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**[Name of Corporation], Inc.**

**STOCKHOLDERS’ AGREEMENT**

**Stockholders’ Agreement** (this “*Agreement”*), dated effective as \_\_\_, 201\_, by and among **[**Insert Name of Corporation**]**, Inc., a \_\_\_\_ [Insert State of Incorporation] corporation (the “*Company*”), the purchasers of Series A Preferred, par value $\_\_\_ per share (the “*Series A Preferred Stock*”) listed on Schedule 1 hereto (each, an “*Investor*” and collectively, the “*Investors*”), \_\_\_\_\_ (the “*Founder*”), and the other stockholders of the Company listed in Schedule 2 hereto (the “*Existing Holders*”, and, collectively with the Investors and the Founder, the “*Stockholders*”). [[1]](#footnote-1)

**RECITALS:**

**WHEREAS**, the Company proposes to sell shares of its Series A Preferred Stock to the Investor pursuant to the terms of the Securities Purchase Agreement of even date herewith between the Company and the Investor (the “*Securities Purchase Agreement”*), and it is a condition to the closing of such sale that this Agreement be executed and delivered by the parties hereto;

**WHEREAS**, the Founder owns \_\_\_% of, and the Existing Holders collectively own \_\_% of the issued and outstanding capital stock of the Company as of the date hereof (without giving effect to the sale and issuance of any Series A Preferred Stock pursuant to the Securities Purchase Agreement [or the exercise of Warrants (as defined below) granted contemporaneously therewith][[2]](#footnote-2); and

**WHEREAS,** the parties hereto wish to promote and protect their mutual interests of their investment in the Company be restricting the transfer of the capital stock of the Company by imposing certain rights and obligations upon the parties with respect to the Stock (as defined below);

**NOW, THEREFORE**, in consideration of the mutual premises and covenants contained in this Agreement and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

# Definitions.

As used herein the following capitalized terms shall have the meanings set forth below, and all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Securities Purchase Agreement:

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

*“Agreement”* shall have the meaning set forth in the preamble of this Agreement and shall include any duly approved amendments and modifications.

*“Appraisal”* shall mean, whenever a determination of fair market value of the Company by appraisal is called for pursuant to the terms hereof, the written appraisal that is prepared by a Qualified Appraiser selected by the Board of Directors in accordance with the terms of this Agreement.

**“***Articles [Certificate] of Incorporation”* shall mean the Company’s Articles [Certificate] of Incorporation, as amended and restated from time to time.

“*Available Shares*” shall have the meaning set forth in Section 2.3(b)(iii) of this Agreement.

“*Board of Directors*” shall mean the board of directors of the Company.

*“Business Day”* shall mean any day, other than a Saturday, Sunday, a federal holiday, and days on which banks in the State of \_\_\_\_\_\_\_ are closed for business.

“*Bylaws*” shall mean the Company’s Bylaws, as amended and restated from time to time.

“*Change of Control*”[“*Liquidation Event”*][[3]](#footnote-3) shall mean any of the following: [(a) any liquidation, dissolution, or winding up of the affairs of the Company, whether voluntary or involuntary,] (a)[(b)] a consolidation, merger, or other business combination by, or a sale of equity securities of, or a recapitalization or refinancing of, the Company which results in the holders of the issued and outstanding voting capital stock of the Company entitled to vote generally in an election of Directors immediately prior to such transactions own or control less than a majority of the voting power of the continuing or surviving entity (regardless of whether the Company is the continuing or surviving entity) immediately following such transaction (after giving effect to the exercise or conversion of any derivative or convertible securities issued, directly or indirectly, in connection with such transaction), (b)[(c)] the sale, lease, exchange, transfer, exclusive license or other disposition (including, without limitation, by merger, consolidation, or otherwise) of all or substantially all of the assets or intellectual property of the Corporation to a Person or group (within the meaning of Section 13(d)(3) or 14(d)(2) of the Securities Exchange Act of 1934, as amended (the “*Exchange Act*”)), or (c)[(d)] a transaction pursuant to which any Persons acting together or which would constitute a “group” for purposes of Section 13(d)(3) or 14(d)(2) of the Exchange Act, together with any Affiliates thereof (other than the Stockholders as of the date of this Agreement and their respective Affiliates), beneficially own (as defined in Rule 13d-3 promulgated under the Exchange Act) or control, directly or indirectly, in excess of 50% of the total voting power of all classes of capital stock of the Company entitled to vote generally in the election of directors of the Company.

*“Common Stock”* shall mean the Company’s common stock, par value $\_\_\_\_ per share, and shall also include any class or series of common stock that the Company may be authorized to issue from time to time and any stock into which such Common Stock may hereafter be changed or for which such Common Stock may be exchanged after giving effect to the terms of such change or exchange (by way of reorganization, recapitalization, merger, consolidation or otherwise) and also shall include any Common Stock of the Company hereafter authorized and any capital stock of the Company of any other class hereafter authorized which is not preferred as to dividends or distribution of assets in liquidation over any other class of capital stock of the Company or which has ordinary voting power for the election of directors of the Company.

“*Common Stock Directors*” shall have the meaning set forth in Section 6.1(a)(v) of this Agreement.

*“Company”* shall have the meaning set forth in the preamble of this Agreement and shall include its successors and assigns.

“*Company Offer Price*” shall have the meaning set forth in Section 4.2 of this Agreement.

“*Company Option Period*” shall have the meaning set forth in Section 2.3(a)(i) of this Agreement.

“*Company Purchase Offer Notice*” shall have the meaning set forth in Section 4.2 of this Agreement.

“*Company Purchase Option*” shall have the meaning set forth in Section 2.3(a)(i) of this Agreement

“*Company Purchase Price*” shall have the meaning set forth in Section 2.3(a) of this Agreement.

“*Controlling Shareholders*” shall have the meaning set forth in Section 3.1 of this Agreement.

*“Conversion Price”* shall have the meaning ascribed to such term in the Company’s Articles [Certificate] of Incorporation.

*“Conversion Shares”* means shares of Common Stock issuable upon conversion of shares of Series A Preferred Stock.

“*Drag Along Right*” shall have the meaning set forth in Section 3.1 of this Agreement.

*“Entity”* shall mean any general partnership, limited partnership, corporation, joint venture, trust, limited liability company, limited liability partnership, business trust, cooperative or association.

*“Equivalent Price Per Share”* means, (i) in the case of a share of Common Stock, the same price per share as the share of Common Stock proposed to be sold, and (ii) in the case of a share of Preferred Stock, a price per share equal to the price per share of Common Stock is proposed to be sold multiplied by the number of shares of Common Stock into which each such share of Preferred Stock is then convertible.

*“Existing Holders”* shall have the meaning set forth in the Preamble to this Agreement.

“*Fair Market Value*” shall have the meaning set forth in Section 3.2 of this Agreement.

*“Founder”* shall have the meaning set forth in the Preamble to this Agreement.

“*Founder Director*” shall have the meaning set forth in Section 6.1(a)(iv) of this Agreement

“*Founders Notice*” shall have the meaning set forth in Section 2.3(b)(iii) of this Agreement.

“*Founder Option Period*” shall have the meaning set forth in Section 2.3(c) of this Agreement.

“*Founder Purchase Option*” shall have the meaning set forth in Section 2.3(c) of this Agreement.

“*Independent Director*” shall have the meaning set forth in Section 6.1(a)(iii) of this Agreement.

*“Investor(s)”* shall have the meaning set forth in the Preamble to this Agreement.

“Investor Director[s]” shall have the meaning set forth in Section 6.1(a)(i) of this Agreement.

“*New Securities*” shall have the meaning set forth in Section [5.3][5.4] of this Agreement.

“*New Securities Offer Notice*” shall have the meaning set forth in Section 5.2(a) of this Agreement.

“*New Securities Offer Period*” shall have the meaning set forth in Section 5.2(a) of this Agreement.

“*New Securities Offer Price*” shall have the meaning set forth in Section 5.2(a) of this Agreement.

*“Offered Shares”* shall have the meaning set forth in Section 2.2(a) of this Agreement.

*“Offered Share Price”* shall have the meaning set forth in Section 2.2(a) of this Agreement.

“*Options*” shall mean options, warrants, and other rights to acquire or purchase Common Stock or any security directly or indirectly convertible into or exchangeable or exercisable for, Common Stock, including, without limitation, any convertible indebtedness obligations.

*“Option Period(s)”* shall mean any of the Company Option Period, the Right Holder Option Period, the Over-Allotment Option Period, or the Founder option Period.

*“Over-Allotment Option”* shall have the meaning set forth in Section 2.3(b)(ii) of this Agreement.

*“Over-Allotment Option Period”* shall have the meaning set forth in Section 2.3(b)(ii) of this Agreement.

*“Participating Right Holder”* shall have the meaning set forth in Section 2.5(a) of this Agreement.

“*Permitted Transfers*” shall have the meaning set forth in Section 2.9 of this Agreement.

*“Person”* shall mean any individual or Entity, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so admits.

*“Preemptive Rights Notice”* shall have the meaning set forth in Section [5.2(a)][5.3(b)] of this Agreement.

*“Preferred Stock”* shall mean any class of preferred stock of the Company that may have issued or be authorized to issue from time to time, including the Company’s Series A Preferred Stock.

*“Proportionate Percentage”* shall mean with respect to each Stockholder a fraction, the numerator of which shall be the total number of shares of Common Stock then owned by such Stockholder and the number of Conversion Shares into which Shares of Series A Preferred Stock then owned by such Stockholder may then be converted, and the denominator of which shall be the total number of shares of Common Stock and Conversion Shares then owned by all Stockholders of the Company.

“*Proposed New Securities Purchaser*” shall have the meaning set forth in Section 5.2(a) of this Agreement.

*“Proposed Purchaser”* shall have the meaning set forth in Section 2.2(a) of this Agreement.

*“Purchase Offer”* shall have the meaning set forth in Section 2.2(a) of this Agreement.

*“Qualified Appraiser”* shall mean any investment bank or similar financial institution or a reputable regional or national accounting firm approved by the Board and the Investor which has not been an Affiliate as to any Stockholder within the three year period prior to the date of its appointment hereunder, which shall have had not less than three years’ experience in appraising, valuing, owning or managing companies in a similar line of business to the Company. If the Board and the Investor cannot agree on such a selection, each shall select such a firm or institution and the two firms or institutions so selected shall appoint a Qualified Appraiser meeting the terms of this definition.

*“Qualified IPO”* shall mean a firm commitment underwritten initial public offering (“*IPO*”) of Common Stock by, and for the account of, the Company pursuant to an effective registration statement filed under the Securities Act which (a) the aggregate gross proceeds (before deducting for underwriting discount, commission or expense) received by the Company equals or exceeds $\_\_\_\_\_, and (b) the per price per share of Common Stock equals or exceeds \_\_\_% of the Conversion Price in effect for the Series A Preferred Stock immediately prior to the closing of the sale of the Common Stock by the Company pursuant to the IPO.

*“Remaining Shares”* shall have the meaning set forth in Section 2.3(a)(ii) of this Agreement.

“*Required Sellers*” shall have the meaning set forth in Section 3.1 of this Agreement.

“*Required Percentage*” shall mean with respect to each Existing Holder [and Founder] the number of shares of Stock that such Existing Holder [or Founder] owns divided by the total number of shares of Stock held by all Existing Holder [and Founder].

*“Right Holder”* shall mean any Investor, its Affiliates, or any Person who has acquired shares of Stock from the Investor or its Affiliates in accordance with the terms of this Agreement. [Any Investor owning beneficially or of record of not less than \_\_\_\_\_ shares of Series A Preferred Stock or \_\_\_\_\_ Conversion Shares (each as adjusted for any stock split, stock dividend, subdivision, combination, or reclassification of shares or similar event).]

“*Right Holder Notice*” shall have the meaning set forth in Section 2.3(a)(ii) of this Agreement.

“*Right Holders Option Period*” shall have the meaning set forth in Section 2.3(b)(i) of this Agreement.

“*Right Holders Purchase Option*” shall have the meaning set forth in Section 2.3(b)(i) of this Agreement.

*“Sale of Control”* shall have the meaning set forth in Section 3.1 of this Agreement.

“*Sales Notice*” shall have the meaning set forth in Section 4.2 of this Agreement.

*“Second Right Holder Notice”* shall have the meaning set forth in Section 2.3(b)(ii) of this Agreement.

*“Securities Act”* shall mean the Securities Act of 1933, as amended.

*“Securities Purchase Agreement”* shall have the meaning set forth in the recitals to this Agreement.

*“Selling Stockholder”* shall have the meaning set forth in Section 2.2(a) of this Agreement.

*“Series A Preferred Stock”* shall have the meaning set forth in the Preamble to this Agreement.

*“Stock”* shall mean all (i) shares of Common Stock or Preferred Stock held by Stockholders from time to time, (ii) shares of Common Stock or Preferred Stock subsequently held by transferees of the Stockholders who acquire such shares in one or more transfers, and (iii) securities of the Company or any of its Subsidiaries issued in exchange for, upon conversion of, upon reclassification of, or as a distribution in respect of any of the foregoing, including the Conversion Shares. For purposes of this Agreement, (A) “*Stock*” shall include Common Stock purchasable or otherwise subject to acquisition upon conversion, exercise, or exchange of outstanding Options, and (B) when calculating the percentage of Stock held by any holder, such calculation shall give effect to any stock splits, stock dividends, distributions, subdivisions, combinations or other recapitalization events involving the Stock.

*“Stockholder(s)”* shall have the meaning set forth in the Preamble to this Agreement, and shall include other individuals or Entities becoming party to this Agreement, as provided for herein..

“*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.

*“Transfer”* shall be construed broadly and shall include to mean, in the context of a transfer of Stock, 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 Entity, or other transfer or disposition (voluntarily or involuntarily, by operation of law or otherwise, and whether as security or otherwise) by a Stockholder of all or a portion of its Stock or any right or interest therein. For purposes of this definition, a “*Transfer*” shall include (a) 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 Entity, 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 Stock, or (b) the merger or consolidation of a Stockholder or of any other Person referred to in clause (a) hereof with another Person.

*“Transfer Notice”* shall have the meaning set forth in Section 2.2(a) of this Agreement.

[“*Warrants*” shall have the meaning ascribed to it in the Securities Purchase Agreement.]

# **Restrictions on Transfer and Certain Other Restrictions**.

## **Transfers Prohibited**.[[4]](#footnote-4) No Stockholder shall transfer all or any part of the shares of Stock now or hereafter owned by such Stockholder except as otherwise expressly permitted under the terms of this Agreement.

## **Offer of Sale; Notice of Proposed Sale**.

### Except in the case of a Permitted Transfer that is made in compliance with Section 2.9 of this Agreement, if the Founder or any Existing Holder [[5]](#footnote-5) shall desire to effect a Transfer any shares of Stock now or hereafter owned by such Founder or Existing Holder (other than unvested shares of Stock pursuant to any stock restriction agreement, or similar arrangement, which shall at all times remain subject to such agreement or arrangement) in a transaction with another Person after receipt of a *bona fide* purchase offer[[6]](#footnote-6) therefrom (“*Purchase Offer*”), or of any interest in such Stock, whether voluntarily or by operation of law, then such stockholder (the “*Selling Stockholder”*) shall first deliver a written notice of its desire to do so (the “*Transfer Notice”*) to the Company and each of the Right Holders[[7]](#footnote-7). The Transfer Notice must be delivered no less than [forty-five (45)] Business Days prior to the proposed Transfer and must specify: (i) the name and address of the prospective purchaser or other transferees to which the Selling Stockholder proposes to Transfer all or part of the Stock or an interest in the Stock (the “*Proposed Purchaser”*), (ii) the number of shares of, or the interest in, the Stock that the Selling Stockholder proposes to Transfer (the “*Offered Shares”*), (iii) the consideration per share of Stock to be delivered to the Selling Stockholder in exchange for the proposed Transfer (“*Offered Share Price*”), and (iv) all other material terms and conditions of the proposed Transfer, all of which must be *bona fide*. A complete copy of the Purchase Offer of the Proposed Purchaser must be included with the Transfer Notice furnished to the Company hereunder.

### [Except in the case of a Permitted Transfer that is made in compliance with Section 2.9 of this Agreement, a Stockholder may not Transfer any Stock under this Section 2 payable in consideration other than for cash.[[8]](#footnote-8)]

### A Stockholder may not Transfer any Stock of the Company to any competitor of the Company (as determined by the Company in its sole discretion exercised in good faith), except in connection with a Change in Control[Liquidation Event] approved by the Board of Directors.[[9]](#footnote-9)

## **Right of First Refusal***.[[10]](#footnote-10)*

### ***Company’s Priority Right of First Refusal***.

#### Following receipt of the Transfer Notice, the Company shall have the first option to purchase all or part of the Offered Shares at the Offered Share Price (“*Company Purchase Option*”). If the Company wishes to exercise the Company Purchase Option, it must do so no later than [fifteen (15)] days after the Transfer Notice has been deemed to have been delivered to it (the “*Company Option Period*”). If the Company wishes to exercise the Company Purchase Option, it must do so prior to the expiration of the Company Option Period by written notice to the Selling Stockholder. The election to purchase the Offered Shares shall be made on behalf the Company by a majority of the Board of Directors who have not been designated by, and who are not Affiliates of, the Selling Stockholders [and [a majority][at least one] of the Preferred Directors].

#### In the event that the Company does not elect to purchase all of the Offered Shares, on or before the expiration of the Company Option Period, the Company shall deliver to the Rights Holders [and the Founder (unless the Founder is the Selling Stockholder)] written notice of the proposed Transfer of the Offered Shares (the “*Right Holders Notice*”) which shall set forth the name of the Selling Stockholder, the number of Offered Shares, the number of Offered Shares being purchased by the Company pursuant to the Company Purchase Option, the number of Offered Shares that the Company has elected not to purchase (the “*Remaining Shares*”), and the Offered Share Price as provided in the Transfer Notice.

### ***Right Holders’ Right to Purchase***.

#### Each Right Holder shall have an option to purchase his or her *pro rata* share (based on the number of shares of Stock owned by such Right Holder as a percentage of the total shares of Stock owned by all Right Holders) all or part of the Remaining Shares at the Offered Share Price (“*Right Holders Purchase Option*”). If any such Right Holder wishes to exercise this Right Holder Purchase Option, they must do so no later than [fifteen (15)] days after the expiration of the Company Option Period (the “*Right Holder Option Period*”) by written notice to the Company, which notice shall indicate the number of Remaining Shares that such Right Holder is willing to purchase. If a Right Holder fails to provide such notice the Company prior to the expiration of the Right Holder Option Period or shall elect not to purchase any of the Remaining Shares, then such Right Holder’s right to purchase the Remaining Shares shall terminate.

#### In the event that the Right Holders Purchase Option to purchase have been exercised by the Right Holders with respect to some but not all of the Remaining Shares, the Company shall, on or before the last day of the Right Holders Option Period, give written notice of that fact to those Right Holders who have exercised their options hereunder in full within the Right Holders Option Period (the “*Second Right Holder Notice*”). The Second Right Holder Notice shall specify the number of Offered Shares the Right Holders have not elected to purchase. Each Right Holder who has exercised his options hereunder in full within the Right Holder Option Period shall have an additional option (the “*Over-Allotment Option*”), for a period of 10 [Business Days][days] after delivery to such Right Holder of the Second Right Holder Notice (the “*Over-Allotment Option Period*”), to purchase all or any part of the balance of such Offered Shares on the terms and conditions set forth in the Transfer Notice, which option shall be exercised by the delivery of written notice to the Company. In the event that there are two or more such Right Holders that choose to exercise the Over-Allotment Option for a total number of Offered Shares in excess of the number available, the Offered Shares available for each such Right Holder’s option shall be allocated to such Right Holder *pro rata* based on the number of shares of Stock owned by the Right Holders electing to exercise the Over-Allotment Option.[[11]](#footnote-11)

#### In the event that the Right Holders do not exercise in full their option to purchase all of the Remaining Shares, on or before the expiration of the last day of the Over-Allotment Option Period, the Company shall deliver to the Founder (unless the Founder is the Selling Stockholder) written notice of the proposed Transfer of the Offered Shares (the “*Founder Notice*”) which shall set forth the name of the Selling Stockholder, the number of Offered Shares, the number of Remaining Shares that the Right Holders has elected not to purchase (the “*Available Shares*”), and the Offered Share Price as provided in the Transfer Notice.

#### [[12]](#footnote-12)In the event that a Selling Shareholder proposes to Transfer shares of Stock in a transaction or series of related transactions (other than Permitted Transfers made in accordance with Section 2.9 of this Agreement)[ more than \_\_% of the shares of Stock owned by such Selling Stockholder (so long as such amount is greater than \_\_\_\_ shares of Common Stock or Conversion Shares (each as adjusted for any stock split, stock dividend, subdivision, combination, or reclassification of shares or similar event))][[13]](#footnote-13), then, as an alternative to exercising the Right Holder Purchase Option provided in Section 2.3(b) hereof, each Right Holder may, within the Right Holder Option Period, notify the Company of its desire to participate in the Transfer of the shares of Stock by transferring in compliance with Section 2.5(b), at an Equivalent Price Per Share[[14]](#footnote-14) and on the terms set forth in the Transfer Notice, up to an equivalent proportion of the shares of Stock owned by such Right Holder as the proposed Transfer represents with respect to all shares of Stock then owned by the Selling Shareholder. A Right Holder may only exercise the Right Holder Purchase Option or the rights under this Section 2.3(b)(iv), and may not exercise both the Right Holder Purchase Option with respect to a portion of its shares and the rights under this Section 2.3(b)(iv) with respect to other shares held by it.[[15]](#footnote-15)

### ***Founder’s Right to Purchase***. If the Founder is not the Selling Stockholder, [for so long as the Founder owns beneficially and of record not less than \_\_\_\_\_ shares of Common Stock (including Stock convertible into shares of Common Stock and subject to adjustment to reflect stock splits, stock dividends, and other combinations or subdivisions of the Common Stock)], the Founder shall have an option to purchase all or part of the Available Shares at the Offered Share Price (“*Founder Purchase Option*”). If the Founder wishes to exercise this Founder Purchase Option, the Founder must do so no later than [fifteen (15) days] after the expiration of Over-Allotment Option Period (the “*Founder Option Period*”) by written notice to the Company, which notice shall indicate the number of Available Shares that the Founder is willing to purchase. If the Founder fails to provide such notice the Company prior to the expiration of the Founder Option Period or shall elect not to purchase any of the Available Shares, then such the Founder’s right to purchase the Available Shares shall terminate.

### ***Non-Cash Offered Share Price***.[[16]](#footnote-16) To the extent that the consideration proposed to be paid by the Offeror for the Offered Shares consists of a promissory note or property other than cash, the consideration required to be paid by the Company, Right Holders or the Founder under this Section 2.3 may consist of cash equal to the fair market value of such property, as determined in good faith by agreement of the Board of Directors and the Selling Stockholder; *provided, however,* that in the event the Selling Stockholder and the Board of Directors cannot mutually agree on the fair market value of such property after a reasonable period of good faith negotiation, then such determination shall be based on an Appraisal, which Appraisal shall be binding on all parties. The cost of any such Appraisal shall be borne equally by the Company and the Selling Stockholder.

### ***Notices to Selling Stockholders***. The Selling Stockholder shall be copied on all notices to and by the Company made pursuant to this Section 2.3.

## **Sale of Offered Shares**.

### ***Company Purchases***. In the event that the Company Purchase Option to purchase the Offered Shares is exercised in full by the Company, the Company shall immediately notify the Selling Stockholders of that fact and the closing of the purchase of the Offered Shares shall take place at the offices of the Company no later than five (5) Business Days after expiration of the Company Option Period. In the event that the Company shall exercise the Company Purchase Option to purchase only a portion of the Offered Shares, the closing of such purchase of the Offered Shares by the Company shall take place at the offices of the Company on the date of the closing of the of the Offered Shares pursuant to either: (i) Section 2.4(b) if all of the Remaining Shares are purchased by the Right Holders , (ii) Section 2.4(c) if all of the Remaining Shares are not purchased by the Right Holders and all of the Available Shares are purchased by the Founder, or (iv) Section 2.5(a) if any of the Offered Shares are sold to the Proposed Purchaser.

### ***Right Holders Purchases***. In the event that the options to purchase the Remaining Shares are exercised in full by the Right Holders pursuant to the provisions of Section 2.3(b) hereof, the Company shall immediately notify all of the exercising Right Holders and the Selling Stockholder of that fact, and the closing of the purchase of the Offered Shares shall take place at the offices of the Company no later than five (5) Business Days after expiration of such notice to the Right Holders. In the event that the Right Holders shall exercise their options to purchase only a portion of the Remaining Shares, the closing of such purchase of the Offered Shares by the Right Holders shall take place at the offices of the Company on the date of the closing of the of the Offered Shares pursuant to either (i) Section 2.4(c) if all of the Available Shares are purchased by the Founder, or (iv) Section 2.5(a) if any of the Offered Shares are sold to the Proposed Purchaser.

### ***Founder Purchases***. In the event that the Founder shall exercise the Founder Purchase Option, the Company shall immediately notify the Founder, all of the exercising Right Holders, and the Selling Stockholder of that fact, and the closing of the purchase of the Offered Shares shall take place at the offices of the Company no later than five (5) Business Days after expiration of such notice. In the event that the Founder shall exercise the Founder Purchase Option to purchase only a portion of the Available Shares, the closing of such purchase of the Offered Shares by the Founder shall take place at the offices of the Company on the date of the closing of the of the Offered Shares pursuant to Section 2.5(a) if any of the Offered Shares are sold to the Proposed Purchaser.

## **Transfer to Proposed Purchaser; Co-Sale Rights**.

### If the Company, the Right Holders and the Founder do not elect to purchase all of the Offered Shares within their respective Option Periods, then the Selling Stockholder shall be permitted to Transfer any Offered Shares not purchased by the Company, the Right Holders and the Founder to the Proposed Purchaser in strict compliance with the Transfer Notice during the period commencing on the thirtieth (30th) Business Day and ending on the sixtieth (60th) Business Day following the expiration of the relevant Option Period; *provided, however*, that each Right Holder that has, pursuant to Section 2.4(b)(iv), expressed a desire to Transfer shares in the transaction (a “*Participating Right Holder*”) shall be entitled to do so in accordance with the terms of Section 2.5(b) hereof.

### The Company shall promptly, on expiration of the Founder Option Period or, if the Founder is the Selling Stockholder, the relevant Option Period of the Right Holders, notify the Selling Stockholder of the aggregate number of shares of Stock the Participating Right Holders wish to transfer. The Selling Stockholder shall use his commercially reasonable efforts to interest the Proposed Purchaser in purchasing, in addition to the Offered Shares, the shares of Stock the Participating Right Holders wish to Transfer. If the Proposed Purchaser does not wish to purchase all of the shares of Stock made available by the Selling Stockholder and the Participating Right Holders, then each Participating Right Holder and the Selling Stockholder shall be entitled to Transfer, at an Equivalent Price Per Share and on the terms and conditions set forth in the Transfer Notice, a portion of the shares being sold to the Proposed Purchaser, in the same proportion as such Selling Stockholder’s or Participating Right Holder’s ownership of shares of Stock bears to the aggregate number of shares of Stock owned by the Selling Stockholder and the Participating Right Holders. The proceeds of any Transfer made by the Selling Stockholder without compliance with the provisions of Section 2.5 shall be deemed to be held in constructive trust in such amount as would have been due the Participating Right Holders if the Selling Stockholder had complied with this Agreement.

### If the Participating Right Holders do not elect to sell the full number of shares which they are entitled to sell pursuant to Section 2.5(b), the Selling Stockholder shall be entitled to Transfer to the Proposed Purchaser, according to the terms set forth in the Transfer Notice, that number of the Selling Stockholder’s shares of Stock which equals the difference between the number of shares desired to be purchased by the Proposed Purchaser and the number of shares of Stock the Participating Right Holders wish to transfer without further complying with the other provisions of this Section 2;

### Notwithstanding any of the foregoing, as a condition to any Transfer of the shares of Stock to the Proposed Purchaser, the Proposed Purchaser shall become a party to and agree to be bound by the terms of this Agreement.

### If the Selling Stockholder wishes to Transfer any such shares of Stock (i) at a price per share or for a form or type of consideration which differs from that set forth in the Transfer Notice, (ii) upon terms different from those previously offered to the Company, the Right Holders, and the Founder (including, without limitation, seeking to sell more shares than the number of Offered Shares set forth in the Transfer Notice) or (iii) more than sixty (60) days after the expiration of the relevant Option Period; then in each such case as a condition precedent to such transaction, such Offered Shares shall again be subject to the restrictions of this Section 2 and will need to again be first offered to the Company, the Right Holders, and the Founder in accordance with the provisions of Sections 2.2 and 2.3 above

## **Sale of Offered Shares**. Subject to the rights of the Company, the Right Holders, and the Founder as set forth in this Agreement, the sale of any Offered Shares shall take place at the offices of the Company on a date within sixty (60) days after the expiration of the relevant Option Period (including the period in which the Over-Allotment Option may be exercised). Notwithstanding any other provision in Section 2 hereof, prior to the sale of any of the Offered Shares by the Selling Stockholder, the Selling Stockholder, at its sole discretion, may, by notice to the Company, rescind the proposed Transfer of the Offered Shares with respect to all, but not less than all, of the Offered Shares.[[17]](#footnote-17)

## **Transfer of Stock to Company, the Right Holders, and the Founder**. All Offered Shares elected to be purchased by the Company, the Right Holders, and the Founder pursuant to Section 2.3 hereof shall be delivered free and clear of all liens and encumbrances at the applicable closing (other than any purchase money liens taken back by the Selling Stockholder at the closing, if applicable) and at such closing the Selling Stockholder shall deliver certificates representing the Stock so purchased by the Company, the Right Holders, and the Founder, together with all stock powers, assignments, and other documents that may be reasonably required by the Company, the Right Holders, and the Founder purchasing such Offered Shares.

## **Effect of Prohibited Transfer**.In the event that any Person purportedly Transfers any shares of Stock in violation of any of the provisions of this Agreement, any such purported Transfer and any actions by the purported transferor and transferee in connection therewith shall be void and of no force or effect and the Company shall not: (a) transfer on its books any share of Stock which shall have been Transferred in violation of any of the provisions set forth in this Agreement, or (b) treat as the owner of, or pay dividends to, any transferee to whom any shares of Stock shall have been purportedly Transferred in violation of any of the provisions of this Agreement. In the case of a Transfer or attempted Transfer of any shares of Stock that is in violation of this Agreement, in addition to any other remedies available in Section 7.4 hereof, the parties engaging in or attempting to engage in such Transfer shall indemnify and hold harmless the Company, the Right Holders, and the Founder (unless the Founder is a Selling Stockholder) from all costs, liabilities, and damages that the Company, the Right Holders, or the Founder (unless the Founder is a Selling Stockholder) may incur (including, without limitation, incremental tax liabilities and attorneys’ fees and expenses) as a result of such Transfer or attempted Transfer and efforts to enforce the indemnity granted hereby.

## **Permitted Transfers***.*[[18]](#footnote-18) Anything herein to the contrary notwithstanding, provided that the Transferee (except pursuant to Section 2.9(a) below) has agreed in writing to execute and to be bound by the terms of this Agreement in accordance with Section 7.2 of this Agreement, the following Transfers of Stock by a Stockholder shall be permitted without complying with the provisions of Section 2.2 through 2.8 of this Agreement (“*Permitted Transfers*”):

### Transfer of shares of Stock by a Stockholder pursuant to a Qualified IPO or a Change of Control[Liquidation Event] transaction, [or by a Required Seller pursuant to Section 3];

### Transfer of shares of Stock made pursuant to rights of repurchase in favor of the Company upon termination of employment or services by a Stockholder pursuant to any stock option agreement or other agreement approved by the Board of Directors of the Company[[19]](#footnote-19);

### Transfer of shares of Stock through bequest or inheritance to or for the benefit of a family member of and individual Stockholder (which shall be limited to a spouse, lineal ancestor or decedent, or sibling) or to a trust, partnership or limited liability company for the benefit of such family members, *provided, however*, that, if requested by the Company, such Stockholder shall have furnished the Company with an opinion of counsel, reasonably satisfactory to the Company, that such Transfer will not require registration of such shares under the Securities Act or the securities laws of any other applicable jurisdiction;

### Transfer of shares of Stock by a Right Holder, *provided* *that*, if reasonably requested by the Company, such Right Holder shall have furnished the Company with an opinion of counsel, reasonably satisfactory to the Company, that such transfer will not require registration of such shares under the Securities Act (it being agreed that the Company will not require opinions of counsel for transactions made pursuant to Rule 144); *provided further, however*, that no such opinion of counsel shall be necessary for a Transfer by an Investor that is (i) a partnership to its partners or former partners in accordance with partnership interests, (ii) a corporation to its shareholders in accordance with their interest in the corporation, (iii) a limited liability company to its members or former members in accordance with their interest in the limited liability company, or (iv) to an [Affiliate];[[20]](#footnote-20)

### Transfer of shares of Stock to the Founder.][[21]](#footnote-21)

# **Drag Along Rights**.**[[22]](#footnote-22)**

## **Required Sale**. [Subject to the requirements of Section 3.2, if][If] at any time [after [insert date]] the holders of a majority of the outstanding Stock held by the [Investor or any of its Affiliates][Right Holders] (such majority of the outstanding Stock, referred to herein as the “*Controlling Shareholders*”) approves or accepts an offer to sell or proposes to otherwise Transfer all of the Stock held by them to a*bona fide* third party or group of third parties that are not Affiliates of any of the Controlling Shareholders and such sale or other Transfer is conditioned upon the sale of [all][or a portion][[23]](#footnote-23) of the Stock held by the other Stockholders (“*Sale of Control*”), then the Controlling Shareholders shall have the right to require all, but not less than all, other Stockholders (“*Required Sellers*”) to participate in such sale or other Transfer on the same terms and conditions as the Controlling Shareholders (“*Drag Along Right*”) and the Required Sellers shall agree to sell their shares of Stock to such third party on the same terms and conditions as the Controlling Shareholders and, to the extent requested, to vote in favor of the Sale of Control transaction. [Each Required Seller shall be required to sell that number of shares of Stock that it owns as is equal to the total number of shares that all of the Required Sellers are required by the third party to sell, multiplied by its Required Percentage.]

## [**Minimum Requirements of Drag Along Right**.[[24]](#footnote-24)

### Notwithstanding Section 3.1 hereof, the Required Sellers will not be required to consent to and to vote in favor of, and sell their Stock in a Sale of Control transaction unless:

#### a majority of the Board of Directors has approved the Sale of Control, or

#### the Sale of Control is for a consideration which is at least equal to the Fair Market Value (as defined below) of the Company.

### In the event the Board of Directors has not approved a Sale of Control transaction within fifteen (15) Business Days from receipt of a request by the Controlling Shareholders for approval thereof, a Qualified Appraiser shall be selected to calculate the fair market value of the Company (“*Fair Market Value*”). The reasonable expenses of the Qualified Appraiser shall be paid by the Company.]

### [Notwithstanding Sections 3.1 and 3.2(a) hereof, in the event that a Qualified Appraiser is engaged pursuant to Section 3.2(b) and the Sale of Control is determined to be equal to or greater than Fair Market Value, then in lieu of requiring compliance with Section 3.1 hereof, the Company may at its option purchase all of the Stock of the Controlling Shareholders at a price per share equal to [102]% of the price per share that was offered by the third party to the Controlling Shareholders (which option must be exercised by the Company within fifteen (15) days from the Fair Market Value being submitted to the Company and the Controlling Shareholders by the Qualified Appraiser and payment for which must be made within 45 days after such exercise). If the Qualified Appraiser determines that the proposed Sale of Control transaction is less than the Fair Market Value, the Company also shall have the right to purchase the Stock of the Controlling Shareholders at a price per share equal to [102]% of the Fair Market Value per share (which option must be exercised by the Company within fifteen (15) days from the Fair Market Value being submitted to the Company and the Controlling Shareholders by the Qualified Appraiser and payment for which must be made within 45 days after such exercise).**][[25]](#footnote-25)**

**[3.3] Notice of Drag-Along**. The Controlling Shareholders shall provide written notice of the proposed Sale of Control transaction and the exercise of its Drag Along Right with respect thereto to the Company and the Required Sellers at least \_\_\_\_\_\_ (\_\_) [days][Business Days] prior to the proposed Sale of Control.[[26]](#footnote-26) The notice shall set forth: (a) the name and address of the proposed transferee in the Sale of Control transaction, and (b) the proposed amount and type of consideration to be paid for the shares of Stock and the terms and conditions thereof.

**[3.4] Failure to Transfer**. If a Required Seller fails or refuses to sell or vote his or her shares of Stock as required by this Section 3, then such party hereby irrevocably constitutes and appoints the Controlling Shareholders or his assigns and any representative or agent thereof, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the palace and stead of such Required Seller and in the name of such Required Seller or in its own name, for the purpose of carrying out the terms of this Section 3, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Section 3. Such Required Seller hereby ratifies all that said attorneys shall lawfully do or cause to be done by virtue hereof.

# **Right of First Offer to Purchase Right Holders Stock**.[[27]](#footnote-27)

## **Transfers by Right Holders**. The Right Holders shall have the right to Transfer any or all of its Stock, provided that such Right Holders first complies with the provisions of this Section 4.

## **Sales Notice**. If a Right Holders desire to Transfer any or all of its Stock other than pursuant to: (a) Section 2.5 [or Section 3] hereof, (b) a Qualified IPO, [or] (c) a Change of Control[Liquidation Event] transaction; then the Right Holder shall give notice to the Company of its desire to do so (an “*Sales Notice*”). The Sale Notice shall state: (i) the number of shares of Stock that the Right Holder intends to sell, and (ii) invite the Company to propose a cash price that it would be willing and able to pay for such shares (“*Company Offer Price*”).

## **First Offer**.

### If the Company desires to submit a Company Offer Price, then within ten (10) days after receipt of the Sales Notice, the Company shall notify the Right Holder furnishing the Sales Notice in writing of the Company Offer Price and designate a proposed closing date which may not be less than 30 days nor more than 60 days after the date of the Sales Notice (“*Company Purchase Offer Notice*”).

### If such Right Holder elects to sell the shares of Stock to the Company at the Company Offer Price, such Right Holder shall so notify the Company in writing within [five] days before the proposed closing date, and thereupon the notices given by such Right Holder and the Company pursuant to Sections 4.2 and 4.3(a) shall constitute a binding agreement of purchase and sale between such Right Holder and the Company.

### If such Right Holder does not elect to sell the shares of Stock to the Company at the Company Offer price, such Right Holder shall have the right, subject to this Section 4.3(c), to sell the offered Stock for a purchase price having a cash equivalent value equal to or greater than the Company Offer Price, provided that the closing of such sale shall occur not later than 180 days after the date of the Company Purchase Offer Notice. If such Right Holder does not close a sale of the shares of Stock within such 180 day period, then such Right Holder may not close the sale of Stock without again complying with the provisions of this Section 4.

# **[Rights of Last Refusal and Preemptive Rights**.[[28]](#footnote-28)**]**

[Alternative One: Rights of Last Refusal and Preemptive Rights. [[29]](#footnote-29)]

## **Right of Last Refusal**. [[30]](#footnote-30) Each time the Company proposes to sell to any Person, or proposes to accept an offer from any Person (other than from an existing Right Holder) to acquire, any New Securities (as defined in Section 5.3 hereof), each Right Holder shall have the right to offer to purchase its *pro rata* share (based on the number of shares of Stock owned by such participating Right Holders as a percentage of the Stock owned by all Right Holders participating in such offer) of [all or any portion] of the New Securities that the Company is proposing to sell and issue to such Person. [Each Right Holder shall have the right to transfer its rights under this Section 5.1 to any Qualified Transferee (as defined in Section 3.5 hereof).][[31]](#footnote-31)

## **Mechanics of Right of Last Refusal**.

### In the event that the Company proposes to issue New Securities, at least 45 days before such issuance, it shall give each Right Holder written notice of the proposed issuance (“*New Securities Offer Notice*”), describing in such notice the identity of all Persons offering to purchase such New Securities (“*Proposed New Securities Purchaser*”), the type of New Securities, the terms of the New Securities, and the price offered. Each Right Holder shall have 30 days from the date of its receipt of any such New Securities Offer Notice (“*New Securities Offer Period*”) to offer to purchase all or a part[[32]](#footnote-32) of such New Securities for a purchase price equal to that set forth in the New Securities Offer Notice (“*New Securities Offer Price*”) upon terms no less favorable to the Company than those offered by the Proposed New Securities Purchaser. Any agreement by a Right Holder to purchase New Securities hereunder shall be binding on such Right Holder.

### In the event that Right Holders have agreed to purchase or otherwise acquire all of the New Securities to pursuant to Section 5.1, the Company shall designate by written notice to Right Holders a date for the closing of the issuance and sale of such New Securities to occur not earlier than five days nor later than 15 days following the expiration of the New Securities Offer Period. Notwithstanding the agreement of the Right Holders to purchase any or all of the New Securities, unless otherwise specifically agreed by the Right Holders and the Company, the Company will be under no obligation to issue and sell the New Securities, and may withdraw the proposed issuance, at its sole discretion, at any time prior to the closing of the issuance of the New Securities.

## **[Right Holders’ Preemptive Rights to Purchase New Securities**.

### To the extent New Securities are not purchased pursuant to Section 5.1 of this Agreement, the Company hereby grants to each Right Holder, the, but not the obligation, to purchase its Proportionate Percentage of all (or any part of) any New Securities not sold to Right Holders pursuant to Section 5.1 of this Agreement that the Company proposes to sell or issue. [Each Right Holder shall have the right to transfer its right to any Proportionate Percentage or part thereof to any Qualified Transferee.]]

### In the event that the rights provided under Section 5.3 of this Agreement are required to be granted to Right Holders, after the expiration of the periods specified in Section 5.2(a), and in any event, no later than at least 15 days before the proposed issuance of any remaining New Securities, the Company shall give to each Right Holder written notice of its intention to issue and sell the New Securities, setting forth the number of New Securities remaining and providing the other information previously included in the New Securities Offer Notice (the “*Preemptive Rights Notice”*). Each Right Holder shall have 10 days from the date of its receipt of any such Preemptive Rights Notice to agree to purchase up to that number of shares as is equal to its Proportionate Percentage of the New Securities being offered by the Company to the Proposed New Securities Purchaser for the price and upon the terms specified in the Preemptive Rights Notice by giving written notice to the Company and stating therein the quantity of New Securities to be purchased. Upon the earlier of (x) the expiration of such 10-day period or (y) receipt by the Company of notices from all Right Holders pursuant to the immediately preceding sentence, the Company shall give to all Right Holders exercising in full their right to purchase their respective Proportionate Percentages of such New Securities a written notice setting forth the number of New Securities subscribed to be purchased pursuant to the exercise of such rights by all Right Holders and the number of New Securities that have not been subscribed to be so purchased. [If any Right Holder fails to exercise its right hereunder to purchase all of its Proportionate Percentage of New Securities, each other Right Holder may agree to purchase its *pro rata* share, based on the number of shares of Stock owned by the Right Holder as a percentage of total shares of Stock owned by all Right Holders, of the non-purchasing Right Holder’s unpurchased portion, up to and including all the New Securities proposed to be sold by the Company, within five days from the Company’s giving of the notice referred to in the immediately preceding sentence.][[33]](#footnote-33) Any agreement by a Right Holder to purchase New Securities shall, subject to the provisions of Section 5.3(c) below, be binding on such Right Holder. In the event that Right Holders have agreed to purchase or otherwise acquire all of the New Securities they have a right to purchase or acquire pursuant to Section 5.3, the Company shall designate by written notice to Right Holders a date for the closing of the issuance and sale of such New Securities to occur not earlier than five days nor later than 10 days following the expiration of such 10-plus-five-day period. Notwithstanding the agreement of any Right Holder to purchase any or all of the New Securities, unless otherwise specifically agreed by such Right Holder and the Company, the Company will be under no obligation to issue and sell the New Securities, and may withdraw the proposed issuance, at its sole discretion, at any time prior to the closing of the issuance of the New Securities.

### In the event that the Right Holders fail to exercise in full the above-described right of first refusal within said 10-plus-five-day period or to purchase in a timely manner all New Securities in respect of which such right was exercised or such purchase made, (i) the Company shall have 90 days thereafter to issue or sell to one or more Proposed New Securities Purchasers the New Securities which were the subject of a Preemptive Rights Notice, at a price and upon terms no more favorable to the Proposed New Securities Purchasers than specified in the Preemptive Rights Notice and (ii) no Right Holder that has agreed to purchase or otherwise acquire any New Securities pursuant to the exercise of the right of first refusal set forth in this Section 5.3 shall be obligated to consummate such purchase or acquisition unless and until New Securities available for issuance or sale to one or more Proposed New Securities Purchasers have actually been issued or sold in accordance with the terms set forth in the Preemptive Rights Notice, in which event a closing with respect to both the purchase by such Right Holder and such Proposed New Securities Purchasers shall occur simultaneously. In the event the Company has not so sold the New Securities within said 90 day period, the Company shall not thereafter issue or sell any New Securities without first offering such New Securities to the Right Holders in the manner provided above.

[Alternative Two: Preemptive Rights Only.]

## **Right Holders’ Preemptive Rights to Purchase New Securities**. The Company hereby grants to each Right Holder, the right, but not the obligation, to its Proportionate Percentage of all (or any part of) any New Securities that the Company may from time to time propose to sell or issue. [Each Right Holder shall have the right to transfer its right to any Proportionate Percentage or part thereof to any Qualified Transferee.]

## **Mechanics of Preemptive Right**.

### In the event that the Company proposes to undertake an issuance of New Securities, it shall the Company shall give to each Right Holder written notice of its intention to issue and sell the New Securities, describing in such notice the type of New Securities, the price, and the terms upon which the Company proposes to issue such New Securities (the “*Preemptive Rights Notice*”). Each Right Holder shall have 10 days from the date of its receipt of any such Preemptive Rights Notice to agree to purchase up to that number of shares as is equal to its Proportionate Percentage of the New Securities being offered by the Company to the Proposed Purchaser for the price and upon the terms specified in the Preemptive Rights Notice by giving written notice to the Company and stating therein the quantity of New Securities to be purchased. Upon the earlier of (x) the expiration of such 10-day period or (y) receipt by the Company of notices from all Right Holders pursuant to the immediately preceding sentence, the Company shall give to all Right Holders exercising in full their right to purchase their respective Proportionate Percentages of such New Securities a written notice setting forth the number of New Securities subscribed to be purchased pursuant to the exercise of such rights by all Right Holders and the number of New Securities that have not been subscribed to be so purchased. [If any Right Holder fails to exercise its right hereunder to purchase all of its Proportionate Percentage of New Securities, each other Right Holder may agree to purchase its *pro rata* share, based on the number of shares of Stock owned by the Right Holder as a percentage of total shares of Stock owned by all Right Holders, of the non-purchasing Right Holder’s unpurchased portion, up to and including all the New Securities proposed to be sold by the Company, within five days from the Company’s giving of the notice referred to in the immediately preceding sentence.][[34]](#footnote-34) Any agreement by a Right Holder to purchase New Securities shall, subject to the provisions of Section 5.2(b) below, be binding on such Right Holder. In the event that Right Holders have agreed to purchase or otherwise acquire all of the New Securities they have a right to purchase or acquire pursuant to Section 5.1, the Company shall designate by written notice to Right Holders a date for the closing of the issuance and sale of such New Securities to occur not earlier than five days nor later than 10 days following the expiration of such 10-plus-five-day period. Notwithstanding the agreement of any Right Holder to purchase any or all of the New Securities, unless otherwise specifically agreed by such Right Holder and the Company, the Company will be under no obligation to issue and sell the New Securities, and may withdraw the proposed issuance, at its sole discretion, at any time prior to the closing of the issuance of the New Securities.

### In the event that the Right Holders fail to exercise in full the above-described right of first refusal within said 10-plus-five-day period or to purchase in a timely manner all New Securities in respect of which such right was exercised or such purchase made, (i) the Company shall have 90 days thereafter to issue or sell to one or more third parties the New Securities which were the subject of a Preemptive Rights Notice, at a price and upon terms no more favorable to the purchasers thereof than specified in the Preemptive Rights Notice and (ii) no Right Holder that has agreed to purchase or otherwise acquire any New Securities pursuant to the exercise of the right of first refusal set forth in this Section 5 shall be obligated to consummate such purchase or acquisition unless and until New Securities available for issuance or sale to one or more third parties have actually been issued or sold in accordance with the terms set forth in the Preemptive Rights Notice, in which event a closing with respect to both the purchase by such Right Holder and such third party or parties shall occur simultaneously. In the event the Company has not so sold the New Securities within said 90 day period, the Company shall not thereafter issue or sell any New Securities without again first offering such New Securities to the Right Holders in the manner provided above.

[End of Alternative Two]

**[5.3][5.4]**[[35]](#footnote-35) **“New Securities” Defined**. “*New Securities*” shall mean any equity securities of the Company, whether now authorized or not, and rights, options, or warrants to purchase such equity securities, and securities of any type whatsoever that are, or may become, convertible into such equity securities; *provided, however,* that “New Securities” does not include (i) securities offered to the public pursuant to a Qualified IPO; (ii) shares of Common Stock (or options, warrants, or other rights to purchase Common Stock) issued or to be issued to directors, employees, sales representatives, consultants or advisors of the Company pursuant to a stock option plan, employee stock purchase plan, restricted stock plan or agreement or other employee stock plan or agreement in existence prior to the date of this Agreement or approved by the Board of Directors of the Company, including the approval of the Investor Director, if any; (iii) shares of Common Stock issuable upon the exercise of any Options outstanding on the date of this Agreement; (iv) Common Stock, options or warrants issued or granted after the date hereof in connection with any business combination or acquisitions of another corporation or entity by the Company, equipment leasing or bank financing arrangements or strategic alliances approved by the Board of Directors, including in each instance the approval of [an][the][a majority of the][Investor Director[s]], if any; or (v) shares of Stock issued in connection with any stock split, stock dividend or recapitalization by the Company; and (vi) the Conversion Shares.

# **Voting and Other Agreements**.

## **Board Composition**. [[36]](#footnote-36)

### The Stockholders agree to vote or cause to be voted all shares of Stock now or hereafter owned or controlled by them, and otherwise use their respective best efforts as stockholders of the Company, to set the number of directors of the Company at \_\_\_\_\_\_\_and to elect as a director, on the date of this Agreement and in any subsequent election of directors of the Company, the following:

#### [so long as the Investor holds at least \_\_\_\_\_shares of Series A Preferred Stock or Conversion Shares (each as adjusted for any stock split, stock dividend, subdivision, combination, or reclassification of shares or similar event)][[37]](#footnote-37) [\_\_\_\_] director nominated by the Investor (the “*Investor Director[s]*”), who initially shall be\_\_\_\_\_\_\_\_;

#### one director which shall be the Chief Executive Officer of the Company;

#### [one] independent director (“*Independent Director*”) nominated by mutual agreement of the holders of a majority of the outstanding Series A Preferred Stock (voting together as a single class) on one hand, and on the other hand, the holders of a majority of the outstanding Common Stock (voting together as a single class), who initially shall be \_\_\_\_\_\_\_;

#### [\_\_\_\_] director nominated by the Founder (“*Founder Director*”); and

#### [\_\_\_\_] directors nominated by a majority of the outstanding Common Stock (voting together as a single class)(the “*Common Stock Directors*”), who initially shall be \_\_\_\_\_\_\_.

### In the event that the Company breaches or defaults on any of the terms or conditions of this Agreement, the Securities Purchase Agreement, the Registration Rights Agreement, or the Articles of Amendment, the [Investor][majority of the outstanding Series A Preferred Stock (voting together as a single class)] shall have the right to require the Company to increase the size of the Board of Directors and fill the vacancies with Persons designated by the [Investor][majority of the outstanding Series A Preferred Stock (voting together as a single class)] so that such designees to the Board of Directors constitute a majority of the Board of Directors. In the event that the[Investor][majority of the outstanding Series A Preferred Stock] requires the size of the Board of Directors to be so increased, the Company and the Stockholders agree to take all required actions to fix the size of the Board of Directors at such number and to elect such designees as is necessary to give effect to this Section 6.1(b) hereof.

### Following the designation or election of directors in accordance with this Section 6.1, each of the directors designated or elected in accordance with Section 6.1(a), or 6.1(b) hereof, as the case may be, the director-designees then serving on the Board of Directors shall be re-elected annually if still eligible to serve as provided herein.

## **Vacancies**. Any vacancy on the Board of Directors created by the resignation, removal, incapacity or death of any person designated under Section 6.1 shall be filled by another person designated by the original designating party or parties. The Stockholders shall vote their respective shares of Stock in accordance with such new designation.

## **Removal**. Except in circumstances in which a director could, under \_\_\_\_\_\_\_\_\_\_ of the Bylaws, be removed by a majority vote of the Board of Directors for cause, no party hereto shall vote to remove any member of the Board of Directors designated in accordance with the aforesaid procedure unless the designating party or parties so vote, and if the designating party or parties so vote, then the non-designating party or parties shall likewise so vote.

## **Meetings of the Board of Directors**. Unless the Board of Directors otherwise agrees, the Company shall use its best efforts to cause the Board of Directors to meet on a quarterly basis.

## **Committees**. The Board of Directors shall establish an Audit Committee and a Compensation Committees and various committees as the Board of Directors shall determine in its discretion, The Audit Committee and a Compensation Committee shall be comprised of the Investor Director(s), the Independent Director, Founder Director, and one Common Stock Director. Any other committee established by the Board of Directors shall include [all][one] Investor Director[s].

## **Director Expenses**. The Company will reimburse its directors for reasonable travel and out-of-pocket expenses incurred by such persons in connection with their attendance at meetings of the Board of Directors or any committee thereof.

## **Board Observer Rights**. If for any reason, there is no Investor Director, for so long as the Investor or any of their Affiliates continue to hold shares of Series A Preferred Stock or Conversion Shares, the Company shall permit one representative of the Investor to attend all meetings of the Board of Directors in a non-voting observer capacity, and shall provide its representative with copies of all notices, minutes, written consents, and other materials that it provides to members of the Board of Directors, at the time it provides them to such members.

## **Additional Voting Agreements**. [[38]](#footnote-38)

[Insert Desired Provisions]

## **Designation of Attorney In Fact**. If a Stockholder fails or refuses to vote their shares of Stock in the manner required by this Section 6, then such party hereby irrevocably constitutes and appoints an individual designated by the by the party seeking to enforce the voting rights hereunder, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of such Stockholder and in the name of such Stockholder or in its own name, for the purpose of carrying out the terms of this Section 6, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Section 6. Each such Stockholder hereby ratifies all that said attorneys shall lawfully do or cause to be done by virtue hereof.

# **Miscellaneous**.

## **Cancellation of Prior Agreements**. Except for the \_\_\_\_\_\_\_\_, all prior agreements between the Company, the Investor, and the Existing Holders relating to the same subject matter as the subject matter of this Agreement are hereby terminated and suspended, including, without limitation, \_\_\_\_\_\_\_\_\_\_\_\_\_ [insert prior agreements]. The parties agree that, with respect to the subject matter hereof, they shall, from and after the date hereof, exclusively rely on, and be bound by this Agreement.

## **Additional Stockholders**. Notwithstanding anything herein to the contrary, any Person that, after the date hereof, acquires shares of Stock and is requested by the Board of Directors of the Company to become a party to this Agreement, and becomes a party hereunder, then each such Person shall become a party to this Agreement as a “Stockholder” hereunder (and a “Right Holder” with respect to the Persons acquiring shares of Series A Preferred Stock), without the need of any consent, approval or signature of any other Stockholder.

## **Expenses**. Each party shall bear its own expenses relating to the performance of and continuing performance with this Agreement, and all the transactions contemplated hereby and thereby.

## **Specific Performance; Other Rights**. The Stockholders recognize that various of the rights of the parties under this Agreement are unique and, accordingly, the Stockholders and Company shall, in addition to such other remedies as may be available to any of them at law or in equity, have the right to enforce their rights hereunder by actions for injunctive relief and specific performance to the extent permitted by law. Without limiting the generality of the foregoing, if any Transfer of shares of Common Stock of a New Stockholder is made or attempted contrary to the provisions of this Agreement, the Company or the other Stockholders shall have the right, in addition to any other right available to them under this Agreement (including the right to indemnification provided in Section 2.6 hereof), to enforce their rights hereunder by actions for injunctive relief and specific performance to the extent permitted by law. Except as provided herein, this Agreement is not intended to limit or abridge any rights or other legal remedies available to the Company or any Stockholder, including those which may exist apart from this Agreement.

## **Stock Legend***.* In addition to any other legends that may be required under federal or state securities laws or by the terms of any other agreement, each certificate of shares of Common Stock subject to this Agreement shall have endorsed, stamped or written thereon a legend which shall read substantially as follows:

“THE SECURITIES REPRESENTED HEREBY ARE SUBJECT TO CERTAIN TRANSFER RESTRICTIONS AND OTHER PROVISIONS AS SET FORTH IN THE STOCKHOLDERS’ AGREEMENT, EFFECTIVE AS OF [\_\_\_\_\_\_\_\_\_\_, 20\_\_], AS AMENDED FROM TIME TO TIME, AMONG THE COMPANY AND CERTAIN OF ITS STOCKHOLDERS (COPIES OF WHICH ARE ON FILE AND MAY BE REVIEWED BY THE LAWFUL AND REGISTERED HOLDER HEREOF AT THE COMPANY’S PRINCIPAL OFFICE DURING NORMAL BUSINESS HOURS UPON ADVANCE WRITTEN REQUEST TO THE COMPANY AND PURSUANT TO SUCH OTHER PROCEDURES AS MAY BE REQUIRED BY THE COMPANY TO ENSURE THE SECURITY OF THE COMPANY AND ITS ASSETS, AFFAIRS, AND PERSONNEL)”.

## **Termination***.* This Agreement shall terminate on the date that is the earliest to occur of (i) the closing of a Qualified IPO, and (ii) a [Change in Control][Liquidation Event].

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

If to Company:

If to a Stockholder: At the address shown in the shareholder records of the Company.

Any notice or other communications to be given or that may be given pursuant to this Agreement shall be deemed to have been given: (x) three calendar days after the deposit of such notice or communication in the United States Mail, registered or certified, return receipt requested, with proper postage affixed thereto; (y) on the first Business Day after depositing such notice of communication with Federal Express, Express Mail, or other expedited mail or package delivery service guaranteeing delivery no later than the next Business Day if next Business Day delivery service has been requested and paid for (or on such Business Day as such delivery service has been requested, guaranteed, and paid for); or (z) upon delivery if hand delivered or telecopied to the appropriate address and Person as provided hereinabove or to the Person to whose attention the notice is to be given to the other parties in the manner set forth in this Section 7.7.

## **Amendments and Waivers***.* [[39]](#footnote-39) This Agreement may only be amended with the consent of the Company and the holders of not less than [two-thirds] of the outstanding Common Stock held by the Existing Stockholders, the Founder, and their permitted Transferees hereunder as a group, and [two-thirds] of the Series A Preferred Stock. Except as otherwise expressly set forth in this Agreement, the observance of any term of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively), only with the written consent of not less than [two-thirds] of the outstanding Common Stock held by the Existing Stockholders, the Founder, and their permitted Transferees hereunder as a group, and [two-thirds] of the Series A Preferred Stock. Any amendment or waiver effected in accordance with this Section 7.8 shall be binding upon all parties to this Agreement. 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.

## **Assignment; Successors and Assigns***.* Except as expressly contemplated hereby, neither this Agreement, nor any of the rights, obligations, or interests hereunder or thereunder shall be assigned by any of the parties hereto (whether by operation of law or otherwise) without the prior written consent of the other parties. Subject to the preceding sentence, this Agreement and its provisions shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

## **Severability***.* If any provision of this Agreement shall be held or deemed to be, or shall in fact be, invalid, inoperative or unenforceable as applied to any particular case in any jurisdiction or jurisdictions, or in all jurisdictions or in all cases, because of the conflicting of any provision with any constitution or statute or rule of public policy or for any other reason, such circumstance shall not have the effect of rendering the provision or provisions in question, invalid, inoperative or unenforceable in any other jurisdiction or in any other case or circumstance or of rendering any other provision or provisions herein contained invalid, inoperative or unenforceable to the extent that such other provisions are not themselves actually in conflict with such constitution, statute or rule of public policy, but this Agreement shall be reformed and construed in any such jurisdiction or case as if such invalid, inoperative or unenforceable provision had never been contained herein and such provision reformed so that it would be valid, operative and enforceable to the maximum extent permitted in such jurisdiction or in such case.

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

## **Jurisdiction; Venue**. Any action, litigation, suit or proceeding arising out of or relating to this Agreement or any transaction contemplated hereby shall be brought solely in federal or state courts of competent jurisdiction in the courts of the State of \_\_\_\_ located in \_\_\_\_\_\_, or, if it has or can acquire jurisdiction, in the United States District Court for the \_\_\_\_\_\_\_\_\_, and each of the parties hereto hereby irrevocably consents and submits to the exclusive jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such action, litigation, suit or proceeding and waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the action, litigation, suit or proceeding shall be heard and determined only in any such court and agrees not to bring any action or proceeding arising out of or relating to this Agreement or any transaction contemplated hereby in any other court. Process in any action or proceeding referred to in the first sentence of this Section 7.15 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 7.16. EACH PARTY HERETO FURTHER REPRESENTS AND WARRANTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

[**7.\_\_\_ Arbitration of Disputes**.[[40]](#footnote-40) Any disputes, controversies or claims arising pursuant to this Agreement, except (a) as otherwise provided by this Agreement or (b) disputes, controversies or claims arising out of either party’s Intellectual Property Rights for which a provisional remedy or equitable relief is sought, shall be settled by arbitration held in \_\_\_\_\_\_ in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. Upon such a dispute, the parties will mutually agree upon three arbitrators. In the event the parties are unable to agree upon three arbitrators, each party will select one arbitrator, and each of those arbitrators will agree upon a third arbitrator, and the three arbitrators will serve as the arbitrators for purposes of this Agreement. Judgment upon the award rendered by the arbitrators may be entered in any court having in personam and subject matter jurisdiction. The arbitrators will decide any claim or controversy at issue in accordance with the terms of this Agreement, and will not be authorized to award any damages other than direct compensatory damages actually incurred and proven. The expenses of each party, including its share of the cost of the arbitration, will be borne by such party. However, in the event either party institutes arbitration as result of any claim, suit, action or proceeding being asserted against it by a third party arising out of or in connection with a matter for which the other party is alleged to be responsible under this Agreement, the party instituting arbitration may recover any attorney’s fees and expenses to which it became subject in connection with the arbitration in the event such party prevails in such arbitration. [Insert State] Law will govern the role of judicial participation in the enforcement of the decision arising from arbitration and any matters not covered by this Section or the American Arbitration Association rules related to arbitration as well as the empowerment of the arbitrators. This provision will not preclude any party from obtaining injunctive or other equitable relief in the in the appropriate court.

## **[Attorney Fees**. If any action at law or in equity (including arbitration) is necessary to enforce or interpret the terms of any Transaction Document, the prevailing party shall be entitled to reasonable attorneys’ fees, costs, and necessary disbursements in addition to any other relief to which such party may be entitled.]

## **Agreement Filed with Corporate Records**. An original copy of this Agreement, duly executed by each of the parties hereto, shall be delivered to, and maintained by, the Secretary of the Company at the principal execution office of the Company and it shall be made available for inspection by any Stockholder requesting it.

## **Entire Agreement***.* This Agreement, together with the Securities Purchase Agreement and the documents and agreements referenced therein constitute 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.

## **No Strict Construction**. The parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event of any ambiguity or question of intent or interpretation arises under any provision of this Agreement, this Agreement shall be construed as if drafted by the parties thereto, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of authorship of any of the provisions of this Agreement.

## **Recapitalizations, Exchanges, etc**. The provisions of this Agreement shall apply, to the full extent set forth herein with respect to the Common Stock, to any and all shares of capital stock of the Company or any successor or assign of the Company whether by merger, consolidation, sale of assets or otherwise, which may be issued in respect of, in exchange for, or in substitution of the Common Stock, by reason of conversion, stock dividend, stock split, stock issuance, reverse stock split, combination, recapitalization, reclassification, merger, consolidation or otherwise.

## **Construction of Terms**. All provisions and any variations thereof used herein shall be deemed to refer to the masculine, feminine, neuter, singular, or plural as the identity of such person or persons shall require.

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

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

**[Remainder of Page Intentionally Blank]**

**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.

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

Signature Page 1 of \_\_\_to

Stockholders’ Agreement

**EXISTING STOCKHOLDERS:**

Signature Page 2 of \_\_\_to

Stockholders’ Agreement)

**SCHEDULE 1**

**Investors**

**SCHEDULE 2**

**Existing Holders**

1. This sample Stockholders Agreement – Series A Preferred Stock is prepared for use in an early round of financing where a Founder may be given special rights not available to the other non-Investor stockholders. However, this sample Stockholders Agreement – Series A Preferred Stock can be easily be adapted (or amended) for use in both early round common stock financings and in a second or third round financing with a venture capital or private equity fund where the Founder is less likely to be treated differently from the non-Investor stockholders (except to the extent that the Founder also is an Investor). [↑](#footnote-ref-1)
2. Early round investors often seek to receive warrants to purchase addition shares of Common Stock or Preferred Stock equal to a certain percentage of their investment at an exercise price equal to the Purchase Price (with cashless exercise rights). If such Warrants are issued, the Stockholders Agreement needs include provisions to ensure that any shares of capital stock issued upon exercise of such Warrants are subject to the Stockholders Agreement. [↑](#footnote-ref-2)
3. The Change of Control or Liquidation Event definition generally is used in connection with provisions relating to Permitted Transfers under Section 2 that do not need to comply with the right of first refusal or co-sale rights (Section 2.9), rights of First Offer by the Right Holders (Section 4.2), and termination provisions Section 7.6. The primary difference between a Change of Control or a Liquidation Event in this context is the bracketed language relating to liquidation, dissolution, or winding up of the affairs of the Company with respect to a Liquidation Event. Generally that verbiage is unnecessary in a Stockholders Agreement. Consideration also should be given to merely cross-referencing this definition to what might be included in the Amended Articles of Incorporation [Certificate of Designations] establishing the terms of the Series A Preferred Stock so that there is no possibility of potentially differing definitions (unless that is specifically desired in connection with a particular transaction). Please note however that the Liquidation Event language will likely be used in the Amended Articles of Incorporation [Certificate of Designations] because it is important in the context of the full investment to address such circumstances (where such might not be the case of the Stockholders Agreement taken in isolation). [↑](#footnote-ref-3)
4. By reference to “Stockholders,” this provision establishes the concept that no party to this Agreement may Transfer shares except as specifically permitted under the terms of the Agreement (i.e., reference to Stockholders, as defined, refers to the Founder, the Investor and all other stockholders of the Company that are signatories to this Agreement). [↑](#footnote-ref-4)
5. Note that the transfer restrictions set forth in Sections 2.2 through 2.8 do not apply to the Investor (only to the Founder and the Existing Holders). See Section 2.9 which permits Transfers by the Investor under specified conditions as a “Permitted Transfers.” This is a common scenario. [↑](#footnote-ref-5)
6. The requirement that there be a *bona fide* purchase offer appears on its face to be a reasonable requirement since the parties who will have a right of first refusal need to know the terms of the proposed transaction and that the proposal is legitimate. However, it is difficult to obtain a *bona fide* offer from an unaffiliated third party without providing financial and other information to the proposed purchaser from which they can make a determination of the value of the Stock. Generally this would require the Company to cooperate and to provide this information, which the Company is not obligated to do. As a result, non-Investor stockholders, especially the Founder, may seek to revise this requirement to permit the Selling Stockholder instead to first offer shares of Stock pursuant to the right of first refusal generally as described herein at a proposed Offer Share Price established by the Selling Stockholder. If all the Offered Shares are not purchased through the right of first refusal by the Company, the Right Holders and, if applicable, the Founder; then the Selling Stockholder would have the right to then seek a Proposed Purchaser for the available shares and the Company would agree to provide reasonable assistance (subject to receipt of a confidentiality agreement from any Proposed Purchaser). The sale of the shares would still need to be in compliance with all applicable securities Laws and the Proposed Purchaser would still need to become a party to this Agreement. [↑](#footnote-ref-6)
7. The notice of the proposed Transfer is required to be made to the Company and the Right Holders who will have the initial rights of first refusal to purchase the Stock being offered for sale. Accordingly, it is important to carefully consider the appropriate definition of “Right Holders.” Consider whether these rights belong to the Investor and its Affiliates or whether such rights transfer to those Persons who have acquired the Stock from the Investor or its Affiliates. If not, then consider whether the Investor should be required to maintain a minimum threshold ownership position in the Stock (Series A Preferred Stock and/or Common Stock) as a condition to retain the right of first refusal. [↑](#footnote-ref-7)
8. See Section 2.3(d) of this Agreement and footnote 16 for a provision permitting cash-only consideration. [↑](#footnote-ref-8)
9. Although this is reasonable provision from the point of view of the Company, it is broad and vague and may require a more detailed definition of who or what might be considered a “competitor.” [↑](#footnote-ref-9)
10. Prior to negotiating the terms of the rights of first refusal, the parties need to decide who shall have the right of first refusal and in what priority. In this sample agreement, the parties entitled to such rights are the Company, the Right Holders, and the Founder (which generally needs to be requested) in that order of priority. The Existing Holders do not have a right of first refusal. One significant issue is whether the Company should have a right of first refusal and whether it should have the first priority. The Investor (e.g., the Right Holders) may have concerns about using the Company’s scarce capital resources for this non-productive use. Accordingly, in order to protect its investment, the Investor may negotiate for a priority position over the Company’s right of first refusal and/or establishing various safeguards which provides the Investor with the ability to approve or disapprove the Company’s exercise of any right of first refusal (e.g., approval by the Board of Directors, including the directors designated by the Investors/Series A Preferred Stock. [↑](#footnote-ref-10)
11. The Over-Allotment Option give the Right Holders an opportunity to purchase all of the Remaining Shares that the other Right Holders have not purchased. The additional offer to Right Holders participating on the purchase of the Remaining Shares adds another round of offers to be completed before the Selling Stockholder can sell the Offered Shares and, as a result, the timing of the notice periods are subject to negotiation and the Over-Allotment Option is sometimes not included in the Agreement, especially if the founder has an option to purchase. [↑](#footnote-ref-11)
12. This provision provides the Right Holders with the option of participating in the sale of Stock by the Founder or any of the Existing Stockholders rather than exercise the Right Holder Option to purchase the Offered Shares (commonly referred to as a “Co-Sale Right” or a “Tag Along Right”). The Right Holders are required to notify the Company of their desire under Section 2.3(b)(iv) and then comply with the more specific provisions of Section 2.5 which addresses the mechanics of the Co-Sale Right. [↑](#footnote-ref-12)
13. Instead of subjecting all sales of Stock by the Founder or the Existing Stockholders to the Co-Sale Right, the parties can agree that such rights only exist if a minimum threshold of shares are being offered for sale. This can be tricky because it makes reference to Transfer of shares of Stock in a transaction or *series of related transactions* and a number of sales may take place before the parties conclude that the sales were the part of a series of transaction and it may be too late to meaningfully exercise a Co-Sale Right. [↑](#footnote-ref-13)
14. The Equivalent Price Per Share addresses the situation where Selling Shareholder is selling Common Stock and the Right Holders are participating with the shares of Series A Preferred held by them. [↑](#footnote-ref-14)
15. Although this provision states that the Co-Sale Rights are an alternative to the option to purchase shares under the rights of first refusal, sometimes parties will assert that this does not apply to all shares held by any specific Right Holder and that they can divide their shares between the two alternatives. This sentence clarifies that a Right Holder can’t have it both ways. [↑](#footnote-ref-15)
16. Alternatively, this Agreement can include a provision in Section 2.2 which provides that except in the case of a Permitted Transfer under Section 2.9, neither the Founder nor any Exiting Stockholder Transfer any Stock of the Company under this Section 2 payable in consideration other than for cash. This simplifies the process and eliminates any need for valuing the consideration offered and the exercise of the right of first refusal or co-sale right. [↑](#footnote-ref-16)
17. The Investor may require as a condition to any right of the Selling Stockholder to rescind a proposed Transfer of the Offered Shares to pay the costs incurred by the Company, Right Holders, and Founder in evaluating, obtaining commitments for financing and, if applicable, negotiating the offer to purchase the Stock. [↑](#footnote-ref-17)
18. This provision identifies all of the Transfers that may be permitted without complying with the right of first refusal. Permitted Transfers typically include Transfers made for estate planning purposes and other transactions where the Investor and the Company would not object to a Transfer due to the nature of the transaction or the transferee. This sample Stockholders Agreement – Series A Preferred Stock provides a number of potential Permitted Transfers. The Investor and the Company may negotiate additional Permitted Transfer or less, depending on the circumstances. [↑](#footnote-ref-18)
19. In some agreements, all Transfers to the Company are Permitted Transactions (which is useful to the Existing Holders since, as indicated above, it may be difficult for them to obtain a *bona fide* offer). However Investors may not wish to have the right of first refusal bypassed (although as structured in this sample agreement, the Company will have the priority right to any rights of first refusal). [↑](#footnote-ref-19)
20. This provision provides the Investor with the affirmative right to Transfer its Stock. The Agreement may subject a Transfer of Stock by the Investor to a right of First Offer made to the Company and/or the Founder to make an offer to purchase the shares from the Investor. [↑](#footnote-ref-20)
21. Transfers to the Founder may be permitted by the Investors if they are comfortable about the further consolidation of equity and voting power by the Founder since Transfers by the Founder’s shares are subject to the rights of first refusal set forth in this Section 2. [↑](#footnote-ref-21)
22. The Drag Along Right, sometimes referred to a “Take Along Right,” is a provision where the controlling parties (e.g., the Investors) can require the other parties to the agreement to sell their stock to a third party unaffiliated with the controlling parties if such sale involves the Transfer of all of the Stock held by the controlling parties. If there is a Founder who own a significant percentage of the outstanding Stock, he or she may resist giving this right to the Investor without requiring his or her agreement. [↑](#footnote-ref-22)
23. The non-Controlling Shareholders may resist a Drag Along Right where the purchaser is not acquiring all of the Stock of the Company. They may not wish to be compelled to remain a stockholder of a Company with a new controlling stockholder. [↑](#footnote-ref-23)
24. In order to protect the non-Controlling Shareholders from a Drag Along Right that proposes to sell the Stock in a Sale of Control transaction, provisions may be included that require the price to be paid be at least equal to the fair market value or some other threshold price. [↑](#footnote-ref-24)
25. Section 3.2 provides the Company with a right to purchase the Stock being sold by the Controlling Shareholders at a premium to that offered by the purchaser if the offer equals or exceeds the fair market value. If the offer is less than fair market value, the Company may acquire the Stock at a premium to the fair market value. This is not a common provision in a Drag Along Right. However, provisions providing the Company with a right of First Offer when the Investor seeks to sell its shares is more common. See Section 5. [↑](#footnote-ref-25)
26. If Section 3.2 is included, the timing of the notice needs to be sufficiently long enough to permit the process to be completed. [↑](#footnote-ref-26)
27. If this Section 4 is included, the provisions of Section 3 (especially Section 3.2(c)) need to be carefully coordinated so that there is no overlap. Section 3 would apply to the sale of all shares of Stock by all Right Holders whereas Section 4 would apply to individual Right Holders, if any, or Transfers of less than all of the shares held by all Rights Holders. [↑](#footnote-ref-27)
28. These are not common provisions and the Rights of Last Refusal and/or Preemptive Rights, if any, may instead be included in Amended and Restated Articles of Incorporation or Certificate of Designations where the designations, powers, preferences, and rights, and the qualifications, limitations, and restrictions granted to or imposed on the Series A Preferred Stock are established. [↑](#footnote-ref-28)
29. In essence, in Alternative One the Right Holders have the ability to purchase the New Securities pursuant to Section 5.1 and then have the right to exercise their preemptive rights in Section 5.3 with respect to the remaining shares. This is highly unusual. Typically, if such rights are to be granted, they are either one of the other (i.e., either a right of Last Refusal or a Preemptive Right). In other words, Section 5.3 would not likely be included with a Right of Last Offer. [↑](#footnote-ref-29)
30. This provision provides the Right Holders the opportunity to purchase all or a portion of the shares of New Securities to be offered for sale by the Company before selling the New Securities to any other Person. Whatever portion of the Purchase Offer that the Right Holders decide to purchase, the participating Right Holders will have a pro rata right to purchase those shares. [↑](#footnote-ref-30)
31. The provision permitting a Qualified Transferee to participate in these rights allows a certain specified transferees of Stock by the Right Holder. This provision is unnecessary in this agreement because the definition of a Right Holder in Section 1 includes a transferee of a Right Holder. However, if that definition should be revised and narrowed, this provision may be useful. In that instance, a definition of Qualified Transferee will need to be added: “Qualified Transferee” shall mean any person who is (i) a Right Holder, (ii) an Affiliate of a transferring Right Holder or, (iii) a partner, member or stockholder of a transferring Right Holder.” [↑](#footnote-ref-31)
32. Sometimes the right to participate in the offering of New Securities will be limited to the Investor[s] proportional percentage ownership of the Company (on a fully diluted basis). Such a limitation, however, results more or less in a pre-emptive provision and, in such a situation, the pre-emptive rights provided herein may be revised or dispensed with altogether. [↑](#footnote-ref-32)
33. The rights described in the bracketed text are overkill in this situation where there has already been a right of last offer and a preemptive right on top of that. It should be deleted. [↑](#footnote-ref-33)
34. In the context where the Right Holders are only granted a preemptive right, the rights described in the bracketed text is more reasonable, but can be further negotiated. [↑](#footnote-ref-34)
35. The numbering will depend on whether Alternative One or Alternative Two are used. This definition also could be included in Section 1. It often is included in the body of the agreement because is it easier to follow the section with the definition contained therein. [↑](#footnote-ref-35)
36. The composition of the board and its committees are often heavily negotiated and these provisions are designed to ensure that the designated individuals are elected to the board. The provisions contained in Sections 6.1- 6.7 may instead be included in the Securities Purchase Agreement. The Amended Articles of Incorporation also often will provide holders of the Series A Preferred Stock with specific rights to elect one or more directors. These provisions need to be coordinated and consistent with each other. [↑](#footnote-ref-36)
37. Often the requirement to elect an Investor designee to the board of directors will be subject to the Investor holding a minimum number of shares of Stock. [↑](#footnote-ref-37)
38. The parties can include any other voting agreement that they negotiate as part of the investment agreement. [↑](#footnote-ref-38)
39. The ability to approve amendments and waivers under this Stockholders Agreement by less than all of the parties to the agreement often is necessary if there are numerous Stockholders. The manner in which obtaining that approval is typically the focus of meaningful negotiation which is reflective of the nature of the Stockholders and their varying investment objectives. In some instances, it may be necessary to carve-out certain provisions that should require unanimous or near unanimous approval by the party who may be adversely affected by the revision (e.g., a change in the terms under which Stockholders are required to participate in the Drag Along Right). [↑](#footnote-ref-39)
40. If the parties prefer to have their disputes resolved by arbitration, this provision should be included and Sections 7.15 and 7.16 should be revised to only apply to the exceptions set forth in the Arbitration Provision. [↑](#footnote-ref-40)