

AMERICAN APPAREL, INC  
Form S-1/A  
December 02, 2011  
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As filed with the Securities and Exchange Commission on December 2, 2011

Registration No. 333-176547

**UNITED STATES**  
**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

**Amendment No. 2**  
**to**  
**FORM S-1**  
**REGISTRATION STATEMENT**

*UNDER*

*THE SECURITIES ACT OF 1933*

**American Apparel, Inc.**

*(Exact name of registrant as specified in its charter)*

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**Delaware**  
*(State or other jurisdiction of  
incorporation or organization)*

**6770**  
*(Primary Standard Industrial  
Classification Code Number)*  
**747 Warehouse Street**

**20-3200601**  
*(I.R.S. Employer  
Identification Number)*

**Los Angeles, California 90021-1106**

**(213) 488-0226**

*(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)*

**Glenn A. Weinman**

**Senior Vice President, General Counsel and Secretary**

**747 Warehouse Street**

**Los Angeles, California 90021-1106**

**(213) 488-0226**

*(Name, address, including zip code, and telephone number, including area code, of agent for service)*

*Copy to:*

**Jeffrey H. Cohen, Esq.**

**David C. Eisman, Esq.**

**Skadden, Arps, Slate, Meagher & Flom LLP**

**300 South Grand Avenue**

**34th Floor**

**Los Angeles, California 90071**

**(213) 687-5000**

**Approximate date of commencement of proposed sale to the public:**

**As soon as practicable after the effective date of this Registration Statement.**

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If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933 check the following box.

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

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

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

### CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Amount to be Registered <sup>(1)</sup>	Proposed Maximum Offering Price Per Unit <sup>(2)</sup>	Proposed Maximum Aggregate Offering Price <sup>(1)(2)</sup>	Amount of Registration Fee
Common Stock, par value \$.0001 per share	24,182,669	\$0.555	\$13,421,381	\$1,539 <sup>(3)</sup>

- (1) All 24,182,669 shares of Common Stock registered pursuant to this Registration Statement are to be offered by the selling stockholders named herein.
- (2) Estimated solely for the purpose of calculating the registration fee pursuant to Rule 457(c) under the Securities Act on the basis of the average of the high and low prices per share of the Common Stock, as reported on the NYSE Amex, on November 30, 2011.
- (3) Previously paid.

**The Registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its effective date until the Registrant shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the Registration Statement shall become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine.**

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**The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.**

**SUBJECT TO COMPLETION, DATED DECEMBER 2, 2011**

**PRELIMINARY PROSPECTUS**

**24,182,669 Shares**

**Common Stock**

This prospectus relates to the resale by the selling stockholders of a total of up to 24,182,669 shares of common stock of American Apparel, Inc., or the common stock. These shares were issued to the selling stockholders pursuant to a Purchase and Investment Agreement, dated as of April 26, 2011, or the Investor Purchase Agreement, among American Apparel, Inc. and the selling stockholders. We are required to file this registration statement pursuant to the Investor Purchase Agreement.

We will not receive any proceeds from the sale of the shares of common stock by the selling stockholders. We do not know when or in what amount the selling stockholders may offer the shares for sale.

We have agreed to pay certain expenses in connection with this registration statement and to indemnify the selling stockholders against certain liabilities. The selling stockholders will pay all underwriting discounts and selling commissions, if any, in connection with the sale of the shares of common stock.

The selling stockholders (or their pledgees, donees, transferees, distributees or successors in interest) may offer and sell or otherwise dispose of the shares of common stock described in this prospectus from time to time through public or private transactions at prevailing market prices, at prices related to prevailing market prices or at privately negotiated prices. See Plan of Distribution beginning on page 12 for more information about how the selling stockholders may sell or dispose of their shares of common stock.

The common stock is traded on the NYSE Amex under the symbol APP. The last reported sale price of the common stock on the NYSE Amex on December 1, 2011 was \$0.55 per share.

**Investing in the common stock involves a high degree of risk. See Risk Factors beginning on page 2 of this prospectus, in Item 1A of our Annual Report on Form 10-K for the year ended December 31, 2010, in Part II, Item 1A of our Quarterly Reports on Form 10-Q for the quarter ended March 31, 2011, for the quarter ended June 30, 2011, and for the quarter ended September 30, 2011 and all other information included or incorporated by reference in this prospectus in its entirety, before you decide whether or not to make an investment in the common stock.**

**Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.**

**The date of this prospectus is \_\_\_\_\_, 2011**

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**ABOUT THIS PROSPECTUS**

In this prospectus, unless the context otherwise requires, American Apparel, the Company, we, us and our refer to American Apparel, Inc., a Delaware corporation, and its subsidiaries and predecessor company.

You should rely only on the information contained or incorporated by reference in this prospectus. We have not authorized anyone to provide you with different information. The shares of common stock are not being offered in any state where the offer is not permitted. You should not assume that the information in this prospectus is accurate as of any date other than the date on the front of this prospectus, and you should assume that any information incorporated by reference is accurate only as of the date of the document incorporated by reference, regardless of the time of delivery of this prospectus or of any sale of the common stock.

As permitted under the rules of the Securities and Exchange Commission, or the SEC, this prospectus incorporates important business information about us that is contained in documents that we file with the SEC but that are not included in or delivered with this prospectus. You may obtain copies of these documents, without charge, from the website maintained by the SEC at [www.sec.gov](http://www.sec.gov), as well as from us. See Where You Can Find Additional Information and Incorporation of Certain Information By Reference in this prospectus.

**WHERE YOU CAN FIND ADDITIONAL INFORMATION**

We file annual, quarterly and current reports, proxy statements and other documents with the SEC. You may read and copy, at prescribed rates, any documents we have filed with the SEC at its Public Reference Room located at 100 F Street, N.E., Washington, DC 20549. You may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. We also file these documents with the SEC electronically. You can access the electronic versions of these filings on the SEC's website found at <http://www.sec.gov>.

We have filed with the SEC a registration statement on Form S-1 relating to the securities covered by this prospectus. This prospectus is a part of the registration statement and does not contain all the information in the registration statement. Whenever a reference is made in this prospectus to a contract, agreement or other document, the reference is only a summary and you should refer to the exhibits that are filed with, or incorporated by reference into, the registration statement for a copy of the contract, agreement or other document. You may review a copy of the registration statement at the SEC's Public Reference Room in Washington, D.C., as well as on the SEC's website.

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**INCORPORATION OF CERTAIN INFORMATION BY REFERENCE**

The SEC's rules allow us to incorporate by reference into this prospectus certain information that we file with the SEC. This means that we can include in this prospectus information by referring you to another document already on file with the SEC that contains that information. Any information incorporated by reference into this prospectus is considered to be part of this prospectus.

We incorporate by reference the following documents filed with the SEC:

Annual Report on Form 10-K for the year ended December 31, 2010, as filed by us with the SEC on March 31, 2011, as amended by Amendment No. 1 thereto, as filed by us with the SEC on May 2, 2011, as amended by Amendment No. 2 thereto, as filed by us with the SEC on May 3, 2011, and as amended by Amendment No. 3 thereto, as filed by us with the SEC on May 17, 2011;

Quarterly Reports on Form 10-Q for the quarter ended March 31, 2011, as filed by us with the SEC on May 10, 2011, for the quarter ended June 30, 2011, as filed by us with the SEC on August 9, 2011 and for the quarter ended September 30, 2011, as filed by us with the SEC on November 8, 2011;

Definitive Proxy Statement on Schedule 14A as filed by us with the SEC on May 20, 2011; and

Current Reports on Forms 8-K as filed by us with the SEC on February 1, 2011, February 3, 2011, February 15, 2011, February 22, 2011, March 23, 2011, March 28, 2011, March 28, 2011, April 5, 2011, April 28, 2011 (as amended by Amendment No. 1 thereto, as filed by us with the Commission on April 28, 2011), May 11, 2011, June 27, 2011, June 30, 2011, July 5, 2011, July 8, 2011, July 13, 2011, October 11, 2011, October 28, 2011, November 18, 2011 and November 28, 2011.

Notwithstanding the foregoing, we are not incorporating by reference any information furnished and not filed with the SEC, including information furnished under Item 2.02 or Item 7.01 of any Current Report on Form 8-K, including the related exhibits under Item 9.01, unless, and to the extent, expressly specified otherwise. Any statement contained in a document incorporated in this prospectus shall be deemed to be modified or superseded to the extent that a statement contained in this prospectus modifies or supersedes such statement. Any such statement so modified or superseded shall only be deemed to be a part of this prospectus as so modified or superseded.

We will provide without charge to each person, including any beneficial owner, to whom this prospectus is delivered, upon his or her written or oral request, a copy of any or all of the reports or documents referred to above that have been incorporated by reference into this prospectus, excluding exhibits to those documents unless they are specifically incorporated by reference into those documents. You may request a copy of these filings, at no cost, by contacting:

Glenn A. Weinman

Senior Vice President, General Counsel and Secretary

747 Warehouse Street

Los Angeles, California 90021

Telephone: (213) 488-0226

Email: Glenn@AmericanApparel.net

You also may access these filings on our website at [www.americanapparel.net](http://www.americanapparel.net). We do not incorporate the information on our website into this prospectus or any supplement to this prospectus and you should not consider any information on, or that can be accessed through, our website as part of this prospectus or any supplement to this prospectus (other than those filings with the SEC that we specifically incorporate by reference into this prospectus or any supplement to this prospectus).





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**CAUTIONARY NOTE REGARDING FORWARD-LOOKING STATEMENTS**

This prospectus, including information included or incorporated by reference in this prospectus or any supplement to this prospectus, may contain forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. These forward-looking statements include, but are not limited to, statements about our plans, objectives, expectations and intentions that are not historical facts, and other statements identified by words such as may, will, expects, believes, plans, estimates, potential, or continue, or the negative thereof and similar expressions are forward-looking statements. In addition, in some cases, you can identify forward-looking statements by words of phrases such as trend, potential, opportunity, believe, comfortable, expect, anticipate, current, intention, estimate, position, continue, remain, maintain, sustain, seek, achieve, and similar expressions. These forward looking statements are based on current beliefs, expectations of management and are inherently subject to significant business, economic and competitive uncertainties and contingencies, many of which are beyond our control. In addition, these forward-looking statements are subject to assumptions with respect to future business strategies and decisions that are subject to change. In addition to the factors set forth in this prospectus and the documents incorporated by reference in this prospectus, including under the section entitled Risk Factors in this prospectus, in our Annual Report on Form 10-K for the year ended December 31, 2010, in our Quarterly Reports on Form 10-Q for the quarter ended March 31, 2011, for the quarter ended June 30, 2011, and for the quarter ended September 30, 2011, and in any other reports that we file with the SEC, the following factors, among others, could cause actual results to differ materially from the anticipated results:

our ability to generate or obtain from external sources sufficient liquidity for operations and debt service;

changes in the level of consumer spending or preferences or demand for our products;

our liquidity and losses from operations and projected cash flows and related impact on our ability to continue as a going concern;

disruptions in the global financial markets;

consequences of our significant indebtedness, including our ability to comply with our debt agreements and generate cash flow to service our debt;

our ability to regain compliance with the exchange rules of the NYSE Amex, LLC;

the highly competitive and evolving nature of our business in the U.S. and internationally;

our ability to effectively carry out and manage our strategy, including growth and expansion both in the U.S. and internationally;

loss of U.S. import protections or changes in duties, tariffs and quotas and other risks associated with international business;

intensity of competition, both domestic and foreign;

technological changes in manufacturing, wholesaling, or retailing;

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risks that our suppliers may not timely produce or deliver our products;

loss or reduction in sales to our wholesale or retail customers or financial nonperformance by our wholesale customers;

the adoption of new accounting pronouncements or changes in interpretations of accounting principles;

our ability to pass on the added cost of raw materials to our wholesale and retail customers;

the availability of store locations at appropriate terms and our ability to identify and negotiate new store locations effectively and to open new stores and expand internationally;

our ability to attract customers to our stores;

seasonality and fluctuations in comparable store sales and margins;

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our ability to successfully implement our strategic, operating, financial and personnel initiatives;

our ability to maintain the value and image of our brand and protect our intellectual property rights;

changes in the cost of materials and labor, including increases in the price of raw materials in the global market;

our ability to improve manufacturing efficiency at our production facilities;

location of our facilities in the same geographic area;

our relationships with our lenders and our ability to comply with the terms of our existing debt facilities;

risks associated with our foreign operations and foreign supply sources, such as disruption of markets, changes in import and export laws, currency restrictions and currency exchange rate fluctuations;

continued compliance with U.S. and foreign government regulations, legislation and regulatory environments, including environmental, immigration, labor and occupational health and safety laws and regulations;

the risk that information technology systems changes may disrupt our supply chain or operations and our ability to upgrade our information technology infrastructure and other risks associated with the systems that operate our online retail operations;

litigation and other inquiries and investigations, including the risks that we or our officers will not be successful in defending any proceedings, lawsuits, disputes, claims or audits, and that exposure could exceed expectations or coverage;

our ability to effectively manage inventory and inventory reserves;

changes in key personnel, our ability to hire and retain key personnel, and our relationship with our employees;

material weaknesses in internal controls;

costs as a result of operating as a public company;

general economic conditions, including increases in interest rates, geopolitical events, other regulatory changes and inflation or deflation;

our ability to find a new qualified independent director to fill the vacancy on our Audit Committee and our ability to realign our Board of Directors, in each case within the timeframe prescribed by the NYSE Amex Company Guide, in order to regain compliance

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with NYSE Amex listing standards and maintain listing on the NYSE Amex;

disruptions due to severe weather or climate change; and

any other risks that we may identify in this prospectus under **Risk Factors** or in the documents that we incorporate by reference into this prospectus.

All forward-looking statements speak only as of the date of this prospectus or, in the case of any documents incorporated by reference in this prospectus, the date of such document, in each case based on information available to us as of such date, and we assume no obligation to update any forward-looking statements, except as required by law.

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**THE COMPANY**

We are a vertically-integrated manufacturer, distributor, and retailer of branded fashion basic apparel. We design, manufacture and sell clothing and accessories for women, men, children and babies. As of September 30, 2011, we had approximately 10,000 employees and operated 247 retail stores in 20 countries, including the United States, Canada, Mexico, Brazil, United Kingdom, Ireland, Austria, Belgium, France, Germany, Italy, Netherlands, Spain, Sweden, Switzerland, Israel, Australia, Japan, South Korea, and China. We also operate a wholesale business that supplies t-shirts and other casual wear to distributors and screen printers. In addition to our retail stores and wholesale operations, we operate an online retail e-commerce website at [www.americanapparel.com](http://www.americanapparel.com) where we sell our products directly to consumers.

We conduct our primary apparel manufacturing operations out of an 800,000 square foot facility in the warehouse district of downtown Los Angeles, California. The facility houses our executive offices, as well as cutting, sewing, warehousing, and distribution operations. We conduct knitting operations in Los Angeles and Garden Grove, California, which produce a majority of the fabric we use in our products. We also operate dye houses that currently provide dyeing and finishing services for nearly all of the raw fabric used in production. We operate a fabric dyeing and finishing facility in Hawthorne, California. We also operate a cutting, sewing and garment dyeing and finishing facility located in South Gate, California. We operate a fabric dyeing and finishing facility located in Garden Grove, California, which also includes cutting, sewing and knitting operations. Because we manufacture domestically and are vertically integrated, we believe this enables us to more quickly respond to customer demand and to changing fashion trends and to closely monitor product quality. Our products are noted for their quality and fit, and together with our distinctive branding these attributes have differentiated our products in the marketplace. American Apparel® is a registered trademark of American Apparel (USA), LLC.

We were founded in 1998. Since inception, we have operated a wholesale business. In October 2003, we opened our first retail store in Los Angeles. In 2004, we began our online retail operations, and opened our first retail stores in Canada and Europe. Since 2005, we have opened stores in Asia, Australia, Israel, Latin America, and have further expanded throughout the United States, Canada, Europe, and Asia. All of our retail stores sell the Company's apparel products directly to consumers.

Our principal executive offices are located at 747 Warehouse Street, Los Angeles, California 90021. The telephone number of our principal executive offices is (213) 488-0226.

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**RISK FACTORS**

Ownership of the common stock involves certain risks. You should consider carefully the risks and uncertainties described in, or incorporated by reference in, this prospectus, including the risks described below and under the caption "Risk Factors" in our Annual Report on Form 10-K for the year ended December 31, 2010, in our Quarterly Reports on Form 10-Q for the quarter ended March 31, 2011, for the quarter ended June 30, 2011, for the quarter ended September 30, 2011, and in any other reports that we file with the SEC, along with the other information included or incorporated by reference in this prospectus, in evaluating an investment in the common stock. The information included or incorporated by reference in this prospectus may be amended, supplemented or superseded from time to time by other reports we file with the SEC in the future. For a description of these reports and documents, and information about where you can find them, see the sections entitled "Where You Can Find Additional Information" and "Incorporation of Certain Information by Reference" in this prospectus.

The risks and uncertainties described in this prospectus and the documents incorporated by reference in this prospectus are not the only ones facing us. Additional risks and uncertainties that we do not presently know about or that we currently believe are not material may also adversely affect our business. If any of the risks and uncertainties described in this prospectus or the documents incorporated by reference herein actually occur, our business, financial condition and results of operations could be adversely affected in a material way. This could cause the trading price of the common stock to decline, perhaps significantly, and you may lose part or all of your investment.

**The price of the common stock may fluctuate significantly, and you could lose all or part of your investment.**

Volatility in the market price of the common stock may prevent you from being able to sell your shares at or above the price you paid for your shares. The market price could fluctuate significantly for various reasons, which include:

the potential issuance of additional shares of common stock, including pursuant to outstanding warrants and contractual rights to purchase or receive shares of common stock;

our quarterly or annual earnings or earnings of other companies in our industry;

the public's reaction to our press releases, our other public announcements and our filings with the SEC;

changes in earnings estimates or recommendations by research analysts who track the common stock or the stocks of other companies in our industry;

new laws or regulations or new interpretations of laws or regulations applicable to our business;

changes in accounting standards, policies, guidance, interpretations or principles;

changes in general conditions in the United States and global economies or financial markets, including those resulting from war, incidents of terrorism or responses to such events;

litigation involving us or investigations or audits with respect to our operations;

our compliance with listing standards of the NYSE Amex or any other securities exchange on which the common stock or any of our other securities may be listed or traded;

sales of common stock by our directors, executive officers and significant stockholders; and

other factors described in our filings with the SEC.

In addition, in recent years, the stock market has experienced extreme price and volume fluctuations. This volatility has had a significant impact on the market price of securities issued by many companies, including us

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and other companies in our industry. The changes frequently appear to occur without regard to the operating performance of these companies. The price of the common stock could fluctuate based upon factors that have little or nothing to do with us, and these fluctuations could materially reduce our stock price.

**If we are unable to maintain the listing of the common stock on the NYSE Amex or any other securities exchange, it may be more difficult for you to sell your securities.**

The common stock is currently traded on the NYSE Amex. If for any reason the NYSE Amex should delist the common stock, and we are unable to obtain listing on another national securities exchange, we could face significant material adverse consequences, including:

a limited availability of market quotations for our securities;

a limited amount of news and analyst coverage;

a decreased ability to issue additional securities or obtain additional financing in the future; and

a determination that the common stock is a penny stock, if the securities sell for a substantial period of time at a low price per share which would require brokers trading in the common stock to adhere to more stringent rules, possibly resulting in a reduced level of trading activity in the secondary trading market for the common stock.

At September 30, 2011, we were not in compliance with (i) Section 803(B)(2)(a) of the NYSE Amex Company Guide (the Company Guide), which requires our Audit Committee to consist of at least three members, and (ii) Section 802(d) of the Company Guide, which requires the classes of our classified board to be of approximately equal size. The Company has until the earlier of its next annual meeting of stockholders and July 1, 2012 (or if the next annual meeting is held before January 9, 2012, until January 9, 2012) to regain compliance with the standards of the NYSE Amex.

**Voting control and significant beneficial ownership of the common stock by certain of our stockholders may limit your ability to influence the outcome of director elections and other matters requiring stockholder approval.**

As of September 30, 2011, Dov Charney, our Chairman and Chief Executive Officer, beneficially owned (giving effect to the expiration on October 24, 2011 of the purchase rights under the April Charney Purchase Agreement (as defined below)) 44.3% of the outstanding common stock, Lion/Hollywood L.L.C., or Lion, beneficially owned 17.3% of the outstanding common stock and the selling stockholders (giving effect to the expiration on October 23, 2011 of their remaining purchase rights under the Investor Purchase Agreement) beneficially owned in the aggregate 26.1% of the outstanding common stock. Mr. Charney and Lion also have the right to acquire additional beneficial ownership under certain circumstances as described in the following risk factor.

In addition, Mr. Charney and Lion are parties to a voting agreement, dated March 13, 2009, or the Investment Voting Agreement, and an investment agreement, dated March 13, 2009, or the Investment Agreement. Pursuant to the Investment Agreement, Lion has the right to designate up to two persons to our board of directors and a board observer (or, if we increase our board size to 12, Lion has the right to designate up to three persons to our board of directors and no board observers), subject to maintaining certain minimum ownership thresholds of shares of common stock issuable under Lion's warrants. The Investment Agreement also provides that for so long as Lion has the right to designate any person for nomination for election to our board of directors pursuant to the Investment Agreement, we will not increase the size of our board of directors to more than 10 directors (or 13 directors in the event we elect to increase the size of our board of directors to 12 directors as described above). The two Lion designees on our board of directors and Lion's board observer resigned on March 30, 2011. Lion has indicated that it will retain its ability to re-designate directors to our board of directors and a board observer at the appropriate time in the future, pursuant to its designation rights under the Investment Agreement.

In addition, pursuant to the Investment Voting Agreement, for so long as Lion has the right to designate any person or persons to our board of directors, Mr. Charney has agreed to vote his shares of common stock in favor





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of Lion's designees, provided that Mr. Charney's obligation to so vote terminates if he owns less than 6,000,000 shares of common stock (which number will be adjusted appropriately to take into account any stock split, reverse stock split or similar transaction). In addition, pursuant to the Investment Voting Agreement, for so long as Lion has the right to designate any person or persons to our board of directors, Lion has agreed to vote its shares of common stock in favor of Mr. Charney and each other designee of Mr. Charney, provided that Lion's obligation to so vote terminates if either (i) Mr. Charney beneficially owns less than 27,900,000 shares of common stock (which number will be adjusted appropriately to take into account any stock split, reverse stock split or similar transaction) or (ii) (x) Mr. Charney is no longer employed on a full-time basis by us or any of our subsidiaries and (y) Mr. Charney is in material breach of the non-competition and non-solicitation covenants contained in our November 7, 2007 amended and restated agreement and plan of reorganization, as extended by a letter agreement, dated March 13, 2009, between Mr. Charney and Lion.

This concentration of share ownership and voting agreements may adversely affect the trading price for the common stock because investors often perceive disadvantages in owning stock in companies with controlling stockholders. Also, some or all of our significant stockholders, if they were to act together, would be able to control our management and affairs and matters requiring stockholder approval, including the election of directors and the approval of significant corporate transactions, such as mergers, consolidations or the sale of substantially all of our assets. Consequently, this concentration of ownership may have the effect of delaying or preventing a change of control, including a merger, consolidation or other business combination involving us, or discouraging a potential acquirer from making a tender offer or otherwise attempting to obtain control, even if that change of control would benefit our other stockholders and may prevent our stockholders from realizing a premium over the current market price for their shares of common stock. Furthermore, our significant stockholders may also have interests that differ from yours and may vote their shares of common stock in a way with which you disagree and which may be adverse to your interests.

**There will be a substantial number of shares of the common stock available for issuance or sale in the future that would result in dilution to existing public stockholders, may increase the volume of common stock available for sale in the open market and may cause a decline in the market price of the common stock.**

As of September 30, 2011, Mr. Charney, the selling stockholders and our warrant holders, Lion and SOF Investments, L.P.-Private IV, or SOF, owned or had the right to acquire (giving effect to the expiration on October 23, 2011 and October 24, 2011, respectively, of the remaining purchase rights under the Investor Purchase Agreement and the April Charney Purchase Agreement), in the aggregate 122,120,283 shares of common stock.

Mr. Charney currently owns 45,700,866 shares of common stock and, in addition, Mr. Charney has a right to acquire or receive up to an additional 22,527,397 shares of common stock. Of these additional shares, 2,111,597 shares are issuable to Mr. Charney if the market price of the common stock meets a certain threshold or there is a change of control of the Company in each case on or before March 24, 2014, and the remaining 20,415,800 shares are issuable to Mr. Charney in installments if the market price of the common stock meets certain thresholds between April 16, 2012 and April 15, 2015. The resale of Mr. Charney's shares has not been registered and these shares are or, when issued will be, restricted securities under the securities laws. Of the shares currently owned by Mr. Charney, a total of 37,258,065 shares are subject to a lock-up agreement and cannot be sold publicly, in the absence of our consent, until the expiration of the restricted period under the lock-up agreement in December 2013 (which period may be shortened upon the occurrence of certain events).

On April 26, 2011, we issued to the selling stockholders an aggregate of 15,776,506 shares of common stock, and the selling stockholders also were provided with a right to acquire up to an additional 27,443,173 shares of common stock at a price of \$0.90 per share, within 180 days of that issuance, subject to certain topping-up and anti-dilution adjustments for additional issuances for cash of common stock (or securities exercisable, exchangeable or convertible for common stock), prior to April 26, 2012, including reduction of the

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purchase price to the lowest-issued price for such issuances made at a price below the purchase price, subject to some exceptions. The selling stockholders also were granted one demand registration right with respect to their initial shares and one additional demand registration right if they purchase additional shares, in each case, exercisable after the four-month anniversary of the closing date, subject to customary terms and conditions. On July 7, 2011 and July 12, 2011, some of the selling stockholders exercised their purchase rights and purchased a total of 8,406,163 shares of common stock. The remaining rights to purchase in the aggregate up to 19,037,010 additional shares of common stock expired on October 23, 2011. The 24,182,669 shares issued to the selling stockholders under the Investor Purchase Agreement are the shares to which this prospectus relates and that may be resold by the selling stockholders.

We also have outstanding warrants exercisable to purchase an aggregate of 22,606,025 shares of common stock, representing as of September 30, 2011, on an as-exercised basis, beneficial ownership of approximately 18.0% of the outstanding common stock. SOF holds a warrant, expiring on December 19, 2013, to purchase 1,000,000 shares of common stock at an exercise price of \$2.139 per share, which exercise price is subject to adjustment under some circumstances as set forth in the warrant, and which warrant also contains anti-dilution adjustments for some additional issuances of common stock (or securities exercisable, exchangeable or convertible for common stock) and some other events. In addition, Lion holds warrants, each expiring on February 18, 2018, to purchase an aggregate of 21,606,025 shares of common stock at an exercise price of \$1.00 per share, which exercise price is subject to adjustment under some circumstances as set forth in the warrants and the Lion Credit Agreement (as defined below), and which warrants also contain anti-dilution adjustments for additional issuances of common stock (or securities exercisable, exchangeable or convertible for common stock) and some other events. In particular, upon the issuance of any additional shares to Mr. Charney or the selling stockholders as described above, we would be required, pursuant to the Lion Credit Agreement, to issue to Lion additional warrants, with an exercise price of \$1.00 per share, subject to adjustment under some circumstances as set forth in the warrants and the Lion Credit Agreement, to purchase a number of shares of common stock sufficient to prevent dilution of Lion's fully-diluted beneficial ownership of common stock as a result of the issuance of such shares. In addition, pursuant to the Lion Credit Agreement, in the event of some other issuances and sales of common or preferred stock (including securities convertible, exercisable or exchangeable for common stock) or a debt-for-equity exchange by the Company prior to the repayment of obligations under the Lion Credit Agreement, the Company is required to issue additional warrants to Lion exercisable for a number of shares sufficient to prevent the dilution of Lion's fully-diluted beneficial ownership of common stock as a result of such transaction at an initial exercise price equal to the lesser of \$0.90 and the lowest issued price for such transaction, and, in addition, reduce the exercise price of the existing warrants issued to Lion to the lowest issued price for such transaction. Lion also has demand and piggyback registration rights with respect to the shares of common stock underlying its warrants.

Assuming (1) issuance in full of the 22,527,397 shares of common stock that Mr. Charney has a right to acquire as described above in certain circumstances, (2) exercise in full of Lion's and SOF's existing warrants to purchase a total of 22,606,025 shares of common stock, (3) exercise in full of additional warrants that would be issued to Lion if there was a further issuance of shares to Mr. Charney as described in (1) above, (4) exercise in full by management of currently outstanding options to purchase, and full vesting of restricted stock awards with respect to, a total of 7,637,798 shares of common stock and (5) no other issuances of common stock or securities convertible, exercisable or exchangeable for common stock, the percentage ownership of stockholders other than Mr. Charney, the selling stockholders and holders of outstanding warrants as described above would be reduced from approximately 29.7% as of September 30, 2011 to approximately 19.1%.

In addition, our stockholders recently approved an amendment to our certificate of incorporation to increase the number of shares of common stock that we are authorized to issue from 120,000,000 to 230,000,000, in part to permit the issuances of shares described above. As of September 30, 2011, 103,274,163 shares of common stock were outstanding. Accordingly, our certificate of incorporation would permit us to issue up to 61,005,791 additional shares of common stock (after taking into account the 16,212,798 shares reserved for issuance under existing employee benefit plans or pursuant to exercise of existing options or that represent

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granted but unvested shares of restricted stock, 22,527,397 shares issuable to Mr. Charney as described above, 22,606,025 shares reserved for issuance upon exercise of Lion's and SOF's warrants described above and 4,373,826 shares issuable to Lion in the form of additional warrants if Mr. Charney's additional shares are issued) and up to 1,000,000 shares of preferred stock. Issuances of additional shares of common stock would result in dilution to existing public stockholders, may increase the volume of common stock available for sale in the open market and may cause a decline in the market price of the common stock. In addition, the issuance of additional shares of common stock or voting preferred stock would reduce your influence over matters on which our stockholders vote, and, in the case of issuances of preferred stock, likely would result in your interest in us being subject to the prior rights of holders of that preferred stock.

**Our charter documents and Delaware law could prevent a takeover that stockholders consider favorable and could also reduce the market price of our stock.**

Our certificate of incorporation and bylaws and Delaware law contain provisions that could delay or prevent a change in control of our company. These provisions could also make it more difficult for stockholders to elect directors and take other corporate actions. These provisions include:

a classified board of directors with three-year staggered terms;

ability of stockholders to remove directors only for cause;

not providing for cumulative voting in the election of directors;

authorizing the board to issue, without stockholder approval, preferred stock with rights senior to those of the common stock;

requiring advance notification of stockholder nominations and proposals; and

limitations on transactions with interested shareholders.

These and other provisions in our certificate of incorporation and bylaws and under Delaware law could discourage potential takeover attempts, reduce the price that investors might be willing to pay in the future for shares of common stock and result in the market price of the common stock being lower than it would be without these provisions.

**If securities analysts do not continue to publish research or reports about our business or if they publish negative evaluations of our stock, the price of our stock could decline.**

We believe that the trading price for the common stock will be affected by research or reports that industry or financial analysts publish about us or our business. If one or more of the analysts who may elect to cover us downgrade their evaluations of the common stock, the price of the common stock could decline. If one or more of these analysts cease coverage of our company, we could lose visibility in the market for our stock, which in turn could cause the common stock price to decline.

**We do not intend to pay dividends on the common stock.**

We currently intend to retain any future earnings and do not expect to pay any dividends in the foreseeable future. In addition, provisions of our debt agreements prohibit us from paying cash dividends. Consequently, your only opportunity to achieve a positive return on your investment in us will be if the market price of the common stock appreciates. There can be no assurances that the common stock will appreciate in value or even maintain the price at which you purchase your shares.

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**USE OF PROCEEDS**

This prospectus relates to 24,182,669 shares of common stock which may be sold from time to time by the selling stockholders. We will not receive any proceeds from the sale of common stock by the selling stockholders.

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**DETERMINATION OF OFFERING PRICE**

This offering is being made solely to allow the selling stockholders to offer and sell shares of common stock to the public. The selling stockholders may offer for resale some or all of their shares at the time and price that they choose. On any given day, the price per share is likely to be based on the market price for the common stock on the NYSE Amex on the date of sale, unless shares are sold in private transactions. Consequently, we cannot currently make a determination of the price at which shares offered for resale pursuant to this prospectus may be sold.

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**SELLING STOCKHOLDERS**

The selling stockholders identified below, or their respective pledgees, donees, transferees, distributees or successors in interest, are selling all of the shares of common stock being offered by this prospectus.

We are registering on behalf of the selling stockholders 24,182,669 shares of common stock. These shares were issued to the selling stockholders pursuant to the Investor Purchase Agreement. We are required to file this registration statement pursuant to the Investor Purchase Agreement. See Description of Capital Stock Investor Purchase Rights below for more information about the Investor Purchase Agreement and the shares of common stock covered by this prospectus.

Each selling stockholder may transfer shares of common stock owned by it, and, subject to our prior written consent and compliance with the other provisions of the Investor Purchase Agreement, may assign its purchase rights and its registration rights under the Investor Purchase Agreement. When we refer to selling stockholders in the Plan of Distribution section of this prospectus, we mean the persons listed in the table below, and the pledgees, donees, permitted transferees, distributees, successors in interest and others who later come to hold any of the selling stockholders' interests in shares of common stock other than through a public sale.

None of the selling stockholders holds or has held any position or office, or otherwise has or has had a material relationship, with us, or any of our predecessors or affiliates, within the past three years other than as a result of the ownership of common stock and pursuant to the Investor Purchase Agreement, as set forth under the heading Certain Relationships and Related Transactions of our Definitive Proxy Statement on Schedule 14A filed by us with the SEC on May 20, 2011, which is incorporated by reference into this prospectus.

The following table sets forth, as of September 30, 2011, the name of each selling stockholder, the number of shares held of record or beneficially by each selling stockholder (including shares that may be acquired upon exercise of the purchase rights) and the number of shares that may be offered under this prospectus by each selling stockholders.

Beneficial ownership of a share of common stock is determined in accordance with the rules and regulations of the SEC. Under these rules, a person is deemed to beneficially own a share of common stock if that person has or shares voting power or investment power with respect to that share, or has the right to acquire beneficial ownership of that share within 60 days, including through the exercise of any option or other right or the conversion of any other security. The inclusion of any shares in this table does not constitute an admission of beneficial ownership.

The information in the table below is based on the information provided to us by the selling stockholders and as of the date the same was provided to us. Assuming that the selling stockholders exercise in full their purchase rights and sell all of the shares of common stock owned or beneficially owned by them that have been registered by us and do not acquire any additional shares during the offering, the selling stockholders will not own any shares other than those appearing in the column entitled Common Stock Owned Upon Completion of this Offering. We cannot advise you as to whether the selling stockholders will in fact exercise in full their purchase rights and sell any or all of such shares of common stock. In addition, the selling stockholders may have sold, transferred or otherwise disposed of, or may sell, transfer or otherwise dispose of, at any time and from time to time, the shares of common stock or the purchase rights in transactions exempt from the registration requirements of the Securities Act after the date as of which the information is set forth on the table below.

The percentage beneficial ownership for the following table is based upon 103,274,163 shares of common stock (excluding certain options and unvested shares) outstanding as of September 30, 2011.

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Name of Selling Stockholder	Common Stock Beneficially Owned Prior to the Offering	Common Stock Offered Pursuant to this Prospectus	Common Stock Owned Upon Completion of this Offering (1)	Percentage of Common Stock Owned Upon Completion of this Offering (if greater than 1%) (1)
Anson Investments Master Fund LP (2)	2,167,390	2,167,390		
Delavaco Capital Inc. (3)	666,666	666,666		
Dynamic Power Hedge Fund (4)	12,381,667	9,666,667	2,715,000	