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

**[Common Stock - Early Investment]**

**Stock 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 “*Founders*”)][as to certain provisions hereof][[3]](#footnote-3)[, the Stockholders listed in Schedule hereto of the Company identified in Schedule 1 hereto (the “*Existing Stockholders*”)], 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 shares of common stock, $\_\_\_ par value per share, of the Company (the “*Common Stock*”) 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*”)].[[5]](#footnote-5)

**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:

# **Purchase and Sale of Common Stock**.

## **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 \_\_\_\_\_ shares of the Common Stock[[6]](#footnote-6) (such shares of Common Stock issued to the Investor[s], the “[s]*Acquired Shares*”), 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 1.2 hereof.[[7]](#footnote-7)

## **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.[[8]](#footnote-8)

## **Use of Proceeds**. The Company shall use the proceeds from the sale of the Common Stock for \_\_\_\_ and general corporate purposes[; *provided, however*, that none of the net proceeds from the sale of the Common Stock shall be applied, directly or indirectly, to the payment of or for \_\_\_\_\_\_\_\_\_\_].[[9]](#footnote-9)

## **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*”).[[10]](#footnote-10)

## **Deliveries at Closing**. At [the][each] Closing, (a) the Company shall deliver to [the][each] Investor a certificate or certificates representing the number of shares of Common Stock 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 1.2 hereof.[[11]](#footnote-11)

# **Representations and Warranties of the Company [and Founders]**.[[12]](#footnote-12) 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)][[13]](#footnote-13), the Company[[14]](#footnote-14) 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[[15]](#footnote-15) 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][[16]](#footnote-16).

## **Authority; Due Execution**.[[17]](#footnote-17) 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[[18]](#footnote-18) (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**.[[19]](#footnote-19)

### 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, (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 by which it is bound or to which its properties or assets are subject, (iii) result in the imposition of any Lien upon any properties or assets of the Company or in the suspension, revocation, forfeiture or nonrenewal of any material Permits or licenses applicable to the Company, 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 its 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 for 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**. [[20]](#footnote-20)

### The authorized capital stock of the Company as of the Closing Date, but prior to giving effect to the Investment Transaction contemplated hereby, shall consist of: (i) \_\_\_\_\_\_\_\_\_\_ shares of 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*”), [none of which will be issued and outstanding].[[21]](#footnote-21) [The Company holds no shares of Common Stock or Preferred Stock as treasury shares.].

### All issued and outstanding shares of Common 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] applicable federal securities Laws and the blue sky and securities Laws of all other applicable jurisdictions.][[22]](#footnote-22)

### 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 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.[[23]](#footnote-23) [[24]](#footnote-24)

### Except as set forth in Section 2.4(d) 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, (ii) [except for the Outstanding Plan Options,][[25]](#footnote-25) there are 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, 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, (iv) the Company has no outstanding obligations (contingent or otherwise) of the Company to purchase, redeem, or otherwise acquire any capital stock of or other equity interests in the Company or to pay any dividends or make any other distribution in respect thereof to its securities holders, (v) there are no voting trusts, trusts, proxies or other similar agreements, understandings, or similar arrangements to which the Company is a party or by which the Company is bound with respect to the voting of any shares of capital stock of the Company,[[26]](#footnote-26) and (vi) there are no contractual obligations or commitments of any character to which the Company is a party or by which the Company is bound requiring the registration for sale of any capital stock of or other equity interests in the Company.[[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(e) 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[, and (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].

## **Issuance of Acquired Shares**.[[28]](#footnote-28) The issuance, sale, and delivery of the Acquired Shares to the Investor[s] pursuant to the Investment Transaction have been duly authorized by all necessary corporate action on the part of the Company. The Acquired Shares, when issued, sold, and delivered against payment therefor in accordance with the provisions of this Agreement, will be duly authorized and validly issued, fully paid and nonassessable, and the Investor[s] will receive full ownership of the Acquired 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) 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 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**. 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 its unaudited financial statements (the “*Financial Statements*”), consisting of a balance sheet as of as of \_\_\_\_, 20\_\_, and a statement of income (loss), stockholders’ equity, and cash flows (including related notes and schedules, if any) of the Company for the period ended \_\_\_\_\_\_\_\_\_ [insert recently ended non-year end period] and for [each of the] fiscal year[s] ended December 31, 201\_ [and 201\_\_]. The Financial Statements fairly present (except as may be stated in the notes thereto) the financial position and the results of operations of the Company at and as of the dates and for the periods referred to therein (subject, with respect to the unaudited Financial Statements, to normal and recurring year-end adjustments). [Set forth in Section 2.7 of the Disclosure Schedule is true, complete, and accurate copy of the Financial Statements.]

## **No Undisclosed Liabilities**. The Company does not have 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 date of the most recent Financial Statements 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 date of last Financial Statements: (a) the Company has conducted its businesses in all material respects only in the ordinary course of business, (b) 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 a material adverse effect on the Company, and (c) there has not been any material change in the accounting methods, principals or practices of the Company.

## **Tax Matters**. The Company has duly and timely 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. The Company 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. 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. 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.

## **Contracts and Commitments**.[[32]](#footnote-32)

### Except for the Transaction Documents and as set forth in Section 2.11(a) of the Disclosure Schedule, the Company is not a party to or subject to or bound by any of the following Contracts or proposed transactions that involve: (i) an obligation (whether incurred, assumed, contingent, guaranteed, or secured by any asset or otherwise granting of a Lien) in excess of $\_\_\_\_\_\_\_\_ individually or in excess of $\_\_\_\_\_in the aggregate, (ii) any non-compete or exclusivity provisions with respect to any line of business or geographic area that restricts the business of the Company or that otherwise restrict the ability of the Company to compete in any business or geographic area or with any Person, [(iii) the license of any Intellectual Property Rights, trade secret, or other proprietary right to or from the Company] [[33]](#footnote-33), (iv) the grant of rights to manufacture, produce, assemble, license, market, sell or distribute the Company’s products to any other Person that limits or restricts the Company’s exclusive rights to develop, manufacture, produce, assemble, license, market, sell or distribute the Company’s products, or (v) indemnification by the Company, including, without limitation, indemnification with respect to infringements of proprietary rights.

### Except as set forth in Section 2.11(b) of the Disclosure Schedule, the Company has not: (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, (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 (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.

## **Permits; No Violations; and Compliance with Laws**. [[34]](#footnote-34)

### The Company holds all [material] Permits necessary for it to own, lease, and operate its assets and properties and to lawfully carry on its business as now conducted. All such material Permits are, and at the Closing will be, valid and in full force and effect, and the Company is, and at the Closing 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 any written claim or written notice nor has any Knowledge indicating that the Company 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.

### Except as set forth in Section 2.12(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[; except in the case of clauses (ii), (iii), or (iv) of this Section 2.12(b), as would not have a Material Adverse Effect on the Company or its ability to consummate and perform the terms of this 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 by which its property or assets will or may be bound or affected in or before or by any Governmental Entity [which is reasonably likely to have a Material Adverse Effect on the Company]. There is no litigation, suit, claim, action, or proceeding by the Company pending or which the Company intends to initiate.

## **Intellectual Property Rights**.[[35]](#footnote-35)

### Section 2.14 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 2.14 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 2.14(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 2.14(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 2.14(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**.[[36]](#footnote-36)

### As of the date of this Agreement, the Company employs \_\_\_ full time and \_\_\_ part time employees and engages \_\_\_ consultants or independent contractors.[[37]](#footnote-37) The Company is not aware that any officer or group of employees intends to terminate his, her or their employment with the Company.

### Except as set forth in Section 2.15 of the Disclosure Schedule, the Company is not a party to or bound by any currently effective written employment contract and the employment of each employee or consultant of the Company is terminable at will. To the Knowledge of the Company, no employee of the Company or any consultant with whom the Company has contracted is a party to or bound by any Contract or other commitment (including, without limitation, any employment contract, proprietary information agreement or any other agreement) 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 be employed by, or to contract with, the Company or to promote the interest of the Company or that would conflict with the business the Company; and to the Company’s knowledge the continued employment by the Company of its present employees, and the performance of the Company’s contracts with its independent contractors, will not result in any such violation. The Company has not received any notice in writing alleging that any such violation has occurred.

### Each of the current and former employees, officers, consultants, and independent contractors of the Company has entered into a written (i) propriety information and inventions assignment agreement, the form of which has been provided to the Investor (“*PIIA Agreement*”)[[38]](#footnote-38), 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.

### The Company has no collective bargaining agreements with any of its employees. There is no labor union organizing activity pending or, to the Company’s knowledge, threatened with respect to the Company.

## **Related-Party Transactions**.[[39]](#footnote-39)

### Except as set forth in Section 2.16(a) of the Disclosure Schedule, the Company is not indebted, directly or indirectly, to any of its directors, officers, employees or to their Immediate Family Members, 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 the Immediate Family Members of any such Person are indebted, directly or indirectly, to the Company. The term “*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.

### Except for the Transaction Documents and as set forth in Section 2.16(b) of the Disclosure Schedule, there are no agreements, understandings or proposed transactions between the Company and any of its directors, officers, employees, consultants, or immediate family member of such Person, or any Affiliate thereof. [[40]](#footnote-40)

## **Insurance**.[[41]](#footnote-41)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.

## **Full Disclosure**.[[42]](#footnote-42) 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.]

# **Representations and Warranties of the Investor[s]**.[[43]](#footnote-43) **[**Each of the Investors, severally and not jointly,][The Investor][ hereby represent[s] and warrant[s] to the Company as follows[[44]](#footnote-44):

## **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**.[[45]](#footnote-45) Such Investor: (a) is the sole and true party in interest, and is acquiring its respective portion of the 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 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 Acquired Shares 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 Acquired Shares, 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 Acquired Shares 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 Acquired Shares 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[[46]](#footnote-46), (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 Acquired Shares pursuant to Rule 144 or Rule 144A promulgated under the Securities Act. [[47]](#footnote-47)

### Such Investor understands and acknowledges that only the Company can register the Acquired Shares under applicable securities Laws, and that the Company has no obligation to register or qualify the Acquired Shares 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 Acquired Shares and the Company involves certain risks. Such Investor recognizes that no public market for the Acquired Shares 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 Acquired Shares 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 Acquired Shares 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 Acquired Shares.

### 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 Acquired Shares 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 Acquired Shares.[[48]](#footnote-48) [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.[[49]](#footnote-49)]

## **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.[[50]](#footnote-50) Such Investor represents that in connection with its purchase of the Acquired Shares, 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 Acquired Shares. 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 the Investor is not acquiring the Acquired Shares 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 [[51]](#footnote-51).

## **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 Acquired Shares 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’s Funds**.[[52]](#footnote-52) The 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 fund any portion of the Note Amount 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. The Investor represents and warrants that neither such Investor nor any Person providing funds to the Investor: (x) 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; (y) has been assessed civil or criminal penalties under any Anti-Money Laundering Laws; or (z) 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 Acquired Shares will not violate any applicable securities of other Laws of such 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**.[[53]](#footnote-53)

## **Transfer Restrictions**.[[54]](#footnote-54)[Each of the][The Investor[s] hereby agrees that such Investor will not, directly or indirectly, Transfer or offer to Transfer any of the Acquired Shares, or any of its interests therein (or solicit any offers to buy, purchase, or otherwise acquire [or take a pledge of] the Acquired Shares), except in compliance with this Agreement[, the Stockholders Agreement,][[55]](#footnote-55) 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 Acquired Shares, 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. [[56]](#footnote-56)

## **Investor’s Indemnification Agreement**.[[57]](#footnote-57) 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.

## **Information Rights**.[[58]](#footnote-58)

### The Company covenants and agrees with the Investor that for so long as the Investor continues to own of record no less than [\_\_\_]% of the issued and outstanding Common Stock of the Company and until the Company consummates an [initial public offering] of its securities pursuant to a registration statement declared effective by the Securities and Exchange Commission under the Securities Act, the Company,[[59]](#footnote-59) 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 4.4(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 the Investor that for so long as the Investor continues to own of record no less than [\_\_\_]% of the issued and outstanding Common Stock of the Company and until the Company consummates an [initial public offering] of its securities pursuant to a registration statement declared effective by the Securities and Exchange Commission under the Securities Act, the Company, the Company shall provide to such Investor:

#### 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 report for such year for the Company, with an unaudited 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 reviewed by independent public accountants approved by the [Investor][a majority of the Board of Directors of the Company]];

####  [prior to the start of each quarterly period, a quarterly operating budget and the monthly forecast of the Company’s revenues, expenses, and cash position for the quarter; and] a comprehensive annual operating budget and the monthly forecast of the Company’s revenues, expenses, and cash position for the year shall be provided for the entire fiscal year 60 days in advance of the commencement of each fiscal year;

#### 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

### [Except as otherwise agreed to by the Company, all information received by such Investor with respect to the Company pursuant to this Section 4.4 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].][[60]](#footnote-60)

## **Directors**.[[61]](#footnote-61)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. $\_\_\_ million; and

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

## **[Observation Rights**.[[62]](#footnote-62)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.[[63]](#footnote-63)

## **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 Acquired Shares 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 Closing**.[[64]](#footnote-64) The obligation of the Investor to purchase the Acquired Stock at the Closing is subject to the fulfillment, or the waiver by the Investor, of each of the following conditions on or before the Closing Date.[[65]](#footnote-65)

## **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 Closing.[[66]](#footnote-66)

## **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 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.

## **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 5.3 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 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 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, [certified by the Secretary of State of the State of [insert state of organization]], (b) the Bylaws of the Company as of the Closing, and (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.

## **Stockholders Agreement**.[[67]](#footnote-67) The Company[, the Founders,] and each stockholder of the Company listed on Schedule 1 hereto shall have executed and delivered the Stockholders Agreement.

## **[Registration Rights Agreement**. The Company shall have executed and delivered the Registration Rights Agreement.]

## **Board of Directors**. As of the 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 consummation of the Closing, in accordance with the Stockholders Agreement.[[68]](#footnote-68)

# **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 Closing are subject to fulfillment, or the waiver by the Company, of each of the following conditions on or before the Closing Date[[69]](#footnote-69):

## **Accuracy of Representations andWarranties**. Each of the representations and warranties of [each of] the Investor[s] contained in Section 3 shall be true and correct on and as of the Closing.

## **Performance**.The Investor[s] shall have performed and complied 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 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 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 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 1.2 of this Agreement.[[70]](#footnote-70)

# **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 that directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the first-mentioned Person. 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 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.

“*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 \_\_\_\_\_].[[71]](#footnote-71)

“*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.]][[72]](#footnote-72)

“*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 Acquired Shares, 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 the Acquired Shares 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 Acquired Shares.

“*Transaction Documents*” means, collectively, this Agreement[,][and] the Stockholders Agreement[, and the Registration Rights Agreement].[[73]](#footnote-73)

### The following terms shall have the meanings ascribed thereto in the Section set forth opposite such term: [[74]](#footnote-74)

 **Term Section**

Agreement Preamble

 Aggregate Purchase Price 1.1

 Acquired Shares 1.1

 Bankruptcy and Equity Exceptions 2.2

 Closing 1.4

 Closing Date 1.4

 Code 2.10

Common Stock Recitals

Company Preamble

 Disclosure Schedule Section 2

 Entity Investor 3.1

 Equity Incentive Plan 2.4(c)

 [Existing Stockholders] Preamble

 Financial Statements 2.7

 [Founders] Preamble

 Governmental Entity 2.3(a)

 Immediate Family Member 2.17(a)

 Investment Transaction Recitals

 Investor[s] Preamble

 Non-Competition Agreement 2.16(c)

 Options 2.4(d)

 Outstanding Plan Options 2.4(c)

 Per Share Price 1.1

 PIIA Agreement 2.16(c)

 Preferred Stock 2.4(a)

 [Registration Rights Agreement] Recitals

 Securities Act 2.3(b)

 Stockholders Agreement Recitals

### 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.[[75]](#footnote-75)

## **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 accountable and out of pocket fees and expenses of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, counsel for the Investor[s], in an amount not to exceed \_\_\_\_\_\_ dollars ($\_\_\_\_\_\_).][[76]](#footnote-76)

## **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**.[[77]](#footnote-77) This Agreement may be amended, modified or terminated and the observance of any term hereof may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a written instrument executed by the Company and the Investor. Any amendment, modification, termination or waiver so effected shall be binding upon the Company and the Investor and all of their respective successors and permitted assigns whether or not such party or assignee entered into or approved such amendment, modification, termination or waiver. 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 deemed effectively given upon the earlier of actual receipt or (a) upon personal delivery made by hand to the Person, (b) when sent, if sent by electronic mail or facsimile during normal business hours of the recipient, and if not sent during normal business hours, then on the recipient’s next Business Day, (c) three (3) 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, or (d) the next Business Day after deposit with a nationally recognized overnight courier or package delivery service guaranteeing next Business Day delivery, freight prepaid, specifying next business day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their address as set forth on the signature page to this Agreement, or to such e-mail address, facsimile number or address as subsequently modified by written notice given in accordance with this Section 7.9. If notice is given to the Company, a copy shall also be sent to [insert law firm the company and address of law firm].

## **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. [[78]](#footnote-78)

## **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.

## **Attorney Fees**. A party in breach of this Agreement shall, on demand, indemnify and hold harmless the other party or parties for and against all reasonable out-of-pocket expenses, including legal fees, incurred by such other party or parties by reason of enforcement and protection of its or their rights under this Agreement. The payment of such expenses is in addition to any other relief to which such other party may be entitled.

## **Section Headings**. The section headings and subheadings 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: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Address:  E-Mail:  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  | [INSERT founders/STOCKHOLDERS] Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Address:  E-Mail:  |
|  |  |  |

Signature Page to

Stock Purchase Agreement

Page 1 of 2

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

Signature Page to

Stock Purchase Agreement

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**Schedule 1**

**[FOUNDERS][EXISTING STOCKHOLDERS]**

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

(1) Prior to 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 Stock Purchase Agreement is for use in early rounds of seed financings by and between an angel investor or with a few friendly accredited investors (“Angel Round Offering”) that are willing to invest on an equal equity basis with the start-up entrepreneur (i.e., willing to invest in common stock and not require preferred stock with rights and preferences ahead of the common stock holders). Please refer to the related sample “Term Sheet – Common Stock – Early Investment.” This agreement is for use in connection with a fully negotiated investment in shares of such common stock to one or a few angels investors and/or a small number of sophisticated investors where the Company is required to make detailed representations, warranties and covenants as a condition to the investment and agree to certain post-financing obligations. It is not for use in future (or initial rounds) where investors will likely seek preferred stock rights (i.e., financings with certain angel investors or venture capital or private equity fund investors), such as are typically negotiated in a second or third round financings. See sample “Securities Purchase Agreement – Series B Preferred Stock” for a form of securities purchase agreement to be used in connection with a later round preferred stock investment. Rhis agreement also is not for use in connection with a private placement offering to several investors outside of friends and family where a private placement memorandum and detailed subscription agreement would be used, together with an Investor Questionnaire and a Purchaser Representative’s Questionnaire, to determine the suitability of the investor for the offering in accordance with the applicable exemption from registration under the Securities Act of 1933 (the “Securities Act”) that the Company will rely upon. Please also note that this Agreement contemplates that the offer and sale of the Common 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 agreement is a common stock purchase from a corporation where all investors will share ratably all rights to distributions and voting based on the number of shares held by each. [↑](#footnote-ref-2)
3. As described in footnote 14, the Investor may require that the Founders or certain existing stockholders to make certain representations, warranties and covenants. Although the Company should attempt to resist such efforts, it may be difficult to avoid making such representations and warranties where the Company is in the early stage of development and does not have much in the way of assets, especially where the Founders and stockholders are expected to 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. Generally, the definitive agreements to be entered into in an Angel Round Offering will consist of (a) this Stock Purchase Agreement, (b) a Stockholders Agreement establishing the relationship between the Investors and the other common stockholders of the Company, such as voting agreements, rights to designate directors to serve on the board of directors, rights of first refusal for transfers of shares, requirement for special approvals from Investors in order to take certain corporate actions, and rights to certain information and reports from the Company on a periodic basis, and (c) in some instances, a Registration Rights Agreement (described below). The registration rights agreement is sometimes included in the provisions of the Stockholders Agreement. However, please note that certain of the agreements contained in a Stockholders Agreement may instead be included in a number of separate documents instead of in one comprehensive document (e.g., other than voting agreements and informational requirements). [↑](#footnote-ref-5)
6. Occasionally, the Investor Group also may seek to receive warrants to purchase addition shares of Common 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-6)
7. 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 Common Stock set forth opposite each Investor’s name on Schedule 2 (such shares of Common 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 Acquired Shares purchased hereby (the “*Aggregate Purchase Price”)*, payable by the Investors as set forth in Section 1.2 hereof.” [↑](#footnote-ref-7)
8. 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-8)
9. 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-9)
10. 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). [↑](#footnote-ref-10)
11. 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. 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-11)
12. 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 Stock 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). Because this sample Stock Purchase Agreement – Common Stock – Early Round contemplates an investment in an early stage start-up company, the representations and warranties included herein are less detailed than what might be required by an Investor in a later round financing, such as those set forth in the sample “Securities Purchase Agreement – Series B Preferred Stock.” However, every deal varies and a particular Investor group may require more detailed representations or may require additional representations that are more specific to the industry in which the Company intends to conduct its business. [↑](#footnote-ref-12)
13. 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). In the case of an early round start-up where there are not significant operations or a complicated infrastructure, there is much less of a chance that the Investor will be unable to determine which exceptions should apply elsewhere and such a provision would only serves a putative purpose. As a result, the Company should resist the bracketed language [↑](#footnote-ref-13)
14. As previously indicated, the Investor may seek to have certain founders or significant stockholders to provide their own representations and warranties or 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. Notwithstanding the foregoing, 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. With that said, it may be difficult to avoid making such representations and warranties where the Company is in the early stages of development and does not much in the way of assets. [↑](#footnote-ref-14)
15. In Florida, consistent with the corporate statutes the representation is made as to “having active status” rather than good standing. [↑](#footnote-ref-15)
16. 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. However, in the context of a an early stage start-up company, even small scale inaccuracies may be deemed to be “material” to the company. [↑](#footnote-ref-16)
17. 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-17)
18. 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-18)
19. 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-19)
20. 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-20)
21. 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 Stock Purchase Agreement – Common Stock – Early Round relates an initial or early stage offering of common stock, no Investor would be likely to purchase common stock if any preferred stock was outstanding. According, this agreement contemplates that only common stock is issued and outstanding and, although blank check preferred stock is authorized, no shares of preferred stock have been issued. [↑](#footnote-ref-21)
22. Early stage companies need to ensure that the offer and sale of its securities have been made in compliance with applicable securities laws and that it can demonstrate such compliance, or investors may reluctant to invest. However, this clause can become very broad in scope if it does not include the bracketed language limiting it to registration or exemptions from registration. 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-22)
23. In an early stage start-up company, Investors generally agree with the concept of making available for issuance a limited amount of shares of common stock to management and other key employees of the Company as incentive compensation (and to conserve cash). But because of the potential dilutive effect on their investment, Investors generally will require some limitations to be placed on the amount shares that may be issued, to whom such incentives will be offered, and for what services. There also may be some protections afforded to Investors who have negotiated for board representation which require unanimous board approval (or, at least, the designee’s approval) prior to authorizing additional shares to be made available for equity compensation arrangements. [↑](#footnote-ref-23)
24. If, however, the Company has not yet adopted any Equity Incentive Plan (which is not uncommon as of the time of an Angel Round Offer), then this Section 2(c) should be deleted, together with the bracketed references to Outstanding Plan Options in Sections 2.4(d) and 2.4(e)(ii). [↑](#footnote-ref-24)
25. This bracketed text only applies if the Company has adopted an Equity Incentive Plan and has issued Options that remain unexercised as of the Closing. [↑](#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. However, to the extent that Founders and Existing Shareholders are providing representations, they can represent and warrant as to whether they are parties to such agreements. [↑](#footnote-ref-26)
27. In an Angel Round Financing, it is unlikely that the Company has entered into any other offerings other than with friends and family and, in such cases, it is unlikely that registration rights have been earlier granted any other parties. [↑](#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, however, 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 Stock Purchase Agreement – Common Stock – Early Round relates to an early round financing by a start-up company, the financial statement requirements are not as stringent as in later round deals. The Company is not expected to have audited financial statements or, possibly, any historical financial statements and such financial statements likely are not prepared in accordance with GAAP. The relatively simple representation included in this sample reflects those points. However, certain investors may negotiate more detailed provisions where appropriate. If, however, the Company does have significant historical financial statements or audited financial statements, a more detailed provisions may be required by the Investor, see Section 2.7 of the sample “Securities Purchase Agreement - Series B Preferred Stock” for an example of such a provision. [↑](#footnote-ref-30)
31. This provision provides the Investor with conformation that no material changes that have taken place since the date of the last financial statements. If such changes have occurred, the Company should revise this provision to state “Except as provided in Schedule 2.9 of the Disclosure Schedule,” and then list any changes on that schedule. Investors will sometimes expand this provision to identify a number of specific changes that it will seek to be addressed in any such schedule. See sample of “Securities Purchase Agreement – Series B Preferred Stock” for an example of such a provision. [↑](#footnote-ref-31)
32. 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. This provisions 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. Because an early round start-up Company typically has little operating history, the Investor will typically have a less rigorous approach to this representation. However, in view of the limited operations of most early round start-up companies, even a simplified list of Contracts are likely to be somewhat inclusive of almost all of the Contracts pursuant to which Company is a party. [↑](#footnote-ref-32)
33. It is important to make sure that this provisions does not conflict with Section 2.14. [↑](#footnote-ref-33)
34. 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-34)
35. 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 Stock Purchase Agreement – Common Stock – Early Round anticipates that the Intellectual Property of the Company is important, but limited in scope. The Investor likely will require 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-35)
36. 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 offering or an initial public offering of its securities. [↑](#footnote-ref-36)
37. The Investor may require a list of all employees and, perhaps, information relating to 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-37)
38. 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-38)
39. The purpose of this representation is to require disclosure of transactions with officers, directors, and employees which could be a conflict of interest. Sometime the Investor also will request a representation requiring disclosure of transactions between the Company and entities in which the directors, officers or their respective families have a pecuniary interest. [↑](#footnote-ref-39)
40. 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-40)
41. This is a basic representation. In certain situations, it may be appropriate to add specific industry-based insurance coverage provisions. [↑](#footnote-ref-41)
42. This 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. [↑](#footnote-ref-42)
43. 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 Common Stock does not violate any applicable anti-money laundering and similar laws. For ease of illustration, the section has been prepared for multiple Investors. In an effort to provide the types of representations that may be provided by different types of investors, this sample Stock Purchase Agreement - Common Stock - Early Round Financing agreement, this Section 3 (as opposed to the other provisions provided in this 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-43)
44. Please note that this sample Stock Purchase Agreement – Common Stock – Early Round Financing includes only limited provisions relating to the use of funds from outside of the United States by a foreign investor to pay the Aggregate Purchase Price (e.g. addressing Anti-Money Laundering and certain other relevant Laws relating to use of non-U S. funds). The inclusion and detail of any such representations will depend on the circumstances and the likelihood of potential issues arising with respect to the specific source of funds. For an example of more detailed provisions, see the sample “Securities Purchase Agreement – Series B Preferred Stock.” Please also note that this agreement contemplates that the offer and sale of the Common Stock is taking place in the United States. [↑](#footnote-ref-44)
45. 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-45)
46. 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 requirements, 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-46)
47. 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 Acquired Shares are subject to transfer restrictions set forth in the Stockholders Agreement.” [↑](#footnote-ref-47)
48. 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-48)
49. This provision should be added if the Investor is an entity. [↑](#footnote-ref-49)
50. This confirms that the Investor has been given access to the Company’s books, records, and other information necessary to make an investment decision. This is intended to demonstrate compliance with Rule 502(b)(2)(iv) and (v) of Regulation D. [↑](#footnote-ref-50)
51. 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 Acquired Shares sold hereby, then this Section 3.9 should be revised to verify the accredited investor status of the Investor. [↑](#footnote-ref-51)
52. 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 agreement only addresses Anti-Money Laundering, and other relevant Laws relating to use of non-U S. funds. Depending on the source of funds, the Company may consider adding provisions relating to prohibitions under the U.S. Office of Foreign Assets Control and the U.S. Department of Treasury. See sample “Securities Purchase Agreement – Series B Preferred Stock” for examples of such provisions. Please note that this Agreement contemplates and offer and sale of the Acquired Shares is taking place in the United States. [↑](#footnote-ref-52)
53. Stock 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 Stock 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-53)
54. 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-54)
55. Generally, the Stockholders Agreement will not restrict the Transfer of the Acquired Shares 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-55)
56. The Stockholders Agreement also will require that a legend be included on the certificate and other documents reflecting the Acquired Shares that notifies the holder that the Acquired Shares represented thereby are subject to additional restrictions under the Stockholders Agreement. [↑](#footnote-ref-56)
57. 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-57)
58. Information rights often are included in the Stockholders Agreement instead. However, if there is no Stockholders Agreement or if such information rights are to be provided only to the Investors (as opposed to subsequent holders of the Acquired Shares), it may be preferable to include these rights in the Stock Purchase Agreement to which only the Investor will be a party (i.e., because 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-58)
59. 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 or the Company should consummate an initial public offering of its securities. At that point, the Investor would be treated the same as any shareholder. [↑](#footnote-ref-59)
60. 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 4.4 to the Confidentiality Agreement. If there is no existing confidentiality agreement between the parties, the Company should consider adding a confidentiality provision to Section 4.4. [↑](#footnote-ref-60)
61. 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-61)
62. 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-62)
63. This covenant applies to employees, officers, directors and independent contractors that are engaged after the Closing. Section 2.15(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-63)
64. 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 Acquired Shares. 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 to require that all of the other Transaction 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-64)
65. If the Investment Transaction is structured to be a simultaneous sign and close, then this Closing condition section could instead be included in an expanded Section 1.5 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 5.4, which are addressed in the Section 2 representations and warranties, can be deleted and the other provisions may be converted into deliverables required at the Closing. If there are multiple closings, 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-65)
66. 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 Acquired Shares, etc., as well as those representations that are already qualified as to materiality. [↑](#footnote-ref-66)
67. 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-67)
68. 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-68)
69. If the Investment Transaction is structured to be a simultaneous sign and close, then this Closing condition section could instead be included in an expanded Section 1.5 under a subsection “Deliveries by Company 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 Investor’s obligation to purchase additional shares at each such Closing. [↑](#footnote-ref-69)
70. Although the payment of the purchase price for the Common Stock 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-70)
71. 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-71)
72. This definition is include if the parties agree to include a Material Adverse Effect qualifier to any of the company’s representations and warranties. The carve-outs of what are not include are heavily negotiated. [↑](#footnote-ref-72)
73. If warrants are issued in connection with this transaction, the warrant agreement would be included as a Transaction Document. [↑](#footnote-ref-73)
74. 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-74)
75. This provision provides an open-ended survival of the representations and warranties. The parties can negotiate a more limited survival period. [↑](#footnote-ref-75)
76. In the case of an early round start-up financing where funds are being raised to get the project up and running, the Company should resist paying the legal fees of the Investor (in additional to what it will need to pay its own counsel) so that such amounts will not be diverted from the project. [↑](#footnote-ref-76)
77. 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. Further, if there are multiple Investors, this provision will need to address whether such Investor action must be unanimous or whether it can be taken by a specific percentage of Investors (per capita or by shareholdings). [↑](#footnote-ref-77)
78. This Agreement does not include an arbitration provisions. 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 a separate Arbitration Provision. See sample “Securities Purchase Agreement – Series B Preferred Stock” for an example of an arbitration provision. [↑](#footnote-ref-78)