Award that is not mandatory under the Plan, subject to Section 10(k) and the terms of the Award agreement. The Committee shall require the payment of lawful consideration for an Award to the extent necessary to satisfy the requirements of the Delaware General Corporation Law, and may otherwise require payment of consideration for an Award except as limited by the Plan.

(b) **Options.** The Committee is authorized to grant Options to Participants on the following terms and conditions:

(i) **Exercise Price.** The exercise price per share of Stock purchasable under an Option (including both ISOs and non-qualified Options) shall be determined by the Committee, provided that such exercise price shall be not less than the Fair Market Value of a share of Stock on the date of grant of such Option, subject to Section 8(a). Notwithstanding the foregoing, any substitute award granted in assumption of or in substitution for an outstanding award granted by a company or business acquired by the Company or a subsidiary or affiliate, or with which the Company or a subsidiary or affiliate combines may be granted with an exercise price per share of Stock other than as required above. No adjustment will be made for a dividend or other right for which the record date is prior to the date on which the stock is issued, except as provided in Section 10(c) of the Plan.

(ii) **Option Term; Time and Method of Exercise.** The Committee shall determine the term of each Option, provided that in no event shall the term of any Option exceed a period of ten years from the date of grant. The Committee shall determine the time or times at which or the circumstances under which an Option may be exercised in whole or in part (including based on achievement of performance goals and/or future service requirements), the methods by which such exercise price may be paid or deemed to be paid and the form of such payment (subject to Sections 10(j) and 10(k)), including, without limitation, cash, Stock (including by withholding Stock deliverable upon exercise), other Awards or awards granted under other plans of the Company or any subsidiary or affiliate, or other property (including through broker-assisted “cashless exercise” arrangements, to the extent permitted by applicable law), and the methods by or forms in which Stock will be delivered or deemed to be delivered in satisfaction of Options to Participants (including, in the case of 409A Awards, deferred delivery of shares subject to the Option, as mandated by the Committee, with such deferred shares subject to any vesting, forfeiture or other terms as the Committee may specify).

(iii) **ISOs.** The terms of any ISO granted under the Plan shall comply in all respects with the provisions of Code Section 422.

(c) **Stock Appreciation Rights.** The Committee is authorized to grant SARs to Participants on the following terms and conditions:

(i) **Right to Payment.** An SAR shall confer on the Participant to whom it is granted a right to receive, upon exercise thereof, the excess of (A) the Fair Market Value of one share of Stock on the date of exercise over (B) the grant price of the SAR as determined by the Committee. The grant price of each SAR shall be not less than the Fair Market Value of a share of Stock on the date of grant of such SAR.

(ii) **Other Terms.** The Committee shall determine the term of each SAR, provided that in no event shall the term of an SAR exceed a period of ten years from the date of grant. The Committee shall determine at the date of grant or thereafter, the time or times at which and the circumstances under which a SAR may be exercised in whole or in part (including based on achievement of performance goals and/or future service requirements), the method of exercise, method of settlement, form of consideration payable in settlement, method by or forms in which Stock will be delivered or deemed to be delivered to Participants, whether or not a SAR shall be free-standing or in tandem or combination with any other Award, and whether or not the SAR will be a 409A Award or Non-409A Award. The Committee may require that an outstanding Option be exchanged for an SAR exercisable for Stock having vesting, expiration, and other terms substantially the same as the Option, so long as such exchange will not result in additional accounting expense to the Company.

(d) **Restricted Stock.** The Committee is authorized to grant Restricted Stock to Participants on the following terms and conditions:

(i) **Grant and Restrictions.** Restricted Stock shall be subject to such restrictions on transferability, risk of forfeiture and other restrictions, if any, as the Committee may impose, which restrictions may lapse separately or in combination at such times, under such circumstances (including based on

achievement of performance goals and/or future service requirements), in such installments or otherwise and under such other circumstances as the Committee may determine at the date of grant or thereafter. Except to the extent restricted under the terms of the Plan and any Award document relating to the Restricted Stock, a Participant granted Restricted Stock shall have all of the rights of a stockholder, including the right to vote the Restricted Stock and the right to receive dividends thereon (subject to any mandatory reinvestment or other requirement imposed by the Committee).

(ii) Forfeiture. Except as otherwise determined by the Committee, upon termination of employment or service during the applicable restriction period, Restricted Stock that is at that time subject to restrictions shall be forfeited and reacquired by the Company; provided that the Committee may provide, by rule or regulation or in any Award document, or may determine in any individual case, that restrictions or forfeiture conditions relating to Restricted Stock will lapse in whole or in part, including in the event of terminations resulting from specified causes.

(iii) Certificates for Stock. Restricted Stock granted under the Plan may be evidenced in such manner as the Committee shall determine. If certificates representing Restricted Stock are registered in the name of the Participant, the Committee may require that such certificates bear an appropriate legend referring to the terms, conditions and restrictions applicable to such Restricted Stock, that the Company retain physical possession of the certificates, and that the Participant deliver a stock power to the Company, endorsed in blank, relating to the Restricted Stock.

(iv) Dividends and Splits. As a condition to the grant of an Award of Restricted Stock, the Committee may require that any dividends paid on a share of Restricted Stock shall be either (A) paid with respect to such Restricted Stock at the dividend payment date in cash, in kind, or in a number of shares of unrestricted Stock having a Fair Market Value equal to the amount of such dividends, or (B) automatically reinvested in additional Restricted Stock or held in kind, which shall be subject to the same terms as applied to the original Restricted Stock to which it relates, or (C) deferred as to payment, either as a cash deferral or with the amount or value thereof automatically deemed reinvested in shares of Deferred Stock, other Awards or other investment vehicles, subject to such terms as the Committee shall determine or permit a Participant to elect. Unless otherwise determined by the Committee, Stock distributed in connection with a Stock split or Stock dividend, and other property distributed as a dividend, shall be subject to restrictions and a risk of forfeiture to the same extent as the Restricted Stock with respect to which such Stock or other property has been distributed.

(e) **Deferred Stock.** The Committee is authorized to grant Deferred Stock to Participants, subject to the following terms and conditions:

(i) Award and Restrictions. Issuance of Stock will occur upon expiration of the deferral period specified for an Award of Deferred Stock by the Committee (or, if permitted by the Committee, as elected by the Participant). In addition, Deferred Stock shall be subject to such restrictions on transferability, risk of forfeiture and other restrictions, if any, as the Committee may impose, which restrictions may lapse at the expiration of the deferral period or at earlier specified times (including based on achievement of performance goals and/or future service requirements), separately or in combination, in installments or otherwise, and under such other circumstances as the Committee may determine at the date of grant or thereafter. Deferred Stock may be satisfied by delivery of Stock, other Awards, or a combination thereof (subject to Section 10(k)), as determined by the Committee at the date of grant or thereafter.

(ii) Forfeiture. Except as otherwise determined by the Committee, upon termination of employment or service during the applicable deferral period or portion thereof to which forfeiture conditions apply (as provided in the Award document evidencing the Deferred Stock), all Deferred Stock that is at that time subject to such forfeiture conditions shall be forfeited; provided that the Committee may provide, by rule or regulation or in any Award document, or may determine in any individual case, that restrictions or forfeiture conditions relating to Deferred Stock will lapse in whole or in part, including in the event of terminations resulting from specified causes. Deferred Stock subject to a risk of forfeiture may be called "restricted stock units" or otherwise designated by the Committee.

(iii) **Dividend Equivalents.** Unless otherwise determined by the Committee, Dividend Equivalents on the specified number of shares of Stock covered by an Award of Deferred Stock shall be either (A) paid with respect to such Deferred Stock at the dividend payment date in cash or in shares of unrestricted Stock having a Fair Market Value equal to the amount of such dividends, or (B) deferred with respect to such Deferred Stock, either as a cash deferral or with the amount or value thereof automatically deemed reinvested in additional Deferred Stock, other Awards or other investment vehicles having a Fair Market Value equal to the amount of such dividends, as the Committee shall determine or permit a Participant to elect.

(f) **Bonus Stock and Awards in Lieu of Obligations.** The Committee is authorized to grant to Participants Stock as a bonus, or to grant Stock or other Awards in lieu of obligations of the Company or a subsidiary or affiliate to pay cash or deliver other property under the Plan or under other plans or compensatory arrangements, subject to such terms as shall be determined by the Committee.

(g) **Dividend Equivalents.** The Committee is authorized to grant Dividend Equivalents to a Participant, which may be awarded on a free-standing basis or in connection with another Award. The Committee may provide that Dividend Equivalents shall be paid or distributed when accrued or shall be deemed to have been reinvested in additional Stock, Awards, or other investment vehicles, and subject to restrictions on transferability, risks of forfeiture and such other terms as the Committee may specify.

(h) **Other Stock-Based Awards.** The Committee is authorized, subject to limitations under applicable law, to grant to Participants such other Awards that may be denominated or payable in, valued in whole or in part by reference to, or otherwise based on, or related to, Stock or factors that may influence the value of Stock, including, without limitation, convertible or exchangeable debt securities, other rights convertible or exchangeable into Stock, purchase rights for Stock, Awards with value and payment contingent upon performance of the Company or business units thereof or any other factors designated by the Committee, and Awards valued by reference to the book value of Stock or the value of securities of or the performance of specified subsidiaries or affiliates or other business units. The Committee shall determine the terms and conditions of such Awards. Stock delivered pursuant to an Award in the nature of a purchase right granted under this Section 6(h) shall be purchased for such consideration, paid for at such times, by such methods, and in such forms, including, without limitation, cash, Stock, other Awards, notes, or other property, as the Committee shall determine. Cash awards, as an element of or supplement to any other Award under the Plan, may also be granted pursuant to this Section 6(h).

(i) **Performance Awards.** Performance Awards, denominated in cash or in Stock or other Awards, may be granted by the Committee in accordance with Section 7.

7. Performance Awards.

(a) **Performance Awards Generally.** Performance Awards may be denominated as a cash amount, number of shares of Stock, or specified number of other Awards (or a combination) which may be earned upon achievement or satisfaction of performance conditions specified by the Committee. In addition, the Committee may specify that any other Award shall constitute a Performance Award by conditioning the right of a Participant to exercise the Award or have it settled, and the timing thereof, upon achievement or satisfaction of such performance conditions as may be specified by the Committee. The Committee may use such business criteria and other measures of performance as it may deem appropriate in establishing any performance conditions, and may exercise its discretion to reduce or increase the amounts payable under any Award subject to performance conditions, except as limited under Sections 7(b) and 7(c) in the case of a Performance Award intended to qualify as “performance-based compensation” under Code Section 162(m).

(b) **Performance Awards Granted to Covered Employees.** If the Committee determines that a Performance Award to be granted to an Eligible Person who is designated by the Committee as likely to be a Covered Employee should qualify as “performance-based compensation” for purposes of Code Section 162(m), the grant, exercise and/or settlement of such Performance Award shall be contingent upon achievement of a preestablished performance goal and other terms set forth in this Section 7(b).

(i) Performance Goal Generally. The performance goal for such Performance Awards shall consist of one or more business criteria and a targeted level or levels of performance with respect to each of such criteria, as specified by the Committee consistent with this Section 7(b). The performance goal shall be objective and shall otherwise meet the requirements of Code Section 162(m) and regulations thereunder, including the requirement that the level or levels of performance targeted by the Committee result in the achievement of performance goals being “substantially uncertain.” The Committee may determine that such Performance Awards shall be granted, exercised and/or settled upon achievement of any one performance goal or that two or more of the performance goals must be achieved as a condition to grant, exercise and/or settlement of such Performance Awards. Performance goals may differ for Performance Awards granted to any one Participant or to different Participants.

(ii) Business Criteria. One or more of the following business criteria for the Company, on a consolidated basis, and/or for specified subsidiaries or affiliates or other business units of the Company shall be used by the Committee in establishing performance goals for such Performance Awards: (1) gross revenue or sales measures; (2) operating income, earnings from operations, earnings before or after taxes, earnings before or after interest, depreciation, amortization, or extraordinary or special items, (3) net income or net income per common share (basic or diluted); (4) return on assets, return on investment, return on capital, or return on equity; (5) cash flow, free cash flow, cash flow return on investment, or net cash provided by operations; (6) interest expense after taxes; (7) economic profit or value created; (8) operating margin; (9) stock price or total stockholder return; and (10) implementation, completion or attainment of measurable objectives with respect to research, development, products or projects, production volume levels, acquisitions and divestitures of subsidiaries, affiliates, joint ventures or other assets, market penetration, total market capitalization and enterprise value, business retention, new product generation, cost controls and targets (including cost of capital), customer satisfaction, employee satisfaction, agency ratings, management of employment practices and employee benefits, supervision of litigation and information technology, implementation of business process controls, and recruiting and retaining personnel. The targeted level or levels of performance with respect to such business criteria may be established at such levels and in such terms as the Committee may determine, in its discretion, including in absolute terms, as a goal relative to performance in prior periods, or as a goal compared to the performance of one or more comparable companies or an index covering multiple companies.

(iii) Performance Period; Timing for Establishing Performance Goals. Achievement of performance goals in respect of such Performance Awards shall be measured over a performance period of up to one year or more than one year, as specified by the Committee. A performance goal shall be established not later than the earlier of (A) 90 days after the beginning of any performance period applicable to such Performance Award or (B) the time 25% of such performance period has elapsed.

(iv) Performance Award Pool. The Committee may establish a Performance Award pool, which shall be an unfunded pool, for purposes of measuring performance of the Company in connection with Performance Awards. The amount of such Performance Award pool shall be based upon the achievement of a performance goal or goals based on one or more of the business criteria set forth in Section 7(b)(ii) during the given performance period, as specified by the Committee in accordance with Section 7(b)(iv). The Committee may specify the amount of the Performance Award pool as a percentage of any of such business criteria, a percentage thereof in excess of a threshold amount, or as another amount which need not bear a strictly mathematical relationship to such business criteria.

(v) Settlement of Performance Awards; Other Terms. Settlement of Performance Awards shall be in cash, Stock, other Awards or other property, in the discretion of the Committee. The Committee

may, in its discretion, increase or reduce the amount of a settlement otherwise to be made in connection with such Performance Awards, but may not exercise discretion to increase any such amount payable to a Covered Employee in respect of a Performance Award subject to this Section 7(b) beyond the level of payment authorized for achievement of the performance goal specified under this Section 7(b) based on the actual level of achievement of such goal. Any settlement which changes the form of payment from that originally specified shall be implemented in a manner such that the Performance Award and other related Awards do not, solely for that reason, fail to qualify as “performance-based compensation” for purposes of Code Section 162(m). The Committee shall specify the circumstances in which such Performance Awards shall be paid or forfeited in the event of termination of employment by the Participant or other event (including a change in control) prior to the end of a performance period or settlement of such Performance Awards.

(c) **Written Determinations.** Determinations by the Committee as to the establishment of performance goals, the amount potentially payable in respect of Performance Awards, the level of actual achievement of the specified performance goals relating to Performance Awards, and the amount of any final Performance Award shall be recorded in writing in the case of Performance Awards intended to qualify under Section 162(m). Specifically, the Committee shall certify in writing, in a manner conforming to applicable regulations under Section 162(m), prior to settlement of each such Award granted to a Covered Employee, that the performance objective relating to the Performance Award and other material terms of the Award upon which settlement of the Award was conditioned have been satisfied.

8. Certain Provisions Applicable To Awards.

(a) **Stand-Alone, Additional, Tandem, and Substitute Awards.** Awards granted under the Plan may, in the discretion of the Committee, be granted either alone or in addition to, in tandem with, or in substitution or exchange for, any other Award or any award granted under another plan of the Company, any subsidiary or affiliate, or any business entity to be acquired by the Company or a subsidiary or affiliate, or any other right of a Participant to receive payment from the Company or any subsidiary or affiliate; provided, however, that a 409A Award may not be granted in tandem with a Non-409A Award and any substitution or exchange shall be subject to the restriction on repricing under Section 10(e). Awards granted in addition to or in tandem with other Awards or awards may be granted either as of the same time as or a different time from the grant of such other Awards or awards. Subject to Sections 10(j) and (k) and subject to the restriction on repricing under Section 10(e), the Committee may determine that, in granting a new Award, the in-the-money value or fair value of any surrendered Award or award or the value of any other right to payment surrendered by the Participant may be applied to the purchase of any other Award.

(b) **Term of Awards.** The term of each Award shall be for such period as may be determined by the Committee, subject to the express limitations set forth in Sections 6(b)(ii), 6(c)(ii) and 8 or elsewhere in the Plan.

(c) **Form and Timing of Payment under Awards; Deferrals.** Subject to the terms of the Plan (including Section 10(k)) and any applicable Award document, payments to be made by the Company or a subsidiary or affiliate upon the exercise of an Option or other Award or settlement of an Award may be made in such forms as the Committee shall determine, including, without limitation, cash, Stock, other Awards or other property, and may be made in a single payment or transfer, in installments, or on a deferred basis. The settlement of any Award may be accelerated, and cash paid in lieu of Stock in connection with such settlement, in the discretion of the Committee or upon occurrence of one or more specified events, subject to Sections 10(j) and (k). Subject to Section 10(k), installment or deferred payments may be required by the Committee (subject to Section 10(e)) or permitted at the election of the Participant on terms and conditions established by the Committee. Payments may include, without limitation, provisions for the payment or crediting of reasonable interest on installment or deferred payments or the grant or crediting of Dividend Equivalents or other amounts in respect of installment or deferred payments denominated in Stock. In the case of any 409A Award that is vested and no longer subject to a risk of forfeiture (within the meaning of Code Section 83), such Award will be distributed to the Participant, upon application of the Participant, if the Participant has had an unforeseeable emergency within the meaning of Code Sections 409A(a)(2)(A)(vi) and 409A(a)(2)(B)(ii), in accordance with Section 409A(a)(2)(B)(ii).

9. Additional Award Forfeiture Provisions.

The Committee may condition a Participant's right to receive a grant of an Award, to exercise the Award, to retain cash, Stock, other Awards, or other property acquired in connection with an Award, or to retain the profit or gain realized by a Participant in connection with an Award, including cash or other proceeds received upon sale of Stock acquired in connection with an Award, upon compliance by the Participant with specified conditions relating to non-competition, confidentiality of information relating to or possessed by the Company, non-solicitation of customers, suppliers, and employees of the Company, cooperation in litigation, non-disparagement of the Company and its subsidiaries and affiliates and the officers, directors and affiliates of the Company and its subsidiaries and affiliates, and other restrictions upon or covenants of the Participant, including during specified periods following termination of employment or service to the Company, or upon compliance with a requirement that Company financial statements not be restated due to a material failure to comply with an applicable financial reporting requirement. Accordingly, an Award may include terms providing for a "clawback" or forfeiture from the Participant of the profit or gain realized by a Participant in connection with an Award, including cash or other proceeds received upon sale of Stock acquired in connection with an Award.

10. General Provisions.

(a) **Compliance with Legal and Other Requirements.** The Company may, to the extent deemed necessary or advisable by the Committee and subject to Section 10(k), postpone the issuance or delivery of Stock or payment of other benefits under any Award until completion of such registration or qualification of such Stock or other required action under any federal or state law, rule or regulation, listing or other required action with respect to any stock exchange or automated quotation system upon which the Stock or other securities of the Company are listed or quoted, or compliance with any other obligation of the Company, as the Committee may consider appropriate, and may require any Participant to make such representations, furnish such information and comply with or be subject to such other conditions as it may consider appropriate in connection with the issuance or delivery of Stock or payment of other benefits in compliance with applicable laws, rules, and regulations, listing requirements, or other obligations.

(b) **Limits on Transferability; Beneficiaries.** No Award or other right or interest of a Participant under the Plan shall be pledged, hypothecated or otherwise encumbered or subject to any lien, obligation or liability of such Participant to any party (other than the Company or a subsidiary or affiliate thereof), or assigned or transferred by such Participant otherwise than by will or the laws of descent and distribution or to a Beneficiary upon the death of a Participant, and such Awards or rights that may be exercisable shall be exercised during the lifetime of the Participant only by the Participant or his or her guardian or legal representative, except that Awards and other rights (other than ISOs and SARs in tandem therewith) may be transferred to one or more transferees during the lifetime of the Participant for purposes of estate-planning, and may be exercised by such transferees in accordance with the terms of such Award, but only if and to the extent such transfers are permitted by the Committee and the Committee has determined that there will be no transfer of the Award to a third party for value, and subject to any terms and conditions which the Committee may impose thereon (which may include limitations the Committee may deem appropriate in order that offers and sales under the Plan will meet applicable requirements of registration forms under the Securities Act of 1933 specified by the Securities and Exchange Commission). A Beneficiary, transferee, or other person claiming any rights under the Plan from or through any Participant shall be subject to all terms and conditions of the Plan and any Award document applicable to such Participant, except as otherwise determined by the Committee, and to any additional terms and conditions deemed necessary or appropriate by the Committee.

(c) **Adjustments.** In the event that any large, special and non-recurring dividend or other distribution (whether in the form of cash or property other than Stock), recapitalization, forward or reverse split, Stock dividend, reorganization, merger, consolidation, spin-off, combination, repurchase, share exchange, liquidation, dissolution or other similar corporate transaction or event affects the Stock, then the Committee shall, in an equitable manner as determined by the Committee, adjust any or all of (i) the number and kind of shares of Stock which may be delivered in connection with Awards granted thereafter, including the number of shares available under Section 4, (ii) the number and kind of shares of Stock by which annual per-person Award limitations are measured under Section 5, (iii) the number and kind of shares of Stock subject to or deliverable in respect of

outstanding Awards, (iv) any performance condition based on stock price and (v) the exercise price, grant price or purchase price relating to any Award or, if deemed appropriate, the Committee may make provision for a payment of cash or property to the holder of an outstanding Option (subject to Section 10(k)). In addition, the Committee is authorized to make adjustments in the terms and conditions of, and the criteria included in, Awards (including Performance Awards and performance goals and any hypothetical funding pool relating thereto) in recognition of unusual or nonrecurring events (including, without limitation, events described in the preceding sentence, as well as acquisitions and dispositions of businesses and assets) affecting the Company, any subsidiary or affiliate or other business unit, or the financial statements of the Company or any subsidiary or affiliate, or in response to changes in applicable laws, regulations, accounting principles, tax rates and regulations or business conditions or in view of the Committee's assessment of the business strategy of the Company, any subsidiary or affiliate or business unit thereof, performance of comparable organizations, economic and business conditions, personal performance of a Participant, and any other circumstances deemed relevant; provided that no such adjustment shall be authorized or made if and to the extent that the existence of such authority (i) would cause Options, SARs, or Performance Awards granted under the Plan to Participants designated by the Committee as Covered Employees and intended to qualify as "performance-based compensation" under Code Section 162(m) and regulations thereunder to otherwise fail to qualify as "performance-based compensation" under Code Section 162(m) and regulations thereunder, or (ii) would cause the Committee to be deemed to have authority to change the targets, within the meaning of Treasury Regulation § 1.162-27(e)(4)(vi), under the performance goals relating to Options or SARs granted to Covered Employees and intended to qualify as "performance-based compensation" under Code Section 162(m) and regulations thereunder. In furtherance of the foregoing, in the event of an "equity restructuring" as defined in FAS 123R which affects the Stock, a Participant shall have a legal right to an adjustment to the Participant's Award which shall preserve without enlarging the value of the Award, with the manner of such adjustment to be determined by the Committee in its discretion, and subject to any limitation on this right set forth in the applicable Award agreement. Other provisions of this Section 10(c) notwithstanding, in connection with any transaction in which Stock will be cancelled or exchanged for consideration, the value of an Award to be preserved shall be based on the value of the consideration to be received by a holder of a share of Stock immediately before the transaction.

(d) Tax Provisions.

(i) Withholding. The Company and any subsidiary or affiliate is authorized to withhold from any Award granted, any payment relating to an Award under the Plan, including from a distribution of Stock, or any payroll or other payment to a Participant, amounts of withholding and other taxes due or potentially payable in connection with any transaction involving an Award, and to take such other action as the Committee may deem advisable to enable the Company and Participants to satisfy obligations for the payment of withholding taxes and other tax obligations relating to any Award. This authority shall include authority to withhold or receive Stock or other property and to make cash payments in respect thereof in satisfaction of a Participant's withholding obligations, either on a mandatory or elective basis in the discretion of the Committee, or in satisfaction of other tax obligations. Other provisions of the Plan notwithstanding, only the minimum amount of Stock deliverable in connection with an Award necessary to satisfy statutory withholding requirements will be withheld, unless withholding of any additional amount of Stock will not result in additional accounting expense to the Company.

(ii) Required Consent to and Notification of Code Section 83(b) Election. No election under Section 83(b) of the Code (to include in gross income in the year of transfer the amounts specified in Code Section 83(b)) or under a similar provision of the laws of a jurisdiction outside the United States may be made unless expressly permitted by the terms of the Award document or by action of the Committee in writing prior to the making of such election. In any case in which a Participant is permitted to make such an election in connection with an Award, the Participant shall notify the Company of such election within ten days of filing notice of the election with the Internal Revenue Service or other governmental authority, in addition to any filing and notification required pursuant to regulations issued under Code Section 83(b) or other applicable provision.

(iii) Requirement of Notification Upon Disqualifying Disposition Under Code Section 421(b). If any Participant shall make any disposition of shares of Stock delivered pursuant to the exercise of an ISO under the circumstances described in Code Section 421(b) (i.e., a disqualifying disposition), such Participant shall notify the Company of such disposition within ten days thereof.

(e) **Changes to the Plan.** The Board may amend, suspend or terminate the Plan or the Committee's authority to grant Awards under the Plan without the consent of stockholders or Participants; provided, however, that any amendment to the Plan shall be submitted to the Company's stockholders for approval not later than the earliest annual meeting for which the record date is at or after the date of such Board action if such stockholder approval is required by any federal or state law or regulation or Nasdaq Marketplace Rules or any other stock exchange or automated quotation system on which the Stock may then be listed or quoted, or if such amendment would materially increase the number of shares reserved for issuance and delivery under the Plan, and the Board may otherwise, in its discretion, determine to submit other amendments to the Plan to stockholders for approval. The Committee is authorized to amend outstanding awards, except as limited by the Plan. The Board and Committee may not amend outstanding Awards (including by means of an amendment to the Plan) without the consent of an affected Participant if such an amendment would materially and adversely affect the rights of such Participant with respect to the outstanding Award (for this purpose, actions that alter the timing of federal income taxation of a Participant will not be deemed material unless such action results in an income tax penalty on the Participant, and any discretion that is reserved by the Board or Committee with respect to an Award is unaffected by this provision). Without the approval of stockholders, the Committee will not amend or replace previously granted Options or SARs in a transaction that constitutes a "repricing," which for this purpose means any of the following or any other action that has the same effect:

- Lowering the exercise price of an option or SAR after it is granted;
- Any other action that is treated as a repricing under generally accepted accounting principles; and
- Canceling an option or SAR at a time when its exercise price exceeds the fair market value of the underlying Stock, in exchange for another option or SAR, restricted stock, other equity, cash or other property;

provided, however, that the foregoing transactions shall not be deemed a repricing if pursuant to an adjustment authorized under Section 10(c). With regard to other terms of Awards, the authority of the Committee to waive or modify an Award term after the Award has been granted does not permit waiver or modification of a term that would be mandatory under the Plan for any Award newly granted at the date of the waiver or modification.

(f) **Right of Setoff.** The Company or any subsidiary or affiliate may, to the extent permitted by applicable law, deduct from and set off against any amounts the Company or a subsidiary or affiliate may owe to the Participant from time to time, including amounts payable in connection with any Award, owed as wages, fringe benefits, or other compensation owed to the Participant, such amounts as may be owed by the Participant to the Company, including but not limited to amounts owed under Section 9, although the Participant shall remain liable for any part of the Participant's payment obligation not satisfied through such deduction and setoff. By accepting any Award granted hereunder, the Participant agrees to any deduction or setoff under this Section 10(f).

(g) **Unfunded Status of Awards; Creation of Trusts.** The Plan is intended to constitute an "unfunded" plan for incentive and deferred compensation. With respect to any payments not yet made to a Participant or obligation to deliver Stock pursuant to an Award, nothing contained in the Plan or any Award shall give any such Participant any rights that are greater than those of a general creditor of the Company; provided that the Committee may authorize the creation of trusts and deposit therein cash, Stock, other Awards or other property, or make other arrangements to meet the Company's obligations under the Plan. Such trusts or other arrangements shall be consistent with the "unfunded" status of the Plan unless the Committee otherwise determines with the consent of each affected Participant.

(h) **Nonexclusivity of the Plan.** Neither the adoption of the Plan by the Board nor its submission to the stockholders of the Company for approval shall be construed as creating any limitations on the power of the Board or a committee thereof to adopt such other incentive arrangements, apart from the Plan, as it may deem

desirable, including incentive arrangements and awards which do not qualify under Code Section 162(m), and such other arrangements may be either applicable generally or only in specific cases.

(i) ***Payments in the Event of Forfeitures; Fractional Shares.*** Unless otherwise determined by the Committee, in the event of a forfeiture of an Award with respect to which a Participant paid cash consideration, the Participant shall be repaid the amount of such cash consideration. No fractional shares of Stock shall be issued or delivered pursuant to the Plan or any Award. The Committee shall determine whether cash, other Awards or other property shall be issued or paid in lieu of such fractional shares or whether such fractional shares or any rights thereto shall be forfeited or otherwise eliminated.

(j) ***Compliance with Code Section 162(m).*** It is the intent of the Company that Options and SARs granted to Covered Employees and other Awards designated as Awards to Covered Employees subject to Section 7 shall constitute qualified “performance-based compensation” within the meaning of Code Section 162(m) and regulations thereunder, unless otherwise determined by the Committee at the time of allocation of an Award. Accordingly, the terms of Sections 7(b), (c), and (d), including the definitions of Covered Employee and other terms used therein, shall be interpreted in a manner consistent with Code Section 162(m) and regulations thereunder. The foregoing notwithstanding, because the Committee cannot determine with certainty whether a given Participant will be a Covered Employee with respect to a fiscal year that has not yet been completed, the term Covered Employee as used herein shall mean only a person designated by the Committee as likely to be a Covered Employee with respect to a specified fiscal year. If any provision of the Plan or any Award document relating to a Performance Award that is designated as intended to comply with Code Section 162(m) does not comply or is inconsistent with the requirements of Code Section 162(m) or regulations thereunder, such provision shall be construed or deemed amended to the extent necessary to conform to such requirements, and no provision shall be deemed to confer upon the Committee or any other person discretion to increase the amount of compensation otherwise payable in connection with any such Award upon attainment of the applicable performance objectives.

(k) ***Certain Limitations on Awards to Ensure Compliance with Section 409A.***

(i) ***409A Awards and Deferrals.*** Other provisions of the Plan notwithstanding, the terms of any 409A Award (which for this purpose means only such an Award held by an employee subject to United States federal income tax), including any authority of the Company and rights of the Participant with respect to the 409A Award, shall be limited to those terms permitted under Section 409A, and any terms not permitted under Section 409A shall be automatically modified and limited to the extent necessary to conform with Section 409A. The following rules will apply to 409A Awards:

- (A) If a Participant is permitted to elect to defer an Award or any payment under an Award, such election will be permitted only at times in compliance with Section 409A (including transition rules thereunder);
- (B) The Committee may, in its discretion, require or permit on an elective basis a change in the distribution terms applicable to 409A Awards (and Non-409A Awards that qualify for the short-term deferral exemption under Section 409A) during 2007 in accordance with, and to the fullest extent permitted by, Proposed Treasury Regulation § 1.409A (including Preamble § XI.C) and IRS Notices 2005-1 and 2006-79, and at any time in accordance with Section 409A and regulations thereunder. The Plan administrators are authorized to modify any such outstanding Awards to permit election of different deferral periods provided that any such modifications may not otherwise increase the benefits to Participants or the costs of such Awards to the Company (aside from administrative costs and costs relating to the timing of tax deductions);
- (C) The Company shall have no authority to accelerate distributions relating to 409A Awards in excess of the authority permitted under Section 409A;
- (D) Any distribution of a 409A Award triggered by a Participant’s termination of employment and intended to qualify under Section 409A(a)(2)(A)(i) shall be made only at the time that the Participant has had a “separation from service” within the meaning of Section 409A(a)(2)(A)(i) (or earlier at such time, after a termination of employment, that there occurs another event triggering a distribution under the Plan or the applicable Award agreement in compliance with Section 409A);

- (E) Any distribution of a 409A Award subject to Section 409A(a)(2)(A)(i) that would be made within six months following a separation from service of a “Specified Employee” (or “key employee”) as defined under Section 409A(a)(2)(B)(i) shall instead occur at the expiration of the six-month period under Section 409A(a)(2)(B)(i). In the case of installments, this delay shall not affect the timing of any installment otherwise payable after the six-month delay period;
- (F) In the case of any distribution of a 409A Award, if the timing of such distribution is not otherwise specified in the Plan or an Award agreement or other governing document, the distribution shall be made not later than 75 days after the date at which the settlement of the Award is specified to occur;
- (G) If any portion of an Award that is scheduled to vest at a single specified date (a vesting “tranche”) is partly deemed a 409A Award and partly deemed exempt from Section 409A (as a short-term deferral or otherwise), the time of settlement of the entire tranche will be governed by the distribution rules applicable to the 409A Award (except to the extent that this rule cannot apply to a distribution that would otherwise occur in 2007); and
- (H) The rules applicable to 409A Awards under this Section 10(k)(i) constitute further restrictions on terms of Awards set forth elsewhere in this Plan. Thus, for example, a 409A Option/SAR shall be subject to restrictions, including restrictions on rights otherwise specified in Section 6(b) or 6(c), in order that such Award shall not result in constructive receipt of income before exercise or tax penalties under Section 409A.

(ii) *Rules Applicable to Non-409A Options/SARs.* With respect to Non-409A Options/ SARs, in applying Code Sections 1563(a)(1), (2) and (3) for purposes of determining a controlled group of corporations under Code Section 414(b), the language “at least 20 percent” shall be used instead of “at least 80 percent” at each place it appears in Sections 1563(a)(1), (2) and (3), and in applying Treasury Regulation § 1.414(c)-2 (or any successor provision) for purposes of determining trades or businesses (whether or not incorporated) that are under common control for purposes of Section 414(c), the language “at least 20 percent” shall be used instead of “at least 80 percent” at each place it appears in Treasury Regulation § 1.414(c)-2.

(iii) *Distributions Upon Vesting.* In the case of any Award providing for a distribution upon the lapse of a risk of forfeiture, if the timing of such distribution is not otherwise specified in the Plan or an Award agreement or other governing document, the distribution shall be made not later than March 15 of the year following the year in which the risk of forfeiture lapsed.

(iv) *Scope and Application of this Provision.* For purposes of this Section 10(k), references to a term or event (including any authority or right of the Company or a Participant) being “permitted” under Section 409A mean that the term or event will not cause the Participant to be deemed to be in constructive receipt of compensation relating to the 409A Award prior to the distribution of cash, shares or other property or to be liable for payment of interest or a tax penalty under Section 409A.

(l) **Governing Law.** The validity, construction, and effect of the Plan, any rules and regulations relating to the Plan and any Award document shall be determined in accordance with the laws of the State of Delaware, without giving effect to principles of conflicts of laws, and applicable provisions of federal law.

(m) **Awards to Participants Outside the United States.** The Committee may modify the terms of any Award under the Plan made to or held by a Participant who is then resident or primarily employed outside of the United States, or establish one or more sub-plans for such Participants, in any manner deemed by the Committee to be necessary or appropriate in order that such Award shall conform to laws, regulations, and customs of the country in which the Participant is then resident or primarily employed, or so that the value and other benefits of the Award to the Participant, as affected by foreign tax laws and other restrictions applicable as a result of the Participant’s residence or employment abroad shall be comparable to the value of such an Award to a Participant who is resident or primarily employed in the United States. An Award may be modified under this Section 10(m)

in a manner that is inconsistent with the express terms of the Plan, so long as such modifications will not contravene any applicable law or regulation or result in actual liability under Section 16(b) for the Participant whose Award is modified.

(n) ***Limitation on Rights Conferred under Plan.*** Neither the Plan nor any action taken hereunder shall be construed as (i) giving any Eligible Person or Participant the right to continue as an Eligible Person or Participant or in the employ or service of the Company or a subsidiary or affiliate, (ii) interfering in any way with the right of the Company or a subsidiary or affiliate to terminate any Eligible Person's or Participant's employment or service at any time (subject to the terms and provisions of any separate written agreements), (iii) giving an Eligible Person or Participant any claim to be granted any Award under the Plan or to be treated uniformly with other Participants and employees, or (iv) conferring on a Participant any of the rights of a stockholder of the Company unless and until the Participant is duly issued or transferred shares of Stock in accordance with the terms of an Award or an Option or SAR is duly exercised. Except as expressly provided in the Plan and an Award document, neither the Plan nor any Award document shall confer on any person other than the Company and the Participant any rights or remedies thereunder. Any Award shall not be deemed compensation for purposes of computing benefits under any retirement plan of the Company or any subsidiary or affiliate and shall not affect any benefits under any other benefit plan at any time in effect under which the availability or amount of benefits is related to the level of compensation (unless required by any such other plan or arrangement with specific reference to Awards under this Plan).

(o) ***Severability.*** If any of the provisions of this Plan or any Award document is finally held to be invalid, illegal or unenforceable (whether in whole or in part), such provision shall be deemed modified to the extent, but only to the extent, of such invalidity, illegality or unenforceability, and the remaining provisions shall not be affected thereby; provided, that, if any of such provisions is finally held to be invalid, illegal, or unenforceable because it exceeds the maximum scope determined to be acceptable to permit such provision to be enforceable, such provision shall be deemed to be modified to the minimum extent necessary to modify such scope in order to make such provision enforceable hereunder. No rule of strict construction shall be applied against the Company, the Committee, or any other person in the interpretation of any terms of the Plan, Award, or agreement or other document relating thereto.

(p) ***Plan Effective Date and Termination.*** The Plan shall become effective if, and at such time as, the stockholders of the Company have approved it by the affirmative votes of the holders of a majority of the voting securities of the Company present, or represented, and entitled to vote on the subject matter at a duly held meeting of stockholders, which shall be the Effective Date. Upon such approval of the Plan by the stockholders of the Company, no further awards shall be granted under the Preexisting Plans, but any outstanding awards under the Preexisting Plans shall continue in accordance with their terms (and any authority to amend those awards will continue under the Preexisting Plans). Unless earlier terminated by action of the Board of Directors, the authority of the Committee to make grants under the Plan shall terminate on the date that is ten years after the latest date upon which stockholders of the Company have approved the Plan, and the Plan will remain in effect until such time as no Stock remains available for delivery under the Plan and the Company has no further rights or obligations under the Plan with respect to outstanding Awards under the Plan.

APPENDIX B

**FIRST AMENDMENT TO EMISPHERE TECHNOLOGIES, INC.
2007 STOCK AWARD AND INCENTIVE PLAN**

WHEREAS, effective as of April 20, 2007, Emisphere Technologies, Inc. (the “Company”) established the Emisphere Technologies, Inc. 2007 Stock Award and Incentive Plan (the “Plan”);

WHEREAS, Section 10(e) of the Plan provides that the Board of Directors of the Company (the “Board”) may amend the Plan;

WHEREAS, the Company desires to amend the Plan to increase the number of new shares reserved for issuance and delivery thereunder from 2,500,000 to 7,500,000 shares; and

WHEREAS, Section 10(e) of the Plan requires that any amendment thereto that increases the number of shares reserved for issuance and delivery under the Plan shall be submitted to the Company’s stockholders for approval not later than the earliest annual meeting for which the record date is at or after the date of the Board’s amendment to the Plan.

NOW THEREFORE,

The Board amends the Plan, effective March 8, 2013, as follows:

Section 4 is hereby amended by replacing Section 4(a) in its entirety with the following text:

“Overall Number of Shares Available for Delivery. Subject to adjustment as provided in Section 10(c), the total number of shares of Stock reserved and available for delivery in connection with Awards under the Plan shall be (i) seven million five hundred thousand (7,500,000) shares of Stock plus (ii) seven hundred sixty-five thousand five hundred sixty two (765,562) shares of stock, the number of shares that, immediately before the Effective Date, remain available for new awards under the Preexisting Plans (or, in the case of the Stock Incentive Plan for Outside Directors, remained available immediately prior to that plan’s expiration on January 29, 2007) and become available in accordance with Section 4(b) after the Effective Date; provided, however, that the total number of shares of Stock with respect to which ISOs may be granted shall not exceed the number specified in clause (i) above. Any shares of Stock delivered under the Plan shall consist of authorized and unissued shares or treasury shares.”

Further, the Board recommends this amendment to the stockholders of the Company.

IN WITNESS WHEREOF, such amendment was adopted by resolution of the Board dated March 8, 2013.

NOTES

NOTES



Emisphere Technologies, Inc. – Executive Leadership Team

Alan L. Rubino
Chief Executive Officer and President

Michael R. Garone
Chief Financial Officer and Corporate Secretary

Carl V. Sailer
Vice President – Marketing and Sales

Emisphere Technologies, Inc. – Board of Directors

John D. Harkey, Jr.

Timothy McNerney

Jacob M. Plotsker

Mark H. Rachesky, M.D.

Timothy G. Rothwell

Alan L. Rubino

Michael Weiser, M.D., Ph.D.

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