

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

**FORM 8-K**

**CURRENT REPORT**

**PURSUANT TO SECTION 13 OR 15(D) OF THE  
SECURITIES EXCHANGE ACT OF 1934**

**Date of Report (date of earliest event reported): April 18, 2005**

**AMN HEALTHCARE SERVICES, INC.**

(Exact name of registrant as specified in its charter)

**DELAWARE**  
(State or other jurisdiction  
of incorporation)

**333-123873**  
(Commission File Number)

**06-1500476**  
(IRS Employer  
Identification No.)

**12400 HIGH BLUFF DRIVE, SUITE 100**  
**SAN DIEGO, CALIFORNIA**  
(Address of principal executive offices)

**92130**  
(Zip Code)

**Registrant's telephone number, including area code: (866) 871-8519**

**NOT APPLICABLE**

(Former name or former address, if changed since last report)

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

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

**Item 1.01 Entry into a Material Definitive Agreement.**

On April 18, 2005, AMN Healthcare Services, Inc. (“the Company”) entered into an Underwriting Agreement (the “Underwriting Agreement”) with HWH Capital Partners, L.P., HWH Nightingale Partners, L.P., HWP Capital Partners II, L.P., HWP Nightingale Partners II, L.P. (collectively, the “HWP Stockholders”) and Banc of America Securities LLC (“Banc of America”), as underwriter. The Underwriting Agreement was entered into in connection with the public offering of 2,000,000 shares of the Company’s common stock, owned by the HWP Stockholders. The HWP Stockholders also granted Banc of America an option to acquire an additional 300,000 shares from the HWP Stockholders. The underwriters exercised their option to acquire the additional 300,000 shares from the HWP Stockholders and the transaction is scheduled to closed on April 22, 2005. Under the terms of the Underwriting Agreement, we have agreed to indemnify Banc of America against certain liabilities, including liabilities under the Securities Act of 1933, or to contribute payments Banc of America may be required to make because of any of those liabilities. A copy of the Underwriting Agreement is attached hereto as Exhibit 99.1.

On April 18, 2005, certain stockholders of the registrant, the HWP Stockholders, Steven Francis and Gayle Francis, as Trustees of the Francis Family Trust dated May 24, 1996 (the “Trust”) and Steven Francis (“Francis” and together with the Trust, the “Francis Stockholders”) entered into Amendment No. 1 to the Registration Rights Agreement (the “Amendment”). The Amendment provides that the Company (1) grant to the Francis Stockholders two demand registration rights, exercisable for firm commitment underwritten offerings at any time after the earlier of March 31, 2006 or the date on which the HWP Stockholders beneficially own an amount of registrable securities equal to or less than 4,931,303 shares of common stock (subject to certain adjustments); (2) grant to the Francis Stockholders unlimited registration rights on Form S-3, exercisable after the date on which the HWP Stockholders own an amount of registrable securities equal to or less than 2,000,000 shares of common stock (subject to certain adjustments); and (3) grant the HWP Stockholders piggyback rights with respect to the Francis Stockholders’ demand registration rights. The Agreement is attached as Exhibit 99.2 to this Current Report on Form 8-K and is incorporated by reference into this Item.

**Item 9.01 Financial Statements and Exhibits.**

(c) Exhibits

<u>Exhibit Number</u>	<u>Title</u>
99.1	Underwriting Agreement
99.2	Amendment No. 1 to the Registration Rights Agreement

**SIGNATURES**

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

**AMN HEALTHCARE SERVICES, INC.**

By: /s/ Steven C. Francis

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Name: Steven C. Francis

Title: Chief Executive Officer

Dated: April 22, 2005

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EXHIBIT INDEX

<u>Exhibit Number</u>	<u>Title</u>
99.1	Underwriting Agreement
99.2	Amendment No. 1 to the Registration Rights Agreement

**2,000,000 SHARES**

**AMN HEALTHCARE SERVICES, INC.**

**COMMON STOCK**

**UNDERWRITING AGREEMENT**

**DATED APRIL 18, 2005**

**BANC OF AMERICA SECURITIES LLC**

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UNDERWRITING AGREEMENT

April 18, 2005

BANC OF AMERICA SECURITIES LLC  
9 West 57<sup>th</sup> Street  
New York, NY 10019

Ladies and Gentlemen:

*Introductory.* The stockholders of AMN Healthcare Services, Inc., a Delaware corporation (the “Company”), named in Schedule A (collectively, the “Selling Stockholders”) severally propose to sell to Banc of America Securities LLC (“BAS” or the “Underwriter”) an aggregate of 2,000,000 shares (the “Firm Common Shares”) of Common Stock, par value \$0.01 per share (the “Common Stock”), of the Company. In addition, the Selling Stockholders have severally granted to the Underwriter an option to purchase up to an additional 300,000 shares (the “Optional Common Shares”) of Common Stock, as provided in Section 2, each Selling Stockholder selling up to the amount set forth opposite such Selling Stockholder’s name in Schedule A. The Firm Common Shares and, if and to the extent such option is exercised, the Optional Common Shares are collectively called the “Common Shares.”

The Company and each of the Selling Stockholders hereby confirm their agreements with the Underwriter as follows:

Section 1. *Representations and Warranties of the Company and the Selling Stockholders.*

(A) Representations and Warranties of the Company. The Company hereby represents, warrants and covenants to each Underwriter as follows:

(a) *Registration Statement.* The Company has prepared and filed with the Securities and Exchange Commission (the “Commission”) a registration statement on Form S-3 (File No. 333-123873), which contains a form of prospectus to be used in connection with the public offering and sale of the Shares. Such registration statement, as amended, including the financial statements, exhibits and schedules thereto, and the documents incorporated by reference in the Prospectus contained in the Registration Statement at the time such Registration Statement became effective, in the form in which it was declared effective by the Commission under the Securities Act of 1933 and the rules and regulations promulgated thereunder (collectively, the “Securities Act”), including any information deemed to be a part thereof at the time of effectiveness pursuant to Rule 430A or Rule 434 under the Securities Act or the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder (collectively, the “Exchange Act”), is called the “Registration Statement.” Any registration statement filed by the Company pursuant to Rule 462(b) under the Securities Act is called the “Rule 462(b) Registration Statement,” and from and after the date and time of filing of the Rule 462(b) Registration Statement the term “Registration Statement” shall include the Rule 462(b)

Registration Statement. Any preliminary prospectus included in the Registration Statement or filed with the Commission pursuant to Rule 424(a) of the rules and regulations of the Commission under the Act is hereinafter called a “preliminary prospectus.” The term “Prospectus” shall mean the final prospectus relating to the Shares that is first filed pursuant to Rule 424(b) after the date hereof or, if no filing pursuant to Rule 424(b) is required, shall mean the form of final prospectus relating to the Shares included in the Registration Statement at the date of effectiveness of the Registration Statement. Any reference herein to any preliminary prospectus or the Prospectus shall be deemed to refer to and include the documents incorporated by reference therein pursuant to Item 12 of Form S-3 under the Act, as of the date of such preliminary prospectus or Prospectus, as the case may be; any reference to any amendment or supplement to any preliminary prospectus or the Prospectus shall be deemed to refer to and include any documents filed after the date of such preliminary prospectus or Prospectus, as the case may be, under the Exchange Act, and incorporated by reference in such preliminary prospectus or Prospectus, as the case may be; and any reference to any amendment to the Registration Statement shall be deemed to refer to and include any annual report of the Company filed pursuant to Section 13(a) or 15(d) of the Exchange Act after the effective date of the Registration Statement that is incorporated by reference in the Registration Statement. All references in this Agreement to the Registration Statement, the Rule 462(b) Registration Statement, a preliminary prospectus, the Prospectus, or any amendments or supplements to any of the foregoing, shall include any copy thereof filed with the Commission pursuant to its Electronic Data Gathering, Analysis and Retrieval System (“EDGAR”).

(b) *Compliance with Registration Requirements.* The Registration Statement and any Rule 462(b) Registration Statement have been declared effective by the Commission under the Securities Act. The Company has complied to the Commission’s satisfaction with all requests of the Commission for additional or supplemental information. No stop order suspending the effectiveness of the Registration Statement or any Rule 462(b) Registration Statement is in effect and no proceedings for such purpose have been instituted or are pending or, to the knowledge of the Company, are contemplated or threatened by the Commission.

Each preliminary prospectus and the Prospectus when filed complied in all material respects with the Securities Act and, if filed by electronic transmission pursuant to EDGAR (except as may be permitted by Regulation S-T under the Securities Act), was identical in all material respects to the copy thereof delivered to the Underwriter for use in connection with the offer and sale of the Common Shares. Each of the Registration Statement, any Rule 462(b) Registration Statement and any post-effective amendment thereto, at the time it became effective and at all subsequent times, complied and will comply in all material respects with the Securities Act and did not and will not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. The Prospectus, as amended or supplemented, as of its date and at all subsequent times, did not and will not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. The representations and warranties set forth in the two immediately preceding sentences do not apply to statements in or omissions from the Registration Statement, any Rule 462(b) Registration Statement, or any post-effective amendment thereto, or the Prospectus, or any amendments or supplements thereto, made in reliance upon and in conformity with information relating to the Underwriter furnished to the

Company in writing by the Underwriter expressly for use therein or information relating to any Selling Stockholder furnished by such Selling Stockholder to the Company in writing expressly for use therein. There are no contracts or other documents required to be described in the Prospectus or to be filed as exhibits to the Registration Statement which have not been described, filed or incorporated by reference therein as required.

(c) *Offering Materials Furnished to the Underwriter.* The Company has delivered to the Underwriter one complete manually signed copy of the Registration Statement and of each consent and certificate of experts filed as a part thereof, and conformed copies of the Registration Statement (without exhibits) and preliminary prospectuses and the Prospectus, as amended or supplemented, in such quantities and at such places as the Underwriter has reasonably requested.

(d) *Distribution of Offering Material by the Company.* The Company has not distributed and will not distribute, prior to the later of the Second Closing Date (as defined below) and the completion of the Underwriter's distribution of the Common Shares, any offering material in connection with the offering and sale of the Common Shares other than a preliminary prospectus, the Prospectus, the Registration Statement and any press release meeting the requirements of Rule 134 or Rule 135 under the Securities Act.

(e) *The Underwriting Agreement.* This Agreement has been duly authorized, executed and delivered, and is a valid and binding agreement of, the Company, enforceable in accordance with its terms, except as rights to indemnification hereunder may be limited by applicable law and except as the enforcement hereof may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the rights and remedies of creditors or by general equitable principles.

(f) *No Applicable Registration or Other Similar Rights.* Other than as provided under the Registration Rights Agreement, dated as of November 16, 2001, by and among the Company and other parties named therein, as amended on the date hereof (the "Registration Rights Agreement"), pursuant to which certain of the Common Shares are being registered under the Registration Statement, there are no persons with registration or other similar rights to have any equity or debt securities registered for sale under the Registration Statement or included in the offering contemplated by this Agreement, except for such rights as have been duly waived.

(g) *No Material Adverse Change.* Except as otherwise disclosed in the Prospectus, subsequent to the respective dates as of which information is given in the Prospectus: (i) there has been no material adverse change, or any development that could reasonably be expected to result in a material adverse change, in the condition, financial or otherwise, or in the earnings, business or operations, whether or not arising from transactions in the ordinary course of business, of the Company and its subsidiaries, considered as one entity (any such change is called a "Material Adverse Change"); (ii) the Company and its subsidiaries, considered as one entity, have not incurred any material liability or obligation, indirect, direct or contingent, not in the ordinary course of business nor entered into any material transaction or agreement not in the ordinary course of business; and (iii) there has been no dividend or distribution of any kind declared, paid or made by the Company or, except for dividends paid to the Company or other subsidiaries, any of its subsidiaries on any class of capital stock or repurchase or redemption by the Company or any of its subsidiaries of any class of capital stock.

(h) *Independent Accountants.* KPMG LLP, who has expressed its opinion with respect to the financial statements (which term as used in this Agreement includes the related notes thereto) and supporting schedules filed with the Commission as a part of the Registration Statement and included in the Prospectus, is an independent registered public accounting firm with respect to the Company as required by the Securities Act and the Exchange Act and the applicable published rules and regulations thereunder.

(i) *Preparation of the Financial Statements.* The financial statements filed with the Commission as a part of or incorporated by reference in the Registration Statement and included or incorporated by reference in the Prospectus present fairly in all material respects the consolidated financial position of the Company its subsidiaries, as of and at the dates indicated and the results of their operations and cash flows for the periods specified. The supporting schedules included or incorporated by reference in the Registration Statement present fairly in all material respects the information required to be stated therein. Such financial statements and supporting schedules have been prepared in conformity with generally accepted accounting principles as applied in the United States applied on a consistent basis throughout the periods involved, except as may be expressly stated in the related notes thereto. No other financial statements or supporting schedules are required to be included or incorporated by reference in the Registration Statement.

(j) *Incorporation and Good Standing of the Company and Its Subsidiaries.* Each of the Company and its subsidiaries has been duly incorporated or organized and is validly existing as a corporation, limited company or proprietary limited company, as applicable, in good standing under the laws of the jurisdiction of its incorporation or organization and has power and authority to own, lease and operate its properties and to conduct its business as described in the Prospectus and, in the case of the Company, to enter into and perform its obligations under this Agreement, except for such jurisdictions where the failure of any such subsidiary to exist as a corporation, limited company or proprietary limited company in good standing would not result in a Material Adverse Change. Each of the Company and each subsidiary is duly qualified as a foreign corporation to transact business and is in good standing in each jurisdiction in which such qualification is required, whether by reason of the ownership or leasing of property or the conduct of business, except for such jurisdictions where the failure to so qualify or to be in good standing would not, individually or in the aggregate, result in a Material Adverse Change. All of the issued and outstanding capital stock of each subsidiary has been duly authorized and validly issued, is fully paid and nonassessable and is owned by the Company, directly or through subsidiaries, and, other than under the Amended and Restated Credit Agreement, dated as of November 16, 2001, as amended, among the Company, AMN Healthcare, Inc., the Subsidiary Guarantors named therein, the Lenders and the Agent named therein (the "Credit Agreement"), is free and clear of any security interest, mortgage, pledge, lien, encumbrance or claim. The Company does not own or control, directly or indirectly, any corporation, association or other entity other than the subsidiaries listed in Exhibit 21 to the Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2004 and, to the extent acquired by the Company, O'Grady-Peyton International (Europe) Limited.

(k) *Capitalization and Other Capital Stock Matters.* The Common Stock (including the Common Shares) conforms in all material respects to the description thereof contained in the Prospectus. All of the issued and outstanding shares of Common Stock (including the shares of

Common Stock owned by Selling Stockholders) have been duly authorized and validly issued, are fully paid and nonassessable and have been issued in compliance with federal and state securities laws. None of the outstanding shares of Common Stock were issued in violation of any preemptive rights, rights of first refusal or other similar rights to subscribe for or purchase securities of the Company. Except as disclosed in or contemplated by the Prospectus and the financial statements of the Company and the related notes thereto included in the Prospectus, the Company has no outstanding options to purchase, or any preemptive rights or other rights to subscribe for or to purchase, any securities or obligations convertible into, or any contracts or commitments to issue or sell, shares of its capital stock or any such options, rights, convertible securities or obligations. The description of the Company's stock option, stock bonus and other stock plans or arrangements, and the options or other rights granted thereunder, set forth in the Prospectus accurately presents in all material respects the information required to be shown with respect to such plans, arrangements, options and rights.

(l) *Stock Exchange Listing.* The Common Shares have been approved for listing on the New York Stock Exchange.

(m) *Non-Contravention of Existing Instruments; No Further Authorizations or Approvals Required.* Neither the Company nor any of its subsidiaries is in violation of its charter or by-laws or is in default (or, with the giving of notice or lapse of time, would be in default) ("Default") under any indenture, mortgage, loan or credit agreement, note, contract, franchise, lease or other instrument to which the Company or any of its subsidiaries is a party or by which it or any of them may be bound, or to which any of the property or assets of the Company or any of its subsidiaries is subject (each, an "Existing Instrument"), except for such Defaults as would not, individually or in the aggregate, result in a Material Adverse Change. The Company's execution, delivery and performance of this Agreement and consummation of the transactions contemplated hereby and by the Prospectus (i) have been duly authorized by all necessary corporate action and will not result in any violation of the provisions of the charter or by-laws of the Company or any subsidiary, (ii) will not conflict with or constitute a breach of, or Default or a Debt Repayment Triggering Event (as defined below) under, or result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of the Company or any of its subsidiaries pursuant to, or require the consent of any other party to, any Existing Instrument, except for such conflicts, breaches, Defaults, liens, charges or encumbrances as would not, individually or in the aggregate, result in a Material Adverse Change and (iii) will not result in any violation of any law, administrative regulation or administrative or court decree applicable to the Company or any subsidiary except, in the case of (iii), for such violations as would not result in a Material Adverse Change. No consent, approval, authorization or other order of, or registration or filing with, any court or other governmental or regulatory authority or agency, is required for the Company's execution, delivery and performance of this Agreement and consummation of the transactions contemplated hereby and by the Prospectus, except such as have been obtained or made by the Company and are in full force and effect under the Securities Act and from the NYSE and such as may be required under applicable state securities or blue sky laws or foreign securities laws and from the National Association of Securities Dealers, Inc. (the "NASD") and the filing of this Agreement on Form 8-K pursuant to the Exchange Act. As used herein, a "Debt Repayment Triggering Event" means any event or condition which gives, or with the giving of notice or lapse of time would give, the holder of any note, debenture or other evidence of indebtedness (or any person acting on such holder's behalf) the right to require the repurchase, redemption or repayment of all or a portion of such indebtedness by the Company or any of its subsidiaries.

(n) *No Material Actions or Proceedings.* There are no legal or governmental actions, suits or proceedings pending or, to the Company's knowledge, threatened (i) against or affecting the Company or any of its subsidiaries, (ii) which has as the subject thereof any property owned or leased by, the Company or any of its subsidiaries or (iii) relating to environmental or discrimination matters, where in any such case such action, suit or proceeding would reasonably be expected to result in a Material Adverse Change or adversely affect the consummation of the transactions contemplated by this Agreement. No labor dispute with the employees of the Company or any of its subsidiaries exists or, to the Company's knowledge, is threatened or imminent except for any such disputes as would not result in a Material Adverse Change.

(o) *Intellectual Property Rights.* The Company and its subsidiaries own or possess sufficient trademarks, trade names, patent rights, copyrights, licenses, approvals, trade secrets and other similar rights (collectively, "Intellectual Property Rights") reasonably necessary to conduct their businesses as now conducted; and the expected expiration of any of such Intellectual Property Rights would not result in a Material Adverse Change. Neither the Company nor any of its subsidiaries has received any notice of infringement or conflict with asserted Intellectual Property Rights of others, which infringement or conflict would reasonably be expected to result in a Material Adverse Change.

(p) *All Necessary Permits, Etc.* Except where the failure to possess any such certificates, authorizations or permits would not result in a Material Adverse Change, the Company and each of its subsidiaries possess such valid and current certificates, authorizations or permits issued by the appropriate state, federal or foreign regulatory agencies or bodies necessary to conduct their respective businesses, and neither the Company nor any such subsidiary has received any notice of proceedings relating to the revocation or modification of, or non-compliance with, any such certificate, authorization or permit which, singly or in the aggregate would reasonably be expected to result in a Material Adverse Change.

(q) *Title to Properties.* The Company and each of its subsidiaries has good and marketable title to all the properties and assets reflected as owned in the financial statements referred to in Section 1(A)(k) above, in each case free and clear of any security interests, mortgages, liens, encumbrances, equities, claims and other defects (any of the foregoing, a "Lien"), except for Liens under the Credit Agreement and except such as do not materially and adversely affect the value of such property and do not materially interfere with the use made or proposed to be made of such property by the Company or such subsidiary. The real property, improvements, equipment and personal property held under lease by the Company or any subsidiary are held under valid and enforceable leases, with such exceptions as are not material and do not materially interfere with the use made or proposed to be made of such real property, improvements, equipment or personal property by the Company or such subsidiary.

(r) *Tax Law Compliance.* The Company and its consolidated subsidiaries have filed all necessary federal, state and foreign income and franchise tax returns or have filed for extensions thereof and have paid all taxes required to be paid by any of them and, if due and payable, any related or similar assessment, fine or penalty levied against any of them, except for

any such tax returns, taxes, assessments, fines or penalties as would not, in the aggregate, result in a Material Adverse Change. The Company has made adequate charges, accruals and reserves in the applicable financial statements referred to in Section 1(A)(k) above in respect of all material federal, state and foreign income and franchise taxes for all periods as to which the tax liability of the Company or any of its consolidated subsidiaries has not been finally determined.

(s) *Company Not an "Investment Company"*. The Company is not an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

(t) *Insurance*. Each of the Company and its subsidiaries are insured by insurers that in its reasonable judgment are recognized, financially sound and reputable institutions with policies in such amounts and with such deductibles and covering such risks as are generally deemed adequate and customary for their businesses. The Company has no reason to believe that it or any of its subsidiaries will not be able (i) to renew its existing insurance coverage as and when such policies expire or (ii) to obtain comparable coverage from similar institutions as may be necessary or appropriate to conduct its business substantially the same as now conducted except where the failure to renew or obtain comparable coverage would not result in a Material Adverse Change.

(u) *No Price Stabilization or Manipulation*. The Company has not taken, directly or indirectly, any action designed to or that might be reasonably expected to cause or result in stabilization or manipulation of the price of the Common Stock to facilitate the sale or resale of the Common Shares.

(v) *Related Party Transactions*. There are no business relationships or related-party transactions involving the Company or any of its subsidiaries or any other person required to be described in the Prospectus which have not been described as required pursuant to the requirements of the Securities Act and the rules and regulations thereunder.

(w) *Internal Controls and Procedures*. The Company maintains (i) effective internal control over financial reporting as defined in Rule 13a-15 under the Exchange Act and (ii) a system of internal accounting controls sufficient to provide reasonable assurance that (A) transactions are executed in accordance with management's general or specific authorizations; (B) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain asset accountability; (C) access to assets is permitted only in accordance with management's general or specific authorization; and (D) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(x) *No Material Weakness in Internal Controls*. Except as disclosed in the Prospectus or in any document incorporated by reference therein, since the end of the Company's most recent audited fiscal year, (i) the Company is not aware of any material weakness in the Company's internal control over financial reporting (whether or not remediated) and (ii) there has been no change in the Company's internal control over financial reporting that has materially affected, or is reasonably likely to materially affect, the Company's internal control over financial reporting.

(y) *Compliance with Environmental Laws.* Except as would not, individually or in the aggregate, result in a Material Adverse Change, (i) neither the Company nor any of its subsidiaries is in violation of any federal, state, local or foreign law or regulation relating to pollution or protection of human health or the environment (including, without limitation, ambient air, surface water, groundwater, land surface or subsurface strata) or wildlife, including without limitation, laws and regulations relating to emissions, discharges, releases or threatened releases of chemicals, pollutants, contaminants, wastes, toxic substances, hazardous substances, petroleum and petroleum products (collectively, “Materials of Environmental Concern”), or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of Materials of Environment Concern (collectively, “Environmental Laws”), which violation includes, but is not limited to, noncompliance with any permits or other governmental authorizations required for the operation of the business of the Company or its subsidiaries under applicable Environmental Laws, or noncompliance with the terms and conditions thereof, nor has the Company or any of its subsidiaries received any written communication, whether from a governmental authority, citizens group, employee or otherwise, that alleges that the Company or any of its subsidiaries is in violation of any Environmental Law; (ii) there is no claim, action or cause of action filed with a court or governmental authority, no investigation with respect to which the Company has received written notice, and no written notice by any person or entity alleging potential liability for investigatory costs, cleanup costs, governmental responses costs, natural resources damages, property damages, personal injuries, attorneys’ fees or penalties arising out of, based on or resulting from the presence, or release into the environment, of any Material of Environmental Concern at any location owned, leased or operated by the Company or any of its subsidiaries, now or in the past (collectively, “Environmental Claims”), pending or, to the Company’s knowledge, threatened against the Company or any of its subsidiaries or any person or entity whose liability for any Environmental Claim the Company or any of its subsidiaries has retained or assumed either contractually or by operation of law; and (iii) to the Company’s knowledge, there are no past or present actions, activities, circumstances, conditions, events or incidents, including, without limitation, the release, emission, discharge, presence or disposal of any Material of Environmental Concern, that reasonably could result in a violation of any Environmental Law by the Company or any of its subsidiaries or against any person or entity whose liability for any Environmental Claim the Company or any of its subsidiaries has retained or assumed either contractually or by operation of law.

(z) *ERISA Compliance.* The Company and its subsidiaries and any “employee benefit plan” (as defined under the Employee Retirement Income Security Act of 1974, as amended, and the regulations and published interpretations thereunder (collectively, “ERISA”)) established or maintained by the Company, its subsidiaries or their ERISA Affiliates (as defined below) are in compliance in all material respects with ERISA. “ERISA Affiliate” means, with respect to the Company or a subsidiary, any member of any group of organizations described in Sections 414(b), (c), (m) or (o) of the Internal Revenue Code of 1986, as amended, and the regulations and published interpretations thereunder (the “Code”) of which the Company or such subsidiary is a member. No “reportable event” (as defined under ERISA) has occurred or is reasonably expected to occur with respect to any “employee benefit plan” established or maintained by the Company, its subsidiaries or any of their ERISA Affiliates except as would not result in a Material Adverse Change. No “employee benefit plan” established or maintained by the Company, its subsidiaries or any of their ERISA Affiliates, if such “employee benefit



plan” were terminated, would have any “amount of unfunded benefit liabilities” (as defined under ERISA) except as would not result in a Material Adverse Change. Neither the Company, its subsidiaries nor any of their ERISA Affiliates has incurred or reasonably expects to incur any liability under (i) Title IV of ERISA with respect to termination of, or withdrawal from, any “employee benefit plan” or (ii) Sections 412, 4971, 4975 or 4980B of the Code except as would not result in a Material Adverse Change. Each “employee benefit plan” established or maintained by the Company, its subsidiaries or any of their ERISA Affiliates that is intended to be qualified under Section 401(a) of the Code is so qualified and nothing has occurred, whether by action or failure to act, which would cause the loss of such qualification except as would not result in a Material Adverse Change.

Any certificate signed by an officer of the Company and delivered to the Underwriter or to counsel for the Underwriter shall be deemed to be a representation and warranty by the Company to the Underwriter as to the matters set forth therein.

The Company acknowledges that the Underwriter and, for purposes of the opinions to be delivered pursuant to Section 5 hereof, counsel to the Company and counsel to the Underwriter, will rely upon the accuracy and truthfulness of the foregoing representations and hereby consents to such reliance.

(B) *Representations and Warranties of the Selling Stockholders.* Each Selling Stockholder, severally and not jointly, represents and warrants with respect to such Selling Stockholder only, to the Underwriter as follows:

(a) *The Underwriting Agreement.* This Agreement has been duly authorized, executed and delivered by or on behalf of such Selling Stockholder, and is a valid and binding agreement of such Selling Stockholder, enforceable in accordance with its terms, except as rights to indemnification hereunder may be limited by applicable law and except as the enforcement hereof may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the rights and remedies of creditors or by general equitable principle.

(b) *Title to, or “Security Entitlement” in, Common Shares to Be Sold; All Authorizations Obtained.* Such Selling Stockholder has, and on the First Closing Date and, in the case of Optional Common Shares, the Second Closing Date, will have, valid title to, or a valid “security entitlement” within the meaning of Section 8-501 of the New York Uniform Commercial Code in respect of, the Common Shares to be sold by such Selling Stockholder free and clear of all security interests, claims, liens, equities or other encumbrances and the legal right and power, and all authorization and approval required by law, to enter into this Agreement and to sell, transfer and deliver the Common Shares to be sold by such Selling Stockholder or a security entitlement in respect of such Shares.

(c) *Delivery of the Common Shares to Be Sold.* Upon payment for the Common Shares to be sold by such Selling Stockholder pursuant to this Agreement, delivery of such Common Shares, as directed by the Underwriter, to Cede & Co. (“Cede”) or such other nominee as may be designated by the Depository Trust Company (“DTC”), registration of such Shares in the name of Cede or such other nominee and the crediting of such Shares on the books of DTC to the securities account or accounts of the Underwriter (assuming that neither DTC nor the

Underwriter has notice of any adverse claim (within the meaning of Section 8-105 of the New York Uniform Commercial Code (the "UCC")) to such Shares), (A) DTC shall be a "protected purchaser" of such Common Shares within the meaning of Section 8-303 of the UCC, (B) under Section 8-501 of the UCC, the Underwriter will acquire a valid security entitlement in respect of such Common Shares and (C) no action based on any "adverse claim", within the meaning of Section 8-102 of the UCC, to such Common Shares may be asserted against the Underwriter with respect to such security entitlement; for purposes of this representation, such Selling Stockholder may assume that when such payment, delivery and crediting occur, (x) such Common Shares will have been registered in the name of Cede or another nominee designated by DTC, in each case on the Company's share registry in accordance with its certificate of incorporation, bylaws and applicable law, (y) DTC will be registered as a "clearing corporation" within the meaning of Section 8-102 of the UCC and (z) appropriate entries to the account of the Underwriter on the records of DTC will have been made pursuant to the UCC.

(d) *Non-Contravention; No Further Authorizations or Approvals Required.* The execution and delivery by such Selling Stockholder of, and the performance by such Selling Stockholder of its obligations under, this Agreement will not conflict with, result in a breach of, or constitute a Default under, or require the consent of any other party to, the partnership agreement or other organizational documents of such Selling Stockholder or any other agreement or instrument to which such Selling Stockholder is a party or by which it is bound, any provision of applicable law or any judgment, order, decree or regulation applicable to such Selling Stockholder of any court, regulatory body, administrative agency, governmental body or arbitrator having jurisdiction over such Selling Stockholder, except for such consents that have been obtained or other than such conflicts, breaches, or Defaults that, individually or in the aggregate, could not materially and adversely affect such Selling Stockholder's ability to consummate the transactions contemplated hereby. No consent, approval, authorization or other order of, or registration or filing with, any court or other governmental authority or agency, is required for the consummation by such Selling Stockholder of the transactions contemplated in this Agreement, except such as have been obtained or made and are in full force and effect under the Securities Act, the Exchange Act, applicable state securities or blue sky laws and from the NASD.

(e) *No Registration or Other Similar Rights.* Such Selling Stockholder does not have any registration or other similar rights to have any equity or debt securities registered for sale by the Company under the Registration Statement or included in the offering contemplated by this Agreement, except for such rights as are described in the Prospectus under "Selling Stockholders."

(f) *No Further Consents, Etc.* Except for such consents, approvals and waivers as have been obtained with respect to the Registration Rights Agreement, dated as of November 16, 2001, no consent, approval or waiver is required under any instrument or agreement to which such Selling Stockholder is a party or by which it is bound, in connection with the offering, sale or purchase by the Underwriter of any of the Common Shares which may be sold by such Selling Stockholder under this Agreement or the consummation by such Selling Stockholder of any of the other transactions contemplated hereby.

(g) *Disclosure Made by Such Selling Stockholder in the Prospectus.* All information furnished by or on behalf of such Selling Stockholder in writing to the Company expressly for use in the Registration Statement and Prospectus is, and on the First Closing Date and the Second Closing Date will be, true, correct, and complete in all material respects, and does not, and on the First Closing Date and the Second Closing Date will not, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading. Such Selling Stockholder confirms as accurate the number of shares of Common Stock set forth opposite such Selling Stockholder's name in the Prospectus under the caption "Principal and Selling Stockholders" (both prior to and after giving effect to the sale of the Firm Common Shares).

(h) *No Price Stabilization or Manipulation.* Other than any actions taken by the Underwriter, such Selling Stockholder has not taken, directly or indirectly, any action designed to or that might be reasonably expected to cause or result in stabilization or manipulation of the price of the Common Stock to facilitate the sale or resale of the Common Shares.

Any certificate signed by or on behalf of any Selling Stockholder and delivered to the Underwriter or to counsel for the Underwriter shall be deemed to be a representation and warranty by such Selling Stockholder to the Underwriter as to the matters covered thereby.

Such Selling Stockholder acknowledges that the Underwriter and, for purposes of the opinion to be delivered pursuant to Section 5 hereof, counsel to the Company and counsel to the Underwriter, will rely upon the accuracy and truthfulness of the foregoing representations and hereby consents to such reliance.

*Section 2. Purchase, Sale and Delivery of the Common Share.*

(a) *The Firm Common Shares.* The Selling Stockholders agree, severally and not jointly, to sell to the Underwriter the Firm Common Shares upon the terms set forth herein, each Selling Stockholder selling the number of Firm Common Shares set forth opposite such Selling Stockholder's name on Schedule A. On the basis of the representations, warranties and agreements herein contained, and upon the terms but subject to the conditions herein set forth, the Underwriter agrees to purchase from the Selling Stockholders all of Firm Common Shares. The purchase price per Firm Common Share to be paid by the Underwriter to the Selling Stockholders shall be as set forth in Schedule B hereto.

(b) *The First Closing Date.* Delivery of certificates for the Firm Common Shares to be purchased by the Underwriter and payment therefor shall be made at the offices of Shearman & Sterling LLP, New York, New York 10022 (or such other place as may be agreed to by the Company and the Underwriter) at 9:00 a.m. New York City time, on April 22, 2005 or such other time and date as the Underwriter and the Company may agree upon in writing (the time and date of such closing are called the "First Closing Date"). The Company and the Selling Stockholders hereby acknowledge that circumstances under which the Underwriter may provide notice to postpone the First Closing Date as originally scheduled include, but are not limited to, any determination by the Company, the Selling Stockholders or the Underwriter to recirculate to the public copies of an amended or supplemented Prospectus.

(c) *The Optional Common Shares; the Second Closing Date.* In addition, on the basis of the representations, warranties and agreements herein contained, and upon the terms but subject to the conditions herein set forth, the Selling Stockholders, severally and not jointly, hereby grant an option to the Underwriter to purchase up to an aggregate of 300,000 Optional Common Shares from the Selling Stockholders at the purchase price per share to be paid by the Underwriter for the Firm Common Shares. The option granted hereunder may be exercised at any time (but not more than once) upon notice by the Underwriter to the Company which notice may be given at any time within 21 days from the date of this Agreement. Such notice shall set forth (i) the aggregate number of Optional Common Shares as to which the Underwriter is exercising the option, (ii) the names and denominations in which the certificates for the Optional Common Shares are to be registered and (iii) the time, date and place at which such certificates will be delivered (which time and date may be simultaneous with, but not earlier than, the First Closing Date; and in such case the term "First Closing Date" shall refer to the time and date of delivery of certificates for the Firm Common Shares and the Optional Common Shares). Such time and date of delivery, if subsequent to the First Closing Date, is called the "Second Closing Date" and shall be determined by the Underwriter and shall not be earlier than three nor later than five full business days after delivery of such notice of exercise. The Underwriter may cancel the option at any time prior to its expiration by giving written notice of such cancellation to the Company.

(d) *Public Offering of the Common Shares.* The Underwriter hereby advises the Company and the Selling Stockholders that the Underwriter intends to offer for sale to the public, as described in the Prospectus, the Common Shares as soon after this Agreement has been executed and the Registration Statement has been declared effective as the Underwriter has determined is advisable and practicable.

(e) *Payment for the Common Shares.* Payment for the Common Shares to be sold by the Selling Stockholders shall be made at the First Closing Date (and, if applicable, at the Second Closing Date) by wire transfer of immediately available funds to the order of the Selling Stockholders.

It is understood that the Underwriter has been authorized, for its own account, to accept delivery of and receipt for, and make payment of the purchase price for, the Firm Common Shares and any Optional Common Shares it has agreed to purchase.

Each Selling Stockholder hereby agrees that it will pay all stock transfer taxes, stamp duties and other similar taxes, if any, payable upon the sale or delivery of the Common Shares to be sold by such Selling Stockholder to the Underwriter, or otherwise in connection with the performance of such Selling Stockholder's obligations hereunder.

(f) *Delivery of the Common Shares.* Each Selling Stockholder shall, severally and not jointly, deliver, or cause to be delivered, to the Underwriter for its account, certificates, accompanied by duly executed stock powers, representing the number of shares of Common Stock set forth under the column titled "Number of Firm Common Shares to be Sold" opposite such Selling Stockholder's name on Schedule A hereto at the First Closing Date, against the irrevocable release of a wire transfer of immediately available funds for the amount of the purchase price therefor. Each Selling Stockholder shall, severally and not jointly, also deliver, or

cause to be delivered, to the Underwriter for its account, certificates, accompanied by duly executed stock powers, representing the number of shares of Common Stock set forth under the column titled "Maximum Number of Optional Common Shares to be Sold" opposite such Selling Stockholder's name that the Underwriter has agreed to purchase at the First Closing Date or the Second Closing Date, as the case may be, against the irrevocable release of a wire transfer of immediately available funds for the amount of the purchase price therefor. The certificates for the Common Shares shall be in definitive form and registered in such names and denominations as the Underwriter shall have requested at least two full business days prior to the First Closing Date (or the Second Closing Date, as the case may be) and shall be made available for inspection on the business day preceding the First Closing Date (or the Second Closing Date, as the case may be) at a location in New York City as the Underwriter may designate. Time shall be of the essence, and delivery at the time and place specified in this Agreement is a further condition to the obligations of the Underwriter.

(g) *Delivery of Prospectus to the Underwriter.* Not later than 12:00 p.m. on the second business day following the date the Common Shares are first released by the Underwriter for sale to the public, the Company shall deliver or cause to be delivered copies of the Prospectus in such quantities and at such places as the Underwriter shall reasonably request.

Section 3. *Additional Covenants of the Company and the Selling Stockholders.*

(A) *Covenants of the Company.* The Company further covenants and agrees with the Underwriter as follows:

(a) *Underwriter's Review of Proposed Amendments and Supplements.* During such period beginning on the date hereof and ending on the later of the First Closing Date or such date, as in the reasonable opinion of counsel for the Underwriter, the Prospectus is no longer required by law to be delivered in connection with sales by an Underwriter or dealer (the "Prospectus Delivery Period"), prior to amending or supplementing the Registration Statement (including any registration statement filed under Rule 462(b) under the Securities Act) or the Prospectus, the Company shall furnish in a timely manner to the Underwriter for review a copy of each such proposed amendment or supplement, and the Company shall not file any such proposed amendment or supplement to which the Underwriter reasonably objects in a timely manner.

(b) *Securities Act Compliance.* After the date of this Agreement, the Company shall promptly advise the Underwriter in writing (i) of the receipt of any comments of, or requests for additional or supplemental information from, the Commission in connection with the Registration Statement, (ii) of the time and date of any filing of any post-effective amendment to the Registration Statement or any amendment or supplement to any preliminary prospectus or the Prospectus, (iii) of the time and date that any post-effective amendment to the Registration Statement becomes effective, (iv) of the issuance by the Commission of any stop order suspending the effectiveness of the Registration Statement or any post-effective amendment thereto or of any order preventing or suspending the use of any preliminary prospectus or the Prospectus and (v) of any proceedings to remove, suspend or terminate from listing or quotation the Common Stock from any securities exchange upon which it is listed for trading or included or designated for quotation, or of the threatening or initiation of any proceedings for any of such

purposes; provided that the obligation of the Company to so advise of the events set forth in (v) above shall be deemed to be satisfied after the end of the Prospectus Delivery Period by the Company's issuance of a press release and/or the filing of a current report on Form 8-K with the Commission. If the Commission shall enter any such stop order at any time, the Company will use its best efforts to obtain the lifting of such order at the earliest possible moment. Additionally, the Company agrees that it shall comply in all material respects with the provisions of Rules 424(b), 430A and 434, as applicable, under the Securities Act and will use its reasonable efforts to confirm that any filings made by the Company under such Rule 424(b) were received in a timely manner by the Commission.

(c) *Amendments and Supplements to the Prospectus and Other Securities Act Matters.* If, during the Prospectus Delivery Period, any event shall occur or condition exist as a result of which it is necessary to amend or supplement the Prospectus in order to make the statements therein, in the light of the circumstances when the Prospectus is delivered to a purchaser, not misleading, or if in the reasonable opinion of the Underwriter or counsel for the Underwriter it is otherwise necessary to amend or supplement the Prospectus to comply with law, the Company agrees to promptly prepare (subject to Section 3(A)(a) hereof), file with the Commission and furnish at its own expense to the Underwriter and to dealers, amendments or supplements to the Prospectus so that the statements in the Prospectus as so amended or supplemented will not, in the light of the circumstances when the Prospectus is delivered to a purchaser, be misleading or so that the Prospectus, as amended or supplemented, will comply in all material respects with law.

(d) *Copies of Any Amendments and Supplements to the Prospectus.* The Company agrees to furnish the Underwriter, without charge, during the Prospectus Delivery Period, as many copies of the Prospectus and any amendments and supplements thereto (including any documents incorporated or deemed incorporated by reference therein) as the Underwriter may reasonably request.

(e) *Blue Sky Compliance.* The Company shall cooperate with the Underwriter and counsel for the Underwriter to qualify or register the Common Shares for sale under (or obtain exemptions from the application of) the state securities or blue sky laws or Canadian provincial Securities laws of those jurisdictions designated by the Underwriter in its reasonable discretion, shall comply with such laws and shall continue such qualifications, registrations and exemptions in effect so long as required under such state securities or blue sky laws or Canadian provincial Securities laws for the distribution of the Common Shares. The Company shall not be required to qualify as a foreign corporation or to take any action that would subject it to general service of process in any such jurisdiction where it is not presently qualified or where it would be subject to taxation as a foreign corporation. The Company will advise the Underwriter promptly upon receipt of any notice of the suspension of the qualification or registration of (or any such exemption relating to) the Common Shares for offering, sale or trading in any jurisdiction or any initiation or threat of any proceeding for any such purpose, and in the event of the issuance of any order suspending such qualification, registration or exemption, the Company shall use its commercially reasonable efforts to obtain the withdrawal thereof at the earliest possible moment.

(f) *Transfer Agent.* The Company shall engage and maintain, at its expense, a registrar and transfer agent for the Common Stock.

(g) *Earnings Statement.* As soon as practicable, the Company will make generally available to its security holders and to the Underwriter an earnings statement (which need not be audited) covering the twelve-month period ending June 30, 2005, that satisfies the provisions of Section 11(a) of the Securities Act.

(h) *Periodic Reporting Obligations.* During the Prospectus Delivery Period, the Company shall file, on a timely basis, with the Commission and the New York Stock Exchange all reports and documents required to be filed to each such entity under the Exchange Act.

(B) *Covenants of the Selling Stockholders.* Each Selling Stockholder further covenants and agrees with each Underwriter:

(a) *Agreement Not to Offer or Sell Additional Securities.* Other than as contemplated by this Agreement, such Selling Stockholder will not, without the prior written consent of BAS (which consent may be withheld in its sole discretion), directly or indirectly, sell, offer, contract or grant any option to sell (including without limitation any short sale), pledge, transfer, establish an open “put equivalent position” within the meaning of Rule 16a-1(h) under the Exchange Act, or otherwise dispose of any shares of Common Stock, options or warrants to acquire shares of Common Stock, or securities exchangeable or exercisable for or convertible into shares of Common Stock currently or hereafter owned either of record or beneficially (as defined in Rule 13d-3 under the Exchange Act) by such Selling Stockholder, or publicly announce such Selling Stockholder’s intention to do any of the foregoing, for a period commencing on the date hereof and continuing through the close of trading on the date 21 days after the date of the Prospectus. The foregoing restrictions shall not apply to (A) transfers by way of testate or intestate succession or by operation of law, (B) transfers to members of the immediate family of such Selling Stockholder or to a trust, partnership, limited liability company or other entity, all of the beneficial interests of which are held by such Selling Stockholder or by a member of such Selling Stockholder’s immediate family, (C) transfers to charitable organizations, (D) if such Selling Stockholder is a corporation, partnership, limited liability company or similar entity, transfers to the stockholders, partners, members or similar persons of such Selling Stockholder and (E) the exercise of stock options pursuant to employee stock option plans existing on the date hereof; provided that in each case of a transfer pursuant to clauses (A) — (D), or an exercise of any option pursuant to clause (E), of this sentence, the transferee (or the Selling Stockholder as the optionee in the case of clause (E)) shall have agreed to be bound by the restrictions on transfer described herein.

(b) *Delivery of Forms W-8 and W-9.* Such Selling Stockholder will deliver to the Underwriter prior to the First Closing Date a properly completed and executed United States Treasury Department Form W-8 (if the Selling Stockholder is a non-United States person) or Form W-9 (if the Selling Stockholder is a United States person).

BAS may waive in writing the performance by the Company or any Selling Stockholder of any one or more of the foregoing covenants or, in the case of the Company’s covenants, extend the time for their performance.

Section 4. *Payment of Expenses.* The Company agrees to pay all costs, fees and expenses incurred in connection with the performance of its obligations and the obligations of

the Selling Stockholders hereunder and in connection with the transactions contemplated hereby, including without limitation (i) all expenses incident to the issuance and delivery of the Common Shares (including all printing and engraving costs), (ii) all fees and expenses of the registrar and transfer agent of the Common Stock, (iii) all necessary issue, transfer and other stamp taxes in connection with the issuance and sale of the Common Shares to the Underwriter, (iv) all fees and expenses of the Company's counsel, independent public or certified public accountants and other advisors, (v) all costs and expenses incurred in connection with the preparation, printing, filing, shipping and distribution of the Registration Statement (including financial statements, exhibits, schedules, consents and certificates of experts), each preliminary prospectus and the Prospectus, and all amendments and supplements thereto, (vi) all reasonable filing fees, attorneys' fees and expenses incurred by the Company or the Underwriter in connection with qualifying or registering (or obtaining exemptions from the qualification or registration of) all or any part of the Common Shares for offer and sale under the state securities or blue sky laws or the provincial securities laws of Canada, and, if requested by the Underwriter, preparing and printing a "Blue Sky Survey" or memorandum, and any supplements thereto, advising the Underwriter of such qualifications, registrations and exemptions, (vii) if applicable, the filing fees incident to, and the reasonable fees and expenses of counsel for the Underwriter in connection with, the NASD's review and approval of the Underwriter's participation in the offering and distribution of the Common Shares, (viii) the fees and expenses associated with listing the Common Shares on the New York Stock Exchange, (ix) the fees and expenses of the Custodian and (x) all other fees, costs and expenses referred to in Item 14 of Part II of the Registration Statement. Except as provided in this Section 4, Section 6, Section 8 and Section 9 hereof, the Underwriter shall pay its own expenses, including the fees and disbursements of its counsel.

The Selling Stockholders further agree with the Underwriter to pay (directly or by reimbursement) all fees and expenses incident to the performance of their obligations under this Agreement which are not otherwise specifically provided for herein, including but not limited to (i) fees and expenses of counsel and other advisors for such Selling Stockholders, and (ii) expenses (including but not limited to underwriting discounts and commissions) and taxes incident to the sale and delivery of the Common Shares to be sold by such Selling Stockholders to the Underwriter hereunder (which taxes, if any, may be deducted by the Custodian under the provisions of Section 2 of this Agreement to the extent required by law).

Section 5. *Conditions of the Obligations of the Underwriter.* The obligations of the Underwriter to purchase and pay for the Common Shares as provided herein on the First Closing Date and, with respect to the Optional Common Shares, the Second Closing Date, shall be subject to the accuracy of the representations and warranties on the part of the Company and the Selling Stockholders set forth in Sections 1(A) and 1(B) hereof as of the date hereof and as of the First Closing Date as though then made and, with respect to the Optional Common Shares, as of the Second Closing Date as though then made, to the timely performance by the Company and the Selling Stockholders of their respective covenants and other obligations hereunder, and to each of the following additional conditions:

(a) *Accountants' Comfort Letter.* On the First Closing Date, the Underwriter shall have received from KPMG LLP, independent registered public accounting firm for the Company, a letter dated the date hereof addressed to the Underwriter, in form and substance reasonably satisfactory to the Underwriter, containing statements and information of the type



ordinarily included in accountant's "comfort letters" to underwriters, delivered according to Statement of Auditing Standards No. 72 (or any successor bulletin), with respect to the audited and unaudited financial statements and certain financial information contained in the Registration Statement and the Prospectus.

(b) *Compliance with Registration Requirements; No Stop Order; No Filing with NASD.* For the period from and after effectiveness of this Agreement and prior to the First Closing Date and, with respect to the Optional Common Shares, the Second Closing Date:

(i) the Company shall have filed the Prospectus with the Commission (including the information required by Rule 430A under the Securities Act) in the manner and within the time period required by Rule 424(b) under the Securities Act; or the Company shall have filed a post-effective amendment to the Registration Statement containing the information required by such Rule 430A, and such post-effective amendment shall have become effective; or, if the Company elected to rely upon Rule 434 under the Securities Act and obtained the Underwriter's consent thereto, the Company shall have filed a Term Sheet with the Commission in the manner and within the time period required by such Rule 424(b);

(ii) no stop order suspending the effectiveness of the Registration Statement, any Rule 462(b) Registration Statement, or any post-effective amendment to the Registration Statement, shall be in effect and no proceedings for such purpose shall have been instituted or threatened by the Commission; and

(iii) no filing with the NASD is required for the offering of the Common Shares pursuant to this Agreement.

(c) *No Material Adverse Change.* For the period from and after the date of this Agreement and prior to the First Closing Date and, with respect to the Optional Shares, the Second Closing Date in the judgment of the Underwriter there shall not have occurred any Material Adverse Change.

(d) *Opinion of Counsel for the Company.* On each of the First Closing Date and the Second Closing Date the Underwriter shall have received the favorable opinion of Paul, Weiss, Rifkind, Wharton & Garrison LLP, counsel for the Company, dated as of such Closing Date, the form of which is attached as Exhibit A and the favorable opinion of Denise Jackson, Esq., in-house counsel for the Company, the form of which is attached as Exhibit B.

(e) *Opinion of Counsel for the Underwriter.* On each of the First Closing Date and the Second Closing Date the Underwriter shall have received the favorable opinion of Shearman & Sterling LLP, counsel for the Underwriter, dated as of such Closing Date, in form satisfactory to the Underwriter.

(f) *Officers' Certificate.* On each of the First Closing Date and the Second Closing Date the Underwriter shall have received a written certificate of the Company executed by the Chairman of the Board, Chief Executive Officer or President of the Company and the Chief Financial Officer or Chief Accounting Officer of the Company, dated as of such Closing Date, to the effect set forth in subsection (b)(ii) of this Section 5, and further to the effect that:

(i) for the period from and after the date of this Agreement and prior to such Closing Date, there has not occurred any Material Adverse Change;

(ii) the representations, warranties and covenants of the Company set forth in Section 1(A) of this Agreement are true and correct with the same force and effect as though expressly made on and as of such Closing Date; and

(iii) the Company has complied with all the agreements hereunder and satisfied in all material respects all the conditions on its part to be performed or satisfied hereunder at or prior to such Closing Date.

(g) *Bring-down Comfort Letter.* On the Second Closing Date, the Underwriter shall have received from KPMG LLP, independent registered public accounting firm for the Company, such letters as they may reasonably request, dated such date, in form and substance reasonably satisfactory to the Underwriter, to the effect that they reaffirm the statements made in the letter furnished by them pursuant to subsection (a) of this Section 5, except that the specified date referred to therein for the carrying out of procedures shall be no more than three business days prior to the Second Closing Date.

(h) *Opinion of Counsel for the Selling Stockholders.* On each of the First Closing Date and the Second Closing Date the Underwriter shall have received the favorable opinion of Paul, Weiss, Rifkind, Wharton & Garrison LLP, counsel to the other Selling Stockholders, dated as of such Closing Date, the form of which are attached as Exhibit C.

(i) *Selling Stockholders' Certificate.* On each of the First Closing Date and the Second Closing Date the Underwriter shall receive a written certificate executed by each Selling Stockholder (or such Selling Stockholder's Attorney-in-Fact), dated as of such Closing Date, to the effect that:

(i) the representations, warranties and covenants of such Selling Stockholder set forth in Section 1(B) of this Agreement are true and correct with the same force and effect as though expressly made by such Selling Stockholder on and as of such Closing Date; and

(ii) such Selling Stockholder has complied with all the agreements and satisfied all the conditions on its part to be performed or satisfied at or prior to such Closing Date.

(j) *Selling Stockholders' Documents.* On the date hereof, the Company and the Selling Stockholders shall have furnished for review by the Underwriter such information, certificates and documents as the Underwriter may reasonably request.

(k) *Additional Documents.* On or before each of the First Closing Date and the Second Closing Date, the Underwriter and counsel for the Underwriter shall have received such information, documents and opinions as they may reasonably require for the purposes of enabling them to pass upon the issuance and sale of the Common Shares as contemplated herein, or in order to evidence the accuracy of any of the representations and warranties, or the satisfaction of any of the conditions or agreements, herein contained.

If any condition specified in this Section 5 is not satisfied when and as required to be satisfied, this Agreement may be terminated by the Underwriter by notice to the Company and the Selling Stockholders at any time on or prior to the First Closing Date and, with respect to the Optional Common Shares, at any time prior to the Second Closing Date, which termination shall be without liability on the part of any party to any other party, except that Section 4, Section 6, Section 8 and Section 9 shall at all times be effective and shall survive such termination.

Section 6. *Reimbursement of Underwriter's Expenses.* If this Agreement is terminated by the Underwriter pursuant to Section 5 or Section 10(iv), or if the sale to the Underwriter of the Common Shares on the First Closing Date is not consummated because of any refusal, inability or failure on the part of the Company or the Selling Stockholders to perform any agreement herein or to comply with any provision hereof, the Company agrees to reimburse the Underwriter upon demand for all out-of-pocket expenses that shall have been reasonably incurred by the Underwriter in connection with the proposed purchase and the offering and sale of the Common Shares, including but not limited to reasonable fees and disbursements of counsel, printing expenses, travel expenses, postage, facsimile and telephone charges.

Section 7. *Effectiveness of This Agreement.* This Agreement shall not become effective until the later of (i) the execution of this Agreement by the parties hereto and (ii) notification by the Commission to the Company and the Underwriter of the effectiveness of the Registration Statement under the Securities Act.

Prior to such effectiveness, this Agreement may be terminated by any party by notice to each of the other parties hereto, and any such termination shall be without liability on the part of (a) the Company or the Selling Stockholders to the Underwriter, except that the Company and the Selling Stockholders shall be obligated to reimburse the expenses of the Underwriter pursuant to Sections 4 and 6 hereof, (b) the Underwriter to the Company or the Selling Stockholders, or (c) any party hereto to any other party except that the provisions of Section 8 and Section 9 shall at all times be effective and shall survive such termination.

Section 8. *Indemnification.*

(a) *Indemnification of the Underwriter by the Company.* The Company agrees to indemnify and hold harmless the Underwriter, its officers and employees, and each person, if any, who controls the Underwriter within the meaning of the Securities Act and the Exchange Act against any loss, claim, damage, liability or expense, as incurred, to which the Underwriter or such controlling person may become subject, under the Securities Act, the Exchange Act or other federal or state statutory law or regulation, or at common law or otherwise (including in settlement of any litigation, if such settlement is effected with the written consent of the Company), insofar as such loss, claim, damage, liability or expense (or actions in respect thereof as contemplated below) arises out of or is based (i) upon any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement, or any amendment thereto, including any information deemed to be a part thereof pursuant to Rule 430A or Rule 434 under the Securities Act, or the omission or alleged omission therefrom of a material fact required to be stated therein or necessary to make the statements therein not misleading; or (ii) upon any untrue statement or alleged untrue statement of a material fact contained in any preliminary prospectus or the Prospectus (or any amendment or supplement thereto), or the omission or alleged omission

therefrom of a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; or (iii) upon any act or failure to act or any alleged act or failure to act by any Underwriter in connection with, or relating in any manner to, the Common Stock or the offering contemplated hereby, and which is included as part of or referred to in any loss, claim, damage, liability or action arising out of or based upon any matter covered by clause (i) or (ii) above, provided that the Company shall not be liable under this clause (iii) to the extent that a court of competent jurisdiction shall have determined by a final judgment that such loss, claim, damage, liability or action resulted directly from any such acts or failures to act undertaken or omitted to be taken by the Underwriter through its bad faith or willful misconduct; and to reimburse the Underwriter and each such controlling person for any and all expenses (including the fees and disbursements of counsel chosen by BAS) as such expenses are reasonably incurred by the Underwriter or such controlling person in connection with investigating, defending, settling, compromising or paying any such loss, claim, damage, liability, expense or action; provided, however, that the foregoing indemnity agreement shall not apply to any loss, claim, damage, liability or expense to the extent, but only to the extent, arising out of or based upon any untrue statement or alleged untrue statement or omission or alleged omission made in reliance upon and in conformity with written information furnished to the Company by the Underwriter expressly for use in the Registration Statement, any preliminary prospectus or the Prospectus (or any amendment or supplement thereto). With respect to any preliminary prospectus, the foregoing indemnity agreement shall not inure to the benefit of the Underwriter from whom the person asserting any loss, claim, damage, liability or expense purchased Common Shares, or any person controlling the Underwriter, if copies of the Prospectus were timely delivered to the Underwriter pursuant to Section 2 and a copy of the Prospectus (as then amended or supplemented if the Company shall have furnished any amendments or supplements thereto) was not sent or given by or on behalf of the Underwriter to such person, if required by law so to have been delivered, at or prior to the written confirmation of the sale of the Common Shares to such person, and if the Prospectus (as so amended or supplemented) would have cured the defect giving rise to such loss, claim, damage, liability or expense. The indemnity agreement set forth in this Section 8(a) shall be in addition to any liabilities that the Company may otherwise have.

(b) *Indemnification of the Underwriter by the Selling Stockholders.* Each of the Selling Stockholders, severally and not jointly, agrees to indemnify and hold harmless the Underwriter, its officers and employees, and each person, if any, who controls the Underwriter within the meaning of the Securities Act and the Exchange Act against any loss, claim, damage, liability or expense, as incurred, to which the Underwriter or such controlling person may become subject, under the Securities Act, the Exchange Act or other federal or state statutory law or regulation, or at common law or otherwise (including in settlement of any litigation, if such settlement is effected with the written consent of the Selling Stockholders), insofar as such loss, claim, damage, liability or expense (or actions in respect thereof as contemplated below) arises out of or is based: (i) upon any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement, or any amendment thereto, including any information deemed to be a part thereof pursuant to Rule 430A or Rule 434 under the Securities Act, or the omission or alleged omission therefrom of a material fact required to be stated therein or necessary to make the statements therein not misleading or (ii) upon any untrue statement or alleged untrue statement of a material fact contained in any preliminary prospectus or the Prospectus (or any amendment or supplement thereto), or the omission or alleged omission

therefrom of a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, in each case, with respect to each Selling Stockholder, with respect to clauses (i) and (ii) above, to the extent, but only to the extent, that such untrue statement or alleged untrue statement or omission or alleged omission was made in the Registration Statement, any preliminary prospectus, the Prospectus (or any amendment or supplement thereto), in reliance upon and in conformity with written information furnished by such Selling Stockholder to the Company expressly for use therein under the caption "Selling Stockholders"; and to reimburse the Underwriter and each such controlling person for any and all expenses (including the fees and disbursements of counsel chosen by BAS) as such expenses are reasonably incurred by the Underwriter or such controlling person in connection with investigating, defending, settling, compromising or paying any such loss, claim, damage, liability, expense or action; provided, however, that with respect to any preliminary prospectus, the foregoing indemnity agreement shall not inure to the benefit of the Underwriter from whom the person asserting any loss, claim, damage, liability or expense purchased Common Shares, or any person controlling the Underwriter, if copies of the Prospectus were timely delivered to the Underwriter pursuant to Section 2 and a copy of the Prospectus (as then amended or supplemented if the Company shall have furnished any amendments or supplements thereto) was not sent or given by or on behalf of the Underwriter to such person, if required by law so to have been delivered, at or prior to the written confirmation of the sale of the Common Shares to such person, and if the Prospectus (as so amended or supplemented) would have cured the defect giving rise to such loss, claim, damage, liability or expense; and provided, further, that the liability of each Selling Stockholder pursuant to this Section 8 shall not exceed the net proceeds received by such Selling Stockholder from the sale of the Common Shares hereunder. The indemnity agreement set forth in this Section 8(b) shall be in addition to any liabilities that the Selling Stockholders may otherwise have.

(c) *Indemnification of the Company, Its Directors and Officers and the Selling Stockholders.* The Underwriter agrees to indemnify and hold harmless the Company, each of its directors, each of its officers who signed the Registration Statement, the Selling Stockholders and each person, if any, who controls the Company or any Selling Stockholder within the meaning of the Securities Act or the Exchange Act, against any loss, claim, damage, liability or expense, as incurred, to which the Company, or any such director, officer, Selling Stockholder or controlling person may become subject, under the Securities Act, the Exchange Act, or other federal or state statutory law or regulation, or at common law or otherwise (including in settlement of any litigation, if such settlement is effected with the written consent of such Underwriter), insofar as such loss, claim, damage, liability or expense (or actions in respect thereof as contemplated below) arises out of or is based upon any untrue or alleged untrue statement of a material fact contained in the Registration Statement, any preliminary prospectus or the Prospectus (or any amendment or supplement thereto), or arises out of or is based upon the omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, in each case to the extent, but only to the extent, that such untrue statement or alleged untrue statement or omission or alleged omission was made in the Registration Statement, any preliminary prospectus, the Prospectus (or any amendment or supplement thereto), in reliance upon and in conformity with written information furnished to the Company by the Underwriter expressly for use therein and to reimburse the Company, or any such director, officer, Selling Stockholder or controlling person for any legal and other expense reasonably incurred by the Company, or any such director,

officer, Selling Stockholder or controlling person in connection with investigating, defending, settling, compromising or paying any such loss, claim, damage, liability, expense or action. Each of the Company and each of the Selling Stockholders hereby acknowledges that the only information that the Underwriter has furnished to the Company and the Selling Stockholders expressly for use in the Registration Statement, any preliminary prospectus or the Prospectus (or any amendment or supplement thereto) are the statements set forth in the eighth and ninth paragraphs under the caption "Underwriting" in the Prospectus, concerning penalty bids and stabilizing transactions; and the Underwriter confirms that such statements are correct. The indemnity agreement set forth in this Section 8(c) shall be in addition to any liabilities that the Underwriter may otherwise have.

(d) *Notifications and Other Indemnification Procedures.* Promptly after receipt by an indemnified party under this Section 8 of notice of the commencement of any action, such indemnified party will, if a claim in respect thereof is to be made against an indemnifying party under this Section 8, notify the indemnifying party in writing of the commencement thereof, but the omission so to notify the indemnifying party will not relieve it from any liability which it may have to any indemnified party for contribution or otherwise than under the indemnity agreement contained in this Section 8 or to the extent it is not prejudiced as a proximate result of such failure. In case any such action is brought against any indemnified party and such indemnified party seeks or intends to seek indemnity from an indemnifying party, the indemnifying party will be entitled to participate in, and, to the extent that it shall elect, jointly with all other indemnifying parties similarly notified, by written notice delivered to the indemnified party promptly after receiving the aforesaid notice from such indemnified party, to assume the defense thereof with counsel reasonably satisfactory to such indemnified party; provided, however, if the defendants in any such action include both the indemnified party and the indemnifying party and the indemnified party shall have reasonably concluded that a conflict may arise between the positions of the indemnifying party and the indemnified party in conducting the defense of any such action or that there may be legal defenses available to it and/or other indemnified parties which are different from or additional to those available to the indemnifying party, the indemnified party or parties shall have the right to select separate counsel to assume such legal defenses and to otherwise participate in the defense of such action on behalf of such indemnified party or parties. Upon receipt of notice from the indemnifying party to such indemnified party of such indemnifying party's election so to assume the defense of such action and approval by the indemnified party of counsel, the indemnifying party will not be liable to such indemnified party under this Section 8 for any legal or other expenses subsequently incurred by such indemnified party in connection with the defense thereof unless (i) the indemnified party shall have employed separate counsel in accordance with the proviso to the next preceding sentence (it being understood, however, that the indemnifying party shall not be liable for the reasonable expenses of more than one separate counsel (together with local counsel), approved by the indemnifying party, representing the indemnified parties who are parties to such action) or (ii) the indemnifying party shall not have employed counsel reasonably satisfactory to the indemnified party to represent the indemnified party within a reasonable time after notice of commencement of the action, in each of which cases the reasonable fees and expenses of counsel shall be at the expense of the indemnifying party.

(e) *Settlements.* The indemnifying party under this Section 8 shall not be liable for any settlement of any proceeding effected without its written consent, but if settled with such

consent or if there be a final judgment for the plaintiff, the indemnifying party agrees to indemnify the indemnified party against any loss, claim, damage, liability or expense by reason of such settlement or judgment. Notwithstanding the foregoing sentence, if at any time an indemnified party shall have requested an indemnifying party to reimburse the indemnified party for fees and expenses of counsel as contemplated by Section 8(d) hereof, the indemnifying party agrees that it shall be liable for any settlement of any proceeding effected without its written consent if (i) such settlement is entered into more than 30 days after receipt by such indemnifying party of the aforesaid request and (ii) such indemnifying party shall not have reimbursed the indemnified party in accordance with such request prior to the date of such settlement, except, with respect to clause (ii), to the extent the indemnifying party has provided written notice to the indemnified party that the indemnifying party disputes in good faith the unpaid balance of such fees and expenses for which reimbursement was requested. No indemnifying party shall, without the prior written consent of the indemnified party, effect any settlement, compromise or consent to the entry of judgment in any pending or threatened action, suit or proceeding in respect of which any indemnified party is or could have been a party and indemnity was or could have been sought hereunder by such indemnified party, unless such settlement, compromise or consent includes an unconditional release of such indemnified party from all liability on claims that are the subject matter of such action, suit or proceeding.

Section 9. *Contribution.* If the indemnification provided for in Section 8 is for any reason held to be unavailable to or otherwise insufficient to hold harmless an indemnified party in respect of any losses, claims, damages, liabilities or expenses referred to therein, then each indemnifying party shall contribute to the aggregate amount paid or payable by such indemnified party, as incurred, as a result of any losses, claims, damages, liabilities or expenses referred to therein (i) in such proportion as is appropriate to reflect the relative benefits received by the Company and the Selling Stockholders, on the one hand, and the Underwriter, on the other hand, from the offering of the Common Shares pursuant to this Agreement or (ii) if the allocation provided by clause (i) above is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) above but also the relative fault of the Company and the Selling Stockholders, on the one hand, and the Underwriter, on the other hand, in connection with the statements or omissions which resulted in such losses, claims, damages, liabilities or expenses, as well as any other relevant equitable considerations. The relative benefits received by the Company and the Selling Stockholders, on the one hand, and the Underwriter, on the other hand, in connection with the offering of the Common Shares pursuant to this Agreement shall be deemed to be in the same respective proportions as the total net proceeds from the offering of the Common Shares pursuant to this Agreement (before deducting expenses) received by the Company and the Selling Stockholders, and the total underwriting discount received by the Underwriter, in each case as set forth on the front cover page of the Prospectus (or, if Rule 434 under the Securities Act is used, the corresponding location on the Term Sheet) bear to the aggregate public offering price of the Common Shares as set forth on such cover. The relative fault of the Company and the Selling Stockholders, on the one hand, and the Underwriter, on the other hand, shall be determined by reference to, among other things, whether any such untrue or alleged untrue statement of a material fact or omission or alleged omission to state a material fact relates to information supplied by the Company or the Selling Stockholders (in the case of a Selling Stockholder, if such information was furnished to the Company in writing by such Selling Stockholder expressly for use in the Preliminary Prospectus, Prospectus or Registration Statement under the caption

“Principal and Selling Stockholders”), on the one hand, or the Underwriter, on the other hand, and the parties’ relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission.

The amount paid or payable by a party as a result of the losses, claims, damages, liabilities and expenses referred to above shall be deemed to include, subject to the limitations set forth in Section 8(d), any legal or other fees or expenses reasonably incurred by such party in connection with investigating or defending any action or claim. The provisions set forth in Section 8(d) with respect to notice of commencement of any action shall apply if a claim for contribution is to be made under this Section 9; provided, however, that no additional notice shall be required with respect to any action for which notice has been given under Section 8(d) for purposes of indemnification.

The Company, the Selling Stockholders and the Underwriter agree that it would not be just and equitable if contribution pursuant to this Section 9 were determined by pro rata allocation or by any other method of allocation which does not take account of the equitable considerations referred to in this Section 9.

Notwithstanding the provisions of this Section 9, (i) the Underwriter shall not be required to contribute any amount in excess of the underwriting commissions received by the Underwriter in connection with the Common Shares underwritten by it and distributed to the public and (ii) no Selling Stockholder shall be required to contribute any amount in excess of the net proceeds received by such Selling Stockholder from the sale of Common Shares hereunder. No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. The Selling Stockholders’ obligations to contribute pursuant to this Section 9 are several, and not joint, in proportion to their respective aggregate sale proceeds of Common Shares (including Optional Common Shares). For purposes of this Section 9, each officer and employee of the Underwriter or a Selling Stockholder, as applicable, and each person, if any, who controls the Underwriter or a Selling Stockholder, as applicable, within the meaning of the Securities Act and the Exchange Act shall have the same rights to contribution as the Underwriter or such Selling Stockholder, and each director of the Company, each officer of the Company who signed the Registration Statement, and each person, if any, who controls the Company within the meaning of the Securities Act and the Exchange Act shall have the same rights to contribution as the Company.

Section 10. *Termination of This Agreement.* Prior to the First Closing Date this Agreement may be terminated by the Underwriter by notice given to the Company and the Selling Stockholders if at any time (i) trading or quotation in any of the Company’s securities shall have been suspended or limited by the Commission or by the New York Stock Exchange, or trading in securities generally on either the Nasdaq Stock Market or the New York Stock Exchange shall have been suspended or limited, or minimum or maximum prices shall have been generally established on any of such stock exchanges by the Commission or the NASD; (ii) a general banking moratorium shall have been declared by any of federal or New York authorities; (iii) there shall have occurred any outbreak or escalation of national or international hostilities or any crisis or calamity, or any change in the United States or international financial markets, or any substantial change or development involving a prospective substantial change in United



States' or international political, financial or economic conditions, as in the judgment of the Underwriter is material and adverse and makes it impracticable to market the Common Shares in the manner and on the terms described in the Prospectus or to enforce contracts for the sale of securities; (iv) in the judgment of the Underwriter there shall have occurred any Material Adverse Change; or (v) the Company shall have sustained a loss by strike, fire, flood, earthquake, accident or other calamity of such character as in the judgment of the Underwriter may interfere materially with the conduct of the business and operations of the Company regardless of whether or not such loss shall have been insured. Any termination pursuant to this Section 10 shall be without liability on the part of (a) the Company or the Selling Stockholders to the Underwriter, except that the Company shall be obligated to reimburse the expenses of the Underwriter pursuant to Sections 4 and 6 hereof, (b) the Underwriter to the Company and the Selling Stockholders, or (c) any party hereto to any other party except that the provisions of Section 8 and Section 9 shall at all times be effective and shall survive such termination.

Section 11. *Representations and Indemnities to Survive Delivery.* The respective indemnities, agreements, representations, warranties and other statements of the Company, of its officers, of the Selling Stockholders and of the Underwriter set forth in or made pursuant to this Agreement will remain in full force and effect, regardless of any investigation made by or on behalf of the Underwriter or the Company or any of its or their partners, officers or directors or any controlling person, or the Selling Stockholders, as the case may be, and will survive delivery of and payment for the Common Shares sold hereunder and any termination of this Agreement.

Section 12. *Notices.* All communications hereunder shall be in writing and shall be mailed, hand delivered or telecopied and confirmed to the parties hereto as follows:

If to the Underwriter:

Banc of America Securities LLC  
9 West 57<sup>th</sup> Street  
New York, NY 10019  
Facsimile: 212.933.2217  
Attention: Equity Capital Markets

with copies to:

Banc of America Securities LLC  
9 West 57<sup>th</sup> Street  
New York, New York 10019  
Facsimile: 704.409.0753  
Attention: Raymond P. Ko, Esq.

Shearman & Sterling LLP  
599 Lexington Avenue  
New York, New York 10022  
Facsimile: 646.848.8244  
Attention: Danielle Carbone, Esq.

If to the Company:

AMN Healthcare Services, Inc.  
12400 High Bluff Drive, Suite 100  
San Diego, California 92130  
Facsimile: 858.509.3587  
Attention: each of the President and General Counsel

with a copy to

Paul, Weiss, Rifkind, Wharton & Garrison LLP  
1285 Avenue of the Americas  
New York, New York 10019-6064  
Facsimile: 212.757.3900  
Attention: John C. Kennedy, Esq.

If to any of the Selling Stockholders:

c/o Haas Wheat & Partners, L.P.  
300 Crescent Court, Suite 1700  
Dallas, Texas 75201  
Facsimile: 214.871.8365  
Attention: Douglas Wheat

Any party hereto may change the address for receipt of communications by giving written notice to the others.

Section 13. *Successors.* This Agreement will inure to the benefit of and be binding upon the parties hereto and to the benefit of the employees, officers and directors and controlling persons referred to in Section 8 and Section 9, and in each case their respective successors, and no other person will have any right or obligation hereunder. The term "successors" shall not include any purchaser of the Common Shares as such from the Underwriter merely by reason of such purchase.

Section 14. *Partial Unenforceability.* The invalidity or unenforceability of any Section, paragraph or provision of this Agreement shall not affect the validity or enforceability of any other Section, paragraph or provision hereof.

Section 15. *Governing Law Provisions.*

(a) *Governing Law Provisions.* THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO AGREEMENTS MADE AND TO BE PERFORMED IN SUCH STATE.

(b) *Consent to Jurisdiction.* Any legal suit, action or proceeding arising out of or based upon this Agreement or the transactions contemplated hereby (“Related Proceedings”) may be instituted in the federal courts of the United States of America located in the Borough of Manhattan, City and County of New York or the courts of the State of New York in each case located in the Borough of Manhattan, City and County of New York (collectively, the “Specified Courts”), and each party irrevocably submits to the exclusive jurisdiction (except for proceedings instituted in regard to the enforcement of a judgment of any such court (a “Related Judgment”), as to which such jurisdiction is non-exclusive) of such courts in any such suit, action or proceeding. Service of any process, summons, notice or document by mail to such party’s address set forth above shall be effective service of process for any suit, action or other proceeding brought in any such court. The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action or other proceeding in the Specified Courts and irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such suit, action or other proceeding brought in any such court has been brought in an inconvenient forum.

Section 16. *Failure of One or More of the Selling Stockholders to Sell and Deliver Common Shares.* If one or more of the Selling Stockholders shall fail to sell and deliver to the Underwriter the Common Shares that they have agreed to sell hereunder on the First Closing Date, the other non-defaulting Selling Stockholders shall have the right, severally, in the proportions that the number of Firm Common Shares set forth opposite their respective names on Schedule A bears to the aggregate number of Firm Common Shares set forth opposite the names of all such non-defaulting Selling Stockholders, or in such other proportions as may be agreed to by the Committee with the consent of all non-defaulting Selling Stockholders, to sell the number of Common Shares which such defaulting Selling Stockholder or Selling Stockholders agreed but failed or refused to sell and deliver on such date. If the non-defaulting Selling Stockholders do not so agree to sell in the aggregate the number of Common Shares that the defaulting Selling Stockholders failed or refused to sell and deliver, and arrangements satisfactory to the Underwriter, the Company and the other Selling Stockholders for the sale of such Common Shares are not made within 48 hours after such default, then the Underwriter may at its option, by written notice from the Underwriter to the Company and the Selling Stockholders, either (i) terminate this Agreement without any liability on the part of any Underwriter or, except as provided in Sections 4, 6, 8 and 9 hereof, the Company or the Selling Stockholders, or (ii) purchase the shares which the other Selling Stockholders have agreed to sell and deliver in accordance with the terms hereof. In any such case where one or more of the Selling Stockholders shall fail to sell and deliver to the Underwriter the Common Shares to be sold and delivered by such Selling Stockholders pursuant to this Agreement at the First Closing Date or the Second Closing Date, then the Underwriter shall have the right, by written notice from the Underwriter to the Company and the Selling Stockholders, to postpone the First Closing Date or the Second Closing Date, as the case may be, but in no event for longer than seven days in order that the required changes, if any, to the Registration Statement and the Prospectus or any other documents or arrangements may be effected.

Section 17. *General Provisions.* This Agreement constitutes the entire agreement of the parties to this Agreement and supersedes all prior written or oral and all contemporaneous oral agreements, understandings and negotiations with respect to the subject matter hereof. This Agreement may be executed in two or more counterparts, each one of which shall be an original,

with the same effect as if the signatures thereto and hereto were upon the same instrument. This Agreement may not be amended or modified unless in writing by all of the parties hereto, and no condition herein (express or implied) may be waived unless waived in writing by each party whom the condition is meant to benefit. The Table of Contents and the Section headings herein are for the convenience of the parties only and shall not affect the construction or interpretation of this Agreement.

Each of the parties hereto acknowledges that it is a sophisticated business person who was adequately represented by counsel during negotiations regarding the provisions hereof, including, without limitation, the indemnification provisions of Section 8 and the contribution provisions of Section 9, and is fully informed regarding said provisions. Each of the parties hereto further acknowledges that the provisions of Sections 8 and 9 hereto fairly allocate the risks in light of the ability of the parties to investigate the Company, its affairs and its business in order to assure that adequate disclosure has been made in the Registration Statement, any preliminary prospectus and the Prospectus (and any amendments and supplements thereto), as required by the Securities Act and the Exchange Act.

If the foregoing is in accordance with your understanding of our agreement, kindly sign and return to the Company the enclosed copies hereof, whereupon this instrument, along with all counterparts hereof, shall become a binding agreement in accordance with its terms.

Very truly yours,

AMN HEALTHCARE SERVICES, INC.

By:       /s/ Steven C. Francis      

Name: Steven C. Francis

Title: Chief Executive Officer

The Selling Stockholders:

HWH CAPITAL PARTNERS, L.P.

By: HWH, L.P., its General Partner

By: HWH Incorporated, its General Partner

By: /s/ Douglas D. Wheat

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Name: Douglas D. Wheat

Title: President

HWH NIGHTINGALE PARTNERS, L.P.

By: HWH NIGHTINGALE, L.P., its General Partner

By: HWH NIGHTINGALE, L.L.C., its General Partner

By: /s/ Douglas D. Wheat

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Name: Douglas D. Wheat

Title: President

HWP CAPITAL PARTNERS II, L.P.

By: HWP II, L.P., its General Partner

By: HWP II, LLC, its General Partner

By: /s/ Douglas D. Wheat

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Name: Douglas D. Wheat

Title: President

HWP NIGHTINGALE PARTNERS II, L.P.

By: HWP Nightingale II, L.P., its General Partner

By: HWP Nightingale II, LLC, its General Partner

By: /s/ Douglas D. Wheat

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Name: Douglas D. Wheat

Title: President

The foregoing Underwriting Agreement is hereby confirmed and accepted by the Underwriter in New York, New York as of the date first above written.

BANC OF AMERICA SECURITIES LLC

By: /s/ Jeffrey B. Rosichan

Name: Jeffrey B. Rosichan

Title: Managing Director

**AMENDMENT NO. 1 TO THE  
REGISTRATION RIGHTS AGREEMENT**

THIS **AMENDMENT NO. 1** (the "Amendment") to that certain Registration Rights Agreement (the "Agreement"), dated November 16, 2001, among AMN Healthcare Services, Inc., a Delaware corporation (formerly known as AMN Holdings, Inc.) (the "Company"), HWH Capital Partners, L.P., a Delaware limited partnership ("HWH Capital Partners"), HWH Nightingale Partners, L.P., a Delaware limited partnership ("HWH Nightingale"), HWP Capital Partners II, L.P., a Delaware limited partnership ("HWP Capital Partners II"), HWP Nightingale Partners II, L.P., a Delaware limited partnership ("HWP Nightingale II" and together with HWH Capital Partners, HWH Nightingale and HWP Capital Partners II, the "HWP Stockholders"), Steven Francis and Gayle Francis, as Trustees of the Francis Family Trust dated May 24, 1996 (the "Trust"), Steven Francis ("Francis" and together with the Trust, the "Francis Stockholders") and BancAmerica Capital Investors SBIC I, L.P. ("BancAmerica") is made as of this 18th day of April 2005 by and among the Company, the HWP Stockholders and the Francis Stockholders. All capitalized terms used herein and not otherwise defined herein shall have the meanings set forth in the Agreement.

RECITALS:

**WHEREAS**, the Company, the HWP Stockholders and the Francis Stockholders are parties to the Agreement;

**WHEREAS**, pursuant to Section 10(d) of the Agreement, the Company, the HWP Stockholders and the Francis Stockholders desire to amend certain provisions of the Agreement; and

**WHEREAS**, the HWP Stockholders are the holders of at least 50% of the Registrable Securities.

AGREEMENT:

**NOW THEREFORE**, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Section 3(a) of the Agreement shall hereby be amended and restated in its entirety as follows:

“(a) Request for Demand Registration. The HWP Stockholders as a group, acting through HWH Capital Partners or its written designee, BancAmerica or the Francis Stockholders as a group, acting through Francis, may make a written request to the Company to register (the party making such request, the "Initiating Holders"), and the Company shall register, under the Securities Act (other than pursuant to a Registration



Statement on Form S-4 or S-8 or any successor thereto) (a "Demand Registration"), the number of Registrable Securities stated in such request; provided, however, that the Company shall not be obligated to effect (x) more than five such Demand Registrations requested by the HWP Stockholders, more than one such Demand Registration requested by BancAmerica and more than two such Demand Registrations requested by the Francis Stockholders, (y) a Demand Registration if the Initiating Holders, together with the Designated Holders (other than the Initiating Holders) which have requested to register securities in such registration pursuant to Section 3(b), propose to sell their Registrable Securities at an aggregate price (calculated based upon the Market Price of the Registrable Securities on the date of filing of the Registration Statement with respect to such Registrable Securities) to the public of less than \$5,000,000 and (z) any Demand Registration requested by the Francis Stockholders at any time prior to the earlier of (i) March 31, 2006 or (ii) the date on which the HWP Stockholders beneficially own an amount of Registrable Securities equal to or less than 4,931,303 shares of Common Stock (as such number may be adjusted to reflect stock splits, stock dividends, consolidations and/or similar transactions). For purposes of the preceding sentence, two or more Registration Statements filed in response to one demand shall be counted as one Demand Registration. If the Board of Directors, in its good faith judgment, determines that any registration of Registrable Securities should not be made or continued because it would materially interfere with any material financing, acquisition, corporate reorganization or merger or other material transaction involving the Company (a "Valid Business Reason"), the Company may (x) postpone filing a Registration Statement relating to a Demand Registration until such Valid Business Reason no longer exists, but in no event for more than (i) forty-five (45) days in the case of a Demand Registration requested by the HWP Stockholders or the Francis Stockholders and (ii) nine (9) months in the case of a Demand Registration requested by BancAmerica and (y) in case a Registration Statement has been filed relating to a Demand Registration, the Company, upon the approval of a majority of the Board of Directors, may cause such Registration Statement to be withdrawn and its effectiveness terminated or may postpone amending or supplementing such Registration Statement (in which case, if the Valid Business Reason no longer exists or if more forty-five (45) days (in the case of a Demand Registration requested by the HWP Stockholders or the Francis Stockholders) or nine (9) months (in the case of a Demand Registration requested by BancAmerica) have passed since such withdrawal or postponement, the Initiating Holders may request a new Demand Registration). The Company shall give written notice of its determination to postpone or withdraw a Registration Statement and of the fact that the Valid Business Reason for such postponement or withdrawal no longer exists, in each case, promptly after the occurrence thereof. Notwithstanding anything to the contrary contained herein, the Company may not postpone or withdraw a filing under this Section 3(a) more than once in any eighteen (18) month period. Each request for a Demand Registration by the Initiating Holders shall state the amount of the Registrable Securities proposed to be sold and the intended method of disposition thereof. Any Demand Registration requested by the Francis Stockholders may be only in the form of a firm commitment underwritten offering."

2. The following new sentence is hereby added to the end of 3(b) of the Agreement:

“For avoidance of doubt, even though any Designated Holder (other than Initiating Holders which have requested a registration under Section 3(a)) may have previously registered any or a portion of its Registrable Securities on a Registration Statement on Form S-3, such Designated Holder may request all or a portion of its Registrable Securities be included in a Demand Registration in accordance with this Section 3(b) whether through registering such Registrable Securities, preparing a joint prospectus issued under Rule 429 promulgated under the Securities Act or otherwise.”

3. Section 5(a) of the Agreement shall hereby be amended and restated in its entirety as follows:

“(a) Request for a Form S-3 Registration. The Company will use its commercially reasonable efforts to file all required reports under the Exchange Act in order to qualify for the use of Form S-3 under the Securities Act; provided, that this covenant shall not require the Company to remain a reporting company under the Exchange Act if the Company shall have determined to enter into a merger, acquisition, going private transaction or similar transaction. Upon the Company becoming eligible for use of Form S-3 (or any successor form thereto) under the Securities Act in connection with a public offering of its securities, in the event that the Company shall receive from one or more of the HWP Stockholders, acting through HWH Capital Partners or its written designee, or one or more Francis Stockholders, acting through Francis (collectively, the “S-3 Initiating Holders”), a written request that the Company register, under the Securities Act on Form S-3 (or any successor form then in effect) (an “S-3 Registration”), all or a portion of the Registrable Securities owned by such S-3 Initiating Holders, the Company shall give written notice of such request to all of the Designated Holders (other than S-3 Initiating Holders which have requested an S-3 Registration under this Section 5(a)) at least ten (10) days before the anticipated filing date of such Form S-3, and such notice shall describe the proposed registration and offer such Designated Holders the opportunity to register the number of Registrable Securities as each such Designated Holder may request in writing to the Company, given within ten (10) days after their receipt from the Company of the written notice of such registration. With respect to each S-3 Registration, the Company shall, subject to Section 5(b), (i) include in such offering the Registrable Securities of the S-3 Initiating Holders and the Designated Holders (who have requested in writing to participate in such registration on the same terms and conditions as the Registrable Securities of the S-3 Initiating Holders included therein) and (ii) use its commercially reasonable efforts to cause such registration pursuant to this Section 5(a) to become and remain effective as soon as practicable.”

4. Section 5(c) of the Agreement shall hereby be amended and restated in its entirety as follows:

“(c) Limitations on Form S-3 Registrations. If the Board of Directors has a Valid Business Reason, the Company may (x) postpone filing a Registration Statement

relating to a S-3 Registration until such Valid Business Reason no longer exists, but in no event for more than forty-five (45) days following the request and (y) in case a Registration Statement has been filed relating to a S-3 Registration, the Company, upon the approval of a majority of the Board of Directors, may cause such Registration Statement to be withdrawn and its effectiveness terminated or may postpone amending or supplementing such Registration Statement (in which case, if the Valid Business Reason no longer exists or if more than forty-five (45) days have passed since such withdrawal or postponement, the S-3 Initiating Holder may request the prompt amendment or supplement of such Registration Statement or a new S-3 Registration). The Company shall give written notice of its determination to postpone or withdraw a Registration Statement and of the fact that the Valid Business Reason for such postponement or withdrawal no longer exists, in each case, promptly after the occurrence thereof. Notwithstanding anything to the contrary contained herein, the Company may not postpone or withdraw a filing, under either this Section or Section 3(a), due to a Valid Business Reason more than once in any twelve (12) month period. In addition, the Company shall not be required to effect any registration pursuant to Section 5(a), (i) within ninety (90) days after the effective date of any other Registration Statement of the Company (other than a Registration Statement on Form S-4 or S-8 or any successor thereto), (ii) if Form S-3 is not available for such offering by the S-3 Initiating Holders, (iii) if the S-3 Initiating Holders, together with the Designated Holders (other than S-3 Initiating Holders which have requested an S-3 Registration under Section 5(a)) registering Registrable Securities in such registration, propose to sell their Registrable Securities at an aggregate price (calculated based upon the Market Price of the Registrable Securities on the date of filing of the Form S-3 with respect to such Registrable Securities) to the public of less than \$5,000,000 or (iv) if it is requested by the Francis Stockholders prior to the date on which the HWP Stockholders own an amount of Registrable Securities equal to or less than 2,000,000 shares of Common Stock (as such number may be adjusted to reflect stock splits, stock dividends, consolidations and/or similar transactions).”

5. All references to the Agreement shall be deemed to refer to the Agreement as amended hereby.
6. Except as otherwise expressly set forth in this Amendment, the Agreement shall continue to be in full force and effect in accordance with its terms.
7. This Amendment may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same document. This Agreement may be executed by facsimile signatures.
8. THIS AMENDMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD TO THE PRINCIPLES OF CONFLICTS OF LAW THEREOF.

IN WITNESS WHEREOF, the parties have executed this Amendment No. 1 to the Registration Rights Agreement as of the date first written above.

AMN HEALTHCARE SERVICES, INC.

By: /s/ Denise L. Jackson

Name: Denise L. Jackson

Title: Senior Vice President and General Counsel

HWH CAPITAL PARTNERS, L.P.

By: HWH, L.P., its General Partner

By: HWH Incorporated, its General Partner

By: /s/ Douglas D. Wheat

Name: Douglas D. Wheat

Title: President

HWH NIGHTINGALE PARTNERS, L.P.

By: HWH NIGHTINGALE, L.P., its General Partner

By: HWH NIGHTINGALE, L.L.C., its General Partner

By: /s/ Douglas D. Wheat

Name: Douglas D. Wheat

Title: Managing Member

HWP CAPITAL PARTNERS II, L.P.

By: HWP II, L.P., its General Partner

By: HWP II, LLC, its General Partner

By: /s/ Douglas D. Wheat

Name: Douglas D. Wheat

Title: Managing Member

HWP NIGHTINGALE PARTNERS II, L.P.

By: HWP Nightingale II, L.P., its General Partner

By: HWP Nightingale II, LLC, its General Partner

By: /s/ Douglas D. Wheat

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Name: Douglas D. Wheat

Title: Managing Member

/s/ Steven C. Francis

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Steven C. Francis, as Trustee of the Francis  
Family Trust dated May 24, 1996, as amended

/s/ Gayle A. Francis

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Gayle A. Francis, as Trustee of the Francis  
Family Trust dated May 24, 1996, as amended

/s/ Steven C. Francis

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Steven C. Francis