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**[Name of Issuing Corporation]**

**SECURITIES PURCHASE AGREEMENT**

**BY AND AMONG**

**[Name of Issuing Corporation],**

**[THE CORPORATION][THE FOUNDERS]**

**[, AND CERTAIN STOCKHOLDERS] OF [Name of Issuing Corporation]**

**IDENTIFIED ON SCHEDULE 1**

**AND**

**THE INVESTOR**

**EFFECTIVE AS OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

Preliminary Draft – This transaction is subject to negotiation and this draft does not constitute an offer. This document is intended solely to facilitate discussions among the parties identified herein. It is not intended to create, and will not be deemed to create, a legally binding or enforceable offer or agreement of any type or nature prior to the duly authorized and approved execution of this document by all such parties and the delivery of an executed copy hereof by all such parties to all other parties.

**SECURITIES PURCHASE AGREEMENT** [[1]](#footnote-1)

**[Series B Preferred Stock]**

**Securities Purchase Agreement** (this “*Agreement*”), effective as of \_\_\_\_\_\_\_\_\_, is entered into by and among [Insert Name of the Issuing Corporation][[2]](#footnote-2), a \_\_\_\_ [Insert State of Incorporation] corporation (the “*Company*”), [the Stockholders of the Company listed in Schedule 1 hereto (the “*Existing Stockholders*”), ][ \_\_\_\_\_\_ (the “*Founders*”)] as to certain provisions hereof,][[3]](#footnote-3) and [Insert Name of Investor or Investment Group] (the “*Investor*”)[[4]](#footnote-4). Certain capitalized terms used in this Agreement are defined in Section 7.1 of this Agreement.

**RECITALS**

 **WHEREAS**, the Investor desires to purchase from the Company, and the Company desires to sell to the Investor, newly-authorized \_\_\_% Series B Redeemable Cumulative Preferred Stock, $\_\_\_ par value per share, of the Company (the “*Series B Preferred Stock*”)[[5]](#footnote-5) upon the terms and conditions set forth herein (the “*Investment Transaction*”); and

 **WHEREAS**, the Company has required as a condition and an inducement to its willingness to enter into this Agreement and to consummate the Investment Transaction, that the Company, the Investors, and the Existing Stockholders shall enter into: (a) a Stockholders’ Agreement in substantially the form set forth in Exhibit B to this Agreement (the “*Stockholders Agreement*”) and (b) a Registration Rights Agreement in substantially the form set forth in Exhibit C to this Agreement (the “*Registration Rights Agreement*”).

**NOW, THEREFORE**, in consideration of the foregoing, and of the mutual representations, warranties, covenants and agreements contained in this Agreement and other valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

# Authorization and Sale of Acquired Shares.

## **Authorization**. The Company shall adopt and file with the [Secretary of State of the State of \_\_\_\_\_] at or before the Closing[[6]](#footnote-6), the Amended and Restated [Articles of Incorporation] [Certificate of Incorporation/Certificate of Designations] in the form attached hereto as Exhibit A (the “*Amended Articles*”).[[7]](#footnote-7)

## **Purchase and Sale**.On the basis of the representations, warranties, and agreements contained in this Agreement, and subject to the terms and conditions of this Agreement, the Investor[s] shall purchase from the Company, and the Company shall sell, issue, and deliver to the Investor[s] \_\_\_\_\_ shares of the Series B Preferred Stock[[8]](#footnote-8) (such shares of Series B Preferred Stock issued to the Investor[s], the “*Acquired Shares*”), representing all of the outstanding shares of Series B Preferred Stock, at a purchase price of $\_\_\_\_ per share (“*Per Share Price*”), or an aggregate of $\_\_\_\_\_ (“*Aggregate Purchase Price*”), payable by the Investor as set forth in Section 1.3 hereof.[[9]](#footnote-9)

## **Payment of Purchase Price**. At the Closing, the Investor[s] shall pay the Aggregate Purchase Price to the Company by wire transfer of immediately available funds to an account designated by the Company in writing at least one Business Day prior to the Closing Date.[[10]](#footnote-10)

## **Use of Proceeds**. The Company shall use the proceeds from the sale of the Acquired Shares for \_\_\_\_ and general corporate purposes[; *provided, however*, that none of the net proceeds from the sale of the Acquired Shares shall be applied, directly or indirectly, to the payment of or for \_\_\_\_\_\_\_\_\_\_].[[11]](#footnote-11)

## **The Closing[s]**.The closing of the purchase and sale of the Acquired Shares (“*Closing*”) shall take place at 10:00 a.m., on \_\_\_\_\_\_\_\_, 20\_\_ at the offices of [insert law firm and law firm address] or such other time and place (including by means of an exchange of documents and signatures facsimile, e-mail, or other electronic transmission) as the parties may mutually agree (the “*Closing Date*”).[[12]](#footnote-12)

## **Deliveries at Closing**. At [the][each] Closing, (a) the Company shall deliver to [the][each] Investor a certificate or certificates representing the number of Acquired Shares being purchased by [the][each] Investor at the Closing, registered in the name of the Investor, and (b) [the][each] Investor shall pay to the Company the [Aggregate Purchase Price][applicable Investor Purchase Price] in the manner set forth in Section 1.3 hereof.[[13]](#footnote-13)

# **Representations and Warranties of the Company [and Founders]**.[[14]](#footnote-14) Except as set forth in the disclosure schedules, dated as of the date of this Agreement and attached hereto, that have been delivered by the Company to the Investor[s] prior to the execution and delivery of this Agreement (the “*Disclosure Schedule*”), which exceptions shall be deemed to part of the representations and warranties made hereunder (the Disclosure Schedule shall be arranged in sections corresponding to the numbered and lettered sections contained in this Sections 2[, and each such exception set forth in the Disclosure Schedule however shall not be deemed a disclosure or an exception with respect to any other section or sections of this Agreement unless reliance of such items to such other section or sections is specifically referenced to each applicable item in the Disclosure Schedule)][[15]](#footnote-15), the Company[[16]](#footnote-16) hereby represents and warrants [the Investor][each of the Investors] as follows:

## **Organization, Standing, and Power**. The Company is a corporation duly incorporated, validly existing, and in good standing[[17]](#footnote-17) under the Laws of the State of \_\_\_\_, and has the requisite corporate power and authority to own, lease, operate and otherwise hold its properties and assets and to carry on its business as it is now being conducted. The Company is duly qualified or licensed to do business as a foreign corporation and is in good standing in each jurisdiction in which the character or location of the property owned, leased, operated, or held by it or the nature of the business transacted by it makes such qualification or license necessary[, except where the failure to be so qualified or licensed would not, individually or in the aggregate, have a Material Adverse Effect on the Company][[18]](#footnote-18).

## **Authority; Due Execution**.[[19]](#footnote-19) The Company has all of the requisite corporate power and authority to execute and deliver, and to perform its obligations hereunder and to consummate the Investment Transaction contemplated by, this Agreement. The execution, delivery, and performance by the Company of this Agreement and the other Transaction Documents and the consummation of the transactions contemplated hereby and thereby, including the Investment Transaction, have been duly and validly authorized by all necessary corporate action on the part of the Company. This Agreement and the other Transaction Documents have been duly executed and delivered by the Company and, assuming due and valid authorization, execution and delivery by [the][each] Investor [and Founder/Existing Stockholder], each will constitute a legal, valid, and binding obligation of the Company, enforceable against it in accordance with its terms[[20]](#footnote-20) (except to the extent enforceability may be limited by (i) applicable bankruptcy, insolvency, reorganization, moratoriums, or similar Laws affecting creditors’ rights and remedies generally, (ii) the availability of the equitable remedy of specific performance and injunctive relief is subject to the discretion of the court before which any proceedings may be brought, or (iii) applicable federal and state securities Laws with respect to indemnification provisions contained in the Stockholders Agreement and Registration Rights Agreement (the “*Bankruptcy and Equity Exceptions*”).

## **No Conflict or Required Approvals**.[[21]](#footnote-21)

### Except as set forth in the Disclosure Schedule, neither the execution and delivery of this Agreement or any of the other Transaction Documents, nor the consummation by the Company of Investment Transaction contemplated hereby, or compliance with any of the terms or provisions herein by the Company will: (i) conflict with or violate any provision of the Articles [Certificate] of Incorporation or Bylaws, of the Company, [assuming the filing of the Amended Articles prior to the consummation of the Investment Transaction], (ii) conflict with, violate, or constitute or result in a [material] breach of any term, condition, or provision of, or constitute a default (with or without due notice or lapse of time or both) under, or give rise to any right of termination, modification, cancellation, or acceleration of any obligation or the loss of any material benefit under, or require a Consent pursuant to any of the terms, provisions, or conditions of any material loan or credit agreement, note, mortgage, indenture, deed of trust, lease, sublease, license, sublicense, agreement, Permit, concession, franchise, security interest, instrument of indebtedness, plan or other instrument, purchase order, or other agreement or Contract to which the Company [or any of the Company’s Subsidiaries is a party] or by which [it is][any of them are] bound or to which [its][their respective] properties or assets are subject, (iii) result in the imposition of any Lien upon any properties or assets of the Company[, or any of the Company Subsidiaries] or in the suspension, revocation, forfeiture or nonrenewal of any material Permit or license applicable to the Company [or any of the Company’s Subsidiaries], or (iv) conflict with or violate any judgment, order, writ, injunction, decree of any court, governmental, regulatory or administrative agency, commission, authority, instrumentality, or other public body, domestic or foreign (a “*Governmental Entity*”), or material Law applicable to the Company[, or any of the Company Subsidiaries], or any of [its][their respective] assets or properties[; except in the case of clauses (ii), (iii), or (iv) of this Section 2.3(a), as would not have a Material Adverse Effect on the Company or its ability to consummate and perform the terms of this Agreement].

### Assuming the accuracy of the representations made by the Investor[s] in Section 3 of this Agreement, no notice to, registration, qualification, designation, declaration of, or filing by the Company with, or the Consent or Permit of, or any action by any Governmental Entity or any other Person is required on the part of the Company in connection with the execution and delivery of this Agreement or the other Transaction Documents, or the consummation the Investment Transaction, including, without limitation, the offer, issuance, sale, and delivery of the Acquired Shares, except: (i) the filing of the Amended and Articles, which shall be filed prior to the Closing, and (ii) the filings as may be required under applicable provisions of United States federal securities Laws (including, if applicable, pursuant to Regulation D promulgated under the Securities Act of 1933, as amended (the “*Securities Act*”)), and as may be required under applicable state securities Laws, each of which will be filed timely within the applicable periods therefor.

## **Capitalization**. [[22]](#footnote-22)

### The authorized capital stock of the Company as of the Closing Date, after giving effect to the filing of the Amended Articles but prior to giving effect to the Investment Transaction contemplated hereby, shall consist of: (i) \_\_\_\_\_\_\_\_\_\_ shares of common stock, par value $\_\_\_ per share (“*Common Stock*”), of which \_\_\_\_\_\_ shares will be issued and outstanding, and \_\_\_ shares shall have been reserved for issuance pursuant to outstanding Options, all of which have been issued under the Equity Incentive Plan, and (ii) \_\_\_\_\_ shares of preferred stock (“*Preferred Stock*”), of which (x) \_\_\_\_\_\_\_ shares have been designated as Series A Preferred Stock, par value $\_\_\_ per share (“*Series A Preferred Stock*”), \_\_\_\_ of which will be issued and outstanding, and (y) \_\_\_\_\_ shares of Series B Preferred Stock, none of which will be issued and outstanding.[[23]](#footnote-23) [The Company holds no shares of Common Stock or Preferred Stock as treasury shares.] The rights, privileges, and preferences of the Series B Preferred Stock are as stated in the Amended Articles.

### [Each share of Series A Preferred Stock is convertible into \_\_\_ shares of Common Stock and the outstanding shares of Series A Preferred Stock is convertible into an aggregate of \_\_ shares of Common Stock. None of the Series A Preferred Stock issued by the Company has been converted into shares of Common Stock. The Company has reserved a sufficient number of shares of Common Stock, for issuance upon conversion of all of the outstanding Series A Preferred Stock.][[24]](#footnote-24)

### All issued and outstanding shares of Common Stock and Preferred Stock have been duly authorized and validly issued and are fully paid and nonassessable. All of the issued and outstanding shares of capital stock of the Company have been offered, sold, and issued by the Company in compliance with all [registration or qualification provisions, or exemptions therefrom, under][[25]](#footnote-25) applicable federal securities Laws and the blue sky and securities Laws of all other applicable jurisdictions.

### The Company has reserved \_\_\_ shares of Common Stock for issuance to officers, directors, employees, agents, and consultants pursuant to the \_\_\_\_\_\_ Equity Incentive Plan duly adopted by the Board of Directors [and approved by the Company’s stockholders] prior to the date of this Agreement (the “*Equity Incentive Plan*”). As of the date of this Agreement, \_\_\_ shares of Common Stock have been issued pursuant to restricted stock purchase agreements or Options granted under the Equity Incentive Plan, \_\_\_ shares of Common Stock are subject to issuance under outstanding and unexercised Options issued under the Equity Incentive Plan (“*Outstanding Plan Options*”), and \_\_\_\_\_ shares of Common Stock remain available for issuance pursuant to future grants under the Equity Incentive Plan. The Company has provided to the Investor[s] with a true and complete copy of the Equity Incentive Plan and all forms of awards and agreements used in connection therewith.

### Except as set forth in Section 2.4(e) of the Disclosure Schedule or as provided in the other Transaction Documents: (i) no stockholder of the Company or any other Person is entitled to any preemptive rights with respect to the purchase, sale, or issuance of, or any co-sale rights, rights of first refusal or similar restrictions with respect to, any equity securities of the Company [or any of the Company’s Subsidiaries], (ii) except for the Outstanding Plan Options, the Company has no outstanding or authorized options, warrants, “phantom” equity rights, agreements, subscriptions, calls, demands, or other rights, commitments, or arrangements (written or oral, or contingent or otherwise) of any character to purchase or acquire any capital stock or other equity investments in any security directly or indirectly convertible into or exchangeable or exercisable for, the capital stock of or other equity interest in the Company [or any of the Company’s Subsidiaries], including, without limitation, any convertible indebtedness obligations (collectively, “*Options*”), (iii) except for the Outstanding Plan Options, the Company has no outstanding obligations (contingent or otherwise) to issue any Options or to issue or distribute any capital stock of, or other equity interests in, or assets of the Company [or any of the Company’s Subsidiaries], (iv) there are no outstanding obligations (contingent or otherwise) of the Company [or any of the Company’s Subsidiaries] to purchase, redeem, or otherwise acquire any capital stock of or other equity interests in the Company [or any of the Company’s Subsidiaries], or to pay any dividends or make any other distribution in respect thereof to [its][their respective] securities holders, (v) there are no voting trusts, trusts, proxies or other similar agreements, understandings, or similar arrangements to which the Company [or any of the Company’s Subsidiaries], is a party or by which the Company [is][or any of the Company’s Subsidiaries was] bound with respect to the voting of any shares of capital stock of the Company [or any of the Company’s Subsidiaries],[[26]](#footnote-26) and (vi) there are no contractual obligations or commitments of any character to which the Company [or any of the Company’s Subsidiaries] is a party or by which the Company [or any of the Company’s Subsidiaries] is bound requiring the registration for sale of any capital stock of or other equity interests in the Company [or any of the Company’s Subsidiaries].[[27]](#footnote-27) The Company has valid waivers of any rights by other parties to purchase any of the Acquired Shares covered by this Agreement.

### Section 2.4(f) of the Disclosure Schedule sets forth a true and complete list of: (i) the holders of all of the outstanding shares of Common Stock of the Company immediately prior to the Closing, including the number of shares held by each holder and, with respect to restricted stock, the vesting schedule and repurchase price for the shares, (ii) the holders of all outstanding Options immediately prior to the Closing, including the vesting schedule and the exercise or conversion price and, in the case of “phantom” equity rights, the amount and terms of the payout thereunder, and (iii) the holders of all outstanding Preferred Stock of the Company immediately prior to the Closing.

### None of the Company’s agreements with respect to its Options, its stock purchase agreements, Equity Incentive Plan documents, or documents providing for conversion or exchange of indebtedness, or which are applicable to shares of Preferred Stock outstanding immediately prior to the Closing (including, without limitation, the Articles [Certificate] of Incorporation), contain a provision for acceleration of vesting (or lapse of a repurchase right), mandatory conversion or exercise, or other changes in vesting, conversion, or exercise provisions or other terms of such agreements or understandings upon an occurrence of events or combination of events, including, without limitation, the execution and delivery of this Agreement, consummation of the Investment Transaction or in the case where the Equity Incentive Plan is not assumed in an acquisition.

### All of the Company’s outstanding Common Stock [and Series A Preferred Stock,] and all shares of the Company’s Common Stock underlying outstanding Options [and which may be issued upon conversion of the Series A Preferred Stock] are subject to a right a first refusal in favor of the Company upon any proposed transfer (other than transfers made for estate planning purposes).

## **Issuance of Acquired Shares and Conversion Shares**.[[28]](#footnote-28) The issuance, sale, and delivery of the Acquired Shares to the Investor[s] pursuant to the Investment Transaction and the issuance of shares of Common Stock upon conversion of the Acquired Shares (the “*Conversion Shares*”) have been duly authorized by all necessary corporate action on the part of the Company. The Company has reserved and shall maintain a sufficient number of shares of Common Stock, for issuance upon conversion of all of the outstanding Acquired Shares. The Acquired Shares, when issued, sold, and delivered against payment therefor in accordance with the provisions of this Agreement, and the Conversion Shares (which have been validly reserved for issuance), when issued and delivered upon conversion of the Acquired Shares in accordance with their terms and the Amended Articles, will be duly authorized and validly issued, fully paid and nonassessable, and the Investor[s] will receive full ownership of the Acquired Shares and, when converted, the Conversion Shares, free and clear of any Liens, or preemptive or other similar rights, except those set forth in the Transaction Documents. Assuming the accuracy of the representations of the Investors in Section 3 of this Agreement, and subject to the filings described in Section 2.3(b)(ii) hereof, the offer and sale of the Acquired Shares to the Investor in accordance with the terms and conditions of, and as contemplated by, this Agreement and the issuance of the Conversion Shares upon conversion of the Acquired Shares in accordance with their terms and the Amended Articles will be exempt from the registration under the Securities Act and will be exempt from registration and qualification the securities Laws of all other applicable jurisdictions.

## **Subsidiaries**. Except as set forth in Section 2.6 of the Disclosure Schedule, the Company does not have any Subsidiaries and 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 of similar arrangement.[[29]](#footnote-29)

## **Financial Statements**.[[30]](#footnote-30)

### The Company has provided the Investor[s] with complete and correct copies of the following financial statements (the “*Financial Statements*”): (a) the [unaudited][audited][consolidated] balance sheets of the Company [and its consolidated subsidiaries] as of \_\_\_\_\_\_\_\_\_ [insert recently ended non-year end period] (the “*Balance Sheet Date*”) and December 31, 201\_ and 201\_\_, and (b) the [unaudited][audited][consolidated] statement of income (loss), stockholders’ equity, and cash flows (including related notes and schedules, if any) of the Company [and its consolidated subsidiaries] for the period ended \_\_\_\_\_\_\_\_\_ [insert recently ended non-year end period] and for each of the fiscal years ended December 31, 201\_ and 201\_\_.

### The Financial Statement, including in each case, any related notes: (i) were prepared in accordance with [United States generally accepted accounting principles (“*GAAP*”)](except that unaudited financial statements may not contain footnotes and are subject to normal and recurring year-end adjustments) applied on a consistent basis during the period involved (or except as may be stated in the notes thereto), (ii) were true, complete and correct in all respects as of their respective dates, (iii) were prepared in accordance with and are supported by and are consistent with the books and records of the Company, which books and records have been made available to the Investor[s] and which have been maintained in accordance with good business practices, and (iv) fairly present (except as may be stated in the notes thereto) the [consolidated] financial position at the date thereof and the [consolidated] results of operations and cash flows (and changes in financial position, if any) of the Company and for the periods referred to therein [subject, with respect to the unaudited Financial Statements, to normal and recurring year-end adjustments that are not reasonably likely to be material in amount]. [Set forth in Section 2.7 of the Disclosure Schedule is true, complete, and accurate copy of the Financial Statements.]

###  [Neither] the Company [nor any of the Company’s Subsidiaries] has [not] filed any voluntary petition in bankruptcy or suffered the filing of an involuntary petition by its creditors, suffered the appointment of a receiver to take possession of substantially all of its assets, or suffered the attachment or other judicial seizure of substantially all of its assets, or made an assignment for the benefit of creditors or admitted in writing its inability to pay its debts generally as the same become due.

## **No Undisclosed Liabilities**. [The Company does not have][Neither the Company nor an of its Subsidiaries has] any [material] liabilities or obligations of any nature (whether accrued, contingent or absolute, unliquidated, matured or unmatured, or known, whether due or to become due and regardless of when asserted) except for those liabilities and obligations that are: (a) disclosed in the Financial Statements (or in the footnotes thereto), (b) incurred or arising in the ordinary course of business since the Balance Sheet Date or in connection with the Investment Transaction, or (c) set forth in the Section 2.8 of the Company’s Disclosure Schedule.

## **Absence of Certain Changes or Events**.[[31]](#footnote-31) Since the Balance Sheet Date, except as set forth in Section 2.9 of the Disclosure Schedule:

### the Company [has][and the Company’s Subsidiaries have] conducted [its][their] respective businesses in all material respects only in the ordinary course of business,

### there has not occurred, and there is not currently existing any circumstance, event, change, development, or occurrence (including, without limitation, any damage, destruction, or other casualty loss (whether or not covered by insurance)) which has had, or that is reasonably likely to have [, individually or in the aggregate,] a Material Adverse Effect on the Company [and its Subsidiaries, taken as a whole],

### there has not been any material change in the accounting methods, principals or practices of the Company [or any of the Company’s Subsidiaries],

### there has not been:

#### any waiver or compromise or forgiveness by the Company [or any of its Subsidiaries] of a valuable right or material debt owed to it, or any satisfaction or discharge of any Lien, or payment of any obligation by the Company, except in the ordinary course of business consistent with past practices and which would not have[, individually or in the aggregate,] a Material Adverse Effect on the Company[and its Subsidiaries, taken as a whole];

#### any sale, assignment, transfer, disposition, lease, license, mortgage, pledge, transfer of a security interest in, or Lien created by the Company (except for Permitted Liens), with respect to any [material] properties or assets of the Company (including any Intellectual Property Rights of the Company), whether such transfer was by licensure of substantially all of such rights or otherwise, or the modification of any [material] indebtedness or other liability of the Company;

#### any declaration or setting aside or payment of any dividends or other distributions with respect to any of the Company’s capital stock or any redemption, purchase or other acquisition of any shares of the Company’s capital stock, or any transaction or instrument entered into by the Company which includes a right to acquire any of its capital stock;

####  any [material] change to the compensation or benefits payable or to become payable to any of its directors, officers or key employees or any [material] amendment or change to any employment, severance, or other compensation agreement or arrangement with any director, officer, employee, or stockholder of the Company, or any loans or guarantees made by the Company to any directors, officers, employees, or Affiliates of the Company [or any Company Subsidiary];

#### any resignation or termination of employment by any officer or key employee of the Company

#### any [material] change, modification, amendment or termination of any Contract by which the Company [or any of the Companies Subsidiaries] or any of[its][their] assets are bound, or any waiver, release or assignment of any material rights or claims under any of such Contracts or agreements;

#### the incurrence of any indebtedness for borrowed money, or the incurrence of any other liabilities (including, without limitation, any agreement to become liable for or any assumption) in excess of $\_\_\_\_ individually or in excess of $\_\_\_\_ in the aggregate;

#### any material commitment or transaction (including, but not limited to, any borrowing, capital expenditure or purchase, sale or lease of assets or property) other than in the ordinary course of business;

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

#### any agreement, contract, commitment or arrangement to do any of the foregoing under this Section 2.9.

## **Tax Matters**. The Company has duly filed or caused to be filed in a timely manner (within applicable extension periods) all material Tax Returns and forms required to be filed by it and no material penalties or other charges are or will become due with respect to any of Tax Returns as the result of the late filing thereof. All Tax Returns are true and complete in all material respects. The Company (i) has paid all Taxes due or claimed to be due by any Taxing authority in connection with any of the Company’s Tax Returns (without regard to whether or not such Taxes are shown as due on such Tax Returns), as well as all other Taxes, assessments, and governmental charges which have become due and payable, including, without limitation, all Taxes which the Company is obligated to withhold from amounts owing to employees, creditors, and third parties, and (ii) has established in its Financial Statements adequate reserves [(in conformity with GAAP consistently applied)] for the payment of all Taxes which are accrued but not yet payable. The amounts set up as reserves for Taxes on the Financial Statements of Company are sufficient for the payment of all unpaid Taxes, whether or not such Taxes are disputed or are yet due and payable, for or with respect to the period, and for which the Company may be liable. There is no federal, state, local or foreign action, suit, proceeding, audit, investigation, or claim pending or, to the Knowledge of the Company, threatened in respect of any Taxes for which the Company is or may become liable, nor has any deficiency or claim for any such Taxes been proposed, asserted or, to the Knowledge of the Company, threatened by any Taxing authority. The Company has not consented to any waivers or extensions of any statute of limitations with respect to any taxable year of the Company. There is no agreement, waiver, or consent providing for an extension of time with respect to the assessment or collection of any Taxes against the Company, and no power of attorney granted by the Company with respect to any tax matters is currently in force. There is no Tax Lien (other than for current Taxes not yet due and payable), whether imposed by any federal, state, county or local Taxing authority, domestic or foreign, outstanding against the assets, properties or business of the Company. Neither the Company nor any of its present or former stockholders has ever filed an election pursuant to Section 1362 of the Internal Revenue Code of 1986 (the “*Code*”), that the Company be taxed as an S corporation.

## **Assets**. Set forth in Section 2.11 of the Disclosure Schedule is list of all real property owned or leased by the Company [or a Company Subsidiary], indicating whether such real property is owned or leased by the Company [or a Company Subsidiary].[[32]](#footnote-32) The Company [or a Company Subsidiary] has good and, in the case of real property, marketable title, or valid leasehold interests in, its properties and assets, real and personal, reflected in the most recent Financial Statements or thereafter acquired by the Company (“*Company* *Assets*”), free and clear of all Liens, except for Permitted Liens. All real property [which is identified in Section 2.11 of the Company Disclosure Schedule as] owned by the Company [or a Company Subsidiary] is held in fee simple by the Company [or a Company Subsidiary and none of the Liens thereon interfere with the enjoyment and use of such real property. All buildings and all fixtures, equipment, and other assets and properties which are material or necessary to the business of the Company [or any Company Subsidiary] held under leases or subleases by [it][any of them] are held under valid instruments enforceable in accordance within their respective terms and each such instrument is in full force and effect. The Company [and each of the Company Subsidiaries] is in substantial compliance with the terms of all leases to which it is a party, and enjoys peaceful and undisturbed possession under all such leases. All personal property of the Company [and each Company Subsidiary] is in good operating condition and repair and is suitable and adequate for the uses for which it is intended or is being used. A copy of the Company’s most recently prepared list of Company Assets has been furnished to the Investors.

## **Contracts and Commitments**.[[33]](#footnote-33)

### [Alternative One: Set forth in Section 2.12(a) of the Disclosure Schedule is a list of all [material] Contracts (which, for purposes of this Section 2.12(a), means for those Contracts in which the principal term is a payment to or from the Company, payments to or from the Company in excess of $\_\_\_\_\_) to which the Company[or any of the Company Subsidiaries] is a party, to which the Company [or any of the Company Subsidiaries] is subject, or by which the Company [or any of the Company Subsidiaries] is bound, and pursuant to which the Company is subject to outstanding obligations or liabilities (excluding Contracts pursuant to which the outstanding obligations are solely warranty obligations.]

[Alternative Two: (a) Except for the Transaction Documents and as set forth in Section 2.12(a) of the Disclosure Schedule, [the Company is not][neither the Company nor any Company Subsidiary is] a party to or subject to or bound by any of the following Contracts or proposed transactions that involve: (i) an indebtedness obligation (whether incurred, assumed, guaranteed, contingent, or secured by any asset or otherwise granting of a Lien) in excess of $\_\_\_\_\_\_\_\_ in the aggregate, (ii) an obligation (contingent or otherwise) of the Company or a payment to the Company in excess of $\_\_\_\_\_\_\_\_ individually or in excess of $\_\_\_\_\_in the aggregate, (iii) any non-compete or exclusivity provisions with respect to any line of business or geographic area that restricts the business of the Company [or any of the Company’s Subsidiaries], or that otherwise restrict the ability of the Company [or any of the Company’s Subsidiaries] to compete in any business or geographic area or with any Person, (iv) the license of any Intellectual Property Rights, trade secret, or other proprietary right to or from the Company [or any of the Company Subsidiaries], or (v) indemnification by the Company [or a Company Subsidiary], including, without limitation, indemnification with respect to infringements of proprietary rights].

### Except as set forth in Section 2.12(b) of the Disclosure Schedule, [the Company has not][neither the Company or any of the Company Subsidiaries has]: (i) incurred an indebtedness for borrowed money or incurred any other liabilities (whether incurred, assumed, guaranteed, or secured by any asset or otherwise granting of a Lien) in excess of $\_\_\_\_\_\_\_\_ individually or in excess of $\_\_\_\_\_in the aggregate, which is not paid in full,[[34]](#footnote-34) (ii) declared, set aside, or paid any dividends or other distributions with respect to any of the Company’s capital stock or any redemption, purchase or other acquisition of any shares of the Company’s capital stock (other than pursuant to a termination of employment or services of an employee or consultant pursuant to any option agreement or other agreement approved by the Board), (iii) sold, assigned, transferred, licensed mortgaged, pledged, or otherwise disposed of any of the properties or assets or rights of the Company [or any Company Subsidiary] (other than a sale of inventory in the ordinary course of business), (iv) made any loans or advances to any Person (other than advances for ordinary travel expenses or trade payables incurred in the ordinary course of business),or (v) guaranteed or indemnified any indebtedness of any other Person.

## **Licensing, Manufacturing, and Marketing Rights Agreements**. Except as set forth in Section 2.13 of the Disclosure Schedule, the Company has not granted rights to manufacture, produce, assemble, license, market, sell or distribute the Company’s products to any other Person and is not bound by any agreement that limits or restricts the Company’s exclusive right to develop, manufacture, license, market, sell or distribute the Company’s products.

## **Customers and Suppliers**. No customer or supplier of the Company that accounted for more than [5]% of the Company’s total sales or purchases, as appropriate, during the preceding 12 months has notified the Company that it intends to discontinue its relationship with the Company.

## **Permits; No Violations; and Compliance with Laws**. [[35]](#footnote-35)

### The Company [and each of the Company’s Subsidiaries] holds all [material] Permits necessary for [it][them] to own, lease, and operate [its][their respective] assets and properties and to lawfully carry on its business as now conducted. All such material Permits are, and at each Closing will be, valid and in full force and effect, and the Company [and each of the Company’s Subsidiaries] is, and at each Closing [each of them] shall be, in substantial compliance with all conditions and requirements of such Permits and all rules and regulations relating thereto. [The Company has not received][Neither the Company nor any of the Company’s Subsidiaries has received] any written claim or written notice nor has any Knowledge indicating that the Company [or any of the Company’s Subsidiaries] is currently not in compliance with the terms of any such Permits, except where the failure to be in compliance with the terms of any such Permits, have not had and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect on the Company [and the Company’s Subsidiaries, taken as a whole].

### Except as set forth in Section 2.15(b) of the Disclosure Schedule, the Company (i) is not in conflict with or in violation of any provision of its Articles [Certificate] of Incorporation or Bylaws, (ii) is not in conflict with or in violation or breach of, or in default under (with or without due notice or lapse of time or both) material loan or credit agreement, note, mortgage, indenture, deed of trust, lease, sublease, license, sublicense, agreement, Permit, concession, franchise, security interest, instrument of indebtedness, plan or other instrument, purchase order, or other agreement or Contract to which the Company or by which it is bound or to which its properties or assets are subject, (iii) is not in conflict with or in violation of any judgment, order, writ, or decree of any Governmental Entity to which it the Company is a party or by which it is bound, or, to the Knowledge of the Company, of any provision of any Laws of the United States and of all other jurisdictions applicable to the Company or any of its assets or properties, and any Governmental Entity in respect of the conduct of its business, and (iv) to the Knowledge of the Company, has not performed any act, the occurrence of which would result in the Company’s loss of any right granted under any [material] license, distribution or other agreement.

## **No Litigation**.There is not now pending or, to the Knowledge of the Company, threatened [in writing], any litigation, suit, claim, action, or proceeding, including, without limitation, arbitration proceeding, mediation, or other alternative dispute resolution proceeding, to which the Company is or will be a party (or, as applicable, to the Knowledge of the Company, any of its directors, officers or employees in their capacities as such is or will be a party) or by which its property or assets will or may be bound or affected in or before or by any Governmental Entity which: (a) is against the Company or any director, officer, or employee of the Company, including, without limitation, actions involving the prior employment of any of the Company’s employees, their services provided in connection with the Company’s business, or any information or actions allegedly proprietary to any of their prior employers or their obligations under any agreement with prior employers, (b) challenges or seeks to question the validity of the Investment Transaction or prevent, enjoin, alter or materially delay any of the transactions contemplated by this Agreement, (c) would be reasonably likely to threaten, impede, impair or adversely affect the obligation of the Company to consummate the transactions contemplated by the Agreement, or (d) which is reasonably likely to have a Material Adverse Effect on the Company. In addition to the foregoing, there is no judgment, decree, writ, injunction, rule or order of any Governmental Entity or arbitrator outstanding against the Company or, to the Knowledge of the Company, against any of its directors, officers, or employees which would affect the Company. The Company has not received any written notification of, and to the Knowledge of the Company, there is no, investigation by any Governmental Entity involving the Company [or any of the Company’s Subsidiaries] or any of [its][their respective] assets that would reasonably be likely to have, individually or in the aggregate, a Material Adverse Effect on the Company [and the Company Subsidiaries, taken as a whole.] There is no litigation, suit, claim, action, or proceeding by the Company pending or which the Company intends to initiate.

## **Intellectual Property Rights**.[[36]](#footnote-36)

### Section 2.17 of the Disclosure Schedule contains an accurate and complete list of all material Intellectual Property Rights owned by the Company, setting forth (i) all issued or registered Trademarks, Copyrights, and Mask Works, all Domains, and all issued or pending Patents that are owned by the Company [or a Company Subsidiary], and (ii) all Licenses to which the Company is a party (other than “shrink-wrap” or off-the-shelf software and databases and other works of authorship licensed to the Company under non-exclusive Licenses granted to end-user customers by third parties in the ordinary course of business of such third parties’ businesses but including any open source and similar license), and such listing accurately states, as to each such License, whether the Company is the licensee or licensor. True and complete copies of all Licenses have been furnished to the Investor. The capitalized terms used in this Section 2.17 are defined within the definition of Intellectual Property Rights in Section 7.1(a) hereof.

### Except for the jointly developed and jointly owned patent rights which are identified as such in Section 2.17(b) of the Disclosure Schedule, the Company is the sole and exclusive owner of, or have a valid license or otherwise possess valid rights to use all Intellectual Property Rights necessary provide, produce, use, sell and license the services and products currently provided, produced, used, sold and licensed by the Company and to conduct the business of the Company as it is currently conducted, free and clear of all Liens.

### Except as set forth in Section 2.17(c) of the Disclosure Schedule, the Company is not under any obligation to pay any royalty or other compensation to a third party or to obtain any approval or consent for the use of any Intellectual Property used in or necessary for its business as currently conducted.

### To the Knowledge of the Company, the conduct of the business of the Company as it is currently conducted and the products or services produced, sold or licensed by or under development by the Company does not infringe, misappropriate or otherwise violate the Intellectual Property Rights of any third party, or give rise to any obligations to any Person as a result of co-authorship, co-inventorship, or an express or implied contract for any use or transfer. There are no pending or, to the Knowledge of the Company, threatened any litigation, suit, claim, action, proceeding, hearing, investigation to demand that challenges the liability, validity, enforceability, or the use or ownership by the Company of any portion of the Intellectual Property Rights owned by the Company or, to the Knowledge of the Company, licensed to the Company. The Company has not received any written notice of any infringement or misappropriation by, or conflict with, any third party with respect to such Intellectual Property Rights, and the Company has not received any notice of claims of infringement or misappropriation of or other conflict with any Intellectual Property Right of any third party. None of the Company’s present products (or those under development) or services incorporate, are based upon or are derived or adapted from, any Intellectual Property Right of any other Person in material violation of any statutory or other legal obligation or any agreement to which the Company is a party or by which it is bound.

### The Company has (i) taken commercially reasonable steps to register or otherwise protect all material Intellectual Property Rights owned by the Company, and (ii) taken reasonable steps in accordance with normal industry practice to maintain the confidentiality of its trade secrets and other confidential Intellectual Property Rights, and, to the Knowledge of the Company, there has been no act or omissions by the Company, the result of which would be to materially impair the rights of the Company to apply for or enforce appropriate legal protection of such Intellectual Property Rights, with the exception of any public disclosures or offers of sale that may create prior art with respect to future patent applications. To the Knowledge of the Company, no Intellectual Property Rights owned by the Company is being infringed, diluted, misappropriated or otherwise violated by any third party and no litigation, suit, claim, action, or proceeding by the Company is pending against any third party in connection with any Intellectual Property Rights owned by the Company. Except as set forth in Schedule 2.17(g) of the Disclosure Schedule, none of the Intellectual Property Rights owned by the Company, or to the Knowledge of the Company, licensed to the Company is subject to any outstanding judgment, order, decree, stipulation, injunction or charge. No former employees, officers, directors or independent contractors of the Company has asserted in writing any or, to the Knowledge of the Company, have any, valid claim or valid right to any of the Intellectual Property Rights used in or necessary for the conduct of the Company’s business as now conducted or as currently proposed to be conducted.

### The Company has taken reasonable steps in accordance with normal industry practice to preserve and maintain, reasonably complete notes and records (including, without limitation, drawings, flow charts and prototypes) relating to its know-how, inventions, processes, procedures, drawings, specifications, designs, plans, written proposals, technical data, works of authorship and other proprietary technical information, sufficient to cause such proprietary information to be readily identified, understood and available.

### The Company [has valid Licenses for all software used in the conduct of the business of the Company as it is currently conducted and the Company has not been the subject of, or have been given notice of, any actual or proposed or threatened software license audit by the Business Software Alliance or any other entity, association or Person. None of the software necessary for the business of the Company is subject to an open source software license (including without limitation any GNU General Public License, Creative Commons License, or any similar open source license). Neither execution of this Agreement nor completion of the transaction contemplated herein will invalidate or violate any License or other agreement with respect to the Intellectual Property Rights owned or used by the Company or any confidentiality agreement or non-disclosure agreement or provision to which the Company is subject.

## **Employee Matters and Benefit Plans**.[[37]](#footnote-37)

### Employees. As of the date of this Agreement, the Company employs \_\_\_ full time and \_\_\_ part time employees and engages \_\_\_ consultants or independent contractors. The Company has provided the Investor a true and complete list of its employees, consultants, and contractors, together with a description of all compensation paid or payable to each of those employees, consultants, and contractors who received compensation in excess of $\_\_\_\_ for the fiscal year ended December 31, 20\_\_ and those each of those employees, consultants, and contractors who are expected to receive in excess of such amount for the current fiscal year ending December 31,\_\_\_\_\_.[[38]](#footnote-38)

### Conflicting Agreements. To the Knowledge of the Company, no director, officer or other employee of the Company is a party to or bound by any Contract or other commitment (including, without limitation, those from any previous or current employment, except with respect to the Company [or a Company Subsidiary]), or subject to any judgment, decree, order of any Governmental Entity or any other restrictions that would materially interfere with such Person’s ability to promote the interest of the Company or that would conflict with the business the Company [or a Company Subsidiary]. Neither the execution and delivery of the Transaction Documents nor the carrying on of the business of the Company [or any Company Subsidiary] by [its][their] employees as it is now conducted and as it is proposed to be conducted following the completion of the Investment Transaction contemplated herein will, to the Knowledge of the Company, conflict with or result in a breach of the terms and provisions of, or constitute a breach under any Contract to which director, officer or other employee of the Company [or any Company Subsidiary] is subject.

### Employee Proprietary Information and Confidentiality Obligations. Each of the current and former employees, officers, consultants, and independent contractors of the Company [and each Company Subsidiary] has entered into a written (i) propriety information and inventions assignment agreement, the form of which has been provided to the Investor (“*PIIA Agreement*”)[[39]](#footnote-39), and (ii) a non-competition and non-solicitation agreement, the form of which has been provided to the Investor (“*Non-Competition Agreement*”). No current and former employees, officers, consultants, or independent contractors has excluded any works or inventions from their respective PIIA Agreement and, to the Knowledge of the Company, none of them is in violation of their respective PIIA Agreements or Non-Competition Agreement.

### Employment Arrangements. The Company has disclosed in Section 2.18(d) of the Disclosure Statement and has delivered to the Investor prior to the execution of this Agreement, true, complete, and correct copies (or summaries thereof if not in writing) of all employment, bonus, incentive, deferred compensation, retention, salary continuation, severance, termination, change in control, consulting, retirement Contracts, arrangements, or other obligations or understandings (including any understandings or obligations with respect to fringe benefits) in effect with respect to any present or former officer, directors or employees. The employment of each employee of the Company [and each Company Subsidiary] is terminable at will. Each former officer and key employee of the Company [and each Company Subsidiary] whose employment was terminated by the Company [or any Company Subsidiary] has entered into an agreement with the Company providing for the full release of any claims against the Company[, each Company Subsidiary,] or any related party arising out of such employment.

### Employee Benefit Plans.[[40]](#footnote-40) Section 2.8(e) of the Disclosure Schedule sets forth sets forth an accurate and complete list of all Employee Benefit Plans of the Company. The Company has made all required contributions and has no outstanding liabilities of, or related to, any Employee Benefit Plan, other than obligations for benefits to be paid in the ordinary course to participants in such Employee Benefit Plan and their beneficiaries in accordance with the terms of such Employee Benefit Plan. Each Employee Benefit Plan of the Company has been administered in accordance with ERISA, the Code, and all other applicable Laws, and in accordance with its terms. Each Employee Benefit Plan of the Company that is a “nonqualified deferred compensation plan” within the meaning of Section 409A of the Code complies (and at all times since [insert date of organization of the Company], has complied) in form and in operation with Section 409A of the Code and all regulations and guidance promulgated thereunder. The execution and delivery of this Agreement and the consummation of the Investment Transaction will not: (i) result in any payment becoming due to any director, officer or employee of the Company [or any Company Subsidiary], (ii) accelerate the time of payment or vesting, or increase the amount, of compensation or benefits due any director, officer, employee, agent, or consultant of the Company, or (iii) increase any benefit under any Employee Benefit Plan of the Company.

### Employment Matters. The Company is in material compliance with all applicable Laws relating to the employment and employment practices, including Laws regarding discrimination, harassment, affirmative action, terms and conditions of employment, wage and hour requirements (including the proper classification of, compensation paid to, and related withholding with respect to employees, leased employees, consultants, and independent contractors), leaves of absence, equal opportunity, reasonable accommodation of disabilities, occupational health and safety requirements, collective bargaining, workers’ compensation insurance and the payment of social security and other Taxes. The Company is not delinquent in payments to any of its employees, consultants, and independent contractors for wages, salaries, commissions, bonuses, or other direct compensation for service performed through the date hereof or any required reimbursements. The Company is not a party to, nor to the Knowledge of the Company is threatened with, any material litigation, action, suit, or proceeding by any current or former employee, including without limitation in respect to deferred salary, benefits or severance.

### Labor Matters. [The Company is not, and has never been,][Neither the Company nor any Company Subsidiary is, and has ever been], a party to any union contract, collective bargaining agreement, or similar Contract, and there is no past or pending labor union organizing activity or, to the Knowledge of the Company, any such activity threatened with respect to the Company [or any Company Subsidiary], or any of [its][their] employees. No work stoppage, slowdown, labor strike or other labor trouble against the Company [or any Company Subsidiary] (including, without limitation, any organizational drive) is pending or, to the Knowledge of the Company, threatened, nor has there been any such activity.

## **Related-Party Transactions**.[[41]](#footnote-41) Except as set forth in Section 2.19 of the Disclosure Schedule:

###  [the Company is not][neither the Company nor any Company Subsidiary is] indebted, directly or indirectly, to any directors, officers, employees or stockholders of the Company [or any Company Subsidiary] or to the Immediate Family Members of any such Person, or to any Affiliate of the foregoing, other than amounts payable in connection with advances of expenses incurred in the ordinary course of business or for employee benefits made available to all employees. None of the directors, officers, employees or stockholders of the Company [or any Company Subsidiary] or the Immediate Family Members of any such Person are indebted, directly or indirectly, to the Company [or any Company Subsidiary].

### to the Knowledge of the Company, no employee, officer or [director][[42]](#footnote-42) of the Company[or any Company Subsidiary], or Immediate Family Members of such Person, or any Affiliate of the foregoing has any direct or indirect ownership interest in any firm or corporation with which the Company [or any Company Subsidiary] is affiliated or with which the Company [or any Company Subsidiary] has a business relationship or any firm or corporation that competes with the Company [or any Company Subsidiary] (other than the ownership of less than 2% of the common equity of publicly traded companies that may compete with the Company[or any Company Subsidiary]).

### no employee, officer or [director] of the Company[or any Company Subsidiary], or immediate family member of such Person, or any Affiliate of the foregoing (i) is directly or indirectly interested in any material Contract or proposed transaction with the Company[or any Company Subsidiary], other than standard employment agreements, Options granted under the Equity Incentive Plan approved by the Board of Directors, and indemnification agreements with officers and directors of the Company approved by the Board of Directors (all of such approvals reflected in the written minutes of the Board of Directors previously provided to the Investor), or (ii) has a material relationship (including, without limitation, commercial, banking, industrial, legal, accounting, consulting, charitable or familial relationship) with any customer, service provider, supplier, licensee or licensor, or joint venture partner of the Company[or any Company Subsidiary].[[43]](#footnote-43)

## **Insurance**.[[44]](#footnote-44)The Company carries insurance on its properties, assets, business, and personnel (or commercially reasonable terms and subject to reasonable deductibles) in amounts sufficient and adequate for the business in which the Company is engaged and which are customary for companies similarly situated. Each material insurance policy and fidelity bond covering the properties assets, business, and personnel of the Company are in full force and effect and, with respect to all such policies, all premiums payable with respect to all periods up to and including the Closing have been fully paid.

## **Environmental Matters**.

### Except as disclosed in Section 2.21 of the Disclosure Schedule[, or as would not have, individually or in the aggregate, a Material Adverse Effect on the Company]: (i) [to the Knowledge of the Company], no Hazardous Materials have been generated, transported, used, disposed, stored or treated by the Company [or any Company Subsidiary] and no Hazardous Materials have been released, discharged, disposed, transported, placed or otherwise caused to enter the soil or water in violation with any Environmental Law in, under, or affecting any current or previously owned or lease real properties of the Company, or any Participation Facility or any Owned Property of the Company; (ii) [to the Knowledge of the Company,] the Company and the operation of its business, and all of its current and previously owned or operated Participation Facilities and its Owned Properties are, and have been, in compliance in all material respects with all applicable Environmental Laws; and (iii) there is no suit, claim, action, or proceeding pending or, to the Knowledge of the Company, threatened before any Governmental Entity or other forum in which the Company, or any current or previously owned or operated Participation Facility or Owned Property has been or, to the Knowledge of the Company with respect to threatened proceedings, may be named as a defendant or a potentially responsible party (x) for alleged noncompliance (including by any predecessor) with any Environmental Law, or (y) relating to the release into the environment of any Hazardous Material in violation of applicable Law, whether or not occurring at, on, under, or involving a site owned, leased, or operated by the Company, or any of its Participation Facilities or Owned Properties (or the Company in respect of any Participation Facility or Owned Property).

### The Company has provided to the Investors, true and complete copies of all material environmental records, reports, notifications, engineering studies, environmental studies and assessments, Permits and pending Permit applications, certificates of need, and related correspondence.

## **Corporate Documents; Minute Book and Records**. A copy of the minute books of the Company, which have been furnished or otherwise made available to the Investor, contains the minutes of all meetings (or written consents without a meeting) of the Board of Directors and of the stockholders of the Company since the Company’s date of incorporation, and accurately reflects (in all material respects) all actions by the Board of Directors and stockholders with respect to all transactions referred to in such minutes. The books of account, ledger, order books, records and documents of the Company, each of which have been furnished or otherwise made available to the Investor, accurately and completely reflect all material information relating to the business of the Company, the nature, acquisition, maintenance and, location and collection of each of, its assets, and the nature of all transactions giving rise to the obligations or accounts receivable of the Company.

## **Full Disclosure**.[[45]](#footnote-45) [Alternative One: The Company has made available or provided to the Investor[s] all information reasonably available to the Company that the Investor[s] have requested in connection with their decision whether to purchase the Acquired Shares[, including certain of the Company’s projections describing the proposed business plan. No representation or warranty of the Company contained in this Agreement, the exhibits hereto, any certificate furnished at Closing [or in the other Transaction Documents] contain any untrue statement of a material fact nor[, to the Knowledge of the Company], omit to state a material fact necessary in order to make the statements contained herein or therein not misleading.]

[Alternative Two if there is a private offering memorandum: (a) The confidential private placement memorandum of the Company, dated \_\_\_\_, 20\_\_ (the “*Offering Memorandum*”) [was prepared with reasonable care, and][,]when read in connection with the materials made available to the Investors and subject to qualifications provided in Section 2.27(b) hereof, does not contain any untrue statement of a material fact or omitted to state any material fact necessary in order to make the statements made therein, in light of the circumstances under which they were made, not misleading. Since the respective dates of the information contained in the Offering Memorandum, the Company is not aware of any occurrence which has had a Material Adverse Effect on the Company (except to the extent corrected, amended, revised, or superseded by the materials made available to the Investors prior to the date of this Agreement). (b) Projections included in the Offering Memorandum (i) were prepared [with reasonable care] based on facts then known and fairly, accurately, and completely state the Company’s reasonable good faith forecasts of future events, and (ii) are based on assumptions of future events considered by the Company to be reasonable, but which may or may not occur. As a result of the foregoing, no representation or warranty is made by the Company with respect to, or to be inferred by, the projections included in the Offering Memorandum (whether as to their accuracy or otherwise).]

## **Certain Business Practices**. Neither the Company [or any Company Subsidiary] nor[, to the Knowledge of the Company,] any director, officer, agent or employee of the Company [or any Company Subsidiary] acting on behalf of the Company [or any Company Subsidiary] has: (a) used any funds for unlawful contributions, gifts, entertainment or other unlawful expenses relating to political activity regarding the business of the Company [or any Company Subsidiary], or (b) made, offered, promised, or authorized any unlawful payment or gift of any money or anything of value to or for the benefit of foreign or domestic government officials or employees or to foreign or domestic political parties or campaigns, in each case in violation of the Foreign Corrupt Practices Act of 1977, as amended (“*FCPA*”). Neither the Company [or any Company Subsidiary] nor[, to the Knowledge of the Company,] any director, officer, agent or employee of the Company [or any Company Subsidiary] have made or authorized any bribe, payoff, kickback, payment for influence, rebate or other unlawful payment of funds or received or retained such funds in violation of any Law. The Company maintains and has caused each [Company Subsidiary and] Affiliate to maintain a system of internal controls to ensure compliance with the FCPA and all other anti-bribery or anti-corruption Law.

## [**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 Section 897(c)(2) of the Code and regulations promulgated thereunder.]

## [**Qualified Small Business Stock**.[[47]](#footnote-47)As of and immediately following the Closing, the Company meets and will meet all of the requirements for qualification as a “qualified small business” set forth in Section 1202(d) of the Code, including without limitation the following: (i) the Company will be a domestic C corporation, (ii) the Company's (and any predecessor's) aggregate gross assets, as defined by Section 1202(d)(2) of the Code, at no time between the date of its incorporation and the Closing, have exceeded U.S. $50 million, taking into account the assets of any corporations required to be aggregated with the Company in accordance with Section 1202(d)(3)of the Code, (iii) the Company has not made any purchases of its own stock described in Section 1202(c)(3)(B) of the Code during the one year period preceding the Closing, and (iv) the Company is an eligible corporation as defined by Section 1202(e)(4) of the Code[; provided, however, that in no event shall the Company be liable to the Investor or any other party for damages arising from subsequently proven or identified error in the Company’s determination with respect to the applicability or interpretation of Section 1202 of the Code, unless the Company is grossly negligent or fraudulent in its determination].]

## **[Small Business Concern**.[[48]](#footnote-48) The Company is a “small business concern” under the Small Business Investment Act of 1958 (the “*Small Business Act*”) as defined in Section 121.301 of Title 13 of the Code of Federal Regulations promulgated thereunder. The Company has heretofore furnished to each Investor that is an licensed Small Business Investment a true and complete copy of the completed SBA Form 480 (Size Status Declaration), SBA Form 652D (Assurance of Compliance), and SBA Form 1031 (Portfolio Financing Report).]

## **No Investment Company**. The Company is not an “investment company” within the meaning of the Investment Company Act of 1940, as amended.

# **Representations and Warranties of the Investors**.[[49]](#footnote-49)[Each of the Investors, severally and not jointly,][The Investor][ hereby represent[s] and warrant[s] to the Company as follows:

## **Organization, Standing, and Power**. Each such Investor which is not an individual (an “*Entity Investor*”) is a limited partnership, limited liability company, or a corporation which has been duly organized and is validly existing and in good standing under the laws of its jurisdiction of formation, organization, or incorporation, as the case may be, and has the requisite power an authority to own, lease, operate and otherwise hold its properties and assets and to carry on its business as it is now being conducted.

## **Authority; Due Execution**.

### Each such Entity Investor has all the requisite power and authority to execute and deliver, and to perform its obligations hereunder and to consummate the Investment Transaction contemplated by, this Agreement. The execution, delivery, and performance by each such Entity Investor of this Agreement and the other Transaction Documents to which they are a party, and the consummation of the transactions contemplated hereby and thereby, including the Investment Transaction, have been duly and validly authorized by all necessary action on the part of each such Entity Investor. This Agreement and other Transaction Documents to which they are a party have been duly executed and delivered by each such Entity Investor and, assuming valid authorization, execution and delivery hereof by the Company and each other Investors to this Agreement, each will constitute a legal, valid and binding obligation of such Equity Investor enforceable against it in accordance with its terms (except to the extent enforceability may be limited by the Bankruptcy and Equity Exceptions).

### Each such Investor which is an individual has the full legal capacity to execute and deliver, and to perform its obligations hereunder and to consummate the Investment Transaction contemplated by this Agreement. This Agreement and the other Transaction Documents to which they are a party have been duly executed and delivered by such non-Entity Investor and, assuming valid authorization, execution and delivery hereof by the Company, and each other Investors to this Agreement, will constitute a legal, valid and binding obligation of such Investor enforceable against it in accordance with its terms (except to the extent enforceability may be limited by the Bankruptcy and Equity Exceptions).

## **No Conflict or Required Approvals**. Neither the execution and delivery of this Agreement and the other Transaction Documents to which they are a party, nor the consummation by [each of] the Investor[s] of Investment Transaction contemplated hereby, or compliance with any of the terms or provisions herein by the Investor[s] will (a) if an Entity Investor, conflict with or violate any provision of, or require a Consent under such Entity Investor’s organizational, operating, and governance documents, (b) conflict with, violate, or constitute or result in a [material] breach of any term, condition, or provision of, or constitute a default (with or without due notice or lapse of time or both) under, or require a Consent pursuant to any of the terms, provisions, or conditions any credit agreement, note, indenture, lease, or other instrument to which such Investor or by which any of its properties or assets are subject bound, or (c) conflict with or violate any judgment, order, writ, injunction, decree of any Governmental Entity or material Law applicable to such Investor or any of its assets or properties is subject. No notice, registration, qualification, designation, declaration, or filing with, or the Consent or Permit of, or any action by any Governmental Entity is required on the part of an Investor in connection with the execution and delivery of this Agreement or the other Transaction Documents, or the consummation the Investment Transaction.

## **Investment Intent**.[[50]](#footnote-50) Such Investor: (a) is the sole and true party in interest, and is acquiring its respective portion of the Acquired Shares, and will acquire the Conversion Shares upon conversion of such Acquired Shares, solely for its own account, not as a nominee or agent, for investment purposes only, and not with an intent or a view to the sale or distribution of any part thereof within the meaning of Section 2(a)(11) of the Securities Act, (b) does not have any present intent of making a Transfer of, granting a participation in, or otherwise distributing the Acquired Shares or any Conversion Shares (collectively, the “*Securities*”) in a manner contrary to the Securities Act or the securities Laws of any other applicable jurisdiction, (c) does not have any contract, undertaking, agreement, or arrangement with any Person to Transfer, grant any participation in, or otherwise distribute any of the Securities to such Person, and (d) does not presently have any reason to anticipate any change in circumstances or other particular occasion or event which would cause such Investor to need to sell the Securities, except in accordance with the terms of this Agreement and in compliance with all applicable federal and state securities Laws.

## **Restricted Securities; Transfer Restrictions**.

### Such Investor affirms that it has been advised and understands that (i) none of the Securities have been registered under the Securities Act or registered or qualified under the securities Laws of any other jurisdiction and are being sold in reliance upon an exemption from registration under such Laws, (ii) such Investor may not Transfer the Securities unless they are subsequently registered and qualified under such Laws or, in the opinion of counsel reasonably satisfactory to the Company, an exemption from such registration and qualification is available,[[51]](#footnote-51) (iii) if an exemption from registration or qualification is available, it may be conditioned on various legal, procedural and other requirements which are outside of the Investor’s control and which the Company has no obligation and may not be able to satisfy, and (iv) such Investor is familiar with Rule 144 and Rule 144A as presently in effect and recognizes that in the future the Company may not satisfy the requirements which would permit it to sell the Securities pursuant to Rule 144 or Rule 144A promulgated under the Securities Act. [[52]](#footnote-52)

### Such Investor understands and acknowledges that only the Company can register the Securities under applicable securities Laws, and that the Company has no obligation to register or qualify the Securities under the Securities Act or the securities Laws of any other jurisdiction except as set forth in the Registration Rights Agreement.

## **Knowledge, Experience, and Financial Capability**.

### Such Investor has sufficient knowledge and experience in financial and business matters and investing in companies similar to the Company so that it is capable of evaluating the merits and risks of the investment contemplated by this Agreement and understands and acknowledges that an investment in the Securities and the Company involves certain risks[, including those risk factors set forth in the Offering Memorandum[[53]](#footnote-53)]. Such Investor recognizes that no public market for the Securities exists and none is expected to develop and, as result, when considered in relation to the Transfer restrictions identified in Section 3.5 hereof, that an investment in the Securities may not be liquid and that such Investor must bear the economic risk of the investment indefinitely. Such Investor is a sophisticated investor and has carefully considered and evaluated the risks and benefits of an investment in the Securities and the Company and such Investor has taken full cognizance of, understands, and is willing to bear the risks related to the purchase of the Securities.

### Such Investor further represents that it has adequate means of providing for its current needs and possible contingencies, it can afford to bear the economic risk of holding the Securities for an indefinite period of time, it has no need for liquidity in its investment in the Securities, and it has the net worth sufficient to bear the risks of and to sustain a complete loss of such Investor’s entire investment in the Company. Such Investor has been represented by counsel and other advisors of its choosing.

## **Accredited Investor; Not a Bad Actor**. Such Investor is: (a) an “accredited investor” as such term is defined in Rule 501(a) promulgated under the Securities Act, and (b) is not subject to any “bad actor” disqualification as set forth in Rule 506(d) of Regulation D or any similar disqualification provision that could adversely affect the Company’s reliance on any federal or state securities registration exemption or that could otherwise adversely affect the offering of the Securities.[[54]](#footnote-54) [To the extent the Investor has been formed for the specific purpose of acquiring Securities, such Investor expressly represents and warrants to the Company that each equity holder of such Investor also is an accredited investor as defined in Rule 501(a) of Regulation D promulgated under the Securities Act.[[55]](#footnote-55)]

## **Information Disclosed to Investor**.Such Investor represents, acknowledges and confirms that prior to the sale of the Acquired Shares to such Investor pursuant to this Agreement, such Investor (a) has been given an the opportunity to ask questions of, and receive answers from, representatives of the Company concerning Company and the terms and conditions of the sale of the Acquired Shares by the Company to such Investor and (b) has been given the opportunity to obtain any additional information which such Investor deemed necessary to verify the accuracy of the information supplied to it. Such Investor confirms that it has been furnished with all such requested information and all questions asked by such Investor have been answered to its full satisfaction. Such Investor represents that in connection with its purchase of the Securities, it has not relied on any statement or representation by the Company, or any of its officers and directors, or any of their attorneys or agents, except as specifically set forth herein or provided pursuant to this Section 3.8. Such Investor confirms that it is aware and understands that no federal or state agency has made any finding or determination as to the fairness of this offering nor has made any recommendation or endorsement of the Securities. None of the representations or warranties of the Investor in this Section 3.8 shall limit or modify the representations and warranties of the Company set forth in Section 2 hereof or the right of the Investors to rely thereon.

## **No General Solicitation**.Such Investor represents and certifies that such Investor is not acquiring the Securities as a result of any form of “general solicitation” or “general advertising” as those terms are used in Rule 502(c) of Regulation D promulgated under the Securities Act[[56]](#footnote-56).

## **Reliance on Investor’s Representations**. Such Investor acknowledges and understands that the representations, warranties, and covenants contained in this Section 3 of the Agreement are being furnished, in part, and will be relied on by the Company in determining whether this offering of the Securities is exempt from registration under the Securities Act and the securities laws of all other applicable jurisdictions and, accordingly, confirms that all such statements contained herein are true, complete, and accurate as of the date hereof, and shall be true, accurate, and complete as of the date that this Agreement is executed and delivered, and shall survive the Closing. If any events occur or circumstances exist prior to the issuance of the Acquired Shares to such Investor which would make any of the representations, warranties, agreements, or other information of an Investor set forth herein untrue or inaccurate, such Investor agrees to immediately notify the Company in writing of such fact specifying which representations, warranties, or covenants are not true, correct, or accurate, and the reasons therefor.

## **Investor Source of Funds**.[[57]](#footnote-57)

### Compliance with International Trade Control Laws and OFAC Regulations. Such Investor represents and warrants that such Investor is not now nor shall it be at any time hereafter an individual, corporation, partnership, joint venture, association, joint stock company, trust, trustee, estate, limited liability company, unincorporated organization, real estate investment trust, government or any agency or political subdivision thereof, or any other form of entity with whom a United States citizen, entity organized under the Laws of the United States or its territories or entity having its principal place of business within the United States or any of its territories (collectively, a “*U.S. Person*”), is prohibited from transacting business of the type contemplated by this Agreement, whether such prohibition arises under United States Law, executive orders and lists published by the Office of Foreign Assets Control, U.S. Department of the Treasury (“*OFAC*”) (including those executive orders and lists published by OFAC with respect to Persons that have been designated by executive order or by the sanction regulations of OFAC as Persons with whom U.S. Persons may not transact business or must limit their interactions to types approved by OFAC “*Specially Designated Nationals and Blocked Persons*”) or otherwise. Neither such Investor nor any Person who owns an interest in the Investor, if an Entity (collectively, a “*Purchaser Party*”), is now nor shall be at any time hereafter a Person with whom a U.S. Person, including a “financial institution” as defined in 31 U.S.C. § 5312(a)(2) (“*Financial Institution*”), is prohibited from transacting business of the type contemplated by this Agreement, whether such prohibition arises under United States Law, regulation, executive orders and lists published by the OFAC (including those executive orders and lists published by OFAC with respect to Specially Designated Nationals and Blocked Persons) or otherwise.

### Investor’s Funds. Such Investor represents and warrants that such Investor has taken, and shall continue to take hereafter, such measures as are required by Law to assure that the funds used to pay to the Company any portion of the Aggregate Purchase Price are derived from: (i) transactions that do not violate United States Law nor, to the extent such funds originate outside the United States, do not violate the laws of the jurisdiction in which they originated; and (ii) permissible sources under United States Law and to the extent such funds originate outside the United States, under the laws of the jurisdiction in which they originated.

### Anti-Money Laundering Laws. Such Investor represents and warrants that neither such Investor nor any Person providing funds to the Investor: (i) is under investigation by any governmental authority for, or has been charged with, or convicted of, money laundering, drug trafficking, terrorist related activities, any crimes which in the United States would be predicate crimes to money laundering, or any violation of any Anti Money Laundering Laws; (ii) has been assessed civil or criminal penalties under any Anti-Money Laundering Laws; or (iii) has had any of its funds seized or forfeited in any action under any Anti Money Laundering Laws.

## **Foreign Investors**. If such Investor is not a U.S. Person, such Investor hereby represents and warrants that it has satisfied the full observance of the Laws of its jurisdiction in connection with this Agreement and the other Transaction Documents and the subscription for the Acquired Shares, including, without limitation, the receipt of any Consents from or actions to be taken by any Governmental Entity in such jurisdiction required as a condition to the Investment Transaction and the satisfaction of any other applicable legal requirements within such jurisdiction for the purchase of the Acquired Shares. The subscription and payment by the Investors for, and the continued beneficial ownership of, the Securities will not violate any applicable securities of other Laws of the Investor’s jurisdiction.

## **No Litigation**.There is not now pending or, to the Knowledge of such Investor, threatened, any material litigation, suit, claim, action, or proceeding, including, without limitation, arbitration proceeding, mediation, or other alternative dispute resolution proceeding, to which such Investor, is or will be a party or by which its property or assets will or may be bound or affected which (a) challenges or seeks to question, prevent, enjoin, alter or materially delay any of the transactions contemplated by this Agreement, or (b) would be reasonably likely to threaten, impede, impair or adversely affect the obligation of such Investor to consummate the transactions contemplated by the Agreement.

# **Additional Agreements**.[[58]](#footnote-58)

## **Transfer Restrictions**.[[59]](#footnote-59)[Each of the][The Investor[s] hereby agrees that such Investor will not, directly or indirectly, Transfer or offer to Transfer any of the Securities, or any of its interests therein (or solicit any offers to buy, purchase, or otherwise acquire [or take a pledge of] the Securities), except in compliance with this Agreement[, the Stockholders Agreement,][[60]](#footnote-60) and the Securities Act, the securities laws of all other applicable jurisdictions, and the rules and regulations promulgated thereunder.

## **Legends**. The Investor confers full authority upon the Company to affix, when issued, appropriate legends relating to applicable Transfer restrictions to the face of the certificate or certificate representing the Securities or on any other document representing the Securities, including, without limitation, the following:

###  “THE SECURITIES REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), OR THE SECURITIES LAWS OF ANY OTHER JURISDICTION AND MAY NOT BE OFFERED FOR SALE, SOLD, ASSIGNED, PLEDGED, HYPOTHECATED, OR OTHERWISE TRANSFERRED EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT AND THE SECURITIES LAWS OF ALL OTHER APPLICABLE JURISDICTIONS UNLESS, IN THE OPINION OF COUNSEL TO THE COMPANY, SUCH REGISTRATION IS NOT REQUIRED.”

### any legend set forth in, or required by, the Other Transaction Documents and the securities Laws of any other applicable jurisdiction, if any. [[61]](#footnote-61)

## **Investor’s Indemnification Agreement**.[[62]](#footnote-62) The Investor acknowledges that understands the meaning and legal consequences of the representations, warranties and covenants contained in Section 3 of this Agreement, especially as it relates to the reliance referenced in Section 3.10 hereof, and agrees to indemnify and hold harmless the Company and its agents, employees, and representatives from and against any and all losses (including reasonable attorney’s fees), damage or liabilities due to or arising out of any misrepresentations, misstatements, or omissions with respect to any of the representations or warranties, or a breach of any of the covenants or agreements, contained in this Agreement by the Investor.

## **Reservation of Conversion Shares**. The Company hereby agrees that:

### it will at all times have authorized and will reserve and keep available, solely for issuance and delivery to the holder of the Acquired Shares, that number of shares of its Common Stock (or other securities and property) that may be required from time to time for issuance and delivery of the upon conversion of the Acquired Shares.

### it shall take all necessary steps to ensure that the Conversion Shares, when issued in accordance with this Agreement, shall be duly and validly issued, shall be fully paid and nonassessable, free and clear of any Liens of any kind whatsoever, and free from all preemptive rights of any security holders of the Company.

### it shall take all action as may be necessary to assure that such Conversion Shares (and any other securities and property) may be issued and delivered as provided herein and as set forth in the Amended Articles without violation of any applicable Law, or of any requirements, of any domestic securities exchange or inter dealer quotation system upon which the Common Stock may then be listed; *provided, however*, that the Company shall not be required to effect a registration under federal or state securities Laws.

## **Information Rights**.[[63]](#footnote-63)

### The Company covenants and agrees with [each][the] Investor that for so long as [such][the] Investor continues to own beneficially or of record not less than \_\_\_\_ shares of Series B Preferred Stock or \_\_\_\_ Conversion Shares (subject to adjustment to reflect stock splits, stock dividends, and other combinations or subdivisions of the Series B Preferred Stock or the Common Stock),[[64]](#footnote-64) The Company shall (i) permit such Investor to visit and inspect the properties of the Company and to discuss the Company’s business and finances with officers of the Company, in each case during normal business hours following reasonable notice, which right may be exercised through any agent or employee of such Investor designated by it or by a certified public accountant designated by such Investor and (ii) promptly upon request, furnish to such Investor such other information bearing on the financial condition and operations of the Company as the Investor may from time to time reasonably request*; provided, however*, that in each case the Company shall not be obligated pursuant to this Section 4.5(a) to provide access to any information that the Company reasonably and in good faith considers to be a trade secret or confidential information (unless covered by an enforceable confidentiality agreement, in form acceptable to the Company) or the disclosure of which would adversely affect the attorney-client privilege between the Company and its counsel.

### The Company covenants and agrees with [each][the] Investor that for so long as [such][the] Investor continues to own beneficially or of record not less than \_\_\_\_ shares of Series B Preferred Stock or \_\_\_\_ Conversion Shares (subject to adjustment to reflect stock splits, stock dividends, and other combinations or subdivisions of the Series B Preferred Stock or the Common Stock),the Company shall provide to such Investor:

#### monthly management reports[, in a format to be agreed upon by the Company and the Investor[s]], within 30 days of the end of each month, including a balance sheet of the Company as of the end of such month and statements of income and retained earnings and changes in financial position of the Company (x) for such month and (y) for the period commencing at the end of the previous fiscal year and ending with the end of such month, setting forth in each case in comparative form the corresponding figures for the corresponding period of the preceding fiscal year;

#### a quarterly management reports[, in a format to be agreed upon by the Company and the Investor[s]], within 45 days after the end of each of the first three quarters of each fiscal year, including an unaudited balance sheet of the Company as of the end of such quarter and statements of income and retained earnings and changes in financial position of the Company (x) for such quarter and (y) for the period commencing at the end of the previous fiscal year and ending with the end of such quarter, setting forth in each case in comparative form the corresponding figures for the corresponding period of the preceding fiscal year;

#### annual reports within 90 days after the end of each fiscal year of the Company, including a copy of the annual [audit] report for such year for the Company, with a balance sheet of the Company as of the end of such fiscal year and statements of income and retained earnings and changes in financial position of the Company for such fiscal year, setting forth in each case in comparative form the corresponding figures for the preceding fiscal year, all such statements to be duly certified by the chief financial officer (or other financial manager or controller) of the Company and the independent public accountants of recognized national or regional standing approved by the [Investor[s]] [a majority of the Board of Directors of the Company];

#### a certificate of compliance at the time of delivery of each monthly and annual statement, executed by the chief financial officer (or other financial manager or controller) in the case of monthly statements, stating that such officer has caused this Agreement and the terms of the Series B Preferred Stock to be reviewed and has no knowledge of any default by the Company in the performance or observance of any of the provisions of this Agreement or the terms of the Series B Preferred Stock or, if such officer has such knowledge, specifying such default and the nature thereof;

#### a forecast at least 10 days before the beginning of each fiscal quarter of the Company, including a comprehensive operating budget for the forthcoming fiscal quarter forecasting the Company’s revenues, expenses and cash position on a month-­to-­month basis for such quarter; a budget shall be provided for the entire fiscal year 60 days in advance of the commencement of each fiscal year;

#### [notice of changes that are reasonably likely to have a Material Adverse Effect promptly after the Company obtains knowledge thereof];

#### promptly after the Company’s Knowledge thereof, notice of all material any litigation, suit, claim, action, or proceeding, including, without limitation, arbitration proceeding, mediation, or other alternative dispute resolution proceeding, before any Governmental Entity to which the Company is a party;

#### such other notices, information and data with respect to the Company as the Company delivers to the holders of its capital stock at the same time it delivers such items to such holders; and

#### copies of the minutes of meetings of the Board of Directors[, provided that the Board of Directors, in its discretion may redact such portions of the minutes to protect proprietary and confidential information, to avoid violating confidentiality agreements made to others, and to avoid disclosure if it reasonably believers that such disclosure would place the Company at a competitive disadvantage].

### **[**Except as otherwise agreed to by the Company, all information received by such Investor with respect to the Company pursuant to this Section 4.5 shall be subject to, the Investor[s] shall be bound by, the terms of that certain confidentiality agreement, dated \_\_\_\_\_\_, by and between the Company and the Investor[s].][[65]](#footnote-65)

## **Insurance**.

### The Company shall maintain insurance on its properties, assets, business and personnel (on commercially reasonable terms and subject to reasonable deductibles) sufficient and adequate, in the reasonable discretion of management of the Company, for the business in which the Company is engaged in amounts customary for companies similarly situated.

### Within \_\_\_ days following the Closing Date, the Company shall obtain a key man life insurance policy for the Company’s chief executive officer in an amount equal to $\_\_\_\_\_\_\_, naming the Company as the beneficiary. At the sole discretion of the Investor, the Investor may at any time direct that the key man insurance policy be modified to designate the Investor as the beneficiary of the key man life insurance policy instead of the Company in an amount equal to the Series B Liquidation Preference Payments (as defined in the Amended Articles) on the then outstanding shares of Series B Preferred Stock. To the extent that proceeds of such insurance policy are paid to the Investors, such payments shall be applied against any Series B Liquidation Preference Payments [or redemption payments due and payable to the Company upon the occurrence of a Liquidation Event (as defined under the Articles of Amendment) or redemption.][[66]](#footnote-66)

## **Directors**.[[67]](#footnote-67)The Company shall, within a reasonable time following the Closing Date:

### obtain directors’ and officers’ liability insurance for each director of the Company reasonably satisfactory to the Investor[s] in an amount of no less than U.S. $2.0 million; and

### enter into an indemnification agreement, in a form acceptable to the Investors, with each member of the Board of Directors.

## **[Observation Rights**.[[68]](#footnote-68)The Company shall permit a designee of the Investor[s] the right to attend all meetings of the Board of Directors in a non-voting observer capacity [and shall provide such designee with copies of all notes, minutes, written consents and other materials that it provides to directors, at the time it provides them to such directors].

## **Nondisclosure Agreements**. Following the Closing Date, the Company shall cause all employees, officers, directors and independent contractors of the Company to execute and deliver PIIA Agreements and Non-Competition Agreements substantially in a form provided to the Investor or as approved by the Board of Directors of the Company after the Closing Date.[[69]](#footnote-69)

## **Books and Records**. The Company shall keep proper books of record and account in which true and complete entries will be made of all transactions in accordance with [GAAP applied on a basis consistent with prior periods].

## **Further Assurances**.On or after the Closing, each of the parties shall execute and deliver, or cause to be executed and delivered, such further documents, certificates, and instruments and to perform such further acts as may be reasonably required to issue and convey the Securities to the Investor[s], all on terms contained herein, and otherwise to comply with the terms of this Agreement and consummate the transactions herein provided.

# **Conditions to the Obligations of the Purchaser at the [Initial] Closing**.[[70]](#footnote-70) The obligation of [each][the] Investor to purchase the Acquired Shares at the [Initial] Closing is subject to the fulfillment, or the waiver by the Investor, of each of the following conditions on or before the [Initial] Closing Date.[[71]](#footnote-71)

## **Accuracy of Representations and Warranties**. Each of the representations and warranties of the Company contained in Section 2 of this Agreement shall be true and correct [in all material respects] on and as of the [initial] Closing with the same effect as though such representations and warranties had been made on and as of that date.[[72]](#footnote-72)

## **Performance**. The Company shall have performed and complied [in all material respects] with all covenants, agreements and conditions contained in this Agreement required to be performed or complied with by the Company prior to or at the [Initial] Closing.

## **No Litigation**. There shall be no action, suit or proceeding pending, or, to the Knowledge of the Company, threatened, which (a) seeks to restrain, enjoin, or prevent the consummation of the transactions contemplated by this Agreement or the other Transaction Documents, (b) challenges the validity of, or seeks to recover damages or to obtain other relief in connection with the transactions contemplated by this Agreement or the other Transaction Documents, [(c) affects adversely the right of the Investor[s] to acquire the Acquired Shares, or (d) affects adversely the business, assets, properties, operation (financial or otherwise), or prospects of the Company (and no such injunction, judgment, order, decree, ruling or charge shall be in effect)][[73]](#footnote-73).

## **No Material Adverse Change**. Since the Balance Sheet Date, there shall have been no change in the financial condition, results of operations, business, business prospects, personnel, assets, or liabilities (whether contingent or absolute, matured or unmatured, known or otherwise) of the Company which has or may cause a Material Adverse Effect.

## **Compliance Certificate**. The Company shall deliver to the Investor a certificate, executed by the chief executive officer and chief financial officer of the Company, dated as of the [Initial] Closing Date, certifying the fulfillment of the conditions specified in Section 5.1 through 5.4 of this Agreement.

## **Qualifications**. All material notices, registrations, qualifications, designations, declarations, or filings with, Consents or Permits of, or any action by any Governmental Entity of the United States or of any other jurisdiction that are required prior to the [Initial] Closing in connection with the lawful issuance and sale of the Acquired Shares pursuant to this Agreement shall be duly obtained and effective as of the [Initial] Closing.

## **Amended Articles**. The Company shall have filed the Amended Articles with the Secretary of State of the State of \_\_\_\_\_ (“*State Secretary*”) on or prior to Closing, which shall continue to be in full force and effect as of the Closing.

## **Secretary Certificate and Documents**. The Company shall have delivered to the Investor[s] a certificate of the Secretary of the Company, certifying: (a) the Articles of Incorporation of the Company, as amended and restated by the Amended Articles, certified by the State Secretary, (b) the Bylaws of the Company as of the Closing, (c) resolutions or written consents of the Board of Directors of the Company evidencing the taking of all corporate action necessary to authorize and approve the execution and delivery of the Transaction Documents, and the transactions contemplated under the Transaction Documents, including the consummation of the Investment Transaction, (d) resolutions or written consents of the stockholders of the Company, if required, approving the Amended Articles, (e) certificates, as of a recent date, as to the corporate good standing of the Company issued by the State Secretary, and as to the corporate good standing and qualification as a foreign corporation of the Company issued by the Secretary of State of each jurisdiction in which the nature of the business transacted by it or the character or location of its properties requires such qualification, and (f) the incumbency of each individual authorized to sign, in the name and on behalf of the Company, this Agreement and the other Transaction Documents.

## **Stockholders Agreement**.[[74]](#footnote-74) The Company[, the Founders,] and each stockholder of the Company listed on Schedule 1 hereto shall have executed and delivered the Stockholders Agreement. [As a condition to the [Initial] Closing, the Stockholders Agreement must be executed by the number of stockholders of the Company (i) necessary to amend that certain Stockholders’ Agreement, dated \_\_\_\_\_, and (ii) representing at least [80]% of the voting power of the Company following the initial Closing and at least [95]% of the outstanding shares existing prior to the [Initial] Closing].[[75]](#footnote-75)

## **Registration Rights Agreement**. The Company [and the requisite number of stockholders of the Company necessary to amend that certain Registration Rights Agreement, dated \_\_\_\_\_] shall have executed and delivered the Registration Rights Agreement.

## **Board of Directors**. As of the [Initial] closing, the Company shall have taken all necessary corporate action to (a) set the size of the Board of Directors at \_\_\_\_\_, and (b) to elect a Board of Directors, effective upon the [initial Closing], in accordance with the Stockholders Agreement.[[76]](#footnote-76)

## **Employee Agreements**. Each employee of the Company shall have executed and delivered a PIIA and a Non-Competition Agreement.[[77]](#footnote-77)

## **Opinion of Counsel**. The Investor[s] shall have received from counsel to the Company an opinion, dated as of the [Initial] Closing Date, relating to the transactions contemplated by this Agreement, addressed to the Investor[s] and in form [of Exhibit D attached hereto][and substance reasonably satisfactory to the Investor[s]].

## **Stockholder Rights**. The Company shall have obtained enforceable waivers or shall have fully satisfied (including, without limitation, timely notification) in respect of any rights of first refusal, preemptive rights, and similar rights directly or indirectly affecting any of its securities.[[78]](#footnote-78)

## **Proceedings and Documents**. All corporate and other proceedings in connection with the transactions contemplated by this Agreement and all documents and instruments incident to such transactions shall be reasonably satisfactory in substance and form to the Investor[s], and the Investor[s] shall have received all such counterpart originals or certified or other copies of such documents as it may reasonably request.

# **Condition to the Obligations of the Company**. The obligations of the Company to issue, sell, and deliver the Acquired Shares to the Investor[s] at [the][any] Closing are subject to fulfillment, or the waiver by the Company, of each of the following conditions on or before [the][each] Closing Date[[79]](#footnote-79):

## **Accuracy of Representations andWarranties**. Each of the representations and warranties of [each of] the Investor[s] contained in Section 3 shall be true in all material respects on and as of the [applicable] Closing with the same effect as though such representations and warranties had been made on and as of that date.

## **Performance**.The Investor[s] shall have performed and complied, in all material respects, with all covenants, agreements and conditions contained in the Agreement required to be performed or complied with by the Investor[s] prior to or at the [applicable] Closing].

## **No Litigation**.There shall be no action, suit, investigation or proceeding pending, or to the Knowledge of [any of] the Investor[s] threatened, which (a) seeks to restrain, enjoin, or prevent the consummation of the transactions contemplated by this Agreement or the other Transaction Documents, (b) challenges the validity of, or seeks to recover damages or to obtain other relief in connection with the transactions contemplated by this Agreement or the other Transaction Documents.

## **Qualifications**. All material notices, registrations, qualifications, designations, declarations, or filings with, Consents or Permits of, or any action by any Governmental Entity of the United States or of any other jurisdiction that are required prior to the [Initial] Closing in connection with the lawful issuance and sale of the Acquired Shares pursuant to this Agreement shall be duly obtained and effective as of the [Initial] Closing.

## **Stockholders Agreement**. [Each of the Investors][The Investor] shall have executed and delivered the Stockholders Agreement.

## **Registration Rights Agreement**. [Each of the Investors][The Investor] shall have executed and delivered the Registration Rights Agreement.

## **Payment of Purchase Price**. [Each][The] Investor shall have paid to the Company the Aggregate Purchase Price for the Acquired Shares as set forth in Section 1.3 of this Agreement.[[80]](#footnote-80)

# **General Provisions**.

## **Definitions**.

### Except as otherwise provided herein, the capitalized terms set forth below shall have the following meanings:

 “*Affiliate*”means, with respect to any Person, (i) a Person that directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the first-mentioned Person, and (ii) an “*associate*” as that term is defined in Rule 12b-2 promulgated under the Securities Exchange Act of 1934 as in effect on the date of this Agreement. For purposes of this definition, the term “*control*” (including the term “*controlling*,” “*controlled by*” and “*under common control*,” or correlative terms) means the possession, direct or indirect, of the power to direct the management and policies of a Person, whether as an officer or director, through the ownership of voting securities, by contract or otherwise.

“*Anti-Money Laundering Laws*” shall mean Laws and sanctions, state and federal, criminal and civil, that: (i) limit the use of and/or seek the forfeiture of proceeds from illegal transactions; (ii) limit commercial transactions with designated countries or individuals believed to be terrorists, narcotics dealers or otherwise engaged in activities contrary to the interests of the United States; (iii) require identification and documentation of the parties with whom a Financial Institution conducts business; or (iv) are designed to disrupt the flow of funds to terrorist organizations. Such laws, regulations and sanctions shall be deemed to include the USA PATRIOT Act of 2001, Pub. L. No. 107-56, the Bank Secrecy Act, 31 U.S.C. §§ 5311 et seq., the Trading with the Enemy Act, 50 U.S.C. App. §§ 1 et seq., the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 et seq., and the sanction regulations promulgated pursuant thereto by the OFAC, as well as laws relating to prevention and detection of money laundering in 18 U.S.C. §§ 1956 and 1957.

“*Board of Directors*” or “*Board*” means the board of directors of the Company.

“*Business Day*” shall mean any day other than a Saturday, Sunday, or other day on which commercial banks in the State of \_\_\_\_\_\_\_\_\_ are authorized or required by Law or executive order to close.

“*Bylaws*” means, unless the context otherwise requires, the bylaws of the Company, as amended through and in effect on the [Initial] Closing Date.

“*Consent*” shall mean any consent, order, approval, authorization, clearance, exemption, exception, waiver, ratification, or similar affirmation by any Person.

“*Contract*” means any oral or written agreement, contract, debenture, note, bond, mortgage, license, instrument, franchise or other obligation, commitment, arrangement or understanding.

“*Employee Benefit Plan*” means employee benefit plan, agreement or arrangement that is a pension, profit-sharing, post-retirement, supplemental retirement, vacation, sick leave, disability, death benefit, group insurance, hospitalization, medical, dental, life, Section 125 of the Code “cafeteria” or “flexible” benefit, employee loan, education assistance or fringe benefit plan, whether written or oral, including, without limitation, any “employee benefit plan” (within the meaning of Section 3(3) of ERISA, inclusive of any “employee pension benefit plan” as defined in Section 3(2) of ERISA, and any “employee welfare benefit plan” (as defined in Section 3(1) of ERISA), any “multi-employer plan” (as defined in Section 3(37) of ERISA), or other Contracts or employee benefit plan, whether or not subject to ERISA and whether or not funded, to which Company is a party, for the benefit of any current or former employee, director, officer, consultant or independent contractor of the Company have any present or future rights to benefits, or with respect to which Company or any of its ERISA Affiliates has any current or future liability or which are maintained, contributed to or sponsored by Company.

“*Environmental Laws*” means all Laws relating to pollution or protection of human health or the environment (including ambient air, surface water, ground water, land surface or subsurface strata) and which are administered, interpreted, or enforced by the United States Environmental Protection Agency and state, local, and foreign agencies with jurisdiction over, and including common law in respect of, pollution or protection of the environment, including the Comprehensive Environmental Response Compensation and Liability act, as amended, 42 U.S.C. 9601 et seq., the Resource Conservation and Recovery act, as amended, 42 U.S.C. 6901 et seq., and other Laws relating to emissions, discharges, releases, or threatened releases of any Hazardous Material, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of any Hazardous Material.

 “*ERISA*” means the Employee Retirement Income Security Act of 1974, as amended.

“*ERISA Affiliate*” means any Person that is a member of a “controlled group of corporations” with, or is under “common control” with, or is a member of the same “affiliated service group” with Seller, as defined in Section 414 of the Code.

“*Hazardous Materials*” means (i) any hazardous substance, hazardous material, hazardous waste, regulated substance, or toxic substance (as those terms are defined by any applicable Environmental Laws) and (ii) any chemicals, pollutants, contaminants, petroleum, petroleum products, or oil and (specifically shall include asbestos requiring abatement, removal, or encapsulation pursuant to the requirements of Governmental Entities and any polychlorinated biphenyls).

“*Immediate Family Member*” means a Person’s spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, and brothers and sisters-in-law

“*Intellectual Property*” means all of the following: (i) U.S. and foreign registered and unregistered trademarks, trade dress, service marks, logos, trade names, corporate names and all registrations and applications to register the same jurisdiction, including any extension, modification or renewal of any such registration or application (the “*Trademarks*”); (ii) issued U.S. and foreign patents and pending patent applications, patent disclosures, and any and all divisions, continuations, continuations in part, continuing prosecution applications, reissues, reexaminations, and extensions thereof, any counterparts claiming priority therefrom or from which priority may be claimed, utility models, patents of importation or confirmation, certificates of invention and like statutory rights (the “*Patents*”); (iii) U.S. and foreign registered and unregistered copyrights (including any work of authorship in which copyright does or may subsist under the law of any jurisdiction), rights of publicity, database rights and moral rights in both published works and unpublished works and all registrations and applications to register the same (the “*Copyrights*”); (iv) U.S. and foreign rights in any semiconductor chip product works or “mask works” as such term is defined in 17 U.S.C. § 901, et seq., and any registrations or applications therefor (the “*Mask Works*”); (v) all categories of trade secrets as defined in the Uniform Trade Secrets Act including, but not limited to, technology, inventions, and business information and other confidential information, and rights to limit the use or disclosure thereof by a Third party, including such rights in inventions, discoveries and ideas, whether patented, patentable or not in any jurisdiction; know-how, customer lists, technical information, proprietary information, technologies, processes and formulae, software, data, plans, drawings and blue prints, whether tangible or intangible and whether stored, compiled, or memorialized physically, electronically, photographically or otherwise (the “*Trade Secrets*”); all licenses and agreements pursuant to which the Company or any of the Company’s Subsidiaries has acquired rights in or to any Trademarks, Patents, Copyrights or Mask Works, or licenses and agreements pursuant to which the Company has licensed or transferred the right to use any of the foregoing (the “*Licenses*”); (vi) all United States and foreign Internet domain name applications and registrations, social media identifiers, and advertising keyword rights owned or used by the Company or any of the Company’s Subsidiaries or otherwise used in conjunction with the business of the Company or any of the Company’s Subsidiaries (the “*Domains*”); and (vii) any similar intellectual property or proprietary rights similar to any of the foregoing, licenses, immunities, covenants not to sue and the like relating to the foregoing, and any claims or causes of action arising out of or related to any infringement, misuse or misappropriation of any of the foregoing.

 *“Knowledge”* means (i) with respect to a Stockholder, the knowledge of the Shareholder that is obtained or would have been obtained [after reasonable investigation], (ii) with respect to the Company, all matters known or that should have been known by the chief executive officer, chief financial officer, and each of the other executive officers of the Company [after reasonable investigation], and (iii) with respect to [an][the] Investor, the [actual] knowledge of [the][such] Investor [or its manager, general partner, or \_\_\_\_\_].[[81]](#footnote-81)

“*Law*” means any code, law, ordinance, regulation, reporting or licensing requirement, rule, or statute applicable to a Person or its assets, properties, liabilities, or business, including those promulgated, interpreted, or enforced by any Governmental Entity.

*“Liens”* shall mean all liens, encumbrances, charges, pledges, claims, security interests, equities, options, warrants, rights to purchase or acquire, and other defects in title.

“*Material Adverse Effect*” means any change, effect, event, occurrence, or state of facts (each, an “*Event*”) which individually, or together with other changes, effects, events, occurrences, or states of facts, that has, or would be reasonably expected to, materially and adversely affect: (a) the Company’s ability to consummate Investment Transaction without material delay, or (b) the financial condition, business, properties, assets, operations, results of operations, [or prospects] of the Company and its Subsidiaries, taken as a whole[; *provided, however*, that none of the following shall be deemed either alone or in combination to constitute, and none of the following shall be taken into account in determining whether there has been or would be, a Material Adverse Effect: (i) any Event resulting from general economic or political conditions or generally affecting financial, credit, foreign exchange, securities or capital markets (including changes in interest rates or exchange rates), including any disruption thereof, in the United States or elsewhere in the world market, (ii) any Events affecting in the general conditions in the industry of such Person and its Subsidiaries, taken as a whole, and (iii) any Events resulting from business conditions in the United States generally or in the geographic regions in which the Company or its Subsidiaries operate]

“*Owned Properties*” means any property owned, leased, or operated by the Company or in which the Company holds a security or other interest (including an interest in a fiduciary capacity) and, when required by the context, this term also includes the owner or operation of such property, but only with respect to such property.

“*Participation Facilities*” means any facility or property in which the Company participates in the management and, where required by the context, said term means the owner or operator of such facility or property, but only with respect to such facility or property.

“*Permitted Liens*” means (i) Liens or imperfections of title which are not, individually or in the aggregate, material in character, amount, or extent and which do not materially detract from the value or interfere with the contemplated use of assets subject thereto or affected thereby, (ii) mechanics’, materialmen’s, carrier’s, warehousemen’s, landlord’s and similar Liens securing obligations not yet delinquent, and (iii) Liens for current Taxes not yet due and payable.

“*Permits*” shall mean all permits, licenses, variances, certificates, filings, franchises, notices, rights, and Consents of and from all Governmental Entities.

“*Person*” shall mean an individual, corporation, general partnership, limited partnership, joint venture, limited liability company, limited liability partnership, unincorporated organization, business trust, association, corporations, or other entity.

“*Subsidiaries*” or “*Subsidiary*” means all corporations, limited liability companies, limited partnerships, and other entities in which the entity in question owns or controls 50% or more of the outstanding equity or voting securities or interests either directly or through an unbroken chain of entities as to each of which 50% or more of the outstanding equity or voting securities or interests are owned directly or indirectly by such entity in question.

“*Taxes*” means all federal, state, local, foreign and other net income, gross income, gross receipts, sales, use, ad valorem, transfer, franchise, profits, license, withholding, payroll, employment, excise, stamp, occupation, property, or other taxes, fees, assessments or other charges imposed by a Governmental Authority, together with any interest and any penalties, additions to tax or additional amounts with respect thereto, and the term “tax” means any of the foregoing taxes..

“*Tax Return*” means all reports, estimates, declarations of estimated tax, information statements and returns relating to, or required to be filed in connection with, any Taxes, including information returns or reports with respect to withholding and other payments to third parties.

“*Transfer*” shall be construed broadly and shall include to mean, in the context of a transfer of any of the Securities, any sale, assignment, participation, gift, bequest, distribution, exchange, pledge, hypothecation, placement of a lien thereon or a grant of a security interest therein or other encumbrances thereon, judicial attachment, contribution to a trust or other Person, or other transfer or disposition (voluntarily or involuntarily, by operation of law or otherwise, and whether as security or otherwise) by a holder of all or a portion of its Securities or any right or interest therein. For purposes of this definition, a “*Transfer*” shall include the sale, assignment, participation, gift, bequest, distribution, exchange, pledge, hypothecation, placement of a lien thereon or a grant of a security interest therein or other encumbrances thereon, judicial attachment, contribution to a trust or other Person, or other transfer or disposition (voluntarily or involuntarily, by operation of law or otherwise, and whether as security or otherwise) of a controlling equity interest in any Person which owns of record any of the Securities.

“*Transaction Documents*” means, collectively, this Agreement, the Amended Articles, the Stockholders Agreement, and the Registration Rights Agreement.[[82]](#footnote-82)

### The following terms shall have the meanings ascribed thereto in the Section set forth opposite such term: [[83]](#footnote-83)

 **Term Section**

Agreement Preamble

 Aggregate Purchase Price 1.2

 Amended Articles 1.1

 Acquired Shares 1.2

 Balance Sheet Date 2.7(a)

 Bankruptcy and Equity Exceptions 2.2

 Closing 1.5

 Closing Date 1.5

 Code 2.10

Common Stock 2.4(a)

Company Preamble

 Company Assets 2.11

 Conversion Shares 2.5

 Disclosure Schedule Section 2

 Entity Investor 3.1

 Equity Incentive Plan 2.4(d)

 [Existing Stockholders] Preamble

 FCPA 2.24

 Financial Institution 3.11(a)

 Financial Statements 2.7(a)

 [Founders] Preamble

 [GAAP] 2.7(b)

 Governmental Entity 2.3(a)

 Investment Transaction Recitals

 Investor[s] Preamble

 Non-Competition Agreement 2.18(c)

 OFAC 3.11(a)

 [Offering Memorandum] 2.23(a)

 Options 2.4(e)

 Outstanding Plan Options 2.4(d)

 Per Share Price 1.2

 PIIA Agreement 2.18(c)

 Preferred Stock 2.4(a)

 Purchaser Party 3.11(a)

 Registration Rights Agreement Recitals

 Securities 3.4

 Securities Act 2.3(b)

 Series A Preferred Stock 2.4(a)

 Series B Preferred Stock Recitals

 [Small Business Act] 2.27

 Specially Designated Nationals and Blocked Persons 3.11(a)

 State Secretary 5.7

 Stockholders Agreement Recitals

 U.S. Person 3.11(a)

### Any singular term in this Agreement shall be deemed to include the plural, and any plural term the singular. Whenever the words “include,” “includes,” or “including” are used in this Agreement, they shall be deemed followed by the words “without limitation.”

## **Survival of Representations**. Unless otherwise set forth in this Agreement, the representations, warranties, and covenants of the Company and the Investor[s] 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 of the subject matter thereof made by or on behalf of the Company or the Investor[s].The representations and warranties in this Agreement and in any certificate delivered pursuant hereto shall survive the Closing.[[84]](#footnote-84)

## **Expenses**. Except as otherwise provided in this Agreement, whether or not the transactions contemplated herein are consummated, each party hereto shall bear and pay its own fees, costs and expenses incident to preparing, entering into and carrying out this Agreement and to consummating the transactions contemplated hereby. Notwithstanding the foregoing, the Company agrees to pay the reasonable fees and expenses of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, counsel for the Investor[s], in an amount not to exceed \_\_\_\_\_\_ dollars ($\_\_\_\_\_\_).

## **No Brokers or Finders**. The Company, and the Investor[s] (a) each represent and warrant to the other party hereto that he or it has neither retained a finder or broker nor is or will be obligated for any finder’s fees or commissions, in connection with the transactions contemplated by this Agreement, and (b) each agree that they will indemnify and save the other party harmless from and against any and all claims, liabilities or obligations with respect to brokerage or finders’ fees or commissions, or consulting fees in connection with the transactions contemplated by this Agreement asserted by any Person on the basis of any statement or representation alleged to have been made by such indemnifying party.

## **Severability**. If one or more provisions of this Agreement are held to be unenforceable under applicable Law, the parties agree to renegotiate such provision in good faith, in order to maintain the economic position enjoyed by each party as close as possible to that under the provision rendered unenforceable. In the event that the parties cannot reach a mutually agreeable and enforceable replacement for such provision, then (i) such provision shall be excluded from this Agreement, (ii) the balance of this Agreement shall be interpreted as if such provision were so excluded and (iii) the balance of this Agreement shall be enforceable in accordance with its terms.

## **Entire Agreement**. This Agreement, which includes the Disclosure Schedule and exhibits hereto, together with the other Transaction Documents, constitutes the entire agreement among the parties hereto with respect the subject matter hereof, and supersedes all prior arrangements or understandings with respect to the subject matter hereof between the parties, both written and oral.

## **Amendment and Modification**.[[85]](#footnote-85) Except as otherwise expressly set forth in this Agreement, any term of this Agreement may be amended, modified, or terminated and the observance of any term of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively), with the written consent of the Company and (a) the holders of at least [insert percentage]% of the then-outstanding Series B Preferred Stock [or, if no Series B Preferred Stock remains outstanding, of the shares of Common Stock issued or issuable upon conversion of the Series B Preferred Stock], or (b) for any amendment, modification, termination or waiver effected prior to the [Initial] Closing, Investor[s] obligated to purchase [insert percentage]% of the Series B Preferred Stock to be issued at such Closing. Any amendment, modification, termination or waiver effected in accordance with this Section 7.7 shall be binding upon [each][the] Investor[s], each transferee of the Securities even if they do not execute such consent, and each future holder of the Securities, and the Company. No waivers of or exceptions to any term, condition or provision of this Agreement, in any one or more instances, shall be deemed to be, or construed as, a further or continuing waiver of any such term, condition or provision.

## **Successors and Assigns**. This terms and conditions of this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties to this Agreement or their respective successors and permitted assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement. The Investor’s rights to purchase the Acquired Shares shall not be assignable except to its Subsidiaries, parent, or Affiliates.

## **Notices**. All notices or other communications given or made pursuant to this Agreement shall be in writing and shall be (a) delivered by registered or certified mail, return receipt requested, postage prepaid, (b) by expedited mail or package delivery service guaranteeing next Business Day delivery, (or, for international deliveries, the earliest Business Day that such delivery service can guarantee delivery if so requested and paid for), or (c) delivered personally, by hand, to the Persons at the addresses set forth below (or at such other address as may be provided hereunder):

If to Company:

[Insert]

with a copy to:

[Insert Company counsel’s information]

If to Investors:

[Insert]

with a copy to:

[Insert Investor counsel’s information]

 Any notice or other communications to be given or that may be given pursuant to this Agreement shall be deemed to have been given: (x) three calendar days after the deposit of such notice or communication in the United States Mail, registered or certified, return receipt requested, with proper postage affixed thereto; (y) on the first Business Day after depositing such notice of communication with Federal Express, Express Mail, or other expedited mail or package delivery service guaranteeing delivery no later than the next Business Day if next Business Day delivery service has been requested and paid for (or on such Business Day as such delivery service has been requested, guaranteed, and paid for); or (z) upon delivery if hand delivered or telecopied to the appropriate address and Person as provided hereinabove or to the Person to whose attention the notice is to be given to the other parties in the manner set forth in this Section 7.9.

## **Governing Law**. This Agreement shall be governed by and construed in accordance with the laws of the State of \_\_\_\_\_\_\_ without giving effect to the choice of law principles thereof that would result in the application of the Laws of any other jurisdiction.

## **Jurisdiction; Venue**. Any action, litigation, suit or proceeding arising out of or relating to this Agreement or any transaction contemplated hereby shall be brought solely in federal or state courts of competent jurisdiction in the courts of the State of \_\_\_\_ located in \_\_\_\_\_\_, or, if it has or can acquire jurisdiction, in the United States District Court for the \_\_\_\_\_\_\_\_\_, and each of the parties hereto hereby irrevocably consents and submits to the exclusive jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such action, litigation, suit or proceeding and waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the action, litigation, suit or proceeding shall be heard and determined only in any such court and agrees not to bring any action or proceeding arising out of or relating to this Agreement or any transaction contemplated hereby in any other court. Process in any action or proceeding referred to in the first sentence of this Section 7.11 may be served on any party anywhere in the world.

## **WAIVER OF JURY TRIAL**. EACH PARTY HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY TRANSACTION CONTEMPLATED HEREBY. EACH PARTY (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THAT FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 7.12. EACH PARTY HERETO FURTHER REPRESENTS AND WARRANTS 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.

[**7.\_\_\_ Arbitration of Disputes**.[[86]](#footnote-86) Any disputes, controversies or claims arising pursuant to this Agreement, except (a) as otherwise provided by this Agreement or (b) disputes, controversies or claims arising out of either party’s Intellectual Property Rights for which a provisional remedy or equitable relief is sought, shall be settled by arbitration held in \_\_\_\_\_\_ in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. Upon such a dispute, the parties will mutually agree upon three arbitrators. In the event the parties are unable to agree upon three arbitrators, each party will select one arbitrator, and each of those arbitrators will agree upon a third arbitrator, and the three arbitrators will serve as the arbitrators for purposes of this Agreement. Judgment upon the award rendered by the arbitrators may be entered in any court having in personam and subject matter jurisdiction. The arbitrators will decide any claim or controversy at issue in accordance with the terms of this Agreement, and will not be authorized to award any damages other than direct compensatory damages actually incurred and proven. The expenses of each party, including its share of the cost of the arbitration, will be borne by such party. However, in the event either party institutes arbitration as result of any claim, suit, action or proceeding being asserted against it by a third party arising out of or in connection with a matter for which the other party is alleged to be responsible under this Agreement, the party instituting arbitration may recover any attorney’s fees and expenses to which it became subject in connection with the arbitration in the event such party prevails in such arbitration. [Insert State] Law will govern the role of judicial participation in the enforcement of the decision arising from arbitration and any matters not covered by this Section or the American Arbitration Association rules related to arbitration as well as the empowerment of the arbitrators. This provision will not preclude any party from obtaining injunctive or other equitable relief in the in the appropriate court.

## **[Attorney Fees.** If any action at law or in equity (including arbitration) is necessary to enforce or interpret the terms of any Transaction Document, 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.]

## **[No Commitment for Additional Financing.** The Company acknowledges and agrees that [no Investor has][the Investor has not] made any representation, warranty, undertaking, commitment or agreement to provide or assist the Company in obtaining any investment, financing or other capital raising activities other than the purchase of the Acquired Shares pursuant to the terms and conditions of this Agreement. No obligation, agreement, or obligation to provide or assist the Company in obtaining any investment, financing or other capital raising activities will created only by a written definitive agreement executed and delivered by the Investor[s] and the Company[, and any such agreement will be binding only on those Investors executing such agreement].

## **Section Headings**. The section headings are for the convenience of the parties and in no way alter, modify, amend, limit, or restrict the contractual obligations of the parties.

## **Counterparts; Electronic Signatures.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. A party may deliver this Agreement by transmitting a facsimile or other electronic signature of this Agreement signed by such party (via PDF, TIFF, JPEG or the like) to the other party, which facsimile or other electronic signature shall be deemed an original for all purposes.

**[Remainder of Page Intentionally Blank. Signatures on Next Page.]**

**IN WITNESS WHEREOF,** each of the parties has caused this Agreement to be executed on its behalf by its respective officer(s) thereunto duly authorized, all as of the date first written above.

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| --- | --- | --- |
|  |  | [Insert company name].By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  | [INSERT founders/STOCKHOLDERS] Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  |  |  |

Signature Page to

Securities Purchase Agreement

Page 1 of 2

|  |  |  |
| --- | --- | --- |
|  |  | [INSERT INVESTORS NAME]By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Address:  |

Signature Page to

Securities Purchase Agreement

Page 2 of 2

**Schedule 1**

**[FOUNDERS][EXISTING STOCKHOLDERS]**

|  |  |  |  |
| --- | --- | --- | --- |
| **Founder/Stockholder** |  |  **Number of**  **Common Shares** |  **Percentage****of Common Shares(1)**  |
|  |  |  |  |

(1) Prior to [initial] Closing

**Schedule 2**

**INVESTORS**

|  |  |  |  |
| --- | --- | --- | --- |
| **Investor** |  |  **Number of**  **Acquired Shares (1)** |  **Aggregate Per** **Share Price**  |
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(1)This is the number of shares each Investor has committed to purchase.

1. This sample Securities Purchase Agreement – Series B Preferred Stock is for use in a second or third round financing with a venture capital or private equity fund. Please refer to the related sample “Term Sheet – Series B Preferred Stock.” This is not for use in connection with an offering of the Preferred Stock (or Common Stock) to several investors pursuant to a private placement offering; but rather in a sale to one or a few sophisticated investors in a negotiated transaction. However, the basic form of this Agreement also could be used for an earlier round sale of the Company’s preferred stock to one or a few sophisticated accredited investors in a negotiated transaction. Please also note that this Agreement contemplates that the offer and sale of the Series B Preferred Stock will take place in the United States and, as a result, does not address any potential exemptions from registration under applicable securities law relating to completely offshore transactions [↑](#footnote-ref-1)
2. Although the entity could be a limited liability company, a limited partnership, a corporation or other entity, the proposed investment reflected in this Term Sheet is a preferred stock purchase from a corporation where the preferred stock will be senior to any existing equity securities and will have priority rights to any cash distributions (dividends, redemptions, etc.), to a return on investment, and to authorize, approve or disapprove of various corporate transactions that may adversely affect the preferred stock investment [↑](#footnote-ref-2)
3. As described in footnote 16, the Investor may require that the Founders or certain existing stockholders to make certain representations, warranties and covenants. The Company should resist such efforts, especially in later round financings, where the Founders and stockholders do not benefit proportionately in relation to the other investors (e.g., early round investors). [↑](#footnote-ref-3)
4. If there is more than one investor, a reference should be made to “the investors identified in Schedule 2 hereto (the “*Investors*”)” and references to the various obligations of the Investors may need to be revised to reference each Investor. [↑](#footnote-ref-4)
5. If this is second or third round financing, the Investor generally will require: (a) that its investment in the Company consist of a preferred stock that is senior to any existing equity securities and will have priority rights to any cash distributions (dividends, redemptions, etc.) and to a specified return on investment, and (b) the right to authorize, approve or disapprove of various corporate transactions that may adversely affect the preferred stock investment. If this is a third or later round of private financing, the series of Preferred Stock may be a Series C or later. In almost all cases, the Preferred Stock will be convertible into common stock of the Company. If this an earlier round seed financing with and angel investor or a few sophisticated accredited investors, the Company may be able to offer and sell Common Stock instead of Preferred Stock, in which case see sample “Stock Purchase Agreement – Common Stock – Early Round.”. [↑](#footnote-ref-5)
6. This Agreement contemplates one closing at which the full funding will be received in exchange for all of the securities sold hereby. If, however, one or more closings are contemplated (e.g., funding in stages or in lock step with achieving milestones), references to Closings (and the Closing conditions) will need to be modified to reference the “initial Closing” and/or “each Closing”. [↑](#footnote-ref-6)
7. In Delaware, the Certificate of Incorporation may need to be amended and restated to authorize shares of preferred stock. If the Certificate of Incorporation already authorizes a sufficient number of shares of undesignated preferred stock, the Company may be able to file a Certificate of Designations to establish the Series B Preferred Stock. In other states, amended and restated (or merely amended) articles of incorporation may need to be filed. [↑](#footnote-ref-7)
8. Occasionally, the Investor Group also may seek to receive warrants to purchase addition shares of Preferred Stock equal to a certain percentage of their investment at an exercise price equal to the Purchase Price (with cashless exercise rights). In essence, the Investor Group is seeking an additional upside for their investment without committing additional cash to the Company until they are ready to cash out. It creates dilution for future investors while locking in the price for the Investor Group. [↑](#footnote-ref-8)
9. If there is more than one Investor, this section should be revised as follows: “On the basis of the representations, warranties, and agreements contained in this Agreement, and subject to the terms and conditions of this Agreement, each Investor shall purchase from the Company, and the Company shall sell, issue, and deliver to each Investor that number of shares of Series B Preferred Stock set forth opposite each Investor’s name on Schedule 2 (such shares of Series B Preferred Stock issued to the Investors, the “*Acquired Shares*”) at a purchase price of $\_\_\_\_ per share (“*Per Share Price*”), resulting in an aggregate payment of $\_\_\_\_\_ for all of the Series B Preferred Stock purchased hereby (the “*Aggregate Purchase Price”)*, payable by the Investors as set forth in Section 1.3 hereof.” [↑](#footnote-ref-9)
10. If there is more than one Investor, this section should be revised as follows: “At the Closing, each Investor shall pay to the Company an amount equal to the Per Share Price for that number of Acquired Shares set forth opposite such Investors name (with respect to each investor, the “*Investor Purchase Price*”) by wire transfer of immediately available funds to an account designated by the Company in writing at least one Business Day prior to the Closing Date.” [↑](#footnote-ref-10)
11. This provision permits the Investors to limit the use of proceeds to those matters for which the investment is intended and to prohibit the use of proceeds for certain items that do not promote the investment (e.g., payment for related party transactions). [↑](#footnote-ref-11)
12. If this Agreement is executed prior to the Closing (or initial Closing if there are multiple closings), this provision affords the parties the ability to change the closing date if circumstances warrant. Often, the Agreement is signed on the Closing Date or the date of the initial Closing if there are multiple closings (i.e., concurrently with the execution and delivery of this Agreement). Further, in a simultaneous sale and close transaction where all of the Acquired Shares will be purchased in one closing, Sections 5 and 6 could be deleted and each of the relevant documents to be furnished as a condition to closing referenced in Sections 5 and 6 could instead be listed in this section as a closing deliverable. [↑](#footnote-ref-12)
13. If there are multiple closings (e.g., such as funding in stages or in lock step with achieving milestones), each additional Closing needs to be referenced herein. [↑](#footnote-ref-13)
14. Representations and warranties provide the Investor with a means for obtaining information relating to the Company’s organization, business, and financial condition and then holding the Company responsible for its accuracy. It serves both a due diligence function and a cause of action for inaccurate information. The Disclosure Schedule is used to identify exceptions to the representations and warranties contained in the Agreement. The detail of the representations and warranties contained in a Securities Purchase Agreement often is a function of the amount invested (e.g., the more invested, the more protection sought by the Investor) and the length of the operating history of the Company (e.g., a start-up with little or no operating history would require less information than a Company with several years of operations to disclose). The representations and warranties included in this sample Securities Purchase Agreement – Series B Preferred Stock is detailed and Investors may not require each of these representations or warranties or may require less detail (in as much as this is an investment transaction and not an entity acquisition) or may include additional representations that are more specific to the industry in which the Company does its business. [↑](#footnote-ref-14)
15. The placement in the Disclosure Schedule of exceptions to the representations or cross-references thereto is an items to be discussed and is often subject to negotiation. If the Company provides the necessary exception to the representation in one part of the schedule but neglects to repeat or include a specific cross-reference to it elsewhere as it may be relevant, under the terms of the bracketed language it will not be an exception to any representation where it is not repeated or cross referenced to the earlier Disclosure Schedule exception (even if known to be so by the Investor). The Company could take the position that it has disclosed the matter to the Investor and it is unfair to have form take precedence over substance. However, an Investor may argue that it is difficult for it to know which exceptions apply to one or more section of the Disclosure Schedule in an operating business and the Investor should be able to rely on the Company in providing that information. [↑](#footnote-ref-15)
16. The Investor may seek to have certain founders or significant stockholders to provide their own representations and warranties or, less likely in a later round transaction, join in certain of the representations and warranties of the Company (and the liability for any inaccuracies) on the theory that they are the persons who know the operations of the business of the Company. These individuals, especially in later round financings, should resist taking personal liability for an investment that benefits the Company and, at best, only indirectly benefits such individuals in the same manner as it benefits any other shareholder. It should be noted that any representations by founders and significant stockholders are included only in a minority of venture capital deals. [↑](#footnote-ref-16)
17. In Florida, consistent with the corporate statutes the representation is made as to “having active status” rather than good standing. [↑](#footnote-ref-17)
18. A heavily negotiated issue often is to what extent that the Company can make representations relating only to “material” matters or include a carve out for items that would not have a “material adverse effect” on the Company. Materiality is an imprecise measure and material adverse effect can exclude items which have a substantial impact on the Company but fall short of a material adverse effect. [↑](#footnote-ref-18)
19. If certain stockholders/founders ultimately are required to join in these representations and warranties, include a subsection indicating their capacity to enter into this Agreement. [↑](#footnote-ref-19)
20. The other Transaction Documents (which are separately defined in Section 7.1) need to be separately considered when making the enforceability representation at the end of this provision. Depending on their terms, there may be issues as to the enforceability of noncompetition or voting agreements in certain jurisdictions. [↑](#footnote-ref-20)
21. This purpose of this provision is to confirm that that engaging in the Investment Transaction will not cause the Company to violate its corporate governance documents, material contracts, judgments or laws applicable to the Company or result in the creation of lien or acceleration of existing agreements. [↑](#footnote-ref-21)
22. These provisions identifies the capital structure of the Company so that the Investor is able to calculate the percentage of the Company’s equity that it is acquiring and the potential dilution that may occur as a result of existing rights to acquire shares of the Company. [↑](#footnote-ref-22)
23. The capitalization can either refer to the Company’s outstanding shares immediately before or upon the Closing (or, if applicable, initial Closing). Because this sample Securities Purchase Agreement – Series B Preferred Stock relates to a second or third round financing, it is likely that a prior series of Preferred Stock will be outstanding. Investors may attach a post-transaction capitalization table as an exhibit and require a representation as to its accuracy or include it as a separate document. [↑](#footnote-ref-23)
24. Because this sample Securities Purchase Agreement – Series B Preferred Stock relates to a second or third round financing, it is likely that a prior series of preferred stock will be outstanding and the Investor will require representations as to the conversion ratio applicable to outstanding shares of Preferred Stock and the potential aggregate dilution of all such conversion rights. [↑](#footnote-ref-24)
25. If that bracketed language is not included, the representation covers all aspects of the applicable securities laws, including the anti-fraud provisions of such laws. [↑](#footnote-ref-25)
26. Investors also will often seek a representation that, to the Knowledge of the Company, no stockholders of the Company have entered into any voting agreement. Although the representation includes a knowledge qualifier, the Company should resist such a representation as to arrangements between third parties. [↑](#footnote-ref-26)
27. In a later round financing, it is likely that registration rights may have been granted to earlier investors, especially investors holding Preferred Stock. The rights required by the new Investors under the Registration Rights Agreement may conflict with those registration rights previously granted. Those conflicts will need to be reviewed and resolved. Often a new Registration Rights Agreement will replace any previously existing agreements and will include the relative rights of all investors (new and old) having such rights so that all such rights are contained in a single agreement. [↑](#footnote-ref-27)
28. This provision is designed to confirm that the Company has taken all of the steps necessary under applicable corporate law and its corporate governance documents to authorize and issue the Series B Preferred Stock being sold pursuant to this Agreement. [↑](#footnote-ref-28)
29. If the Company has any Subsidiaries, this provision will need to be expanded to include disclosure of the name and jurisdiction of each Subsidiary and to add representations indicating that (a) each Subsidiary is duly organized, validly existing and in good standing and is qualified to do business in all applicable jurisdictions (See Section 2.1), (b) each Subsidiary has all requisite entity power and authority to own, lease and operate its properties and carry on its business as now conducted, (c) the outstanding equity interests of each of the Subsidiaries are validly issued, and all such equity interests are owned, directly or indirectly, by the Company free and clear of any and all Liens, pre-emptive or similar rights or any limitation on voting rights, and of any other material limitation or restriction, and (d) complete and correct copies of the organizational documents of each of the Subsidiaries as currently in effect have been furnished to the Investors. Sections 2.3 and 2.5 also will need to be revised to include coverage of any such Subsidiaries. [↑](#footnote-ref-29)
30. Because this sample Securities Purchase Agreement – Series B Preferred Stock relates to a second or third round financing, the Company is expected to have certain historical financial statements, whether or not audited. [↑](#footnote-ref-30)
31. This provision provides the Investor with an update of the changes that have taken place since the date of the last financial statements (the Balance Sheet Date). This list of items requires the Company to include all such developments in the Disclosure Schedule. Section 2.9(d) includes a long list of items and the Company can seek to delete that provision under the theory that subsection (a) through (c) provides all of the changes that could result in a Material Adverse Effect on the Company, and the other representations in the Agreement already address the items set forth in subsection (d). The Investor, however, may see this as a specific checklist of items that it wishes the Company to affirmatively address in the Disclosure Schedule and many of these items may not reach the Material Adverse Effect threshold. [↑](#footnote-ref-31)
32. The listing of all real property owned or leased by the Company is often not required so long as it (a) is reflected accurately in the Financial Statements, (b) is not a significant portion of the Company’s assets, and (c) is not material to the actual business operation of the Company, in which case the first sentence of this Section 2.11 would be deleted (as well as references to such real property in Schedule 2.11 of the Disclosure Schedule). If the Company does not own any real property, the first sentence should be revised to include an affirmative representation to that effect. [↑](#footnote-ref-32)
33. This provision requires the Company to identify certain of its material Contracts (which term is defined in Section 7.1(a)). This can be an important due diligence provision for the Investors. Two alternatives are presented to show the different approaches that may be taken by an Investor. Alternative One requires the listing of all “material” Contracts and, except with respect to the threshold included in the parenthetical for a subset of Contracts, is imprecise and could be broadly interpreted. Alternative Two identifies specific types of Contracts (and in some case with dollar thresholds to be negotiated) that are to be included on the Disclosure Schedule, whether or not they may be deemed to be material. Please note that Alternative Two is an example of a list of such Contracts and an Investor may seek additional documents that reflect the industry or the particular circumstances of the investment. If the Company has little operating history and is in a start-up phase, the Investor will typically have a less rigorous approach to this representation. However, because this sample Securities Purchase Agreement – Series B Preferred Stock is designed for later stage financings, it is more likely that the Investor will more information about the Company’s contractual relationships and not less. [↑](#footnote-ref-33)
34. To the extent that these representations are covered by the longer form of Section 2.9(d) or Alternative Two of Section 2.12(a), they can be deleted from Section 2.12(b). [↑](#footnote-ref-34)
35. This provision is similar to Section 2.3 which includes representations and warranties that entering into this Agreement by the Company will not cause a conflict, default, or violation. This provision represents and warrants that the Company does not now have any such a conflict, default, or violation (irrespective of this Agreement). [↑](#footnote-ref-35)
36. Intellectual Property Rights are often some of the most valuable assets of companies engaged in the technology, media, and entertainment industries and, as a result, the Investor may request very detailed representations from these companies as to these assets, whether owed or licensed. The provision included in this sample Securities Purchase Agreement – Series B Preferred Stock contains a rather detailed series of representations. With respect to those companies where the Intellectual Property Rights are not of such a material significance, a less detailed set of representations may be accepted. But the Investor will still request a list of the Company’s Intellectual Property Rights and seek to ensure, among other things, that the Company has valid licenses or ownership of Intellectual Property Rights used by it, that its products do not infringe the Intellectual Property Rights of others, and that there are no claims of infringement against the Company. Please note that this provision is more detailed than it initially appears because of the very detailed definition of Intellectual Property in Section 7.1(a) of this Agreement. These provisions are often highly negotiated because the Investor will desire unqualified representations (i.e., no “Knowledge” or “materiality” qualifiers), but it may be difficult or impossible for the Company to make such a representation, especially for products in the early stage of development. [↑](#footnote-ref-36)
37. Occasionally Investors will include an additional representation as to the key employees and directors of the Company with respect to whether they (a) have any criminal convictions or are the subject of a criminal proceeding, (b) are subject to any order of a Governmental Entity limiting them from serving as an officer or director of a public company or in the securities or financial industry, (c) have been found by a Governmental Entity to have violated any federal or state securities, commodity, or unfair practices Laws, or (d) have been the subject of any insolvency or bankruptcy laws for his or her business or property. Not only are these significant issues as to the management of the Company, but they also are future disclosure issues if the Company should decide to conduct a private placement or an initial public offering of its securities. [↑](#footnote-ref-37)
38. The Investor will want to know the amount and type of compensation paid to the most highly compensated employees and independent contractors and the various components of such compensation. However, parties do not generally include this information in the Disclosure Schedule because it is often highly sensitive information that the Company seeks to protect, both internally and externally. [↑](#footnote-ref-38)
39. The PIIA Agreement typically includes a confidentially agreement as it relates to the Company’s proprietary information to which the employees, officers, consultants, and independent contractors of the Company have access. It also provides that any inventions or works created by employees in connection with their employment belong to and are owned by the Company. Independent contractors and lower level non-salesperson employees may object to a non-competition agreement and may require the negotiation of an exception or carve-out. The Non-Competition Agreement generally will also include non-solicitation provisions (as to customers and employees of the Company). Often these agreements are combined into a single agreement. [↑](#footnote-ref-39)
40. If the Company does not have any Employee Benefit Plans (as defined), then an affirmative representation should be made to this effect in lieu of all but the last sentence of this Section 2.18(e). [↑](#footnote-ref-40)
41. The purpose of this representation is to require disclosure of transactions with officers, directors, and employees which could be a conflict of interest. [↑](#footnote-ref-41)
42. Because this is a later stage financing, the Company should resist providing any representations relating to the directors, which likely will include representatives of the earlier round investors (e.g., purchasers of Series A Preferred Stock). The Company should not be required to provide disclosures relating to these directors. [↑](#footnote-ref-42)
43. The Company may seek to limit this representation because it is very broad and, as a result, difficult for the Company to verify. [↑](#footnote-ref-43)
44. This is a basic representation. In certain situations, it may be appropriate to add specific industry-based insurance coverage provisions. [↑](#footnote-ref-44)
45. Alternative One is an attempt by the Investor to obtain a representation from the Company that none of the information provided to the Investor contains any material misstatements or omissions. The ultimate goal of the Investor is to receive an unqualified representation. However, the Company should resist this type of Rule 10b-5 representation (anti-fraud representation under the Securities Exchange Act of 1934) which is designed for ensuring that a fully prepared prospectus which has undergone full due diligence is accurate and complete. The Company should especially resist when there has been no disclosure document prepared and distributed to the Investor. The representations and warranties in an agreement are negotiated provisions designed to allocate risk and assist in due diligence by the Investor, but they do not provide a mechanism to provide information not requested (e.g., omissions). The representations and warranties say what they say and no more. Agreeing to such language also provides the Investor with broader cause of action for a breach because: (a) a contractual claim does not require proof of scienter which is required for a fraud action under the securities laws and (b) a contract claim has a longer statute of limitations. If the Company has prepared a private offering memorandum, then it may attempt to resist on the same basis, but at the very least can limit its representations to that document as set forth in Alternative Two. [↑](#footnote-ref-45)
46. This provision is necessary if there are any foreign investors involved in the financing who, as a result may be subject to the Foreign Investment Real Property Tax Act of 1980 (“*FIRPTA*”) tax withholding provisions in connection with the transfer of an interest in a U.S. Real Property Holding Company (a corporation in which more than 50% of its assets consist of U.S. real property). Although there is a low likelihood that such provisions will apply, especially due to recent revisions in the law, this representation seeks to ensure that any foreign investor will not be subject to such tax withholding. [↑](#footnote-ref-46)
47. Section 1202 of the Code provides a 50% exclusion from taxable income gains recognized in connection with the disposition of certain stock held for at least 5 years in qualifying corporations, subject to certain limitations. As a condition to the use of this exclusion, the investor will need to demonstrate compliance with various requirements established under the Code. Because the analysis under Section 1202 of the Code is complex and many of the tests are outside of the control of the Company, the Company should attempt to resist this representation. [↑](#footnote-ref-47)
48. This provision has very limited use and is only necessary if one of the Investors is a SBIC. [↑](#footnote-ref-48)
49. The Investor representations and warranties are primarily designed to ensure that: (a) the Investors meet the requirements for the offer and sale of the securities by the Company to satisfy the private placement exemption from registration under applicable federal and state securities laws and (b) the source of funds for the purchase the Acquired Shares do not violate any applicable anti-money laundering and similar laws. For ease of illustration, the section has been prepared for multiple Investors. This sample agreement presumes that there are both individual natural person Investors and entity Investors. If there is only a single Investor or only entity Investors, this section would be revised to reflect that fact. [↑](#footnote-ref-49)
50. These representations are to demonstrate that the Investors meet the required criteria for the offer and sale of the securities to satisfy the private placement offering exemption from registration under applicable federal and state securities laws (typically Regulation D promulgated under the Securities Act of 1933). In many securities purchase agreements, the investment representations are not included in one section; but, rather are included in several sections relating to specific elements of the Regulation D exemption, such as: (i) the securities are being purchased by the Investor for his own account for investment purposes, (ii) the securities are not registered and may be transferred only if registered or there is an applicable exemption from registration and acknowledges that the securities will contain a legend to this effect, the Investor is an “accredited investor, ” (iii) there is no public market for the securities, (iv) the Investor has had an opportunity to ask questions and receive answers from the Company with respect to the offering, (v) the Investor has sufficient knowledge and experience in this type of an investment, and (vi) the Investor has the financial resources to bear the risks of a loss of their investment in the Company. There is no reason why a single section cannot be used for this purpose. However, for this sample agreement, the representations have been provided in separate sections as is the custom. [↑](#footnote-ref-50)
51. The Securities Act, in general, provides that securities may not be offered or sold except pursuant to a registration statement declared effective under the Securities Act (which will require registration with the SEC under the Securities Act) or pursuant to an exemption from registration thereunder. As indicated above, the shares of Common Stock to be sold in this offering will be offered and sold pursuant to an exemption from registration under the Securities Act. Because of these requirement, Rule 502(d) of Regulation D requires the issuing company to take reasonable care to ensure that the securities sold pursuant to that exemption from registration will not be resold without compliance with such registration requirements or pursuant to an exemption from such registration. Sections 3.4, 3.5(a), 4.1 and 4.2 are designed to demonstrate compliance with this requirement. [↑](#footnote-ref-51)
52. Although it is unusual for the Investors to be subject to any Transfer restrictions under the Stockholders Agreement, if they are subject to such restrictions, include the following clause: “the Securities also are subject to transfer restrictions set forth in the Stockholders Agreement,” [↑](#footnote-ref-52)
53. If there is an Offering Memorandum, add the bracketed text. [↑](#footnote-ref-53)
54. As a condition to an exemption from registration pursuant to Regulation D promulgated under the Securities Act of 1933, none of the following parties may have engaged in any disqualifying activities as set forth in Rule 506(d): (i) the issuing company or its predecessor or affiliated issuer, (ii) any director, executive officer, general partner, managing member other officer of the issuing company, (iii) any beneficial owner of 20% or more of the issuing company’s equity voting power, and (iv) any promoter, any person paid for soliciting investors, and any general partner, managing member of an investment manager or solicitor and their directors, executive officers, and other officers participating in such offering. An exhaustive list of disqualifying activities are set forth in the Rule, but generally pertain to prior violations of federal or state securities laws. [↑](#footnote-ref-54)
55. This provision should be added if the Investor is an entity. [↑](#footnote-ref-55)
56. This was a common provision used to demonstrate compliance with Rule 503(b) of Regulation D which prohibited the use of any general solicitation or general advertising in connection with the private placement offer or sale of securities under Regulation D. However, under the Jumpstart Our Business Startups Act (”JOBS Act”) and the implementing rules promulgated by the Securities and Exchange Commission (Rule 503(c)), general solicitations and advertising are permitted so long as the sale of the securities are sold only to “accredited investors” and the issuer takes reasonable steps to verify their accredited investor status. As a result, if a general solicitation has been used by the Company in connection with the offer and sale of the Securities sold hereby, then this Section 3.9 should be revised to verify the accredited investor status of the Investor (and combined with Section 3.7). [↑](#footnote-ref-56)
57. If the Investor is a foreign investor using funds from outside of the United States to pay the Aggregate Purchase Price, the Company should require that the Investor provide representations as to the lawful source of the funds. This sample Securities Purchase Agreement – Series B Preferred Stock includes detailed provisions addressing OFAC and Anti-Money Laundering, and other relevant Laws relating to use of non-U S. funds. The detail of the representations will depend on the circumstances and the likelihood of potential issues arising with respect to the specific source of funds. Please note that this Agreement contemplates and offer and sale of the Series B Preferred Stock is taking place in the United States. [↑](#footnote-ref-57)
58. Securities purchase agreements do not always include this Section and the covenants of the Company referenced in this Section are instead often: (a) addressed as Closing conditions to be satisfied in order to receive the financing (rather than a breach of the agreement requiring the Investor to take action against the Company, which is its investment, for any remedy) or (b) are obligations contained in the other Transaction Documents (e.g., in the Stockholders Agreement). In some cases where these covenants are in the securities purchase agreement, they may be located after the Closing condition sections if they primarily pertain to obligations to be satisfied after the Closing. [↑](#footnote-ref-58)
59. The Investor covenants contained in Sections 4.1 and 4.2 are sometimes rephrased as, and included in, the Investor representations in Section 3. However, these really are covenants and agreements of the Investor and should be cast as such. [↑](#footnote-ref-59)
60. Generally, the Stockholders Agreement will not restrict the Transfer of the Securities of the Investor in the same manner as it will typically restrict the Transfer of securities by the other holders (e.g., the Investor typically is not required, as a condition to a Transfer, to offer their shares to the Company or the other shareholders pursuant to a right of first refusal). However, in some cases the Investor will agree to certain restrictions on Transfers (e.g., not to certain competitors) and, in those instances, the bracketed language should be used. [↑](#footnote-ref-60)
61. The Stockholders Agreement also will require that a legend be included on the certificate and other documents reflecting the Securities that notifies the holder that the Securities represented thereby are subject to additional restrictions under the Stockholders Agreement. [↑](#footnote-ref-61)
62. The Investor will likely object to providing any indemnification to the Company and will take the view that it also is in its best interests to ensure that the offering complies with applicable securities laws. Because the Investor will require the Company to represent that the offering complies with applicable securities laws, the Investor will provide the investment representations in Section 3 but will not likely agree to provide indemnification for such representations. [↑](#footnote-ref-62)
63. Information rights often are included in the Stockholders Agreement instead. However, if such information rights are to be provided only to the Investors (as opposed to subsequent holders of the Securities), it may be preferable to include these rights in the Securities Purchase Agreement to which only the Investor will be a party (most Stockholders Agreements permit, to some extent, for the Investor to Transfer its Securities and for the transferee to become a party to the Stockholders Agreement). [↑](#footnote-ref-63)
64. The information rights are requested by, and provided to, the Investor in order for the Investor to monitor its investment in the Company. However, the Company may seek to terminate these special information rights if the Investor no longer maintains a minimum threshold investment in the Company which justifies such rights. At that point, the Investor would be treated the same as any shareholder. [↑](#footnote-ref-64)
65. If the parties have previously entered into a Confidentiality Agreement, the Company should seek to subject all of the information provided to the Investor under this Section 4.5 to the Confidentiality Agreement. If there is no existing confidentiality agreement between the parties, the Company should consider adding a confidentiality provision to Section 4.5. [↑](#footnote-ref-65)
66. This provision would only be appropriate if the key man is essential to the Company. It is an expense solely for the benefit of the Investor, which Investor already is in a primary position as compared to other equity holders. If key man insurance is required, it should be a permitted use of the proceeds. [↑](#footnote-ref-66)
67. The Investor will likely have the right to designate persons to serve on the Board of Directors and, as a result, will require the Company to provide D & O insurance and indemnification protections for directors. These provisions often are included in the Stockholders Agreement where the obligation to elect or appoint the Investor designees to the Board of Directors is provided. [↑](#footnote-ref-67)
68. In situations where the Investor does not desire or otherwise require the right to designate persons to the Board of Directors of the Company, it may seek observations rights instead (and Section 4.5 might not be included). These provisions often are included in the Stockholders Agreement. [↑](#footnote-ref-68)
69. This covenant applies to employees, officers, directors and independent contractors that are engaged after the Closing. Section 2.18(c) includes a representation by the Company that each of the current and former employees, officers, consultants, and independent contractors has entered into a written PIIA Agreement and Non-Competition Agreement. If such agreements have not been furnished by any of these persons as of the date of this Agreement, they generally will be required to do so as a condition to Closing. [↑](#footnote-ref-69)
70. This section sets forth the conditions that need to be satisfied by the Company (or waived by the Investor) prior to Closing in order to obligate the Investor to purchase the Series B Preferred Stock. The primary purpose of this Section is to reaffirm the accuracy of the representations and warranties of the Company, to require a Secretary’s Certificate (which certifies and provides copy of the Company’s Bylaws and relevant resolutions of the board and stockholders approving the Investment Transaction and the Amended Articles), an opinion of counsel, and to require that all of the other Transactional Documents are signed by all of the relevant parties thereto and delivered at the Closing. If there are multiple closings, Section 5 can either be revised to require the same requirements at each closing or a new section can be added to address the requirements for subsequent closings. If all of the same closing conditions do not necessarily apply to all subsequent closings, it may be more appropriate to include new separate sections with a more limited set of closing conditions which address the specific requirements that will trigger the Investor’s obligation to purchase additional shares at each such closing. [↑](#footnote-ref-70)
71. If the Investment Transaction is structured to be a simultaneous sign and close, then this initial Closing condition section could instead be included in an expanded Section 1.6 under a subsection “Deliveries by Company At Closing” where each of the operative documents are delivered at Closing. If so revised, Sections 5.1 through 5.6 and 5.12 and 5.15, which are addressed in the Section 2 representations and warranties, can be deleted and the other provisions would be converted into deliverables required at the Closings. If there are multiple closing, a separate section would be necessary to set forth the specific requirements that will trigger the Investor’s obligation to purchase additional shares at each such Closing. [↑](#footnote-ref-71)
72. The materiality qualifier can become a highly negotiated matter. The Investor may not permit a materiality qualifier for certain representations that it believes should be accurate without qualification, such as those relating to the capitalization, due authority to enter into the transaction, the issuance of the Securities, etc, as well as those representations that are already qualified as to materiality. [↑](#footnote-ref-72)
73. Subsection (c) and (d) are unnecessary and repetitive in relation to the other conditions. In fact, it could be argued that Sections 5.3 and 5.4 are covered by Section 5.1 since there are representations to this effect are set forth in Section 2. The Company should seek to delete these condition, especially if this is a simultaneous sign and close where these conditions serve no purpose (i.e., if these exist, the representations and warranties would be required to identify any inaccuracies and the Investor could simply decide to not sign and close). [↑](#footnote-ref-73)
74. In some transactions, Investors may substitute a Stockholders Agreement with several separate documents (e.g., Right of First Refusal and Co-Sale Agreement, and a Voting Agreement). The sample “Stockholders Agreement” combines all of these agreements into a single agreement. [↑](#footnote-ref-74)
75. If there is a pre-existing Stockholders’ Agreement, the requisite number of stockholders necessary to amend the pre-existing Stockholders’ Agreement will need to execute the Stockholders Agreement required by this Agreement. Further, if the Investor is willing to accept less than 100% participation by the existing stockholders, the Investor will likely require that a minimum specified percentage of the outstanding shares participate. [↑](#footnote-ref-75)
76. If the Investor designee is to be appointed to the Board of Directors at the time of the Closing, the Investor also may require that the covenants set forth in Section 4.5 be satisfied prior to the Closing. [↑](#footnote-ref-76)
77. If the Investor does not find the PIIA or the Non-Competition Agreement used by the Company to be satisfactory, the Investor may require a form approved by it and attached as an exhibit to the Agreement be signed and executed by employees of the Company. The Investor also may require that certain key employees also shall be executed an employment agreement in a form satisfactory to the Investor. [↑](#footnote-ref-77)
78. This provision arises in later rounds of financing where there likely are pre-existing rights of this nature granted to the earlier investors. [↑](#footnote-ref-78)
79. If the Investment Transaction is structured to be a simultaneous sign and close, then this initial Closing condition section could instead be included in an expanded Section 1.6 under a subsection “Deliveries by the Investor[s] At Closing” where each of the operative documents are delivered at Closing. If so revised, Sections 6.1 through 6.4, which are addressed in the Section 3 representations and warranties, can be deleted and the other provisions may be converted into deliverables required at the Closing. If there are multiple closing, a separate section would be necessary to set forth the specific requirements that will trigger the Investors’ obligation to purchase additional shares at each such Closing. [↑](#footnote-ref-79)
80. Although the payment of the purchase price for the Acquired Shares being purchased pursuant to this Agreement is a covenant to be performed by the Investor at the Closing, some parties prefer that this obligation be set forth as a separate condition (or a closing deliverable if transaction is a simultaneous sign and close and conditions are not included), especially if there are multiple closings where the payment requirements may be different at other closings. If there are multiple closings, the appropriate mechanics of each such Closing payment as set forth in the forepart of the Agreement should be referenced. [↑](#footnote-ref-80)
81. Use of this qualification limits the accuracy of the statement (e.g., representation) to matters within the knowledge of the party making the representation. Without a “knowledge” qualifier, the party making the representation would take the full risk of the accuracy of the statement regardless of whether the party knew or could have known the represented facts. In essence, it is a risk allocation device and the party making the statement generally would prefer only to be responsible for facts known by it. In order to prevent a lack of inquiry so as to not gain knowledge of certain facts, the parties may include the phrase “after reasonable investigation” to require some level of diligence be undertaken prior to making the representation. [↑](#footnote-ref-81)
82. If warrants are issued in connection with this transaction, the warrant agreement would be included as a Transaction Document. [↑](#footnote-ref-82)
83. Although not necessary and not included in many securities purchase agreements, it is a convenient cross-reference to make it easier to locate where various definitions within the Agreement can be found. [↑](#footnote-ref-83)
84. This provision provides an open-ended survival of the representations and warranties. The parties can negotiate a more limited survival period. [↑](#footnote-ref-84)
85. If Founders or any continuing stockholders are required to provide any representations ,warranties or covenants, this provision will need to be revised to require their approval for any adverse amendment, modification or waiver. [↑](#footnote-ref-85)
86. If the parties prefer to have their disputes resolved by arbitration, this provision should be included and Sections 7.11 and 7.12 should be revised to only apply to the exceptions set forth in the Arbitration Provision. [↑](#footnote-ref-86)