***Preliminary Note***

*The Stock Purchase Agreement sets forth the basic terms of the purchase and sale of the preferred stock to the investors (such as the purchase price, closing date, conditions to closing) and identifies the other financing documents. Generally this agreement does not set forth either (1) the characteristics of the stock being sold (which are defined in the Certificate of Incorporation) or (2) the relationship among the parties after the closing, such as registration rights, rights of first refusal and co-sale and voting arrangements (these matters often implicate persons other than just the Company and the investors in this round of financing and are usually embodied in separate agreements to which those others persons are parties, or in some cases in the Certificate of Incorporation). The main items of negotiation in the Stock Purchase Agreement are therefore the price and number of shares being sold, the representations and warranties that the Company must make to the investors and the closing conditions for the transaction.*

**SERIES A PREFERRED STOCK PURCHASE AGREEMENT**

THIS SERIES A PREFERRED STOCK PURCHASE AGREEMENT (this “**Agreement**”), is made as of [\_\_\_\_\_\_\_\_], 20[\_\_], by and among [\_\_\_\_\_\_\_\_\_\_\_\_], a Delaware corporation (the “**Company**”), and the investors listed on Exhibit A attached to this Agreement (each a “**Purchaser**” and together the “**Purchasers**”).

The parties hereby agree as follows:

# Purchase and Sale of Preferred Stock.

## Sale and Issuance of Preferred Stock.

### The Company shall have adopted and filed with the Secretary of State of the State of Delaware [on or before the Initial Closing[[1]](#footnote-1) (as defined below)] the Amended and Restated Certificate of Incorporation in the form of Exhibit B attached to this Agreement (the “**Restated Certificate**”).

### Subject to the terms and conditions of this Agreement, each Purchaser agrees to purchase, and the Company agrees to sell and issue to each Purchaser, at the [applicable] Closing (as defined below) that number of shares of Series A Preferred Stock, $[\_\_] par value per share (the “**Series A Preferred Stock**”), set forth opposite each Purchaser’s name on Exhibit A [with respect to such Closing], at a purchase price of $[\_\_] per share [or, if/as applicable, a purchase price of $[\_\_\_] per share with respect to any shares of Series [A] Preferred Stock being issued pursuant to any cancellation or conversion of Convertible Securities (as defined below) as set forth in Section 1.3 below]. The shares of Series A Preferred Stock issued to the Purchasers pursuant to this Agreement shall be referred to in this Agreement as the “**Shares**.”

## Closing; Delivery.

### Theinitial purchase and sale of the Shares shall take place remotely via the exchange of documents and signatures, on the date of this Agreement at such time as is mutually agreed upon, orally or in writing, by the Company and the Purchasers (which time and place are designated as the “**Initial Closing**”).[[2]](#footnote-2) In the event there is more than one closing, the term “**Closing**” shall apply to each such closing unless otherwise specified.

### At each Closing, the Company shall deliver to each Purchaser a certificate[[3]](#footnote-3) representing the Shares being purchased by such Purchaser at such Closing against payment of the purchase price therefor by check payable to the Company, by wire transfer to a bank account designated by the Company, by cancellation or conversion of indebtedness or other convertible securities of the Company to Purchaser[, including interest[[4]](#footnote-4)], or by any combination of such methods.

## Conversion and Termination of Convertible Securities.

### By executing and delivering this Agreement, each Purchaser holding one or more [simple agreements for future equity/convertible notes] issued by the Company prior to the date of this Agreement (each, regardless of whether held by a Purchaser or not, a “**Convertible Security**” and, collectively, regardless of whether held by a Purchaser or not, the “**Convertible Securities**”) hereby irrevocably agrees that:

#### The aggregate face amount of all such Convertible Securitiesheld by such Purchaser is set forth on Exhibit A under the column heading “Convertible Securities”;

#### Such Purchaser is the sole owner of all right, title and interest in and to the Convertible Securities corresponding to the amounts shown opposite such Purchaser’s name on Exhibit A;

#### At the Initial Closing, all of such Purchaser’s Convertible Securities will automatically and without any action on the part of such Purchaser convert into the number of shares of Series [A] Preferred Stock set forth opposite such Purchaser’s name under the column heading “Convertible Security Shares” on Exhibit A (as to any Purchaser, such shares being such Purchaser’s “**Convertible Security Shares**”), regardless of whether any such Convertible Securities or an affidavit of loss therefor is actually delivered in original or other form to the Company, and any original Convertible Securities held by (or delivered (electronically or otherwise) to) the Company may be cancelled (and marked cancelled) by the Company upon or following the Initial Closing; [and]

#### As to such Purchaser, such Purchaser’s Convertible Security Shares are issued in full and complete discharge and satisfaction of all obligations of the Company (including outstanding principal, interest or any other amounts) under such Purchaser’s Convertible Securities, and such Convertible Securities will be terminated and of no further force or effect automatically immediately upon the Initial Closing[.][; and]

#### [The Company and its Affiliates and agents shall be entitled to deduct and withhold from the amounts deliverable pursuant to Purchaser’s Convertible Securities (including any Convertible Security Shares otherwise issuable with respect thereto) such amounts, if any, as are required to be deducted and withheld under the Code or any other applicable tax law. To the extent that amounts are so deducted and withheld and duly paid over to the appropriate tax authority, such withheld amounts shall be treated for all purposes of the Transaction Agreements as having been delivered to the person in respect of whom such deduction and withholding was made. Each person holding Convertible Securities shall, upon request, use its commercially reasonable efforts to provide the applicable withholding agent with all necessary tax forms, including a duly executed IRS Form W-9 or appropriate version of IRS Form W-8, as applicable. Prior to withholding any amounts pursuant to this Section 1.3(a)(v), the Company (and its Affiliates and agents) shall use commercially reasonable efforts to notify Purchaser, and the Company and Purchaser shall cooperate in good faith to reduce or eliminate any such withholding.][[5]](#footnote-5)

### The Company and each Purchaser holding a Convertible Security hereby agree[, on behalf of themselves and all holders of Convertible Securities,] that [such Purchaser’s] [all] Convertible Securities hereby are and will be deemed for all purposes to have been amended and modified by virtue hereof to the full extent necessary to permit and facilitate their conversion as provided in this Agreement into Convertible Security Shares, to fix the conversion price[[6]](#footnote-6) (as defined therein) at $[\_\_\_] per share, and, immediately upon the Initial Closing, such Convertible Securities shall be deemed terminated in full and null, void and of no further force or effect; provided that the foregoing will not impair the right of the holder of a Convertible Security to receive the applicable number of Convertible Security Shares shown opposite such Purchaser’s name on Exhibit A as provided above.[[7]](#footnote-7)

## Sale of Additional Shares of Preferred Stock

. After the Initial Closing, the Company may sell, on the same terms and conditions as those contained in this Agreement[[8]](#footnote-8), any unsold shares [up to [\_\_\_\_\_\_\_\_\_] additional shares (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or similar recapitalization affecting such shares)] of Series A Preferred Stock (the “**Additional Shares**”), to one or more purchasers (the “**Additional Purchasers**”) [reasonably acceptable to Purchasers holding a [*specify percentage*] of the then outstanding Shares[[9]](#footnote-9)], provided that (i) such subsequent sale is consummated prior to [90] days after the Initial Closing and (ii) each Additional Purchaser becomes a party to the Investors’ Rights Agreement, the Voting Agreement, and the Right of First Refusal and Co-Sale Agreement, each as defined below, by executing and delivering a counterpart signature page to each of such Transaction Agreements. Exhibit A to this Agreement shall be updated to reflect the number of Additional Shares purchased at each such Closing and the parties purchasing such Additional Shares.

## Defined Terms Used in this Agreement

. In addition to the terms defined above, the following terms used in this Agreement shall be construed to have the meanings set forth or referenced below.

### “**Affiliate**” means, with respect to any specified Person, any other Person who, directly or indirectly, controls, is controlled by, or is under common control with such Person, including, without limitation, any general partner, managing member, officer, director or trustee of such Person, or any venture capital fund or investment fund now or hereafter existing that is controlled by one or more general partners, managing members or investment advisers of, or shares the same management company or investment adviser with, such Person.

### “**Code**” means the Internal Revenue Code of 1986, as amended.

### “**Company Intellectual Property**” means all Intellectual Property Rights that are owned, purported to be owned by, or in-licensed to the Company, or used by the Company in the conduct of the Company’s business as now conducted.

### “**Company-Controlled Intellectual Property**” means (i) Intellectual Property Rights owned or purported to be owned by the Company and (ii) Intellectual Property Rights exclusively in-licensed to the Company.

### “**Company-Registered Intellectual Property**” means Company-Controlled Intellectual Property registered by the Company with any governmental authority, and applications for such registration.

### “**Indemnification Agreement**” means the agreement between the Company and [*list the individual director names*][[10]](#footnote-10), in the form of Exhibit D attached to this Agreement.

### “**Intellectual Property Rights**” means all intellectual property rights, whether registered or unregistered, that are recognized in any jurisdiction of the world, including such rights in patents, utility models, trademarks and tradenames, copyrights, trade secrets, and domain names (and any registrations of or applications to register any of the foregoing).

### “**Investors’ Rights Agreement**” means the agreement among the Company and the Purchasers [and certain other stockholders of the Company] dated as of the date of the Initial Closing, in the form of Exhibit E attached to this Agreement.

### “**Knowledge**” including the phrase “**to the Company’s knowledge**” means the Knowledge Parties’ actual knowledge after reasonable investigation and assuming such knowledge as the individual would have as a result of the reasonable performance of the individual’s duties in the ordinary course.[[11]](#footnote-11) Additionally, for purposes of Section 2, the Company shall be deemed to have “knowledge” of a patent right only if the Company has actual knowledge of the patent right.

### “**Knowledge Parties**” means [(i)] the Officers [and (ii) solely for purposes of Section 2.8, [*specify*]].

### “**Management Rights Letter**” means the agreement between the Company and [*name the applicable Purchasers*], in substantially the form of Exhibit F attached to this Agreement, dated as of the date of the applicable Closing.

### “**Material Adverse Effect**” means a material adverse effect on the business, assets (including intangible assets), liabilities, financial condition, property, or results of operations of the Company.

### “**Officer**” means the Chief Executive Officer, President, Chief Financial Officer, and any other person who reports directly to the Board of Directors or the Chief Executive Officer.[[12]](#footnote-12)

### “**Person**” means any individual, corporation, partnership, trust, limited liability company, association or other entity.

### “**Right of First Refusal and Co-Sale Agreement**” means the agreement among the Company, the Purchasers, and certain other stockholders of the Company, dated as of the date of the Initial Closing, in the form of Exhibit G attached to this Agreement.

### “**Securities Act**” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

### “**Transaction Agreements**” means this Agreement, the Investors’ Rights Agreement, the Management Rights Letter[s], the Right of First Refusal and Co-Sale Agreement, the Voting Agreement and [*list any other agreements, instruments or documents entered into in connection with this Agreement, such as the Indemnification Agreement if applicable*].

### “**Voting Agreement**” means the agreement among the Company, the Purchasers and certain other stockholders of the Company, dated as of the date of the Initial Closing, in the form of Exhibit H attached to this Agreement.

# Representations and Warranties of the Company

.[[13]](#footnote-13) The Company hereby represents and warrants to each Purchaser that, except as set forth on the Disclosure Schedule attached as Exhibit C to this Agreement, which exceptions shall be deemed to be part of the representations and warranties made hereunder, the following representations are true and complete as of the date of the [Initial][applicable] Closing, except as otherwise indicated. The Disclosure Schedule shall be arranged in sections corresponding to the numbered and lettered sections contained in this Section 2, and the disclosures in any section of the Disclosure Schedule shall qualify other sections in this Section 2 only to the extent it is readily apparent from a reading of the disclosure that such disclosure is applicable to such other sections.[[14]](#footnote-14)

For purposes of these representations and warranties (other than those in Sections 2.2, 2.3, 2.4, 2.5, 2.6[, 2.21, 2.22, 2.23, 2.24, 2.25] and 2.34 [and the second to last sentence of Section 2.26]), the term the “**Company**” shall include any subsidiaries of the Company, unless otherwise noted herein.

## Organization, Good Standing, Corporate Power and Qualification

.[[15]](#footnote-15) The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has all requisite corporate power and authority to carry on its business as now conducted and as presently proposed to be conducted. The Company is duly qualified to transact business and is in good standing in each jurisdiction in which the failure to so qualify would have a Material Adverse Effect.

## Capitalization.[[16]](#footnote-16)

### The authorized capital of the Company consists, immediately prior to the Initial Closing, of:

#### [\_\_\_\_\_\_\_\_\_\_] shares of common stock, $[\_\_\_\_] par value per share (the “**Common Stock**”), [\_\_\_\_\_\_\_\_\_] shares of which are issued and outstanding immediately prior to the Initial Closing.

#### [\_\_\_\_\_\_\_\_\_\_] shares of preferred stock, $[\_\_\_\_] par value per share (the “**Preferred Stock**”), of which [\_\_\_\_\_\_\_\_\_\_] shares have been designated Series A Preferred Stock, noneof which are issued and outstanding immediately prior to the Initial Closing. The rights, privileges and preferences of the Preferred Stock are as stated in the Restated Certificate and as provided by the Delaware General Corporation Law. [The Company has issued Convertible Securities that will convert into an aggregate of [\_\_\_] shares of Series [A] Preferred Stock as of the Initial Closing as set forth under the column heading “Convertible Security Shares” on Exhibit A.][[17]](#footnote-17)

#### All of the outstanding shares of capital stock have been duly authorized, are fully paid and nonassessable and were issued in compliance with all applicable federal and state securities laws.[[18]](#footnote-18) [The Company holds no capital stock in its treasury.]

### The Company has reserved [\_\_\_\_\_\_\_\_\_\_] shares of Common Stock for issuance to officers, directors, employees and consultants of the Company pursuant to its [*insert Plan Year and Name*] Plan duly adopted by the Board of Directors of the Company (the “**Board of Directors**”) and approved by the Company stockholders (the “**Stock Plan**”). Of such reserved shares of Common Stock, (i) [\_\_\_\_\_\_\_\_\_\_] shares have been issued pursuant to restricted stock purchase agreements and/or the exercise of options and are currently outstanding (and included as outstanding in Section 2.2(a)(i) above), (ii) options to purchase [\_\_\_\_\_\_\_\_\_\_] shares have been granted and are currently outstanding, and (iii) [\_\_\_\_\_\_\_\_\_\_] shares of Common Stock remain available for issuance to officers, directors, employees and consultants pursuant to the Stock Plan, [all] of which remain uncommitted and unallocated. The Company has furnished to the Purchasers complete and accurate copies of the Stock Plan and forms of agreements used thereunder.

### [Section 2.2(c) of the Disclosure Schedule sets forth the summary capitalization of the Company immediately following the Initial Closing including the aggregate number of shares of, or issuable pursuant to, each of the following: (i) issued and outstanding Common Stock, including, with respect to restricted Common Stock, vesting schedule and repurchase price; (ii) outstanding stock options, including vesting schedule and exercise price; (iii) shares of Common Stock reserved for future award grants under the Stock Plan; (iv) issued and outstanding Preferred Stock, by series; and (v) warrants or stock purchase rights, if any.][[19]](#footnote-19) Except for (A) the conversion privileges of the Shares to be issued under this Agreement, (B) the rights provided in Section 4 of the Investors’ Rights Agreement, and (C) the securities and rights described in Sections 2.2(a)(ii) and 2.2(b) of this Agreement and Section 2.2(c) of the Disclosure Schedule, there are no outstanding options, warrants, rights (including conversion or preemptive rights and rights of first refusal or similar rights) or agreements, orally or in writing, to purchase or acquire from the Company any shares of Common Stock or Preferred Stock, or any securities convertible into or exchangeable for shares of Common Stock or Preferred Stock. All outstanding shares of Common Stock and all shares of Common Stock underlying outstanding options are subject to (i) a right of first refusal in favor of the Company upon any proposed transfer (other than transfers for estate planning purposes); and (ii) a lock-up or market standoff agreement of not less than 180 days following the Company’s initial public offering pursuant to a registration statement filed with the Securities and Exchange Commission under the Securities Act.

### None of the Company’s stock purchase agreements or stock option documents contains a provision for acceleration of vesting (or lapse of a repurchase right) or other changes in the vesting provisions or other terms of such agreement or understanding upon the occurrence of any event or combination of events, including, without limitation, in the case where the Company’s Stock Plan is not assumed in an acquisition. The Company has never adjusted or amended the exercise price of any stock options previously awarded, whether through amendment, cancellation, replacement grant, repricing, or any other means. Except as set forth in the Restated Certificate, the Company has no obligation (contingent or otherwise) to purchase or redeem any of its capital stock.

### [409A. The Company believes in good faith that any “nonqualified deferred compensation plan” (as such term is defined under Section 409A(d)(1) of the Code and the guidance thereunder) under which the Company makes, is obligated to make or promises to make, payments (each, a “**409A Plan**”) complies in all material respects, in both form and operation, with the requirements of Section 409A of the Code and the guidance thereunder. To the knowledge of the Company, no payment to be made under any 409A Plan is, or will be, subject to the penalties of Section 409A(a)(1) of the Code.][[20]](#footnote-20)

### The Company has obtained valid waivers of any rights by other parties to purchase any of the Shares covered by this Agreement.

## Subsidiaries

.[[21]](#footnote-21) The Company does not currently own or control, directly or indirectly, any interest in any other corporation, partnership, trust, joint venture, limited liability company, association, or other business entity. The Company is not a participant in any joint venture, partnership or similar arrangement.

## Authorization

.[[22]](#footnote-22) All corporate action required to be taken by the Board of Directors and the Company’s stockholders in order to authorize the Company to enter into the Transaction Agreements, and to issue the Shares at the Closing and the Common Stock issuable upon conversion of the Shares, has been taken[ or will be taken prior to the [applicable] Closing]. All action on the part of the officers of the Company necessary for the execution and delivery of the Transaction Agreements, the performance of all obligations of the Company under the Transaction Agreements to be performed as of the Closing, and the issuance and delivery of the Shares has been taken[ or will be taken prior to the [applicable] Closing]. The Transaction Agreements, when executed and delivered by the Company, shall constitute valid and legally binding obligations of the Company, enforceable against the Company in accordance with their respective terms except (i) as limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance, or other laws of general application relating to or affecting the enforcement of creditors’ rights generally; (ii) as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies; or (iii) to the extent the indemnification provisions contained in the Investors’ Rights Agreement and the Indemnification Agreement may be limited by applicable federal or state securities laws.

## Valid Issuance of Shares

.[[23]](#footnote-23) The Shares, when issued, sold and delivered in accordance with the terms and for the consideration set forth in this Agreement, will be validly issued, fully paid and nonassessable and free of restrictions on transfer other than restrictions on transfer under the Transaction Agreements, applicable state and federal securities laws and liens or encumbrances created by or imposed by a Purchaser. Assuming the accuracy of the representations of the Purchasers in Section 3 of this Agreement and subject to the filings described in Section 2.6 below, the Shares will be issued in compliance with all applicable federal and state securities laws. The Common Stock issuable upon conversion of the Shares has been duly reserved for issuance, and upon issuance in accordance with the terms of the Restated Certificate, will be validly issued, fully paid and nonassessable and free of restrictions on transfer other than restrictions on transfer under the Transaction Agreements, applicable federal and state securities laws and liens or encumbrances created by or imposed by a Purchaser. Assuming the accuracy of the representations of the Purchasers in Section 3 of this Agreement and in the Voting Agreement, the Common Stock issuable upon conversion of the Shares will be issued in compliance with all applicable federal and state securities laws.

## Governmental Consents and Filings

. Assuming the accuracy of the representations made by the Purchasers in Section 3 of this Agreement, no consent, approval, order or authorization of, or registration, qualification, designation, declaration or filing with, any federal, state or local governmental authority is required on the part of the Company in connection with the consummation of the transactions contemplated by this Agreement, except for [(i) the filing of the Restated Certificate, which will have been filed as of the Initial Closing, and (ii)] filings pursuant to applicable securities laws, which have been made or will be made in a timely manner.

## Litigation

.[[24]](#footnote-24) There is no claim, action, suit, proceeding, arbitration, complaint, charge or investigation[[25]](#footnote-25) pending or to the Company’s knowledge, currently threatened [in writing] (i) against the Company or any Officer or director of the Company [arising out of their employment or Board of Directors relationship with the Company]; (ii) [to the Company’s knowledge,] that questions the validity of the Transaction Agreements or the right of the Company to enter into them, or to consummate the transactions contemplated by the Transaction Agreements; or (iii) that would reasonably be expected to have, either individually or in the aggregate, a Material Adverse Effect. Neither the Company nor, to the Company’s knowledge, any of its Officers or directors is a party or is named as subject to the provisions of any order, writ, injunction, judgment or decree of any court or government agency or instrumentality (in the case of Officers or directors, such as would affect the Company). There is no action, suit, proceeding or investigation by the Company pending or which the Company intends to initiate. The foregoing includes, without limitation, actions, suits, proceedings or investigations pending or threatened in writing (or any basis therefor known to the Company) involving the prior employment of any of the Company’s employees, their services provided in connection with the Company’s business, any information or techniques allegedly proprietary to any of their former employers or their obligations under any agreements with prior employers.

## Intellectual Property.

### The Company owns, possesses, has developed, or has acquired on commercially reasonable terms, legal rights to all Company Intellectual Property sufficient to carry out its business as now conducted; provided that the foregoing representation is made to the Company’s knowledge [with respect to patents and trademarks].[[26]](#footnote-26) [[27]](#footnote-27)

### No past or current product or service or activity of the Company has infringed or violated, or infringes or otherwise violates any Intellectual Property Rights of a third Person; provided that the foregoing representation is made to the Company’s knowledge [with respect to patents and trademarks].

### To the Company’s knowledge, by conducting the Company’s business as currently conducted or as presently proposed, the Company would not infringe or violate any of the Intellectual Property Rights of a third Person. The Company has not received any unsolicited offers to license any Intellectual Property Rights from any third Person.

### To the Company’s knowledge, no third Person is presently infringing any Company-Controlled Intellectual Property in a way that is expected to have a Material Adverse Effect.

### Other than pursuant to: (i) standard end-user license or services agreements for the Company’s products and services on substantially the Company’s standard forms made available to the Purchasers, (ii) customary nondisclosure agreements entered into by the Company in the ordinary course of business (that do not include any terms (w) granting the right to use residuals, (x) assigning Intellectual Property Rights, (y) granting express license rights, or (z) constituting a covenant not to assert Intellectual Property Rights); (iii) nonexclusive feedback licenses and nonexclusive licenses to use trademarks, in each case that are incidental to the subject matter of the applicable agreement in which they are incorporated; and (iv) licenses to a service provider solely for the purpose of allowing such service provider to provide services to the Company (collectively, “**Standard Outbound Agreements**”), the Company has not granted to a third Person any options, licenses, covenants not to assert, agreements, claims, encumbrances or shared ownership interests of any kind relating to the Company-Controlled Intellectual Property that are material to the Company’s business as now conducted.

### Other than pursuant to: (i) standard license or services agreements for commercially available software products and cloud services non-exclusively licensed to Company under standard terms[, which products and cloud services are not incorporated into the Company’s products or services][[28]](#footnote-28); (ii) backup licenses from employees and contractors granted in connection with providing services to the Company; (iii) licenses to Open Source Software, (iv) customary nondisclosure agreements entered into by the Company in the ordinary course of business that do not include any terms (w) granting the right to use residuals, (x) assigning Intellectual Property Rights, (y) granting express license rights, or (z) constituting a covenant not to assert Intellectual Property Rights); (v) nonexclusive feedback licenses and nonexclusive licenses to use trademarks, in each case that are incidental to the subject matter of the applicable agreement in which they are incorporated; and (vi) licenses to the Company solely for the purpose of enabling the Company to provide services to the licensor (collectively, “**Standard Inbound Agreements**”), the Company is not bound by or a party to any options, licenses, covenants not to assert or other grants or agreements of any kind with respect to Intellectual Property Rights of any third Person that are material to the Company’s business as now conducted.

### The Company has taken commercially reasonable measures to maintain and protect all confidential information and trade secrets of the Company that the Company intended to maintain as confidential or a trade secret. To the Company’s knowledge, [except as would not reasonably be expected to result in a Material Adverse Effect], there has been no unlawful, accidental or unauthorized access to or use or disclosure of any confidential information and trade secrets of the Company that the Company intended to maintain as confidential or a trade secret.

### (i) Each current and former employee of the Company has assigned to the Company all Intellectual Property Rights that such employee has solely or jointly conceived, reduced to practice, developed, or made during the period of employment with the Company that: (A) relate, at the time of conception, reduction to practice, development, or making of such Intellectual Property Right, to the Company’s business as then conducted or as then proposed to be conducted; (B) were developed on any amount of the Company’s time or with the use of any of the Company’s equipment, supplies, facilities or information; or (C) resulted from such individual’s performance of services for the Company. (ii) Each current and former consultant of the Company who was involved in the development of any [material] Intellectual Property Rights for the Company or that are otherwise owned or purported to be owned by the Company has assigned to the Company all Intellectual Property Rights that such consultant has solely or jointly conceived, reduced to practice, developed, or made during the period of its consulting relationship with the Company that resulted from such consultant’s performance of services for the Company.[[29]](#footnote-29) (iii) Each such employee and consultant has executed an agreement with the Company regarding confidentiality and proprietary information, and assignment of Intellectual Property Rights developed by or for the Company, [substantially] in the form or forms made available to the Purchasers or their respective counsel (the “**Confidential Information Agreements**”). (iv) No such employee or consultant has excluded Intellectual Property Rights from the assignment of Intellectual Property Rights pursuant to such Person’s Confidential Information Agreement, which excluded Intellectual Property Rights would be material to the Company in the conduct of the Company’s business as now conducted or currently proposed to be conducted.[[30]](#footnote-30) (v) The Company is not aware that any current or former employee or consultant is in violation of any Confidential Information Agreement.

### [Section 2.8(h) of the Disclosure Schedule lists all Company-Registered Intellectual Property, and all material domain names that are Company-Controlled Intellectual Property.][[31]](#footnote-31)

### The Company has not embedded, used, linked or distributed any open source, software, technologies or other materials that are licensed or distributed under any license arrangement or other distribution model qualifying for the “Open Source” definition promulgated by the Open Source Initiative at www.opensource.org/osd or any other public domain or “community” (or similar) materials (collectively “**Open Source Software**”) in connection with any of its products or services or proprietary materials in any manner that requires, or purports to require, (i) any material software code owned or authored by or on behalf of the Company (“**Company Code**”) to be disclosed or distributed in source code form or be licensed for the purpose of making derivative works; (ii) any restriction on the consideration to be charged for the distribution of any such Company Code; (iii) the grant to any third Person of any rights or immunities under material Company-Controlled Intellectual Property; or (iv) any other material limitation, restriction or condition on the right of the Company with respect to its use or distribution of any material Company-Controlled Intellectual Property (other than attribution, warranty and liability disclaimer, and notice delivery conditions). The Company is in [material] compliance with all licenses for Open Source Software that it embeds, links to, uses or distributes.[[32]](#footnote-32)

### No government funding, facilities of a university, college, hospital, foundation, other educational institution or research center, or other funding from third Persons provided specifically for research and development was used in the development of any Company‑Controlled Intellectual Property in a manner that has resulted in such entity retaining any claim of ownership or right to use any such Company-Controlled Intellectual Property. To the Company’s knowledge, no Person who was involved in, or who contributed to, the creation or development of any Company‑Controlled Intellectual Property, has performed services for the government, university, college, hospital, foundation, or other educational institution or research center in a manner that would affect Company’s rights in the Company‑Controlled Intellectual Property.

### [Generative AI. (i) The Company uses all Generative AI Tools (as defined below) in [material] compliance with the applicable license terms, consents, agreements and laws. (ii) The Company has not included and does not include any sensitive Personal Information, trade secrets or material confidential or proprietary information of the Company, or of any third Person under an obligation of confidentiality by the Company, in any prompts or inputs into any Generative AI Tools, except in cases where such Generative AI Tools do not use such information, prompts or services to train the machine learning or algorithm of such tools or improve the services related to such tools. (iii) The Company has not used Generative AI Tools to develop any material Company-Controlled Intellectual Property that the Company intended to maintain as proprietary in a manner that it believes would materially affect the Company’s ownership or rights therein. (iv) For purposes hereof, “**Generative AI Tools**” means generative artificial intelligence technology or similar tools capable of automatically producing various types of content (such as source code, text, images, audio, and synthetic data) based on user-supplied prompts.]

## Compliance with Other Instruments

. The Company is not in violation or default (a) of any provisions of its Restated Certificate or Bylaws; (b) of any instrument, judgment, order, writ or decree; (c) under any note, indenture or mortgage; (d) under any lease, agreement, contract or purchase order to which it is a party or by which it is bound that is required to be listed on the Disclosure Schedule;or (e) [to the Company’s knowledge,] of any provision of any federal or state statute, rule or regulation applicable to the Company, the violation of which would have a Material Adverse Effect. The execution, delivery and performance of the Transaction Agreements and the consummation of the transactions contemplated by the Transaction Agreements will not result in any such violation or be in conflict with or constitute, with or without the passage of time and giving of notice, either (i) a default under any such provision, instrument, judgment, order, writ, decree, contract or agreement; or (ii) an event which results in the creation of any lien, charge or encumbrance upon any assets of the Company or the suspension, revocation, forfeiture, or nonrenewal of any material permit or license applicable to the Company.

## Agreements; Actions.[[33]](#footnote-33)

### Except for the Transaction Agreements, there are no agreements, understandings, instruments, contracts or proposed transactions to which the Company is a party or by which it is bound that involve (i) obligations (contingent or otherwise) of, or payments to, the Company in excess of $[\_\_\_\_\_\_\_\_\_\_] (other than employment agreements and offer letters); (ii) other than pursuant to any university licenses listed in Section [2.8(f) and/or 2.8(k)] of the Disclosure Schedule[[34]](#footnote-34), the grant of rights to manufacture, produce, assemble, license, market, or sell its products to any other Person that limit the Company’s exclusive right to develop, manufacture, assemble, distribute, market or sell its products; or (iii) any “most favored” provisions, Board of Directors observer rights, or other side letter agreements not otherwise disclosed pursuant to any other representation.

### The Company has not (i) declared or paid any dividends, or authorized or made any distribution upon or with respect to any class or series of its capital stock, (ii) incurred any indebtedness for money borrowed or incurred any other liabilities individually in excess of [\_\_\_\_\_\_\_\_\_\_] or in excess of [\_\_\_\_\_\_\_\_\_\_] in the aggregate, (iii) made any loans or advances to any Person, other than ordinary advances for business expenses, or (iv) sold, exchanged or otherwise disposed of any material portion of its assets or rights, other than in the ordinary course of business. For the purposes of (a) and (b) of this Section 2.10, all indebtedness, liabilities, agreements, understandings, instruments, contracts and proposed transactions involving the same Person (including Persons the Company has reason to believe are affiliated with each other) shall be aggregated for the purpose of meeting the individual minimum dollar amounts of such section.

### The Company is not a guarantor or indemnitor of any indebtedness of any other Person.[[35]](#footnote-35)

## Certain Transactions.[[36]](#footnote-36)

### Other than (i) standard employee benefits generally made available to all employees, standard employee offer letters and Confidential Information Agreements; (ii) standard director and officer indemnification agreements approved by the Board of Directors; (iii) the purchase of shares of the Company’s capital stock and the issuance of options to purchase shares of the Company’s Common Stock, in each instance, approved in the written minutes of the Board of Directors (previously made available to the Purchasers or their respective counsel); and (iv) the Transaction Agreements, there are no agreements, understandings or proposed transactions between the Company and any of its Officers or directors, or any Affiliate thereof.

### The Company is not indebted, directly or indirectly, to any of its directors, officers or employees or to their respective spouses or children or to any Affiliate of any of the foregoing, other than in connection with expenses or advances of expenses incurred in the ordinary course of business or employee relocation expenses and for other customary employee benefits made generally available to all employees. None of the Company’s directors, officers or employees [or consultants], or any members of their immediate families, or any Affiliate of the foregoing are, directly or indirectly, indebted to the Company or, to the Company’s knowledge, have any (i) material commercial, industrial, banking, consulting, legal, accounting, charitable or familial relationship with the Company or any of the Company’s customers, suppliers, service providers, joint venture partners, licensees and competitors, (ii) direct or indirect ownership interest in any firm or corporation with which the Company is affiliated or with which the Company has a business relationship, or any firm or corporation which competes with the Company except that directors, officers, employees or stockholders of the Company may own stock in (but not exceeding 2% of the outstanding capital stock of) publicly traded companies that may compete with the Company; or (iii) financial interest in any [material] contract with the Company.

## Rights of Registration and Voting Rights

.[[37]](#footnote-37) Except as provided in the Investors’ Rights Agreement, the Company is not under any obligation to register under the Securities Act any of its currently outstanding securities or any securities issuable upon exercise or conversion of its currently outstanding securities. To the Company’s knowledge, except as contemplated in the Voting Agreement, no stockholder of the Company has entered into any agreements with respect to the voting of capital shares of the Company.

## Tangible and Real Property

. The tangible and real property and assets that the Company owns are free and clear of all mortgages, deeds of trust, liens, loans and encumbrances, except for statutory liens for the payment of current taxes that are not yet delinquent and encumbrances and liens that arise in the ordinary course of business and do not materially impair the Company’s ownership or use of such property or assets. With respect to the tangible and real property and assets it leases, the Company is in compliance with such leases and holds a valid leasehold interest free of any liens, claims or encumbrances other than those of the lessors of such property or assets. The Company does not own any real property.

## Financial Statements

.[[38]](#footnote-38) The Company has delivered to each Purchaser its [unaudited] [audited] financial statements as of [\_\_\_\_\_\_\_ \_\_, 20\_] and for the fiscal year ended [\_\_\_\_\_\_\_ \_\_, 20\_] [and its unaudited financial statements (including balance sheet, income statement and statement of cash flows) as of [\_\_\_\_\_\_\_ \_\_, 20\_] (the “**Balance Sheet Date**”) and for the [\_\_\_\_\_]-month period ended on the Balance Sheet Date] (collectively, the “**Financial Statements**”). The Financial Statements have been prepared in accordance with generally accepted accounting principles (“**GAAP**”) applied on a consistent basis throughout the periods indicated[, except that the unaudited Financial Statements may not contain all footnotes required by GAAP]. The Financial Statements fairly present in all material respects the financial condition and operating results of the Company as of the dates, and for the periods, indicated therein, subject in the case of the unaudited Financial Statements to normal year-end audit adjustments. Except as set forth in the Financial Statements, the Company has no material liabilities or obligations, contingent or otherwise, other than (i) liabilities incurred in the ordinary course of business subsequent to the Balance Sheet Date; (ii) obligations under contracts and commitments incurred in the ordinary course of business; and (iii) liabilities and obligations of a type or nature not required under GAAP to be reflected in the Financial Statements, which, in all such cases, individually and in the aggregate would not have a Material Adverse Effect. The Company maintains and will continue to maintain a standard system of accounting established and administered in accordance with GAAP.

## Changes

.[[39]](#footnote-39) Since the Balance Sheet Date, there has not been:

### any change in the assets, liabilities, financial condition or operating results of the Company from that reflected in the Financial Statements, except changes in the ordinary course of business that have not caused, in the aggregate, a Material Adverse Effect;

### any damage, destruction or loss, whether or not covered by insurance, that would have a Material Adverse Effect;

### any waiver or compromise by the Company of a valuable right or of a material debt owed to it;

### any satisfaction or discharge of any lien, claim, or encumbrance or payment of any obligation by the Company, except in the ordinary course of business and the satisfaction or discharge of which would not have a Material Adverse Effect;

### any material change to a material contract or agreement by which the Company or any of its assets is bound or subject;

### any material change in any compensation arrangement or agreement with any employee, officer, director or stockholder;

### any resignation or termination of employment of any Officer ;

### any mortgage, pledge, transfer of a security interest in, or lien, created by the Company, with respect to any of its material properties or assets, except liens for taxes not yet due or payable and liens that arise in the ordinary course of business and do not materially impair the Company’s ownership or use of such property or assets;

### any loans or guarantees made by the Company to or for the benefit of its employees, officers or directors, or any members of their immediate families, other than travel advances and other advances made in the ordinary course of its business;

### any declaration, setting aside or payment or other distribution in respect of any of the Company’s capital stock, or any direct or indirect redemption, purchase, or other acquisition of any of such stock by the Company;

### any sale, assignment or transfer by the Company of any Company-Controlled Intellectual Property that could reasonably be expected to result in a Material Adverse Effect;

### receipt of notice that there has been a loss of, or material order cancellation by, any major customer of the Company;

### [to the Company’s knowledge,] any other event or condition of any character, other than events affecting the economy or the Company’s industry generally, that could reasonably be expected to result in a Material Adverse Effect; or

### any arrangement or commitment by the Company to do any of the things described in this Section 2.15.

## Employee Matters

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### [To the Company’s knowledge,] none of its employees is obligated under any contract (including licenses, covenants or commitments of any nature) or other agreement, or subject to any judgment, decree or order of any court or administrative agency, that would materially interfere with such employee’s ability to promote the interest of the Company or that would conflict with the Company’s business. Neither the execution or delivery of the Transaction Agreements, nor the carrying on of the Company’s business by the employees of the Company, nor the conduct of the Company’s business as now conducted and as presently proposed to be conducted, will[, to the Company’s knowledge,] conflict with or result in a breach of the terms, conditions, or provisions of, or constitute a default under, any contract, covenant or instrument under which any such employee is now obligated.

### The Company is not delinquent in payments to any of its employees, consultants, or independent contractors for any wages, salaries, commissions, bonuses, or other direct compensation for any service performed for it to the date hereof or amounts required to be reimbursed to such employees, consultants or independent contractors. The Company has complied in all material respects with all applicable state and federal equal employment opportunity laws and with other laws related to employment, including those related to wages, hours, worker classification and collective bargaining. The Company has withheld and paid to the appropriate governmental entity or is holding for payment not yet due to such governmental entity all amounts required to be withheld from employees of the Company and is not liable for any arrears of wages, taxes, penalties or other sums for failure to comply with any of the foregoing.

### To the Company’s knowledge, no Officer intends to terminate employment with the Company or is otherwise likely to become unavailable to continue as an employee. The Company does not have a present intention to terminate the employment of any of the foregoing. The employment of each employee of the Company is terminable at the will of the Company. Except as set forth in Section 2.16(c)(i) of the Disclosure Schedule or as required by law, upon termination of the employment of any such employees, no severance or other payments will become due. Except as set forth in Section 2.16(c)(ii) of the Disclosure Schedule, the Company has no policy, practice, plan or program of paying severance pay or any form of severance compensation in connection with the termination of employment services.

### The Company has not made any representations regarding equity incentives to any officer, employee, director or consultant that are inconsistent with the share amounts and terms set forth in the minutes of meetings of (or actions taken by unanimous written consent by) the Board of Directors.

### Each former officer or other employee who reported to the Chief Executive Officer, Chief Financial Officer, or Board of Directors has entered into an agreement with the Company providing for the full release of any claims against the Company or any related party arising out of such employment.

### Section 2.16(f) of theDisclosure Schedule sets forth each employee benefit plan maintained, established or sponsored by the Company, or which the Company participates in or contributes to, which is subject to the Employee Retirement Income Security Act of 1974, as amended (“**ERISA**”). The Company has made all required contributions and has no liability to any such employee benefit plan, other than liability for health plan continuation coverage described in Part 6 of Title I(B) of ERISA, and has complied in all material respects with all applicable laws for any such employee benefit plan.

### [The Company is not bound by or subject to (and none of its assets or properties is bound by or subject to) any written or oral, express or implied, contract, commitment or arrangement with any labor union, and no labor union has requested or, to the knowledge of the Company, has sought to represent any of the employees, representatives or agents of the Company. There is no strike or other labor dispute involving the Company pending, or to the Company’s knowledge, threatened, which could have a Material Adverse Effect, nor is the Company aware of any labor organization activity involving its employees.]

### [To the Company’s knowledge, none of the Officers or directors[[40]](#footnote-40) of the Company has been (i) subject to voluntary or involuntary petition under the federal bankruptcy laws or any state insolvency law or the appointment of a receiver, fiscal agent or similar officer by a court for such person’s business or property; (ii) convicted in a criminal proceeding or named as a subject of a pending criminal proceeding (excluding traffic violations and other minor offenses); (iii) subject to any order, judgment or decree (not subsequently reversed, suspended, or vacated) of any court of competent jurisdiction permanently or temporarily enjoining such person from engaging, or otherwise imposing limits or conditions on such person’s engagement in any securities, investment advisory, banking, insurance, or other type of business or acting as an officer or director of a public company; or (iv) found by a court of competent jurisdiction in a civil action or by the Securities and Exchange Commission or the Commodity Futures Trading Commission to have violated any federal or state securities, commodities, or unfair trade practices law, which such judgment or finding has not been subsequently reversed, suspended, or vacated.][[41]](#footnote-41)

##  Tax Returns and Payments

. There are no [income or other material] taxes due and payable by the Company that have not been timely paid and no material withholding taxes required to be withheld by the Company that have not been withheld and timely paid over to the appropriate governmental agency. There have been no examinations or audits with respect to any taxes or tax returns of the Company, by any applicable federal, state, county, local or foreign governmental agency, and the Company has not received written notice of an intent to commence any such examination or audit that remains outstanding. The Company has duly and timely filed all income or other material tax returns required to have been filed by it, and there are in effect no waivers of applicable statutes of limitations with respect to taxes for any year.[[42]](#footnote-42)

## Insurance

.[[43]](#footnote-43) The Company has in full force and effect insurance policies concerning such casualties as would be reasonable and customary for companies like the Company,[[44]](#footnote-44) with extended coverage, sufficient in amount (subject to reasonable deductions) to allow it to replace any of its properties that might be damaged or destroyed.

## Permits

. The Company has all franchises, permits, licenses and any similar authority necessary for the conduct of its business, the lack of which could reasonably be expected to have a Material Adverse Effect. The Company is not in default in any material respect under any of such franchises, permits, licenses or other similar authority.

## Corporate Documents

. The Certificate of Incorporation and Bylaws of the Company as of the date of this Agreement are in the form made available to the Purchasers. The copy of the minute books of the Company made available to the Purchasers contains minutes of all meetings of directors and stockholders and all actions by written consent without a meeting by the directors and stockholders since the date of incorporation and accurately reflects in all material respects all actions by the directors (and any committee of directors) and stockholders.

## [83(b) Elections

. To the Company’s knowledge, all elections and notices under Section 83(b) of the Code have been or will be timely filed by all individuals who have acquired unvested shares of the Company’s Common Stock.][[45]](#footnote-45)

## [Real Property Holding Corporation

.[[46]](#footnote-46) The Company is not now and has never been a “United States real property holding corporation” as defined in the Code and any applicable regulations promulgated thereunder. The Company has filed with the Internal Revenue Service all statements, if any, with its United States income tax returns which are required under such regulations.]

## [Environmental and Safety Laws

. Except as could not reasonably be expected to have a Material Adverse Effect [to the best of its knowledge] (a) the Company is and has been in compliance with all Environmental Laws; (b) there has been no release or [to the Company’s knowledge] threatened release of any pollutant, contaminant or toxic or hazardous material, substance or waste or petroleum or any fraction thereof (each a “**Hazardous Substance**”), on, upon, into or from any site currently or heretofore owned, leased or otherwise used by the Company; (c) there have been no Hazardous Substances generated by the Company that have been disposed of or come to rest at any site that has been included in any published U.S. federal, state or local “superfund” site list or any other similar list of hazardous or toxic waste sites published by any governmental authority in the United States; and (d) there are no underground storage tanks located on, no polychlorinated biphenyls (“**PCBs**”) or PCB-containing equipment used or stored on, and no hazardous waste as defined by the Resource Conservation and Recovery Act, as amended, stored on, any site owned or operated by the Company, except for the storage of hazardous waste in compliance with Environmental Laws. The Company has made available to the Purchasers true and complete copies of all material environmental records, reports, notifications, certificates of need, permits, pending permit applications, correspondence, engineering studies and environmental studies or assessments. For purposes of this Section 2.23, “**Environmental Laws**” means any law, regulation, or other applicable requirement relating to (a) releases or threatened release of Hazardous Substance; (b) pollution or protection of employee health or safety, public health or the environment; or (c) the manufacture, handling, transport, use, treatment, storage, or disposal of Hazardous Substances.]

## [Qualified Small Business Stock

.[[47]](#footnote-47) As of and immediately following the Closing: (i) the Company will be an eligible corporation as defined in Section 1202(e)(4) of the Code, (ii) the Company will not have made purchases of its own stock described in Code Section 1202(c)(3)(B) during the one-year period preceding the Initial Closing, except for purchases that are disregarded for such purposes under Treasury Regulation Section 1.1202-2, and (iii) the Company’s aggregate gross assets, as defined by Code Section 1202(d)(2), at no time between its incorporation and through the Initial Closing have exceeded $50 million, taking into account the assets of any corporations required to be aggregated with the Company in accordance with Code Section 1202(d)(3); provided, however, that in no event shall the Company be liable to the Purchasers or any other party for any damages arising from any subsequently proven or identified error in the Company’s determination with respect to the applicability or interpretation of Code Section 1202, unless such determination shall have been given by the Company in a manner either grossly negligent or fraudulent.]

## [Small Business Concern

.[[48]](#footnote-48) The Company together with its “affiliates” (as that term is defined in Section 121.103 of Title 13 of the Code of Federal Regulations (“**CFR**”)) is a [“small business concern”][“smaller business”] within the meaning of the Small Business Investment Act of 1958, as amended (the “**Small Business Act**”), and the regulations promulgated thereunder, including [Section 121.301 of Title 13 of the CFR][Section 107.710 of Title 13 of the CFR]. The information delivered to each Purchaser that is a licensed Small Business Investment Company (an “**SBIC Purchaser**”) on SBA Forms 480, 652 and 1031 delivered in connection herewith is true and complete. The Company is not ineligible for financing by any SBIC Purchaser pursuant to Section 107.720 of the CFR. The Company acknowledges that each SBIC Purchaser is a Federal licensee under the Small Business Act.]

## [Foreign Corrupt Practices Act

. To the Company’s knowledge, neither the Company nor any of the directors, officers, employees or agents of the Company have, directly or indirectly, made, offered, promised or authorized any payment or gift of any money or anything of value to or for the benefit of any “foreign official” (as such term is defined in the U.S. Foreign Corrupt Practices Act of 1977, as amended (the “**FCPA**”)), foreign political party or official thereof or candidate for foreign political office for the purpose of (i) influencing any official act or decision of such official, party or candidate[, including inducing such official, party or candidate to do or omit to do any act in violation of such person’s lawful duty]; (ii) inducing such official, party or candidate to use such person’s influence to affect any act or decision of a foreign governmental authority, or (iii) otherwise securing any improper advantage, in the case of (i), (ii) and (iii) above in order to assist the Company or any of its affiliates in obtaining or retaining business for or with, or directing business to, any person. Neither the Company nor any of its directors, officers, employees or, to the Company’s knowledge, agents have made or authorized any bribe, rebate, payoff, influence payment, kickback or other unlawful payment of funds or received or retained any funds in violation of any law, rule or regulation. [The Company further represents that it has maintained, and has caused its subsidiaries and affiliates to maintain, systems of internal controls (accounting systems, purchasing systems and billing systems) and written policies reasonably designed to ensure compliance with the FCPA or any other applicable anti-bribery or anti-corruption law, and reasonably designed to ensure that all books and records of the Company accurately and fairly reflect, in reasonable detail, all transactions and dispositions of funds and assets.][[49]](#footnote-49) Neither the Company nor[, to the Company’s knowledge,] any of its officers, directors or employees are the subject of any allegation, voluntary disclosure, investigation, prosecution or other enforcement action related to the FCPA or any other anti-corruption law (“**Enforcement Action**”).]

## Data Privacy

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### In connection with the collection, storage, use, access, disclosure and/or other processing of any information that constitutes “personal information,” “personal data,” “personally identifiable information” or analogous term as defined in applicable laws (collectively, “**Personal Information**”), by or on behalf of the Company, to the Company’s knowledge, the Company is and has been’ in compliance in all material respects with the following (collectively, “**Privacy Requirements**”): (i) all applicable laws governing privacy or data security in all relevant jurisdictions relating to data loss, data theft, and security breach notification obligations, telephone or text message communications, artificial intelligence and automated decision-making, or marketing by email or other channels, (ii) the Company’s published privacy policies, and (iii) the privacy or data security requirements of any contracts, codes of conduct, or industry standards by which the Company is legally bound.

### The Company maintains and has maintained reasonable physical, technical, and administrative security measures and policies designed to protect all Personal Information owned, stored, used, maintained or controlled by or on behalf of the Company from and against unlawful, accidental or unauthorized access, destruction, loss, use, modification, disclosure, and/or other processing.

### [To the extent the Company maintains or transmits protected health information, as defined under 45 C.F.R. § 160.103, as a covered entity or business associate, as defined therein, (i) the Company is in compliance with the applicable requirements of the Health Insurance Portability and Accountability Act of 1996 (“**HIPAA**”), as amended by the Health Information Technology for Economic and Clinical Health Act, including all binding rules and regulations promulgated thereunder and (ii) without limiting the generality of the foregoing, the Company: (A) has designated a privacy official and a security official who is responsible for the development and implementation of the entity’s privacy and security compliance infrastructure; (B) has entered into, and complies with the terms of, business associate agreements as described under HIPAA when required by HIPAA; (C) has provided regular training to its workforce with respect to and to the extent required for compliance with HIPAA; (D) has adopted, and has been in compliance with, privacy and security compliance policies and procedures in compliance with HIPAA; and (E) has completed regular security risk analyses in compliance with HIPAA and has addressed and remediated all material threats, vulnerabilities and deficiencies that have been identified.[[50]](#footnote-50)]

### [To the Company’s knowledge, there has been no material unlawful, accidental or unauthorized access to, or destruction, loss, use, modification, disclosure, or other processing of, Personal Information owned, stored, used, maintained or controlled by or on behalf of the Company [where Privacy Requirements obligate the Company to notify government authorities, affected individuals or other parties of such occurrence].]

## [Export Control Laws

. The Company has conducted any export transactions in accordance with applicable provisions of United States export control laws and regulations, including the Export Administration Regulations, the International Traffic in Arms Regulations, the regulations administered by the Office of Foreign Assets Control of the U.S. Department of the Treasury, and the export control laws and regulations of any other applicable jurisdiction (collectively, “**Export Control Laws**”). Without limiting the foregoing: (a) the Company has obtained all required export licenses and other approvals and timely filed any other required filings to the extent required pursuant to Export Control Laws[[51]](#footnote-51); (b) the Company is in compliance with the terms of all applicable export licenses, filing requirements or other approvals; (c) there are no pending or, to the Company’s knowledge, threatened claims or investigations against the Company with respect to Export Control Laws; and (d) [to the Company’s knowledge,] there are no actions, conditions, or circumstances pertaining to the Company’s export transactions that would reasonably be expected to give rise to any material future claims.]

## [Healthcare Laws

. The Company is and has been in material compliance with all applicable Healthcare Laws. “**Healthcare Laws**” means all applicable federal, state, or local health care laws, each as amended, relating to the regulation of the Company, including but not limited to laws regarding fraud and abuse; kickbacks; self-referrals; fee-splitting; the operation of healthcare provider networks or risk bearing entities; beneficiary inducement, false claims, false billing, false coding, reimbursement, and reassignment; record retention; healthcare professional or entity licensure, qualifications, accreditations, or scope of practice requirements, including the practice of telehealth and healthcare professional supervision; the corporate practice of a learned or licensed healthcare profession; health information privacy laws, including those relating to mental health and substance abuse, including [the Health Insurance Portability and Accountability Act of 1996][HIPAA]; and all applicable implementing regulations, rules, ordinances, and orders related to any of the foregoing.][[52]](#footnote-52)

## CFIUS Representations

. The Company does not engage in (a) the design, fabrication, development, testing, production or manufacture of one or more “critical technologies” within the meaning of the Defense Production Act of 1950, as amended, including all implementing regulations thereof (the “**DPA**”); (b) the ownership, operation, maintenance, supply, manufacture, or servicing of “covered investment critical infrastructure” within the meaning of the DPA (where such activities are covered by column 2 of Appendix A to 31 C.F.R. Part 800); or (c) the maintenance or collection, directly or indirectly, of “sensitive personal data” of U.S. citizens within the meaning of the DPA. The Company has no current intention of engaging in such activities in the future.[[53]](#footnote-53)

## [Preclinical Development and Clinical Trials

.[[54]](#footnote-54) The studies, tests, preclinical development and clinical trials, if any, conducted by or on behalf of the Company are being conducted in all material respects in accordance with experimental protocols, procedures and controls pursuant to accepted professional and scientific standards for products or product candidates comparable to those being developed by the Company and all applicable laws and regulations, including the Federal Food, Drug, and Cosmetic Act and 21 C.F.R. parts 50, 54, 56, 58, [312, and 812][[55]](#footnote-55). The descriptions of, protocols for, and data and other results of, the studies, tests, development and trials conducted by or on behalf of the Company that have been furnished or made available to the Purchasers are accurate and complete in all material respects. The Company has not received any notices or correspondence from the U.S. Food and Drug Administration (“**FDA**”) or any other governmental entity or any institutional review board or comparable authority requiring the termination, suspension or material modification of any studies, tests, preclinical development or clinical trials conducted by or on behalf of the Company.]

## [FDA Approvals

. (a) The Company possesses all required permits, licenses, registrations, certificates, authorizations, orders, exemptions, clearances and approvals from the appropriate federal, state or foreign regulatory authorities necessary to conduct its business [as now conducted] as required by the FDA or any other federal, state or foreign agencies or bodies engaged in the regulation of [drugs, pharmaceuticals, medical devices or biohazardous materials][[56]](#footnote-56). (b) The Company has not received any notice of proceedings relating to the suspension, material modification, revocation or cancellation of any such permit, license, registration, certificate, authorization, order or approval. Neither the Company nor, to the Company’s knowledge, any officer, employee or agent of the Company has been convicted of any crime or engaged in any conduct that has previously caused or would reasonably be expected to result in (i) debarment by the FDA under 21 U.S.C. Sections 335a, or disqualification under any similar law, rule or regulation of any other governmental entities, (ii) debarment, suspension, or exclusion under any federal healthcare programs or by the General Services Administration, or (iii) exclusion under 42 U.S.C. Section 1320a-7 or any similar law, rule or regulation of any governmental entities. (c) Neither the Company nor any of its officers, employees, or, to the Company’s knowledge, any of its contractors or agents is the subject of any pending or threatened investigation by FDA pursuant to its “Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities” policy as stated at 56 Fed. Reg. 46191 (September 10, 1991) (the “**FDA Application Integrity Policy**”) and any amendments thereto, or by any other similar governmental entity pursuant to any similar policy. (d) Neither the Company nor any of its officers, employees, or to the Company’s knowledge, any of its contractors or agents has made any materially false statements on, or material omissions from, any notifications, applications, approvals, reports and other submissions to FDA or any similar governmental entity that would reasonably be expected to provide a basis for FDA to invoke the FDA Application Integrity Policy or for any similar governmental entity to invoke a similar policy.]

## [FDA Regulation

. The Company is and has been in material compliance with all applicable laws administered or issued by the FDA or any similar governmental entity, including the Federal Food, Drug, and Cosmetic Act and all other applicable laws regarding developing, testing, manufacturing, complaint handling, adverse event [or medical device] reporting, marketing, distributing or promoting the products of the Company.]

## Sanctions

. (a) During the past five years the Company and its subsidiaries have complied [in all material respects] with applicable laws and regulations pertaining to trade and economic sanctions administered by the United States[, European Union, or United Kingdom][[57]](#footnote-57) (collectively, “**Sanctions**”). (b) None of the Company, its subsidiaries, or their respective directors, officers, employees, or, to the Company’s knowledge, the Company’s or subsidiaries’ agents is: (i) organized under the laws of, ordinarily resident in, or located in a country or territory that is the subject of comprehensive Sanctions (which as of the date of this Agreement comprise Cuba, Iran, North Korea, Syria, and the Crimea, Donetsk, and Luhansk regions of Ukraine (“**Restricted Countries**”)); (ii) 50% or more owned or controlled by the government of a Restricted Country; or (iii) (A) designated on a sanctioned parties list administered by the United States[, European Union, or United Kingdom], including, without limitation, the U.S. Department of the Treasury’s Office of Foreign Assets Control’s Specially Designated Nationals and Blocked Persons List, Foreign Sanctions Evaders List, Sectoral Sanctions Identification List[, the Consolidated List of Persons, Groups, and Entities Subject to EU Financial Sanctions, and the UK’s Consolidated Sanctions List] (collectively, “**Designated Parties**”); or (B) 50% or more owned or, where relevant under applicable Sanctions, controlled, individually or in the aggregate, by one or more Designated Party, in each case only to the extent that dealings with such persons are prohibited pursuant to applicable Sanctions[[58]](#footnote-58) (collectively, “**Sanctioned Parties**”). (c) During the past five years, none of the Company, its subsidiaries, or any of their respective officers, directors, or employees: (i) has been the subject or target of any investigation, prosecution, other enforcement action, or government inquiry related to Sanctions violations; or (ii) submitted a voluntary self-disclosure to any U.S. [or, [to the Company’s knowledge,] other relevant] government agency regarding actual or potential Sanctions violations. (d) The Company maintains policies and procedures reasonably designed to promote compliance with applicable Sanctions.

## [FCC Regulation and Compliance

. (a) The Company possesses all required permits, licenses, registrations, certificates, authorizations, and approvals from the appropriate federal, state or foreign regulatory authorities necessary to conduct its business [as now conducted] as required by the Federal Communications Commission (“**FCC**”) or any other state or foreign agencies or bodies engaged in the regulation of [telecommunications, media, equipment manufacturers, and technology companies][[59]](#footnote-59). (b) The Company has not received any notice of proceedings relating to the suspension, material modification, revocation or cancellation of any such permit, license, registration, certificate, authorization, or approval. Neither the Company nor, to the Company’s knowledge, any officer, employee or agent of the Company has been convicted of any crime or engaged in any conduct that has previously caused or would reasonably be expected to result in disqualification under the FCC’s rules or any similar law, rule or regulation of any other governmental entities. (c) Neither the Company nor any of its officers or employees is the subject of any pending or threatened investigation by FCC or by any other similar governmental entity. (d) Neither the Company nor any of its officers or employees has made any materially false statements on, or material omissions from, any notifications, applications, reports and other submissions to the FCC or any similar governmental entity. (e) The Company is and has been in material compliance with the Communications Act of 1934, as amended, and all applicable rules and regulations of the FCC or any similar governmental entity.][[60]](#footnote-60)

## Disclosure

.[[61]](#footnote-61) The Company has made available to the Purchasers all the information [reasonably available to the Company] that the Purchasers have requested for deciding whether to acquire the Shares, including certain of the Company’s projections describing its proposed business plan (the “**Business Plan**”). No representation or warranty of the Company contained in this Agreement, as qualified by the Disclosure Schedule, and no certificate furnished or to be furnished to Purchasers at the Closing contains any untrue statement of a material fact or[, to the Company’s knowledge,] omits to state a material fact necessary in order to make the statements contained herein or therein not misleading in light of the circumstances under which they were made. The Business Plan was prepared in good faith; however, the Company does not warrant that it will achieve any results projected in the Business Plan. It is understood that this representation is qualified by the fact that the Company has not delivered to the Purchasers, and has not been requested to deliver, a private placement or similar memorandum or any written disclosure of the types of information customarily furnished to purchasers of securities.

# Representations and Warranties of the Purchasers

.[[62]](#footnote-62) Each Purchaser hereby represents and warrants to the Company, severally and not jointly, that:

## Authorization

. The Purchaser has full power and authority to enter into the Transaction Agreements. The Transaction Agreements to which the Purchaser is a party, when executed and delivered by the Purchaser, will constitute valid and legally binding obligations of the Purchaser, enforceable against such Purchaser in accordance with their terms, except (a) as limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and any other laws of general application affecting enforcement of creditors’ rights generally, and as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies, or (b) to the extent the indemnification provisions contained in the Investors’ Rights Agreement may be limited by applicable federal or state securities laws.

## Purchase Entirely for Own Account

.[[63]](#footnote-63) This Agreement is made with the Purchaser in reliance upon the Purchaser’s representation to the Company, which by the Purchaser’s execution of this Agreement, the Purchaser hereby confirms, that the Shares to be acquired by the Purchaser will be acquired for investment for the Purchaser’s own account, not as a nominee or agent, and not with a view to the resale or distribution of any part thereof, and that the Purchaser has no present intention of selling, granting any participation in, or otherwise distributing the same. By executing this Agreement, the Purchaser further represents that the Purchaser does not presently have any contract, undertaking, agreement or arrangement with any Person to sell, transfer or grant participations to such Person or to any third Person, with respect to any of the Shares. The Purchaser has not been formed for the specific purpose of acquiring the Shares.

## Disclosure of Information

. The Purchaser has had an opportunity to discuss the Company’s business, management, financial affairs and the terms and conditions of the offering of the Shares with the Company’s management and has had an opportunity to review the Company’s facilities. The foregoing, however, does not limit or modify the representations and warranties of the Company in Section 2 of this Agreement or the right of the Purchasers to rely thereon.

## Restricted Securities

. The Purchaser understands that the Shares have not been, and will not be, registered under the Securities Act, by reason of a specific exemption from the registration provisions of the Securities Act which depends upon, among other things, the bona fide nature of the investment intent and the accuracy of the Purchaser’s representations as expressed herein. The Purchaser understands that the Shares are “restricted securities” under applicable U.S. federal and state securities laws and that, pursuant to these laws, the Purchaser must hold theShares indefinitely unless they are registered with the Securities and Exchange Commission and qualified by state authorities, or an exemption from such registration and qualification requirements is available. The Purchaser acknowledges that the Company has no obligation to register or qualify the Shares, or the Common Stock into which it may be converted, for resale except as set forth in the Investors’ Rights Agreement. The Purchaser further acknowledges that if an exemption from registration or qualification is available, it may be conditioned on various requirements including, but not limited to, the time and manner of sale, the holding period for the Shares, and on requirements relating to the Company which are outside of the Purchaser’s control, and which the Company is under no obligationand may not be able to satisfy. [The Purchaser acknowledges that the Company filed a registration statement for a public offering of its Common Stock, which was withdrawn effective [\_\_\_\_\_ \_\_, 20\_]. The Purchaser understands that this offering is not intended to be part of the public offering, and that the Purchaser will not be able to rely on the protection of Section 11 of the Securities Act.[[64]](#footnote-64)]

## No Public Market

. The Purchaser understands that no public market now exists for the Shares, and that the Company has made no assurances that a public market will ever exist for the Shares.

## Legends

. The Purchaser understands that the Shares and any securities issued in respect of or exchange for the Shares, may be notated with one or all of the following legends:

“THE SHARES REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AND HAVE BEEN ACQUIRED FOR INVESTMENT AND NOT WITH A VIEW TO, OR IN CONNECTION WITH, THE SALE OR DISTRIBUTION THEREOF. NO SUCH TRANSFER MAY BE EFFECTED WITHOUT AN EFFECTIVE REGISTRATION STATEMENT RELATED THERETO OR AN OPINION OF COUNSEL IN A FORM SATISFACTORY TO THE COMPANY THAT SUCH REGISTRATION IS NOT REQUIRED UNDER THE SECURITIES ACT OF 1933.”

### Any legend set forth in, or required by, the other Transaction Agreements.

### Any legend required by the securities laws of any state to the extent such laws are applicable to the Shares represented by the certificate, instrument, or book entry so legended.

## Accredited Investor

. The Purchaser is an accredited investor as defined in Rule 501(a) of Regulation D promulgated under the Securities Act.

## Foreign Investors

. If the Purchaser is not a United States person (as defined by Section 7701(a)(30) of the Code), the Purchaser hereby represents that it has satisfied itself as to the full observance of the laws of its jurisdiction in connection with any invitation to subscribe for the Shares or any use of this Agreement, including (i) the legal requirements within its jurisdiction for the purchase of the Shares, (ii) any foreign exchange restrictions applicable to such purchase, (iii) any governmental or other consents that may need to be obtained, and (iv) the income tax and other tax consequences, if any, that may be relevant to the purchase, holding, redemption, sale, or transfer of the Shares. The Purchaser’s subscription and payment for and continued beneficial ownership of the Shares will not violate any applicable securities or other laws of the Purchaser’s jurisdiction.

## [CFIUS Foreign Person Status

. The Purchaser is not a “foreign person” or a “foreign entity,” as defined in Section 721 of the DPA. The Purchaser is not controlled by a “foreign person,” as defined in the DPA. The Purchaser does not permit any foreign person affiliated with the Purchaser, whether affiliated as a limited partner or otherwise, to obtain through the Purchaser any of the following with respect to the Company: (i) access to any “material nonpublic technical information” (as defined in the DPA) in the possession of the Company; (ii) membership or observer rights on the Board of Directors or equivalent governing body of the Company or the right to nominate an individual to a position on the Board of Directors or equivalent governing body of the Company; (iii) any involvement, other than through the voting of shares, in the substantive decision-making of the Company regarding (x) the use, development, acquisition, or release of any “critical technology” (as defined in the DPA), (y) the use, development, acquisition, safekeeping, or release of “sensitive personal data” (as defined in the DPA) of U.S. citizens maintained or collected by the Company, or (z) the management, operation, manufacture, or supply of “covered investment critical infrastructure” (as defined in the DPA); or (iv) “control” of the Company (as defined in the DPA).][[65]](#footnote-65)

## Sanctions

. Neither the Purchaser, nor any of its officers, directors, employees, agents, stockholders or partners, is a Sanctioned Party.

## No General Solicitation

. Neither the Purchaser, nor any of its officers, directors, employees, agents, stockholders or partners has either directly or indirectly, including, through a broker or finder (a) engaged in any general solicitation, or (b) published any advertisement in connection with the offer and sale of the Shares.

## Exculpation Among Purchasers

. The Purchaser acknowledges that it is not relying upon any Person, other than the Company and its officers and directors, in making its investment or decision to invest in the Company. [The Purchaser agrees that neither any Purchaser nor the respective controlling Persons, officers, directors, partners, agents, or employees of any Purchaser shall be liable to any other Purchaser for any action heretofore taken or omitted to be taken by any of them in connection with the purchase of the Shares.][[66]](#footnote-66)

## Residence

. If the Purchaser is an individual, then the Purchaser resides in the state or province identified in the address of the Purchaser set forth on the Purchaser’s signature page or Exhibit A; if the Purchaser is a partnership, corporation, limited liability company or other entity, then the office or offices of the Purchaser in which it has its principal place of business is identified in the address or addresses of the Purchaser set forth on the Purchaser’s signature page or Exhibit A.

# Conditions to the Purchasers’ Obligations at Closing

.[[67]](#footnote-67) The obligations of each Purchaser to purchase Shares at the Initial Closing [or any subsequent Closing] are subject to the fulfillment, on or before the [Initial/applicable] Closing, of each of the following conditions, unless otherwise waived:

## Representations and Warranties

. The representations and warranties of the Company contained in Section 2 shall be true and correct in all respects as of the Initial Closing [and, as to any subsequent Closing, in all material respects as of such subsequent Closing].

## Performance

. The Company shall have performed and complied with all covenants, agreements, obligations and conditions contained in this Agreement that are required to be performed or complied with by the Company in all respects on or before the Initial Closing [and, as to any subsequent Closing, in all material respects on or before such subsequent Closing].

## Compliance Certificate

. The Chief Executive Officer or President of the Company shall deliver to the Purchasers at the [Initial/applicable] Closing a certificate certifying that the conditions specified in Sections 4.1 and 4.2 have been fulfilled.

## Qualifications

. All authorizations, approvals or permits, if any, of any governmental authority or regulatory body of the United States or of any state that are required in connection with the lawful issuance and sale of the Shares pursuant to this Agreement shall be obtained and effective as of the applicable Closing.

## [Opinion of Company Counsel

. The Purchasers shall have received from [\_\_\_\_\_\_\_\_\_\_\_], counsel for the Company, an opinion, dated as of the Initial Closing, in substantially the form ofExhibit I attached to this Agreement.][[68]](#footnote-68)

## [Board of Directors

. As of the Initial Closing, the authorized size of the Board of Directors shall be [\_\_\_\_\_\_], and the Board of Directors shall be comprised of [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_].][[69]](#footnote-69)

## [Board Committees. The Board of Directors shall have created an audit committee and a compensation committee.][[70]](#footnote-70)

## Indemnification Agreement

. The Company shall have executed and delivered the Indemnification Agreements.

## Investors’ Rights Agreement

. The Company andeach Purchaser (other than the Purchaser relying upon this condition to excuse such Purchaser’s performance hereunder) [and the other stockholders of the Company named as parties thereto] shall have executed and delivered the Investors’ Rights Agreement.

## Right of First Refusal and Co‑Sale Agreement

. The Company, each Purchaser (other than the Purchaser relying upon this condition to excuse such Purchaser’s performance hereunder), and the other stockholders of the Company named as parties thereto shall have executed and delivered the Right of First Refusal and Co‑Sale Agreement.

## Voting Agreement

. The Company, each Purchaser (other than the Purchaser relying upon this condition to excuse such Purchaser’s performance hereunder), and the other stockholders of the Company named as parties thereto shall have executed and delivered the Voting Agreement.

## Restated Certificate

. The Company shall have filed the Restated Certificate with the Secretary of State of Delaware on or prior to the Initial Closing, which shall continue to be in full force and effect as of the Initial Closing.

## Secretary’s Certificate

. The Secretary of the Company shall have delivered to the Purchasers at the Initial Closing a certificate certifying (i) the Certificate of Incorporation and Bylaws of the Company as in effect at the Initial Closing; (ii) resolutions of the Board of Directors approving the Restated Certificate, the Transaction Agreements and the transactions contemplated under the Transaction Agreements; and (iii) resolutions of the stockholders of the Company approving the Restated Certificate.

## Proceedings and Documents

. All corporate and other proceedings in connection with the transactions contemplated at the Closing and all documents incidental thereto shall be reasonably satisfactory in form and substance to each Purchaser, and each Purchaser (or its respective counsel) shall have received all such counterpart original and certified or other copies of such documents as reasonably requested. Such documents may include good standing certificates.

## [Minimum Number of Shares at Initial Closing

. A minimum of [\_\_\_\_\_\_\_\_\_] Shares must be sold at the Initial Closing.][[71]](#footnote-71)

## [Management Rights

.[[72]](#footnote-72) A Management Rights Letter shall have been executed by the Company and delivered to each Purchaser to whom it is addressed.]

## [SBA Matters

. The Company shall have executed and delivered to each SBIC Purchaser a Size Status Declaration on SBA Form 480 and an Assurance of Compliance on SBA Form 652, and shall have provided to each such Purchaser information necessary for the preparation of a Portfolio Financing Report on SBA Form 1031.]

# Conditions of the Company’s Obligations at Closing

. The obligations of the Company to sell Shares to the Purchasers at the Initial Closing or any subsequent Closing are subject to the fulfillment, on or before the Closing, of each of the following conditions, unless otherwise waived:

## Representations and Warranties

. The representations and warranties of each Purchaser purchasing Shares in such Closing contained in Section 3 shall be true and correct in all respects as of the applicable Closing.

## Performance

. The Purchasers purchasing Shares in such Closing shall have performed and complied with all covenants, agreements, obligations and conditions contained in this Agreement that are required to be performed or complied with by them on or before the applicable Closing.

## Qualifications

. All authorizations, approvals or permits, if any, of any governmental authority or regulatory body of the United States or of any state that are required in connection with the lawful issuance and sale of the Shares pursuant to this Agreement shall be obtained and effective as of the Closing.

## Investors’ Rights Agreement

. Each Purchaser shall have executed and delivered the Investors’ Rights Agreement.

## Right of First Refusal and Co‑Sale Agreement

. Each Purchaser and the other stockholders of the Company named as parties thereto shall have executed and delivered the Right of First Refusal and Co‑Sale Agreement.

## Voting Agreement

. Each Purchaser and the other stockholders of the Company named as parties thereto shall have executed and delivered the Voting Agreement.

## [Minimum Number of Shares at Initial Closing

. A minimum of [\_\_\_\_\_\_\_] Shares must be sold at the Initial Closing.]

# Miscellaneous

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## Survival of Warranties

. Unless otherwise set forth in this Agreement, the representations and warranties of the Company and the Purchasers contained in or made pursuant to this Agreement shall survive the execution and delivery of this Agreement and the Closing and shall in no way be affected by any investigation or knowledge of the subject matter thereof made by or on behalf of the Purchasers or the Company.[[73]](#footnote-73)

## Successors and Assigns

. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

## Governing Law

. This Agreement shall be governed by the internal law of [the State of Delaware],[[74]](#footnote-74) without regard to conflict of law principles that would result in the application of any law other than the law of the [State of Delaware].

## Counterparts

. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, *e.g.*, www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

## Titles and Subtitles

. The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

## Notices

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### General. All notices and other communications given or made pursuant to this Agreement shall be in writing (including electronic mail as permitted in this Agreement) and shall be deemed effectively given upon the earlier of actual receipt, or (i) personal delivery to the party to be notified; (ii) when sent, if sent by electronic mail during normal business hours of the recipient, and if not sent during normal business hours, then on the recipient’s next business day; (iii) five days after having been sent by registered or certified mail, return receipt requested, postage prepaid; or (iv) one business day after deposit with a nationally recognized overnight courier, freight prepaid, specifying next business day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their address as set forth on the signature page or Exhibit A, or to such e-mail address or address as subsequently modified by written notice given in accordance with this Section 6.6. If notice is given to the Company, a copy (which copy shall not constitute notice) shall also be sent to [*Company Counsel Name and Address*]. If notice is given to any Purchaser, a copy (which copy shall not constitute notice) shall also be sent to any “cc” address noted on Exhibit A for such Purchaser[[75]](#footnote-75).

### Consent to Electronic Notice. Each Purchaser consents to the delivery of any stockholder notice pursuant to the Delaware General Corporation Law (the “**DGCL**”), as amended or superseded from time to time, by electronic mail pursuant to Section 232 of the DGCL (or any successor thereto) at the e-mail address set forth below such Purchaser’s name on the signature page or Exhibit A, as updated from time to time by notice to the Company. To the extent that any notice given by means of electronic mail is returned or undeliverable for any reason, the foregoing consent shall be deemed to have been revoked until a new or corrected e-mail address has been provided, and such attempted electronic notice shall be ineffective and deemed to not have been given. Each party agrees to promptly notify the other parties of any change in its e-mail address, and that failure to do so shall not affect the foregoing.

## No Finder’s Fees

.[[76]](#footnote-76) Each party represents that it neither is nor will be obligated for any finder’s fee or commission in connection with this transaction. Each Purchaser agrees to indemnify and to hold harmless the Company from any liability for any commission or compensation in the nature of a finder’s or broker’s fee arising out of this transaction (and the costs and expenses of defending against such liability or asserted liability) for which each Purchaser or any of its officers, employees or representatives is responsible. The Company agrees to indemnify and hold harmless each Purchaser from any liability for any commission or compensation in the nature of a finder’s or broker’s fee arising out of this transaction (and the costs and expenses of defending against such liability or asserted liability) for which the Company or any of its officers, employees or representatives is responsible.

## Fees and Expenses

. Within five business days after the later of (a) the receipt of a summary invoice therefor or (b) the Initial Closing, the Company shall pay the reasonable fees and expenses of [\_\_\_\_\_\_\_], the counsel for [name of lead Purchaser[[77]](#footnote-77)], in an amount not to exceed, in the aggregate, $[\_\_\_\_\_\_\_\_].

## Costs of Enforcement

. [If any action at law or in equity (including, arbitration) is necessary to enforce or interpret the terms of any of the Transaction Agreements, the prevailing party shall be entitled to reasonable attorneys’ fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.] [Each party will bear its own costs in respect of any disputes arising under this Agreement.]

## Amendments and Waivers

. [Except as set forth in Section 1.4 of this Agreement,] any term of this Agreement may be amended, terminated or waived only with the written consent of the Company and [(i)] the holders of at least [*specify percentage*] of the then-outstanding Shares[, or (ii) for an amendment, termination or waiver effected prior to the Initial Closing, Purchasers obligated to purchase [*specify percentage*] of the Shares to be issued at the Initial Closing].[[78]](#footnote-78) Any amendment or waiver effected in accordance with this Section 6.10 shall be binding upon the Purchasers and each transferee of the Shares (or the Common Stock issuable upon conversion thereof), each future holder of all such securities, and the Company.

## Severability

. The invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision.

## Delays or Omissions

. No delay or omission to exercise any right, power or remedy accruing to any party under this Agreement, upon any breach or default of any other party under this Agreement, shall impair any such right, power or remedy of such non-breaching or non-defaulting party nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of any party of any breach or default under this Agreement, or any waiver on the part of any party of any provisions or conditions of this Agreement, must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

## Entire Agreement

. This Agreement (including the Exhibits hereto), the Restated Certificate and the other Transaction Agreements constitute the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties are expressly canceled.

## [Corporate Securities Law

.[[79]](#footnote-79)THE SALE OF THE SECURITIES THAT ARE THE SUBJECT OF THIS AGREEMENT HAS NOT BEEN QUALIFIED WITH THE COMMISSIONER OF FINANCIAL PROTECTION AND INNOVATION OF THE STATE OF CALIFORNIA AND THE ISSUANCE OF THE SECURITIES OR THE PAYMENT OR RECEIPT OF ANY PART OF THE CONSIDERATION THEREFOR PRIOR TO THE QUALIFICATION IS UNLAWFUL, UNLESS THE SALE OF SECURITIES IS EXEMPT FROM THE QUALIFICATION BY SECTION 25100, 25102 OR 25105 OF THE CALIFORNIA CORPORATIONS CODE. THE RIGHTS OF ALL PARTIES TO THIS AGREEMENT ARE EXPRESSLY CONDITIONED UPON THE QUALIFICATION BEING OBTAINED, UNLESS THE SALE IS SO EXEMPT.]

## Termination of Closing Obligations

. Each Purchaser shall have the right to terminate its obligations to complete the [Initial] Closing [or any subsequent Closing, as the case may be,] if prior to the occurrence thereof, any of the following occurs:

### the Company consummates a Deemed Liquidation Event (as defined in the Restated Certificate);

### the closing of an initial public offering of the Company, in which case the Purchasers may terminate their obligations hereunder immediately prior to, or contingent upon, such closing; or

### the Company (i) applies for or consents to the appointment of a receiver, trustee, custodian or liquidator of itself or substantially all of its property, (ii) becomes subject to the appointment of a receiver, trustee, custodian or liquidator of itself or substantially all of its property, (iii) makes an assignment for the benefit of creditors, (iv) institutes any proceedings under the United States Bankruptcy Code or any other federal or state bankruptcy, reorganization, receivership, insolvency or other similar law affecting the rights of creditors generally, or files a petition or answer seeking reorganization or an arrangement with creditors to take advantage of any insolvency law, or files an answer admitting the material allegations of a bankruptcy, reorganization or insolvency petition filed against it, or (v) becomes subject to any involuntary proceedings under the United States Bankruptcy Code or any other federal or state bankruptcy, reorganization, receivership, insolvency or other similar law affecting the rights of creditors generally, when proceeding is not dismissed within 30 days of filing, or have an order for relief entered against it in any proceedings under the United States Bankruptcy Code.

## Dispute Resolution

.[[80]](#footnote-80)

[*Alternative 1:* Any unresolved controversy or claim arising out of or relating to this Agreement, except as (i) otherwise provided in this Agreement, or (ii) any such controversies or claims arising out of either party’s intellectual property rights for which a provisional remedy or equitable relief is sought, shall be submitted to arbitration by one arbitrator mutually agreed upon by the parties, and if no agreement can be reached within 30 days after names of potential arbitrators have been proposed by Judicial Arbitration and Mediation Services, Inc. (“**JAMS**”),[[81]](#footnote-81) then by one arbitrator having reasonable experience in corporate finance transactions of the type provided for in this Agreement and who is chosen by JAMS. The arbitration shall take place in [*location*], in accordance with the JAMS rules then in effect, and judgment upon any award rendered in such arbitration will be binding and may be entered in any court having jurisdiction thereof. There shall be limited discovery prior to the arbitration hearing as follows: (a) exchange of witness lists and copies of documentary evidence and documents relating to the issues to be arbitrated, (b) depositions of all party witnesses, and (c) such other depositions as may be allowed by the arbitrators upon a showing of good cause. Depositions shall be conducted in accordance with the [*state*] Code of Civil Procedure, the arbitrator shall be required to provide in writing to the parties the basis for the award or order of such arbitrator, and a court reporter shall record all hearings, with such record constituting the official transcript of such proceedings.

Each of the parties to this Agreement consents to personal jurisdiction for any equitable action sought in the U.S. District Court for the District of [\_\_\_\_\_] or any court of the [State][Commonwealth] of [*state*] having subject matter jurisdiction.][[82]](#footnote-82)

[*Alternative 2:*

The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of [*state*] and to the jurisdiction of the United States District Court for the District of [judicial district] for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of [*state*]or the United States District Court for the District of [*judicial district*], and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject personally to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Agreement or the subject matter hereof may not be enforced in or by such court.

Each of the parties to this Agreement consents to personal jurisdiction for any equitable action sought in the U.S. District Court for the District of [\_\_\_\_\_] or any court of the [State][Commonwealth] of [*state*] having subject matter jurisdiction.]

[WITH Either alternative:][[83]](#footnote-83)

[Waiver of Jury Trial:EACH PARTY HEREBY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, THE OTHER TRANSACTION AGREEMENTS, THE SECURITIES OR THE SUBJECT MATTER HEREOF OR THEREOF. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS (INCLUDING NEGLIGENCE), BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF THE PARTIES HERETO AND THESE PROVISIONS WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY HERETO HEREBY FURTHER WARRANTS AND REPRESENTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.][[84]](#footnote-84)

## [No Commitment for Additional Financing

. The Company acknowledges and agrees that no Purchaser has made any representation, undertaking, commitment or agreement to provide or assist the Company in obtaining any financing, investment or other assistance, other than the purchase of the Shares as set forth herein and subject to the conditions set forth herein. In addition, the Company acknowledges and agrees that (i) no statements, whether written or oral, made by any Purchaser or its representatives on or after the date of this Agreement shall create an obligation, commitment or agreement to provide or assist the Company in obtaining any financing or investment, (ii) the Company shall not rely on any such statement by any Purchaser or its representatives, and (iii) an obligation, commitment or agreement to provide or assist the Company in obtaining any financing or investment may only be created by a written agreement, signed by such Purchaser and the Company, setting forth the terms and conditions of such financing or investment and stating that the parties intend for such writing to be a binding obligation or agreement. Each Purchaser shall have the right, in its sole and absolute discretion, to refuse or decline to participate in any other financing of or investment in the Company, and shall have no obligation to assist or cooperate with the Company in obtaining any financing, investment or other assistance.]

## [Waiver of Conflicts

. Each party to this Agreement acknowledges that [*insert name of Company counsel*], counsel for the Company, may have in the past performed, and may continue to or in the future perform, legal services for certain of the Purchasers in matters that are similar, but not substantially related, to the transactions described in this Agreement, including the representation of such Purchasers in venture capital financings and other matters. Accordingly, each party to this Agreement hereby acknowledges that (a) they have had an opportunity to ask for information relevant to this disclosure, and (b) [*insert name of Company counsel*] represents only the Company with respect to the Agreement and the transactions contemplated hereby. The Company gives its informed consent to [*insert name of Company counsel*]’s existing and/or future representation of such Purchasers in matters not substantially related to this Agreement, and such Purchasers give their informed consent to [*insert name of Company counsel*]’s representation of the Company in connection with this Agreement and the transactions contemplated hereby.] *[[85]](#footnote-85)*

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this Series A Preferred Stock Purchase Agreement as of the date first written above.[[86]](#footnote-86)

COMPANY: [*Insert Company Name*]

By:

Name:

Title:

Address:

Email: [[87]](#footnote-87)

PURCHASER: [*Insert Investor Name]*

By:

Name:

Title:

1.

**SCHEDULE OF PURCHASERS**[[88]](#footnote-88)

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Name and Address of Purchaser**[[89]](#footnote-89) | **Invested in Convertible Securities ($)** | **Convertible Security Shares** | **Total Cash Purchase Price ($)** | **Shares Purchased by Cash** | **Total Shares** |
|  |  |  |  |  |  |

1.

**FORM OF AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION**

1.

**DISCLOSURE SCHEDULE**

This Disclosure Schedule is made and given pursuant to Section 2 of the Series A Preferred Stock Purchase Agreement, dated as of [date] (the “**Agreement**”), by and among [*Company name*] (the “**Company**”) and the Purchasers listed on Exhibit A attached thereto. All capitalized terms used but not defined herein shall have the meanings as defined in the Agreement, unless otherwise provided. The section numbers below correspond to the section numbers of the representations and warranties in the Agreement; provided, however, that any information disclosed herein under any section number shall be deemed to be disclosed and incorporated into any other section number under the Agreement where such disclosure would be appropriate and such appropriateness is reasonably apparent from the face of such disclosure. Nothing in this Disclosure Schedule is intended to broaden the scope of any representation or warranty contained in the Agreement or to create any covenant. Inclusion of any item in this Disclosure Schedule (1) does not represent a determination that such item is material or establish a standard of materiality, (2) does not represent a determination that such item did not arise in the ordinary course of business, (3) does not represent a determination that the transactions contemplated by the Agreement require the consent of third parties, and (4) shall not constitute, or be deemed to be, an admission to any third party concerning such item. This Disclosure Schedule includes brief descriptions or summaries of certain agreements and instruments. Such descriptions do not purport to be comprehensive and are qualified in their entirety by reference to the text of the documents described, true and complete copies of which have been made available to the Purchasers or their respective counsel.

1.

**FORM OF INDEMNIFICATION AGREEMENT**

1.

**FORM OF INVESTORS’ RIGHTS AGREEMENT**

1.

**FORM OF MANAGEMENT RIGHTS LETTER**

1.

**Form of Right of First Refusal and Co-Sale Agreement**

1.

**FORM OF VOTING AGREEMENT**

1.

**FORM OF LEGAL OPINION**

**ADDENDUM 1**

[Alternative dispute resolution provision:[[90]](#footnote-90)

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a “**Dispute**”) shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 Del. C § 5801, et seq. (the “**DRAA**”). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the “**Arbitration**”) in accordance with this Section 6.16, and each party represents and warrants that it is not a “consumer” as such term is defined in 6 Del. C. § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in sections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section 6.16 and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules (the “**Rules**”), as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.[[91]](#footnote-91) To be effective, any departure from the Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in such location as the parties and the Arbitrator may agree.[[92]](#footnote-92)

(d) The Arbitration shall be presided over by one arbitrator (the “**Arbitrator**”) who shall be [*insert name of person*]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five days of being notified of such person’s appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the “**Replacement Arbitrator**”). The Replacement Arbitrator shall be [*describe qualifications of the Replacement Arbitrator*]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within 45 days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.[[93]](#footnote-93)

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.[[94]](#footnote-94)

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.[[95]](#footnote-95)

(g) The arbitral award (the “**Award**”) shall (i) be rendered within [120] days after the Arbitrator’s acceptance of the appointment;[[96]](#footnote-96) (ii) be delivered in writing; (iii) state the reasons for the Award;[[97]](#footnote-97) (iv) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties without the possibility of challenge or appeal, which are hereby waived;[[98]](#footnote-98) and (v) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section 6.16 shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.[[99]](#footnote-99)

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,[[100]](#footnote-100) and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, [any third-party discovery proceedings, including any discovery obtained pursuant thereto,][[101]](#footnote-101) and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery.[[102]](#footnote-102) In all events, the parties [and any third parties] participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(ies) regarding the scope and content of required disclosure.

(i) [Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.][[103]](#footnote-103) [The prevailing party shall be entitled to reasonable attorney’s fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.]

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the “**Respondent**”) is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, the Respondent shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of res judicata, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section 6.16, if any amendment to the DRAA is enacted after the date of this Agreement, and such amendment would render any provision of this Section 6.16 unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section 6.16 shall be enforced to the fullest extent permitted by law.

(l) [Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.[[104]](#footnote-104)] [*Alternative A:[[105]](#footnote-105)* Any challenge to the final award of the Arbitrator shall be made before a panel of three appellate arbitrators, who shall be [*insert names or description of appellate arbitrators*].[[106]](#footnote-106) The appellate panel may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.[[107]](#footnote-107)] [*Alternative B:[[108]](#footnote-108)* Any challenge to the final award of the Arbitrator shall be made before a panel of three appellate arbitrators, who shall be [*insert names or description of appellate arbitrators*].[[109]](#footnote-109) The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.]]

1. If only one closing is contemplated, references to “Initial Closing,” “each Closing,” “such Closing,” etc. should be modified. If the transaction has a so-called “simultaneous sign and close” you can update the tense accordingly (“has adopted and filed”). [↑](#footnote-ref-1)
2. If the Agreement is signed prior to the Closing, this provision gives the parties flexibility to change the closing date as contingencies arise. As a practical matter, however, the Agreement is usually signed on the date of the Closing. This means that, until the Closing, everyone has an opportunity to back out of the deal. [↑](#footnote-ref-2)
3. **\**Revised Footnote*\*** If the Company has uncertificated shares, consider revising “a certificate representing” to “a notice of issuance of uncertificated shares (and may, upon written request by such Purchaser, issue and deliver a certificate )”. [↑](#footnote-ref-3)
4. If some or all of the Purchasers will be converting previously issued notes to Shares, consider paying the interest in cash, if the terms of the notes permit this, to avoid last-minute re-computations if the closing is delayed. Note that cancellation of interest in return for stock may be a taxable event in the amount of the interest cancelled. Accordingly, some of the Purchasers may require payment of interest in cash to avoid imputation of income without the corresponding payment of cash to pay the tax. [↑](#footnote-ref-4)
5. \****New Footnote*\*** The Company may have tax reporting and/or withholding obligations in connection with the conversion of Convertible Securities into Company stock. Bracketed language provides a generic mechanism for Company to obtain relevant tax documentation to facilitate the tax analysis and comply with its withholding obligations. Section 1.2(b) and this Section 1.3(a)(v) to be tailored to particular specifics of the Convertible Securities being converted, after input from parties’ tax advisors. [↑](#footnote-ref-5)
6. **\**New Footnote*\*** Conform to the convertible securities outstanding. [↑](#footnote-ref-6)
7. **\**New Footnote*\*** Including this provision where there are Safes/notes or similar instruments converting helps ensure that any minor deviations from the formulas (based on rounding, applications of assumptions, etc.) cannot later become an issue. It is recommended that all Safe/note holders sign the financing documents, but this provision (1) speaks only on behalf of the signing holders, and (2) provides for amendment of all convertible securities converting at closing to comply herewith if and to the extent such convertible securities may be amended by some majority and that majority signs. If the instruments require individual consent, it is still beneficial to include this provision, but any safe/note holder that does not sign would not be bound hereby. [↑](#footnote-ref-7)
8. This Section 1.4 is intended to allow the Company to hold an Initial Closing once it has reached the minimum required to close, and then continue to raise capital over some agreed upon period on the same terms. This should not be confused with a “tranched” financing, where the amount committed to the financing round is not invested all at once up front but rather is invested in pre-specified “tranches,” usually dependent on the achievement of agreed upon milestone(s). [↑](#footnote-ref-8)
9. The Company may want to limit this approval right to the larger Purchasers. As an alternative, the Agreement may specify that Additional Purchasers must be approved by the Board of Directors, including the directors elected by the Series A Preferred stockholders. [↑](#footnote-ref-9)
10. See model Indemnification Agreement for discussion of the issue of expanding coverage to include not just VC designee director, but also the fund(s) making the investment. When the fund is also an indemnified party under the indemnification agreement, it may be appropriate for the D&O policy to include an endorsement extending coverage to the fund. [↑](#footnote-ref-10)
11. **\**Revised Footnote*\*** An important point of negotiation is often whether the Company will represent that a given fact (a) is true or (b) is true to the Company’s knowledge. Alternative (a) requires the Company to bear the entire risk of the truth or falsity of the represented fact, regardless of whether the Company knew (or could have known) at the time of the representation whether or not the fact was true. Alternative (b) is preferable from the Company’s standpoint, since it holds the Company responsible only for facts of which it is actually aware. Alternative (b) is also most compatible with the role of diligence and the Company’s representations in venture capital transactions, which is to ensure that venture investors have the best information available regarding their potential investment, rather than to “shift risk” in the manner of an M&A transaction (in other words, venture investors do not expect to sue portfolio companies or their founders for statements made in good faith that later turn out to have been incorrect). [↑](#footnote-ref-11)
12. ***\*New Footnote\**** While this list likely encompasses relevant individuals, consider any unique titles or circumstances for the particular company. [↑](#footnote-ref-12)
13. The Voting Agreement contains representations by the Company and Purchasers relating to “bad actor” disqualifying events. If some or all of the Purchasers are not also entering into the Voting Agreement, consider adding similar representations to the Purchase Agreement in Sections 2 and 3. [↑](#footnote-ref-13)
14. The purpose of the Company’s representations is primarily to create a mechanism to ensure full disclosure about the Company’s organization, financial condition and business to the investors. The Company is required to list any deviations from the representations on a Disclosure Schedule, the preparation and review of which drives the due diligence process on both sides of the deal. For subsequent closings, changes to the Disclosure Schedule are sometimes simply referenced on the Compliance Certificate. The introductory paragraph to this Section 2 may be modified to permit an update to the Disclosure Schedule that would be reasonably acceptable to each of the Purchasers. If this modification is made, a closing condition should be added to indicate that the updated Disclosure Schedule will be delivered and that each of the Purchasers may refuse to close if the updated Disclosure Schedule is not reasonably acceptable to that Purchaser. Some practitioners prefer to deliver the Disclosure Schedule separately, instead of as an exhibit to the Stock Purchase Agreement, so that the Disclosure Schedule will not have to be publicly filed in the event the Stock Purchase Agreement is filed as an exhibit to a public offering registration statement. [↑](#footnote-ref-14)
15. The purpose of this representation is to ensure that basic corporate maintenance has been properly carried out by the Company. Note that the Company is required to disclose failure to qualify in other jurisdictions where it does business only if failure to do so could have a “Material Adverse Effect”; the purpose of this language is to eliminate the time and expense of doing a state-by-state analysis to determine whether the Company should technically be qualified. If the Company has material connections to states in which it is not qualified, these states must be investigated by counsel to determine whether qualification is necessary and whether there are potential adverse effects of having failed to qualify. [↑](#footnote-ref-15)
16. Section 2.2 describes the Company’s capital structure and can be stated either immediately prior to or upon the Initial Closing of the financing. This description details any outstanding rights or privileges with respect to the Company’s securities. In later round financings, this description would also list any preemptive rights, co-sale rights and rights of first refusal granted to investors in prior rounds. In later round financings, consider adding representations that there have been no conversions of previously issued preferred stock to common stock, the number of shares that would be outstanding on an as-converted-to-common stock basis and the current conversion ratios of each series of preferred stock. [↑](#footnote-ref-16)
17. **\**New Footnote*\*** Added sentence reduces need to list the Convertible Securities in the Disclosure Schedule that are already being listed in the Schedule of Purchasers. [↑](#footnote-ref-17)
18. **\**Revised Footnote*\*** Rule 506 of Regulation D (“**Rule 506**”) incudes specific requirements for offerings made in reliance on the exception from registration provided by Rule 506. Those include the absence of “bad actors” and, for offerings involving general solicitation under Rule 506(c), the taking by the issuer of reasonable steps to confirm each purchaser’s accredited investor status. [↑](#footnote-ref-18)
19. **\**Revised Footnote*\*** If this first bracketed sentence is removed, consider adding the following vesting schedule representation in Section 2.2(d) as the first or second sentence of Section 2.2(d): “All outstanding Common Stock and all stock options held by service providers are subject to a customary vesting schedule either (x) as to employees, [monthly] over four years with a one-year cliff, or (y) as to consultants, [monthly] over [\_\_\_] months, in each case except as set forth in Section 2.2(d) of the Disclosure Schedule.” [↑](#footnote-ref-19)
20. It should be noted that the consensus among the NVCA drafting group was that the 409A issues are better dealt with as a diligence item, rather than a Company rep. Nevertheless, this rep is included here because it is in any case important that the issue be surfaced as part of the financing, to ensure that the Company is mindful of the obligations and potential penalties imposed by 409A as it makes future equity grants. Inserting the rep in the first draft, as a discussion item, is one way to ensure that the issue is not neglected. [↑](#footnote-ref-20)
21. The purpose of this representation is to require the Company to fully disclose its structure, including other corporations, if any, that it controls. If the Company does have subsidiaries, you should (i) add to Section 2.2(f) a representation with respect to the subsidiaries of the Company modeled after Section 2.1 regarding the organization, good standing and qualification of each such subsidiary, and (ii) add a reference to subsidiaries where appropriate in Section 2. Some formulations include subsidiaries in the definition of the Company. This approach works if careful attention is given to representations where the effect of such inclusion requires additional language (for example, the representation in Section 2.2 would require either the exclusion of subsidiaries or a separate paragraph regarding the capitalization of subsidiaries). [↑](#footnote-ref-21)
22. In certain jurisdictions, ancillary agreements executed in connection with the financing, such as noncompetition provisions or voting agreements, may be subject to some question regarding their enforceability, and the representation should be modified accordingly. [↑](#footnote-ref-22)
23. The representations in Sections 2.4 and 2.5 are intended to ensure that the Company has taken all steps necessary to issue the preferred stock in accordance with applicable corporate law. This means that, before the closing, the Company must (A) obtain the requisite stockholder and board approvals to amend the Certificate of Incorporation and issue the stock; (B) file the Restated Certificate; and (C) obtain any other stockholder consents or waivers required pursuant to the Restated Certificate, Bylaws, and existing agreements with securityholders (most importantly, waivers to any existing rights of first offer or refusal). Section 2.5 also requires the Company to disclose any restrictions on transfer other than those contained in the Transaction Agreements (such as any contained in the Restated Certificate and Bylaws, or any preemptive rights contained in agreements with other securityholders). [↑](#footnote-ref-23)
24. The litigation representation will often be unqualified in Series A financings. The bracketed materiality qualifiers are more common in later rounds of financings. In subsequent rounds it is no longer appropriate to have the Company make representations regarding directors (as opposed to employees), since directors will include investor representatives. [↑](#footnote-ref-24)
25. It may be appropriate to include a knowledge qualifier as to investigations since it would be difficult for the Company to know of an investigation unless it had been notified. Some investors nevertheless feel the risk is appropriately borne by the Company. [↑](#footnote-ref-25)
26. ***\*Revised Footnote\**** Section 2.8(a) and Section 2.8(b) give the Purchasers assurances that the Company has the intellectual property rights necessary to conduct its business, or that the Company has disclosed its need to acquire further rights. This model agreement includes options for (i) knowledge-qualifying the entire representation or (ii) knowledge-qualifying solely as to patents and trademarks, on the theory that potential patent conflicts cannot always be uncovered even after reasonable investigation. [↑](#footnote-ref-26)
27. \****New Footnote***\* If the investor has indicated that specific patents or other registered IP are critically important to the success of the Company, consider adding a validity and enforceability rep along the lines of the following: “To the Company’s knowledge, [*specified patent(s)*] (the “**Specified Patents**”) (excluding applications) is valid and enforceable. The Company has not received any notice disputing the inventorship or ownership or the validity or enforceability of the Specified Patents, and to the Company’s knowledge there are no circumstances that would reasonably support such a claim. Notwithstanding the foregoing, this paragraph does not require the disclosure of any non-final notice or correspondence from the registering entity issued in the course of the prosecution of an application.” [↑](#footnote-ref-27)
28. **\**New Footnote*\*** The limitation that the services not be incorporated into the Company’s products or services may not be appropriate for a cloud services company relying heavily on third party integrations or vendors; on the other hand, investors may want to review any such contracts in that situation if the Company’s business is dependent on them. [↑](#footnote-ref-28)
29. **\**New Footnote*\*** In certain circumstances, it may be appropriate for the Company to represent that it does not use (or otherwise does not need) any employee- or consultant-created IP that it does not otherwise own. In such circumstances, consider adding the following representation: “Other than with respect to any Intellectual Property Rights owned by a Founder at the time of the Company’s founding that have been assigned to the Company, to the Company’s knowledge, it is not and will not be necessary to use any Intellectual Property Rights of any of its current and former employees or consultants (or Persons it currently intends to hire) made prior to their engagement by Company.” [↑](#footnote-ref-29)
30. **\**New Footnote*\*** Depending on the jurisdiction in which the Company is based, it may be appropriate to include a representation relating to customary non-solicitation language residing in the Company’s Confidential Information Agreement forms. However, if the Company is based in or has substantial operations in a state in which certain types of non-solicits (*e.g.*, customer non-solicits or certain types of personnel-related non-solicits) may be unenforceable, such a representation would likely not be appropriate. In appropriate circumstances, consider adding the following representation: “If legally permissible, each current and former Key Employee has executed a non-solicitation agreement substantially in the form or forms made available to the Purchasers or their respective counsel.” [↑](#footnote-ref-30)
31. ***\*New Footnote\**** The consensus among the NVCA drafting group is that this disclosure may be better addressed as a diligence matter. Nevertheless, this rep is included here to ensure that all registered intellectual property has been disclosed/reviewed in due diligence, as appropriate. [↑](#footnote-ref-31)
32. **\**Revised Footnote*\*** This representation regarding use of open source software is intended to elicit disclosure of publicly available, third-party source code that the Company has incorporated, into its products under any license that imposes specified obligations upon the Company, particularly so-called “copyleft” obligations. Much publicly available source code is distributed under permissive open source licenses that permit it to be freely used and redistributed without imposing copyleft obligations upon those that use it to develop their own software and listing all such code may be of little added value. A more expansive open source representation, which may be appropriate for distributed products to affirm the content of a list provided in diligence, is as follows: “The Company has made available to the Purchasers and their counsel an accurate and complete list of all items of Open Source Software that it has embedded, linked, or distributed in connection with any Company Code or any of its products or services or proprietary materials (whether generally available or in development), including the name of each such item and the license(s) applicable to each such item.” The primary benefits of requiring this expanded disclosure are: (1) the investors can confirm that the Company is actually tracking its open source software usage; and (2) the investors can perform their own diligence on open source software usage instead of relying on the Company to properly disclose against the narrower representation. Additional diligence may be appropriate, particularly given that acquirers often take a very risk-averse stance on open source license requirements and compliance. [↑](#footnote-ref-32)
33. Sections 2.8, 2.10, 2.11 and 2.15 require the Company to disclose material contracts as well as other agreements or arrangements that might be important from a due diligence standpoint regardless of dollar amount (such as intellectual property licenses or a proposed acquisition of the Company). The disclosure thresholds are negotiable. [↑](#footnote-ref-33)
34. **\**New Footnote*\*** University licenses subject to Bayh-Dole will have march-in rights, so this exception reduces disclosure obligations for licenses already called out elsewhere. [↑](#footnote-ref-34)
35. **\**Revised Footnote*\*** In prior iterations of this model SPA, the following representation, while not standard, was included as optional: “The Company has not engaged in the past [three months] in any discussion with any representative of any Person regarding (i) a sale or exclusive license of all or substantially all of the Company’s assets, or (ii) any merger, consolidation or other business combination transaction of the Company with or into another Person.” Because this rep is not standard, and rarely requested or given, it has been removed; the sentiment of the drafting committee is that this is best addressed as a diligence matter. [↑](#footnote-ref-35)
36. This representation requires disclosure of situations which could create a conflict of interest. This is an item of particular concern in the first round of venture capital financing, since loans among the Company and its founders and their families (which may not be well documented) are especially common prior to the first infusion of outside capital. [↑](#footnote-ref-36)
37. Prior registration rights may conflict with those currently being negotiated among the investors and the Company. Therefore, any such rights must be carefully reviewed, and any conflicts resolved. It is common to have any previous registration rights agreement amended to include the new investors or replaced by a new agreement, including the old and new investors and clarifying their rights relative to each other as well as the Company. It is preferable to have all registration rights relating to the Company’s securities set forth in one document. Having several different sets of rights outstanding can be a significant (and confusing) complication when the Company goes public. [↑](#footnote-ref-37)
38. For early-stage companies without financial statements, it may be appropriate to have an alternative provision, such as the following: “Material Liabilities. The Company has no liability or obligation, absolute or contingent (individually or in the aggregate), except (i) obligations and liabilities incurred after the date of incorporation in the ordinary course of business that are not material, individually or in the aggregate, and (ii) obligations under contracts made in the ordinary course of business that would not be required to be reflected in financial statements prepared in accordance with GAAP.” [↑](#footnote-ref-38)
39. The purpose of this representation is to “bring down” the financial statements from the period covered thereby. Therefore, the third blank in Section 2.14 should be filled with the last date covered by the financial statements provided to the investors, and any of the changes listed in this section must be disclosed on the Disclosure Schedule. While the itemization in this section serves as a useful due diligence checklist, this section can be replaced by a much shorter section reading simply, “[To the Company’s knowledge], since [\_\_\_\_\_\_,] there have been no events or circumstances of any kind that have had or could reasonably be expected to result in a Material Adverse Effect.” [↑](#footnote-ref-39)
40. See footnote 24 – same point as to investor directors. [↑](#footnote-ref-40)
41. The following representation can be added to focus attention on whether there are any diligence issues related to prior workplace misconduct: “or (e) informed, following an internal investigation: (i) by the Company that such Key Employee or director has violated any Company policy regarding appropriate workplace behavior or any Company anti-harassment or anti-discrimination policy prohibiting discrimination and/or harassment at the Company, or (ii) by any prior employer of the violation of any substantially similar policy.” [↑](#footnote-ref-41)
42. Consider PFIC/CFC representations as appropriate. [↑](#footnote-ref-42)
43. The investors may negotiate life insurance coverage in favor of the Company for certain founders or other key employees. If such coverage is in effect prior to the closing, it may be appropriate to add to this representation a statement of the covered individuals and amount of coverage for each. [↑](#footnote-ref-43)
44. Add specific coverages if concerned. [↑](#footnote-ref-44)
45. **\**New Footnote*\***This is included as an optional provision to ensure that at a minimum it is addressed as a diligence matter. Failure to file an 83(b) election is substantially the concern of the particular stockholder who failed to file; however, for employees who fail to file the Company would have withholding obligations and for all failed filings the Company would have reporting obligations. [↑](#footnote-ref-45)
46. This representation is appropriate if there are foreign investors (*i.e.*, nonresident aliens) involved in the financing, since they are subject to the Foreign Investment Real Property Tax Act of 1980 (“**FIRPTA**”). Under FIRPTA, a transfer of an interest in a U.S. Real Property Holding Corporation (a “**USRPHC**”) by a foreign investor is subject to tax withholding, notwithstanding the general rule that sales of stock by foreigners are not subject to U.S. taxation. A corporation is USRPHC if more than 50% of its assets consist of U.S. real property. While very few, if any, venture capital investors are USRPHCs, it is customary to provide this representation in order to ensure that any foreign investors will not be subject to tax withholding. Regardless of FIRPTA, if a foreign person or entity is, directly or indirectly, acquiring a 10% or greater voting interest in the Company, it must file Form BE-13 with the U.S. Department of Commerce unless an exemption applies. [↑](#footnote-ref-46)
47. Section 1202 of the Code provides for a 100% exclusion for U.S. federal income tax purposes (subject to certain limitations) from taxable income of gains recognized on the disposition of certain stock in qualifying corporations that has been held for at least five years. Although investors may ask for various representations about the QSBS eligibility of the Company’s stock, companies may resist on the theory that the analysis regarding current compliance is complex, and that many elements of the test are outside the Company’s control. In any event, compliance with numerous other requirements during the time the investor holds the stock is needed for the investor to qualify for the benefits of Section 1202. See also QSBS covenants in NVCA model IRA. [↑](#footnote-ref-47)
48. The Small Business Concern representation is only necessary if one or more Purchasers is an SBIC. [↑](#footnote-ref-48)
49. Many early-stage companies may not have internal controls and policies in place and be unable to provide this representation. When this is the case, in lieu of a representation it might be appropriate for the Purchasers to request a post-closing covenant that the Company will put such controls in place. [↑](#footnote-ref-49)
50. **\**New Footnote*\*** While these measures are likely required by the preceding rep, companies may not be aware that they have to take these measures in order to make the preceding rep, so it may be helpful to call out these measures specifically. [↑](#footnote-ref-50)
51. **\**New Footnote*\*** The classification rep has been removed because companies cannot reasonably make the representation and the rep regarding export licenses/approvals/filings should provide investors with sufficient protections. [↑](#footnote-ref-51)
52. **\**New Footnote*\*** With the increase in venture-backed companies subject to these healthcare laws, it may be appropriate to specifically make representations in regards thereto, even though as a technical matter the general compliance with law representation likely covers these issues. [↑](#footnote-ref-52)
53. In this representation, the Company confirms that it is not a “TID U.S. business” within the meaning of that term pursuant to the regulations of the Committee on Foreign Investment in the United States (CFIUS). Companies that are not TID U.S. businesses are (a) not subject to either of the two CFIUS *mandatory* filing regimes and (b) not subject to CFIUS’s extended jurisdiction over non-controlling transactions. This representation does not wholly eliminate the possibility of CFIUS intervention – CFIUS has the discretionary right to *elect* to intervene in any transaction that grants a foreign party a control stake in a U.S. business (*e.g.*, an investment of 10% or more, or that otherwise grants substantive rights of control) – but it should provide investors with significant comfort. Some Companies will not be able to make all parts of this representation but will be able to make part (a), the “no critical technologies” representation, which would eliminate the need to make the most common form of mandatory CFIUS filing. The final line of the representation will provide investors additional comfort that reevaluation at the time of the next capital raise is not required. Either this representation or the Purchaser representation in Section 3.9, below, is sufficient to show that no *mandatory* CFIUS filing applies; accordingly, if the Company is able to make this representation, consider removing Section 3.9. [↑](#footnote-ref-53)
54. For life science transactions, consider adding the representations and warranties in Sections 2.31, 2.32 and 2.33. These can be customized to development stage of the Company. [↑](#footnote-ref-54)
55. **\**New Footnote*\*** 21 CFR 312 applies to investigational new drug applications. 21 CFR 812 applies to investigational device exemption. These should be revised based on what is applicable to the Company. [↑](#footnote-ref-55)
56. **\**New Footnote*\*** This should be revised depending on what is applicable to the Company. [↑](#footnote-ref-56)
57. **\**New Footnote*\*** Include to the extent that these jurisdictions that are relevant. [↑](#footnote-ref-57)
58. **\**New Footnote*\*** Model language is to account for the fact that some listed parties may not be fully prohibited, but rather subject to more targeted restrictions. [↑](#footnote-ref-58)
59. **\**New Footnote*\*** This should be revised depending on what is applicable to the Company. [↑](#footnote-ref-59)
60. **\**New Footnote*\*** In this representation, the Company confirms that, to the extent is it regulated by the FCC or any similar state or international regulatory agency, it holds the appropriate authorization to conduct its business and that it is in material compliance with its obligations under the laws and regulations that govern the business. In addition to licenses issued by the FCC to operate telecommunications and media companies, the representation would cover the receipt of an authorization to import and sell in the United States any FCC-regulated electronic product. [↑](#footnote-ref-60)
61. There is no consensus position on what should be included in the “Disclosure” representation. Purchasers will generally try to obtain an unqualified representation that none of the written information and business plan information provided to them by the Company contains a material misstatement or a materially misleading omission. The Company will generally try to resist such a broad representation, on the basis that a 10b-5 type representation, commonly found in an IPO prospectus, is inappropriate for a private financing in which a prospectus-type due diligence process has not occurred. The language shown represents a compromise position. It is important to note that the investors’ right of recovery for a breach of this rep may be broader than under Rule SEC 10b-5, because in order to prevail in a Rule 10b-5 securities fraud action, the purchaser must establish that the seller acted with scienter. That is, a purely innocent misrepresentation normally does not give rise to civil liability under 10b-5. Another issue for a Series A investor to consider is the relative utility of this rep to the Series A investor at this stage, versus the risk of giving such a broad rep to investors in later rounds (who, in a worst case, may be looking for a rep on which to “hang their hat” if they decide they want out of the investment). [↑](#footnote-ref-61)
62. The main purpose of the Purchasers’ representations and warranties in Section 3 are to ensure that the investors meet the criteria for private placement exceptions under applicable state and federal securities laws. [↑](#footnote-ref-62)
63. Occasionally, a venture capital fund will allow its employees and principals to co-invest through a special entity as a nominee. Assuming these employees and principals meet the accreditation or sophistication standards necessary for the private placement exemption being relied on, and assuming the special purpose entity is not formed solely for the purpose of this investment, the language of this provision can be tailored to carve out that special entity. [↑](#footnote-ref-63)
64. Include the bracketed language if the private placement exemption is based on the safe harbor in Rule 155(c) under the Securities Act for private offerings following an abandoned public offering. [↑](#footnote-ref-64)
65. In this representation, the Purchaser confirms that it is not a “foreign person” within the meaning of that term pursuant to the regulations of the Committee on Foreign Investment in the United States (CFIUS), and that it does not permit a foreign person to obtain CFIUS triggering rights by virtue of its investment. Purchasers that are not foreign persons and do not grant foreign persons such rights are not subject to CFIUS review in either its mandatory or elective forms. Either this representation or the Company representation in Section 2.30, above, is sufficient to show that no mandatory CFIUS filing applies. [↑](#footnote-ref-65)
66. This provision is intended to protect the lead investor from claims of reliance by other investors. [↑](#footnote-ref-66)
67. Section 4 contains the conditions which the Company must satisfy (or which must be waived) prior to closing in order to trigger the investors’ obligation to purchase the shares; Section 5 contains the conditions the investors must satisfy to trigger the Company’s obligation to sell the shares. With respect to each side, the essential requirements are (A) that all of the representations and warranties each makes in the Agreement are still true at the closing, and (B) that the other parties have entered into the other Transaction Agreements. If (as is typically the case) the Agreement contemplates a simultaneous signing and closing, consider deleting Sections 4.1 – 4.4, 4.6, 4.7, 4.14, and 4.15 (which, for the most part, can be covered by the representations in Section 2), and recasting the other sections of Section 4 as closing deliverables. If the Agreement contemplates multiple closings (*e.g.*, milestone closings), attention should be given to determining what conditions must be satisfied in order to trigger the investors’ obligations to purchase shares at subsequent closings. Sections 4.3 and 4.5 specifically require the Company to deliver at the Closing a Compliance Certificate and opinion of Company Counsel. In addition, it is generally necessary to deliver at the Closing (A) a Secretary’s certificate certifying the Company’s bylaws, board resolutions approving the transaction, and stockholder resolutions approving the Restated Certificate, (B) good standing certificates from the Secretary of State, (C) the certified Restated Certificate, and (D) waivers of any rights of first refusal triggered by the financing. These documents are therefore listed as “Closing Documents” on transaction checklists even though they are not specifically required to be delivered by the Agreement and are technically covered by the Compliance Certificate and the opinion of the Company’s counsel. If the transaction is structured as a simultaneous signing and closing, the closing conditions serve as a convenient closing checklist, but are significantly diminished in importance. If there are to be subsequent closings, consider whether all of the closing conditions applicable to the Initial Closing should be applicable to the subsequent closing. It may be appropriate to include a separate, more limited set of closing conditions for a subsequent closing. [↑](#footnote-ref-67)
68. Opinions can be expensive and time consuming; particularly for early-stage deals, and as a result the parties might agree to forego a legal opinion as a condition precedent. [↑](#footnote-ref-68)
69. **\**New Footnote*\*** This closing condition is only appropriate if there are changes to the Board composition as part of the transaction. [↑](#footnote-ref-69)
70. **\**April 2024 New Footnote*\*** See the new footnote 86 of the Model Certificate of Incorporation. The proposed post-*Moelis* amendment to the DGCL referenced in the new footnote 78 of the Model Investor Rights Agreement does not solve the Board committee formation issue; an investor interested in the formation of specific committees would still have to rely on the Board of Directors to form those committees and may not be able to get a specific enforcement order to make the Board do that. Accordingly, it may be a simpler solution to make their creation a condition to closing. Such committees are typically more appropriate for later stage companies and/or larger boards. [↑](#footnote-ref-70)
71. Sometimes the term sheet will specify that a minimum number of Shares must be sold at the Initial Closing. This also may be expressed as a minimum aggregate amount to be raised at the Initial Closing. [↑](#footnote-ref-71)
72. See explanatory commentary in introduction to model Management Rights Letter. [↑](#footnote-ref-72)
73. Sometimes a limited survival period is negotiated. [↑](#footnote-ref-73)
74. Delaware law has historically been the richest source for corporation law precedent. [↑](#footnote-ref-74)
75. **\**New Footnote*\*** For investors that desire to have a cc to counsel, this model agreement moves the cc to the address portion of the Schedule of Purchasers/Exhibit A – this way in future rounds, the cc is not simply replaced with the new round’s lead investor’s counsel. [↑](#footnote-ref-75)
76. This provision may need to be modified to fit the facts of a particular transaction. [↑](#footnote-ref-76)
77. Typically, only the lead Purchaser is actually represented by counsel, with the other Purchasers relying on the lead Purchaser having conducted due diligence and hired legal counsel. Occasionally, counsel will represent the Purchasers as a group, or one or more of the other Purchasers will have separate counsel, in which case this provision will need to be tailored accordingly. [↑](#footnote-ref-77)
78. This clause is only necessary where the transaction is structured to be signed in advance of, and not simultaneously with, the Initial Closing. Most transactions are simultaneously signed and closed. [↑](#footnote-ref-78)
79. ***\*April 2024 Revised Footnote\**** Section 6.14 is to be used for transactions governed by California law that are not relying on NSMIA for a state securities law exemption. Please note the title of the California Commissioner of Corporations changed to the Commissioner of Financial Protection and Innovation in 2020. [↑](#footnote-ref-79)
80. **\**New Footnote*\*** ADDENDUM 1 contains a dispute resolution provision for parties who may choose to resolve disputes under the Delaware Rapid Arbitration Act (“**DRAA**”). However, the two alternatives contained herein are generally preferred by parties, which is why the DRAA alternative is set forth in ADDENDUM 1. [↑](#footnote-ref-80)
81. Some parties prefer to use the American Arbitration Association (“**AAA**”) instead of JAMS. [↑](#footnote-ref-81)
82. **\**New Footnote*\*** Binding arbitration may be less expensive and more efficient than litigating disputes in court. Additionally, it may be more confidential. However, some investors dislike that the result cannot be appealed, and the arbitrator(s) is not bound to follow case law and precedent. [↑](#footnote-ref-82)
83. **\**January 2024 New Footnote*\*** If Alternative 1 (arbitration) is being used for dispute resolution, the jury trial waiver language should always be included. If Alternative 2 (court) is being used for dispute resolution, then this provision is optional. [↑](#footnote-ref-83)
84. **\**New Footnote*\*** If the parties select California state court as the forum for any dispute resolution, a jury trial waiver will likely be unenforceable. Instead, the parties can choose to submit to trial by judicial referee, a private person (typically a retired judge) the parties select. All California rules of court, procedure and evidence govern judicial reference proceedings and, unlike with arbitration, the decision may be appealed. Accordingly, if the parties select California state court, and would like to backstop the jury waiver, we recommend including the following provision as a next paragraph:

If the waiver of jury trial set forth in this section is not enforceable, then any claim or cause of action based upon or arising out of this Agreement, the other Transaction Agreements, the securities or the subject matter hereof or thereof shall be settled by judicial reference pursuant to California Code of Civil Procedure Section 638 *et seq.* before a referee sitting without a jury, such referee to be mutually acceptable to the parties. Each party will bear an equal share of the cost for the judicial referee. This paragraph shall not restrict a party from exercising remedies under the Uniform Commercial Code or from exercising pre‑judgment remedies under applicable law. [↑](#footnote-ref-84)
85. Some investors require being carved out of this waiver and to address any potential conflicts of interest and possible waivers in a stand-alone waiver document. [↑](#footnote-ref-85)
86. ***\*Revised Footnote\**** This model agreement provides a simplified/condensed form of a signature page, which shall be adjusted as appropriate. [↑](#footnote-ref-86)
87. **\**New Footnote***\* The notice provision provides that notice addresses be either on the signature pages or in the Schedule of Purchasers – accordingly, the Company’s notice address/email address need to be on the signature page (as the Company isn’t listed on the Schedule of Purchasers) and, for simplicity, the Purchaser’s addresses should only be included in the Schedule of Purchasers. [↑](#footnote-ref-87)
88. **\**New Footnote*\*** Carefully customize the table here so the column headings align with the language used in Section 1 and provide clarity for each series, each purchase price, etc. Note, also, that aggregate purchase prices need to be rounded up to the nearest penny to ensure fully paid shares. [↑](#footnote-ref-88)
89. **\**New Footnote*\*** Include the legal name of the purchaser, its notice address, and if applicable, any cc (stating that the cc shall not itself constitute notice). [↑](#footnote-ref-89)
90. This ADDENDUM 1 includes a provision for parties who would prefer to resolve disputes under the Delaware Rapid Arbitration Act (the “**DRAA**”). The DRAA implements a number of new approaches in arbitration that make the statute unique among national and international arbitration regimes. First, the DRAA provides for a truncated “summary” proceeding before the Delaware Court of Chancery to select an arbitrator where such selection was not made in the agreement to arbitrate. By statute, this proceeding must be concluded no more than 30 days after its initiating filing is served, and the jurisdiction of the Court is highly limited. Second, the DRAA divests the courts of jurisdiction to hear and decide any issue concerning arbitrability or the scope of issues to be arbitrated. Instead, the DRAA vests the arbitrator, and only the arbitrator, with the power and authority to decide such issues. Thus, the body of law relating to whether an issue presented at the outset is “substantive” or “procedural” does not apply to arbitrations under the DRAA, and neither party can seek to disrupt the commencement of a DRAA arbitration by running into court. Third, the DRAA vests the arbitrator with power to enjoin any conduct of a party to the arbitration and divests the courts of power in this regard after an arbitrator is appointed, thus avoiding the need for parallel proceedings to compel or enjoin arbitration. Finally, the DRAA provides that, absent an agreement otherwise, all matters must be finally determined within 120 days of the arbitrator’s acceptance of appointment (which deadline may be extended to 180 days, but no longer, by unanimous consent of the parties). Furthermore, the DRAA imposes a financial penalty on an arbitrator who does not decide the matter within the allotted timeframe: the forfeiture of the arbitrator’s fees. The DRAA makes challenges to the arbitrator’s final award available directly to the Delaware Supreme Court in accordance with the limited standards set forth in the Federal Arbitration Act, eliminating any intermediate level of review. The DRAA also provides that the parties may waive any right to challenge or appeal the arbitrator’s final award by agreement or, where the parties wish to maintain confidentiality or allow more searching review, they may proceed with an arbitral appeal. [↑](#footnote-ref-90)
91. The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this paragraph (b). [↑](#footnote-ref-91)
92. The parties may elect to hold the arbitration in a different location. Note, however, that the “seat” of the arbitration is, by statute, in Delaware. This simply means that Delaware law governs the arbitration, wherever it occurs. [↑](#footnote-ref-92)
93. The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications. [↑](#footnote-ref-93)
94. The DRAA empowers the parties to include one, both or neither of the provisions set forth in paragraph (e). If the parties wish to proceed without discovery, neither of the sentences in paragraph (e) would be included. If they wish to proceed with only party discovery, then only the first sentence would be used. The second sentence would be used only where the parties wished to be able to take discovery from third parties. The DRAA would also permit the taking of only documentary discovery (as opposed to deposition or other testimony) or, alternatively, only oral testimony (as opposed to documents). The DRAA contemplates that the scope of discovery is customizable in this agreement, so in all events, this issue should be addressed. The statutory default, which would come into play if this provision was not included in some form, would be for the Arbitrator to be empowered to summon party witnesses and evidence, but not third-party evidence or witnesses. [↑](#footnote-ref-94)
95. The DRAA provides that the agreement may modify or eliminate the foregoing processes. Elimination may be appropriate in circumstances where the parties agree to present a pure issue of law for resolution, or in circumstances where a narrow, technical issue is the subject of the arbitration. [↑](#footnote-ref-95)
96. The parties may specify a longer period for the arbitration. If they do not do so, the 120-day period of the DRAA is the default, and such period may be extended by no more than an additional 60 days, and then only upon consent of all parties to the arbitration. [↑](#footnote-ref-96)
97. A reasoned award is not required by the DRAA, but it may be required by the parties’ contract. [↑](#footnote-ref-97)
98. The DRAA allows the parties to waive the right to appeal. This provision should only be included if the parties intend to waive appellate rights. Paragraph (l) below is included in the event that the parties wish to preserve the right to appeal the Arbitrator’s award, in which case clause (iv) of paragraph (g) should not be included. [↑](#footnote-ref-98)
99. Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision. [↑](#footnote-ref-99)
100. This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration. [↑](#footnote-ref-100)
101. Eliminate reference to “third party discovery proceedings” in the event that such proceedings were not contracted for in paragraph (e), above. [↑](#footnote-ref-101)
102. Clause (v) would be excluded in the event that third-party discovery was not provided for in paragraph (e) above. [↑](#footnote-ref-102)
103. The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the event that the parties wish to vary this provision, they should do so here. Such variations could include a “loser pays” provision or an “arbitrator chooses” provision, which is not prohibited by the DRAA. [↑](#footnote-ref-103)
104. The DRAA permits the parties to waive appellate review, to proceed with a limited review in the Delaware Supreme Court, or to proceed with a private appellate arbitral review. This provision contemplates a review in the Delaware Supreme Court. In the event it is used, the parties should eliminate clause (iv) of paragraph (g). [↑](#footnote-ref-104)
105. The following is an alternative appellate provision in the event that the parties do not to wish to proceed with an appeal before the Delaware Supreme Court and desire a limited scope of appeal in accordance with the FAA. [↑](#footnote-ref-105)
106. In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one or more senior Delaware lawyers. [↑](#footnote-ref-106)
107. This provision contemplates a scope of challenge to the Arbitrator’s final judgment limited to the grounds for review of an arbitral award under the Federal Arbitration Act. Parties who wish a broader scope of review may wish to consider the succeeding alternate provision set forth above. [↑](#footnote-ref-107)
108. The following is an alternative appellate provision for use in the event that the parties do not to wish to proceed with an appeal before the Delaware Supreme Court and desire that the scope of their appeal be as broad as possible. [↑](#footnote-ref-108)
109. In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one or more senior Delaware lawyers. [↑](#footnote-ref-109)