

06-22-1999

Form PTO-1595



Docket No. 2548

101041407

PATENTS ONLY

To the Honorable Commissioner for Patents and Trademarks: Please record the attached original documents or copy thereof.

1. Name of Conveying party(ies):

Diabetes Pro Health, Inc.

Additional name(s) of conveying party(ies)  
attached? Yes : No ☒

2. Name and address of receiving Party(ies)

Name: Akesis Pharmaceuticals, Inc.

Street Address: 1250 Prospect, Suite 202

City: La Jolla State CA

Zip: 92037

Additional name(s) & address(es) attached?  
Yes No ☒

3. Nature of conveyance:

☐ Assignment ☒ Merger  
☐ Security Agreement ☐ Change of name  
 Other \_\_\_\_\_

Execution Date:

4/27/98

4. Application number(s) or patent number(s):

If this document is being filed together with a new application, the execution date of the application is:

A. Patent Application No.(s) 08/964,814

B. Patent No.(s)

Additional numbers attached? Yes : No ☒

5. Name and address of party to whom correspondence concerning document should be mailed:

Name Stephen E. Reiter  
GRAY CARY WARE & FREIDENRICH, LLPStreet Address 4365 Executive Drive, Suite 1600  
City: San Diego State: CA Zip: 92121

6. Total number of Applications and patents involved: 1

7. Total fee (37 CFR 3.41)...\$ 40.00

8. ☐ Enclosed  
☒ Authorized to charge the recordation fee or any underpayment to deposit account.9. ☒ Deposit Account Number: 07-1895

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DO NOT USE THIS SPACE

9. Statement and signature.

To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.

Stephen E. Reiter  
Registration No. 31,192

Date

4/6/99

Total number of pages including cover sheet, attachments, and document: 12

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NO SPEC  
Fee

**AGREEMENT AND PLAN OF MERGER  
OF AKESIS PHARMACEUTICALS, INC.  
A DELAWARE CORPORATION  
AND  
DIABETES PRO HEALTH, INC.  
A PENNSYLVANIA CORPORATION**

THIS AGREEMENT AND PLAN OF MERGER dated as of April 27, 1998, (the "Agreement") is between Akesis Pharmaceuticals, Inc., a Delaware corporation ("Akesis") and Diabetes Pro Health, Inc., a Pennsylvania corporation ("DPH"). Akesis and DPH are sometimes referred to herein as the "Constituent Corporations."

**RECITALS**

A. Akesis is a corporation duly organized and existing under the laws of the State of Delaware and has an authorized capital of 20,000,000 shares, 10,000,000 of which are designated "Common Stock", \$.001 par value and 10,000,000 of which are designated "Preferred Stock", \$.001 par value. Of such authorized shares of Preferred Stock, 500,000 shares are designated as Series A Preferred Stock. As of the date of this Agreement of Merger, 200,000 shares of Common Stock were issued and outstanding, all of which were held by Kevin J. Kinsella. No shares of Preferred Stock were issued and outstanding.

B. DPH is a corporation duly organized and existing under the laws of the State of Pennsylvania and has an authorized capital of 10,000 shares, all of which are designated "Common Stock" at \$.01 par value. As of the date of this Agreement of Merger, 3000 shares of Common Stock were issued and outstanding.

C. The Board of Directors of DPH has determined that, for the purpose of effecting the reincorporation of DPH in the State of Delaware, it is advisable and in the best interests of DPH that DPH merge with and into Akesis upon the terms and conditions herein provided.

D. The respective Boards of Directors of DPH and Akesis have approved this Agreement and have directed that this Agreement be submitted to a vote of their respective stockholders and executed by the undersigned officers.

NOW, THEREFORE, in consideration of the mutual agreements and covenants set forth herein, Akesis and DPH hereby agree, subject to the terms and conditions hereinafter set forth, as follows:

ATTACHMENT 1

**PATENT  
REEL: 9887 FRAME: 0789**

## I. MERGER

1.1 Merger. In accordance with the provisions of this Agreement, the Delaware General Corporation Law and the Pennsylvania Business Corporation Law, DPH shall be merged with and into Akesis (the "Merger"), the separate existence of DPH shall cease and Akesis shall be, and is herein sometimes referred as, the "Surviving Corporation", and the name of the Surviving Corporation shall be Akesis Pharmaceuticals, Inc.

1.2 Filing and Effectiveness. The Merger shall become effective when the following actions shall have been completed:

(a) This Agreement and the Merger shall have been adopted and approved by the stockholders of each Constituent Corporation in accordance with the requirements of the Delaware General Corporation Law and the Pennsylvania Business Corporation Law;

(b) All of the conditions precedent to the consummation of the Merger specified in this Agreement shall have been satisfied or waived by the party entitled to satisfaction thereof;

(c) An executed Agreement and Plan of Merger meeting the requirements of the Delaware General Corporation Law shall have been filed with the Secretary of State of the State of Delaware; and

The date and time when the Merger shall become effective, as aforesaid, is herein called the "Effective Date of the Merger."

1.3 Effect of the Merger. Upon the Effective Date of the Merger, the separate existence of DPH shall cease and Akesis, as the Surviving Corporation, (i) shall continue to possess all of its assets, rights, powers and property as constituted immediately prior to the Effective Date of the Merger, (ii) shall be subject to all actions previously taken by its and DPH's Board of Directors, (iii) shall succeed, without other transfer, to all of the assets, rights, powers and property of DPH in the manner more fully set forth in Section 259 of the Delaware General Corporation Law, (iv) shall continue to be subject to all of the debts, liabilities and obligations of DPH as constituted immediately prior to the Effective Date of the Merger, and (v) shall succeed, without other transfer, to all of the debts, liabilities and obligations of DPH in the same manner as if Akesis had itself incurred them, all as more fully provided under the applicable provisions of the Delaware General Corporation Law and the Pennsylvania Business Corporation Law.

## II. CHARTER DOCUMENTS, DIRECTORS AND OFFICERS

2.1 Certificate of Incorporation. The Certificate of Incorporation of Akesis as in effect immediately prior to the Effective Date of the Merger shall continue in full force and effect

as the Certificate of Incorporation of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

2.2 Bylaws. The Bylaws of Akesis as in effect immediately prior to the Effective Date of the Merger shall continue in full force and effect as the Bylaws of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

2.3 Directors and Officers. The directors and officers of DPH immediately prior to the Effective Date of the Merger shall be the directors and officers of the Surviving Corporation until their successors shall have been duly elected and qualified or until as otherwise provided by law, the Certificate of Incorporation of the Surviving Corporation or the Bylaws of the Surviving Corporation.

### III. MANNER OF CONVERSION OF STOCK

3.1 Diabetes Pro Health-Pennsylvania Common Shares. Upon the Effective Date of the Merger, each share of DPH Common Stock, \$.01 par value, issued and outstanding immediately prior thereto shall by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into and exchanged for 471.111 fully paid and nonassessable shares of Common Stock, \$.001 par value, of the Surviving Corporation. No fractional share interests of Surviving Corporation Common Stock shall be issued. In lieu thereof, any fractional share interests to which a holder would otherwise be entitled shall be aggregated.

3.2 Akesis Common Stock. Upon the Effective Date of the Merger, each share of Common Stock, \$.001 par value, of Akesis issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by Akesis, remain outstanding and unchanged.

3.3 Exchange of Certificates. After the Effective Date of the Merger, each holder of an outstanding certificate representing shares of DPH Common Stock may be asked to surrender the same for cancellation to an exchange agent, whose name will be delivered to holders prior to any requested exchange (the "Exchange Agent"), and each such holder shall be entitled to receive in exchange therefor a certificate or certificates representing the number of shares of the Surviving Corporation's Common Stock into which the surrendered shares were converted as herein provided. Until so surrendered, each outstanding certificate theretofore representing shares of DPH Common Stock shall be deemed for all purposes to represent the number of shares of the Surviving Corporation's Common Stock into which such shares of DPH Common Stock were converted in the Merger.

The registered owner on the books and records of the Surviving Corporation or the Exchange Agent of any such outstanding certificate shall, until such certificate shall have been

surrendered for transfer or conversion or otherwise accounted for to the Surviving Corporation or the Exchange Agent, have and be entitled to exercise any voting and other rights with respect to and to receive dividends and other distributions upon the shares of Common Stock of the Surviving Corporation represented by such outstanding certificate as provided above.

Each certificate representing Common Stock of the Surviving Corporation so issued in the Merger shall bear the same legends, if any, with respect to the restrictions on transferability as the certificates of Diabetes Pro Health-Pennsylvania so converted and given in exchange therefore, unless otherwise determined by the Board of Directors of the Surviving Corporation in compliance with applicable laws.

If any certificate for shares of the Surviving Corporation's stock is to be issued in a name other than that in which the certificate surrendered in exchange therefor is registered, it shall be a condition of issuance thereof that the certificate so surrendered shall be properly endorsed and otherwise in proper form for transfer, that such transfer otherwise be proper and comply with applicable securities laws and that the person requesting such transfer pay to the Exchange Agent any transfer or other taxes payable by reason of issuance of such new certificate in a name other than that of the registered holder of the certificate surrendered or establish to the satisfaction of the Surviving Corporation that such tax has been paid or is not payable.

#### IV. GENERAL

4.1 Covenants of Akesis. Akesis covenants and agrees that it will, on or before the Effective Date of the Merger:

- (a) Qualify to do business as a foreign corporation in the State of Pennsylvania under the provisions of Section 4124 of the Pennsylvania Business Corporation Law.
- (b) File any and all documents with the Pennsylvania Franchise Tax Board necessary for the assumption by Akesis of all of the franchise tax liabilities of DPH.
- (c) Take such other actions as may be required by the Pennsylvania Business Corporation Law.

4.2 Further Assurances. From time to time, as and when required by Akesis or by its successors or assigns, there shall be executed and delivered on behalf of DPH such deeds and other instruments, and there shall be taken or caused to be taken by it such further and other actions as shall be appropriate or necessary in order to vest or perfect in or conform of record or otherwise by Akesis the title to and possession of all the property, interests, assets, rights, privileges, immunities, powers, franchises and authority of DPH and otherwise to carry out the purposes of this Agreement, and the officers and directors of Akesis are fully authorized in the

name and on behalf of DPH or otherwise to take any and all such action and to execute and deliver any and all such deeds and other instruments.

4.3 Abandonment. At any time before the Effective Date of the Merger, this Agreement may be terminated and the Merger may be abandoned for any reason whatsoever by the Board of Directors of either DPH or of Akesis, or of both, notwithstanding the approval of this Agreement by the shareholders of DPH or by the sole stockholder of Akesis, or by both.

4.4 Amendment. The Boards of Directors of the Constituent Corporations may amend this Agreement at any time prior to the filing of this Agreement (or certificate in lieu thereof) with the Secretary of State of the State of Delaware, provided that an amendment made subsequent to the adoption of this Agreement by the stockholders of either Constituent Corporation shall not: (1) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such Constituent Corporation, (2) alter or change any term of the Certificate of Incorporation of the Surviving Corporation to be effected by the Merger, or (3) alter or change any of the terms and conditions of this Agreement if such alteration or change would adversely affect the holders of any class or series of capital stock of any Constituent Corporation.

4.5 Registered Office. The registered office of the Surviving Corporation in the State of Delaware is 1209 Orange Street, Wilmington, County of New Castle, DE 19801 and The Corporation Trust Company is the registered agent of the Surviving Corporation at such address.

4.6 Agreement. Executed copies of this Agreement will be on file at the principal place of business of the Surviving Corporation at 1195 Washington Pike, Suite 350, Bridgeville, Pennsylvania 15017, and copies thereof will be furnished to any stockholder of either Constituent Corporation, upon request and without cost.

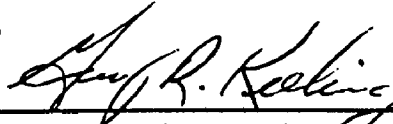
4.7 Governing Law. This Agreement shall in all respects be construed, interpreted and enforced in accordance with and governed by the laws of the State of Delaware and, so far as applicable, the merger provisions of the Pennsylvania Business Corporation Law.

4.8 FIRPTA Notification. (a) On the Effective Date of the Merger, DPH shall deliver to Akesis, as agent for the shareholders of DPH, a properly executed statement (the "Statement") substantially in the form attached hereto as Exhibit A. Akesis shall retain the Statement for a period of not less than seven years and shall, upon request, provide a copy thereof to any person that was a shareholder of DPH immediately prior to the Merger. In consequence of the approval of the Merger by the shareholders of DPH, (i) such shareholders shall be considered to have requested that the Statement be delivered to Akesis as their agent and (ii) Akesis shall be considered to have received a copy of the Statement at the request of the DPH shareholders for purposes of satisfying Akesis' obligations under Treasury Regulation Section 1.1445-2(c)(3).

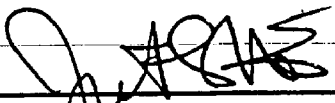
(b) DPH shall deliver to the Internal Revenue Service a notice regarding the Statement in accordance with the requirements of Treasury Regulation Section 1.897-2(h)(2).

IN WITNESS WHEREOF, this Agreement having first been approved by the resolutions of the Board of Directors of Akesis and DPH is hereby executed on behalf of each of such two corporations and attested by their respective officers thereunto duly authorized.

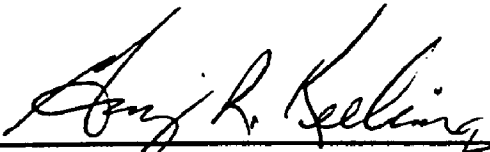
AKESIS PHARMACEUTICALS, INC.  
a Delaware corporation

By:   
Gary R. Keeling, President, Secretary  
and Treasurer *GRK*

ATTEST:

  
John F. Steel, IV,  
~~Chief Executive Officer~~ *GRK*  
Secretary and Treasurer *GRK*

DIABETES PRO HEALTH, INC.  
a Pennsylvania corporation

By:   
Gary R. Keeling, President, Secretary  
and Treasurer

ATTEST:

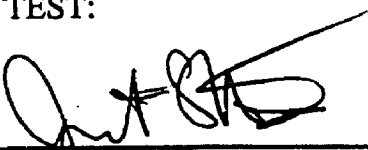
  
John F. Steel, IV,  
~~Chief Executive Officer~~ *GRK*  
Secretary and Treasurer *GRK*

EXHIBIT A

April \_\_, 1998

TO THE SHAREHOLDERS OF DIABETES PRO HEALTH, INC.:

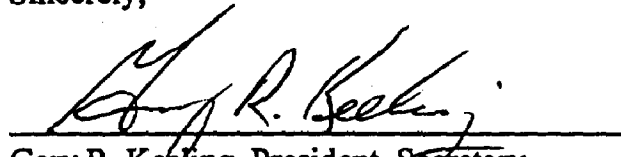
In connection with the reincorporation (the "Reincorporation") in Delaware of Diabetes Pro Health, Inc., a Pennsylvania corporation (the "Company"), pursuant to the Agreement and Plan of Merger (the "Agreement") dated as of April \_\_, 1998 between the Company and Akesis Pharmaceuticals, Inc., a Delaware corporation and wholly-owned subsidiary of the Company ("Akesis"), your shares of Company stock will be replaced by shares of stock in Akesis.

In order to establish that (i) you will not be subject to tax under Section 897 of the Internal Revenue Code of 1986, as amended (the "Code"), in consequence of the Reincorporation and (ii) Akesis will not be required under Section 1445 of the Code to withhold taxes from the Akesis stock that you will receive in connection therewith, the Company hereby represents to you that, as of the date of this letter, shares of Company stock do not constitute a "United States real property interest" within the meaning of Section 897(c) of the Code and the regulations issued thereunder.

A copy of this letter will be delivered to Akesis pursuant to Section 4.8 of the Agreement.

Under penalties of perjury, the undersigned officer of the Company hereby declares that, to the best knowledge and belief of the undersigned, the facts set forth herein are true and correct.

Sincerely,

A handwritten signature in dark ink, appearing to read "Gary R. Keeling", is written over a horizontal line.

Gary R. Keeling, President, Secretary  
and Treasurer