**[AMENDED AND RESTATED]**

**VOTING AGREEMENT**

TABLE OF CONTENTS

*Note to Drafter: Section headings have been formatted to automatically populate the Table of Contents.  However, when editing this document for your own use, the page numbers may change.  In order to reflect the correct page numbers in the Table of Contents, you must “update page numbers” to the Table of Contents by (1) right-clicking anywhere in the Table of Contents, and (2) choose “update field,” then “update page numbers only.”  If you add or delete section headings, follow step (1) and (2) above and choose “update entire table.”*

Page

[1. Voting Provisions Regarding Board of Directors 2](#_Toc379464133)

[1.1 Size of the Board 2](#_Toc379464134)

[1.2 Board Composition 2](#_Toc379464135)

[1.3 Failure to Designate a Board Member 4](#_Toc379464136)

[1.4 Removal of Board Members 4](#_Toc379464137)

[1.5 No Liability for Election of Recommended Directors 5](#_Toc379464138)

[1.6 No “Bad Actor” Designees 5](#_Toc379464139)

[2. Vote to Increase Authorized Common Stock 5](#_Toc379464140)

[3. [Drag-Along Right] 5](#_Toc379464141)

[3.1 Definitions 6](#_Toc379464142)

[3.2 Actions to be Taken 6](#_Toc379464143)

[3.3 Exceptions 7](#_Toc379464144)

[3.4 Restrictions on Sales of Control of the Company 9](#_Toc379464145)

[4. Remedies 10](#_Toc379464146)

[4.1 Covenants of the Company 10](#_Toc379464147)

[4.2 [Irrevocable Proxy and Power of Attorney] 10](#_Toc379464148)

[4.3 Specific Enforcement 11](#_Toc379464149)

[4.4 Remedies Cumulative 11](#_Toc379464150)

[5. “Bad Actor” Matters. 11](#_Toc379464151)

[5.1 Representation 11](#_Toc379464152)

[5.2 Covenant 11](#_Toc379464153)

[6. Term 12](#_Toc379464154)

[7. Miscellaneous 12](#_Toc379464155)

[7.1 Additional Parties 12](#_Toc379464156)

[7.2 Transfers 13](#_Toc379464157)

[7.3 Successors and Assigns 13](#_Toc379464158)

[7.4 Governing Law 13](#_Toc379464159)

[7.5 Counterparts 13](#_Toc379464160)

[7.6 Titles and Subtitles 14](#_Toc379464161)

[7.7 Notices 14](#_Toc379464162)

[7.8 Consent Required to Amend, Terminate or Waive 14](#_Toc379464163)

[7.9 Delays or Omissions 15](#_Toc379464164)

[7.10 Severability 15](#_Toc379464165)

[7.11 Entire Agreement 15](#_Toc379464166)

[7.12 Share Certificate Legend 16](#_Toc379464167)

[7.13 Stock Splits, Stock Dividends, etc. 16](#_Toc379464168)

[7.14 Manner of Voting 16](#_Toc379464169)

[7.15 Further Assurances 16](#_Toc379464170)

[7.16 Dispute Resolution 16](#_Toc379464171)

[7.17 [Costs of Enforcement] 18](#_Toc379464172)

[7.18 Aggregation of Stock 18](#_Toc379464173)

[7.19 [Spousal Consent] 18](#_Toc379464174)

Schedule A - Investors

Schedule B - Key Holders

Exhibit A - Adoption Agreement

[Exhibit B - Consent of Spouse]

[ADDENDUM TO VOTING AGREEMENT: SAMPLE SALE RIGHTS](#_Section___._Sale)

[AMENDED AND RESTATED] VOTING AGREEMENT

THIS [AMENDED AND RESTATED] VOTING AGREEMENT (this “**Agreement**”), is made and entered into as of this [\_\_] day of [\_\_\_\_\_, 20\_\_\_,] by and among [\_\_\_\_\_], a [Dela­ware] corporation (the “**Company**”), each holder of the Company’s Series A Preferred Stock, [$.\_\_\_] par value per share (“**Series A Preferred Stock**”) [and Series [\_\_] Preferred Stock] (referred to herein [collectively with the Series A Preferred Stock,] as the “**Preferred Stock**”) listed on Schedule A (together with any subsequent investors, or transferees, who become parties hereto as “Investors” pursuant to Subsections 7.1(a) or 7.2below, the “**Investors**”), and those certain stockholders of the Company [and holders of options to acquire shares of the capital stock of the Company] listed on Schedule B (together with any subsequent stockholders [or option holders], or any transferees, who become parties hereto as “Key Holders” pursuant to Subsection[s 7.1(b) or] 7.2 below, the “**Key Holders**,”[[1]](#footnote-1) and together collectively with the Investors, the “**Stockholders**”).

RECITALS

[*Alternative 1*:[[2]](#footnote-2)A. Concurrently with the execution of this Agreement, the Com­pany and the Investors are entering into a Series A Preferred Stock Purchase Agreement (the “**Purchase Agreement**”) providing for the sale of shares of the Company’s Series A Preferred Stock, and in connection with that agreement the parties desire to provide the Investors with the right, among other rights, to designate the election of certain members of the board of directors of the Company (the “**Board**”) in accordance with the terms of this Agreement.[[3]](#footnote-3)]

[*Alternative 2*:[[4]](#footnote-4) A. Concurrently with the execution of this Agreement, the Com­pany and the certain of the Investors are entering into a Series [B] Preferred Stock Purchase Agreement (the “**Purchase Agreement**”) providing for the sale of shares of the Company’s Series B Preferred Stock (“**Series B Preferred Stock**”). Certain of the Investors (the “**Existing Investors**”) and the Key Holders are parties to the Voting Agreement dated [\_\_\_\_\_] by and among the Company and the parties thereto (the “**Prior Agreement**”). The parties to the Prior Agreement desire to amend and restate that agreement to provide those Investors purchasing shares of the Company’s Series [B] Preferred Stock with the right, among other rights, to elect certain members of the board of directors of the Company (the “**Board**”) in accordance with the terms of this Agreement.]

B. The Amended and Restated Certificate of Incorporation of the Company (the “**Restated Certificate**”) provides that (a) the holders of record of the shares of the Company’s Series A Preferred Stock, exclusively and as a sepa­rate class, shall be entitled to elect [\_\_\_] directors of the Company (the “**Series A Directors**”) [and the holders of record of the shares of Series [B] Preferred Stock shall be entitled to elect [\_\_\_] directors of the Company]; [(b) the holders of record of the shares of common stock of the Company, [\_\_\_] par value (“**Common Stock**”), exclusively and as a separate class, shall be entitled to elect [\_\_] directors of the Company;] and (c) the holders of record of the shares of Common Stock and of any other class or series of voting stock (including Series A [and B] Pre­ferred Stock), exclusively and voting together as a single class, shall be entitled to elect the bal­ance of the total number of directors of the Company. [[5]](#footnote-5)

[C. The parties also desire to enter into this Agreement to set forth their agreements and understandings with respect to how shares of the Company’s capital stock held by them will be voted on[, or tendered in connection with, an acquisition of the Company] [an increase in the number of shares of Common Stock required to provide for the conversion of the Company’s Preferred Stock.]]

NOW, THEREFORE, the parties agree as follows:

# Voting Provisions Regarding Board of Directors

.[[6]](#footnote-6)

## Size of the Board

. Each Stockholder agrees to vote, or cause to be voted, all Shares (as defined below) owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that the size of the Board shall be set and remain at [five (5)] directors [and may be increased only with the written consent of Investors holding Preferred Stock representing at least [\_\_\_]% of the shares of Common Stock issuable upon conversion of the then outstanding shares of Preferred Stock.] For purposes of this Agreement, the term “Shares” shall mean and include any securities of the Company the holders of which are entitled to vote for members of the Board, including without limitation, all shares of Common Stock, Series A Preferred Stock[, and Series B Preferred Stock], by whatever name called, now owned or subsequently acquired by a Stockholder, however acquired, whether through stock splits, stock dividends, reclassifications, recapitalizations, similar events or otherwise.

## Board Composition

. Each Stockholder agrees to vote, or cause to be voted, all Shares owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that at each annual or special meeting of stockholders at which an election of directors is held or pursu­ant to any written consent of the stockholders, the following persons shall be elected to the Board: [[7]](#footnote-7)

### One person designated by [*Name of Investor*] (the “***Name of Investor* *Designee***”), which individual shall initially be [\_\_\_\_\_\_\_\_\_\_\_\_\_], for so long as such Stockholders and their Affiliates continue to own beneficially at least [\_\_\_\_\_\_] shares of Common Stock of the Company (including shares of Common Stock issued or issuable upon conversion of Series A Preferred Stock), which number is subject to appropriate adjustment for all stock splits, dividends, combinations, recapitalizations and the like.

### One person designated by [*Name of 2d Investor*] (the “***Name of 2d Investor* Designee**”), which individual shall initially be [\_\_\_\_\_\_\_\_\_\_\_\_\_] for so long as such Stockholders and their Affiliates continue to own beneficially at least [\_\_\_\_\_\_\_\_\_\_] shares of Common Stock of the Company (including shares of Common Stock issued or issuable upon conversion of Series A Preferred Stock), which number is subject to appropriate adjustment for all stock splits, dividends, combinations, recapitalizations and the like.

### [*Alternative 1***:** For so long as the Key Holders [who are then providing services to the Company as officers, employees or consultants] hold at least [\_\_\_\_] shares of Common Stock (as adjusted for any stock splits, stock dividends, recapitaliza­tions or the like), one individual designated by the holders of a majority of the Shares of Common Stock [held by the Key Holders], which individual shall initially be [\_\_\_\_\_\_\_\_\_\_\_];

[*Alternative 2***:** [*name of Key Holder*], for so long as [*name of Key Holder*] [remains an [officer] [employee] of the Company] [holds at least [\_\_\_\_\_] Shares (as adjusted for stock splits, stock dividends, recapitalizations or the like)] [holds at least [\_\_\_\_\_]% of the outstanding capital stock of the Company on an as-converted-to-Com­mon Stock basis] [, except that if [*name of Key Holder*] declines or is unable to serve, his or her successor shall be designated by [*name of alternate Key Holder*] [the holders of a majority of the shares of Common Stock of the Company]; [[8]](#footnote-8)

### The Company’s Chief Executive Officer, who shall initially be [\_\_\_\_\_] (the “**CEO Director**”), provided that if for any reason the CEO Director shall cease to serve as the Chief Executive Officer of the Company, each of the Stockholders shall promptly vote their respective Shares (i) to remove the former Chief Executive Officer from the Board if such person has not resigned as a member of the Board; and (ii) to elect such person’s replacement as Chief Executive Officer of the Company as the new CEO Director; and

### One individual not otherwise an Affiliate (as defined below) of the Company or of any Investor who is [mutually acceptable to (i) the holders of a majority of the Shares held by the Key Holders who are then providing services to the Company as officers, employees or consultants; and (ii) the holders of a majority of the Shares held by the Investors] [mutually acceptable to the other members of the Board]; and

To the extent that any of clauses (a) through (d) above shall not be applicable, any member of the Board who would otherwise have been designated in accordance with the terms thereof shall instead be voted upon by all the stockholders of the Company entitled to vote thereon in accordance with, and pursuant to, the Company’s Restated Certificate.

For purposes of this Agreement, an individual, firm, corporation, partnership, association, lim­ited liability company, trust or any other entity (collectively, a “**Person**”) shall be deemed an “Affiliate” of another Person who, directly or indirectly, controls, is controlled by or is under common control with such Person, including, without limitation, any general partner, managing member, officer or director of such Person or any venture capital fund now or hereafter existing that is controlled by one or more general partners or managing members of, or shares the same management company with, such Person.

## Failure to Designate a Board Member

. In the absence of any designation from the Persons or groups with the right to designate a director as specified above, the director previously designated by them and then serving shall be reelected if still eligible to serve as provided herein.

## Removal of Board Members

. Each Stockholder also agrees to vote, or cause to be voted, all Shares owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that:

### no director elected pursuant to Subsections 1.3 or of this Agreement may be removed from office [other than for cause] unless (i) such removal is directed or approved by the affirmative vote of the Person, or of the holders of at least [*specify percentage*] of the shares of stock, entitled under Subsection 1.3 to designate that director;[[9]](#footnote-9) or (ii) the Person(s) originally entitled to designate or approve such director [or occupy such Board seat] pursuant to Subsection 1.3 is no longer so entitled to designate or approve such director [or occupy such Board seat];

### any vacancies created by the resignation, removal or death of a director elected pursuant to Subsections 1.3 or shall be filled pursuant to the provisions of this Section 1;[[10]](#footnote-10) and

### upon the request of any party entitled to designate a director as provided in Subsection 1.2(a) or 1.2(b) to remove such director, such director shall be removed.

All Stockholders agree to execute any written consents required to perform the obligations of this Agreement, and the Company agrees at the request of any party entitled to designate directors to call a special meeting of stockholders for the purpose of electing directors. [So long as the stockholders of the Company are entitled to cumulative voting, if less than the entire Board is to be removed, no director may be removed without cause if the votes cast against his or her removal would be sufficient to elect such director if then cumulatively voted at an election of the entire Board.]

## No Liability for Election of Recommended Directors

. No Stockholder, nor any Affiliate of any Stockholder, shall have any liability as a result of designating a person for election as a director for any act or omission by such designated person in his or her capacity as a director of the Company, nor shall any Stockholder have any liability as a result of voting for any such designee in accordance with the provisions of this Agreement.

## No “Bad Actor” Designees

. Each Person with the right to designate or participate in the designation of a director as specified above hereby represents and warrants to the Company that, to such Person’s knowledge, none of the “bad actor” disqualifying events described in Rule 506(d)(1)(i)-(viii) promulgated under the Securities Act of 1933, as amended (the “**Securities Act**”) (each, a “**Disqualification Event**”), is applicable to such Person’s initial designee named above except, if applicable, for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable. Any director designee to whom any Disqualification Event is applicable, except for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable, is hereinafter referred to as a “**Disqualified Designee**”. Each Person with the right to designate or participate in the designation of a director as specified above hereby covenants and agrees (A) not to designate or participate in the designation of any director designee who, to such Person’s knowledge, is a Disqualified Designee and (B) that in the event such Person becomes aware that any individual previously designated by any such Person is or has become a Disqualified Designee, such Person shall as promptly as practicable take such actions as are necessary to remove such Disqualified Designee from the Board and designate a replacement designee who is not a Disqualified Designee.

# Vote to Increase Authorized Common Stock

. Each Stockholder agrees to vote or cause to be voted all Shares owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to increase the number of authorized shares of Common Stock from time to time to ensure that there will be sufficient shares of Common Stock available for conversion of all of the shares of Preferred Stock outstanding at any given time.

# [Drag-Along Right

.[[11]](#footnote-11)

## Definitions

. A “**Sale of the Company**” shall mean either: (a) a transac­tion or series of related transactions in which a Person, or a group of related Persons, acquires from stockholders of the Company shares representing more than fifty percent (50%) of the out­standing voting power of the Company (a “**Stock Sale**”); or (b) a transaction that qualifies as a “**Deemed Liquidation Event**” as defined in the Restated Certificate.

## Actions to be Taken

. In the event that (i) the holders of at least [*specify percentage*] of the shares of Common Stock then issued or issuable upon conversion of the shares of Series A Preferred Stock (the “**Selling Investors**”); [(ii)the Board of Directors;][[12]](#footnote-12) and [(iii) the holders of a majority of the then outstanding shares of Common Stock (other than those issued or issuable upon conversion of the shares of Series A Preferred Stock)] (collectively, the “**Electing Holders**”) approve a Sale of the Company in writing, specifying that this Section 3 shall apply to such transaction, then each Stockholder and the Company hereby agree:

### if such transaction requires stockholder approval, with respect to all Shares that such Stockholder owns or over which such Stockholder otherwise exercises voting power, to vote (in person, by proxy or by action by written consent, as applicable) all Shares in favor of, and adopt, such Sale of the Company (together with any related amendment to the Restated Certificate required in order to implement such Sale of the Company) and to vote in opposition to any and all other proposals that could [reasonably be expected to] delay or impair the ability of the Company to consummate such Sale of the Company;

### if such transaction is a Stock Sale, to sell the same proportion of shares of capital stock of the Company beneficially held by such Stockholder as is being sold by the Selling Investors to the Person to whom the Selling Investors propose to sell their Shares, and, except as permitted in Subsection 3.3 below, on the same terms and conditions as the Selling Investors;

### to execute and deliver all related documentation and take such other action in support of the Sale of the Company as shall reasonably be requested by the Company or the Selling Investors in order to carry out the terms and provision of this Section 3, including, without limitation, executing and delivering instruments of conveyance and transfer, and any purchase agreement, merger agreement, indemnity agreement, escrow agreement, consent, waiver, governmental filing, share certificates duly endorsed for transfer (free and clear of impermissible liens, claims and encumbrances), and any similar or related documents;

### not to deposit, and to cause their Affiliates not to deposit, except as provided in this Agreement, any Shares of the Company owned by such party or Affiliate in a voting trust or subject any Shares to any arrangement or agreement with respect to the voting of such Shares, unless specifically requested to do so by the acquiror in connection with the Sale of the Company;

### to refrain from exercising any dissenters’ rights or rights of appraisal under applicable law at any time with respect to such Sale of the Company;

### if the consideration to be paid in exchange for the Shares pursuant to this Section 3 includes any securities and due receipt thereof by any Stockholder would require under applicable law (x) the registration or qualification of such securities or of any person as a broker or dealer or agent with respect to such securities; or (y) the provision to any Stockholder of any information other than such information as a prudent issuer would generally furnish in an offering made solely to “accredited investors” as defined in Regulation D promulgated under the Securities Act, the Company may cause to be paid to any such Stockholder in lieu thereof, against surrender of the Shares which would have otherwise been sold by such Stockholder, an amount in cash equal to the fair value (as determined in good faith by the Company) of the securities which such Stockholder would otherwise receive as of the date of the issuance of such securities in exchange for the Shares; and

### in the event that the Selling Investors, in connection with such Sale of the Company, appoint a stockholder representative (the “**Stockholder Representative**”) with respect to matters affecting the Stockholders under the applicable definitive transaction agreements following consummation of such Sale of the Company, (x) to consent to (i) the appointment of such Stockholder Representative, (ii) the establishment of any applicable escrow, expense or similar fund in connection with any indemnification or similar obligations, and (iii) the payment of such Stockholder’s pro rata portion (from the applicable escrow or expense fund or otherwise) of any and all reasonable fees and expenses to such Stockholder Representative in connection with such Stockholder Representative’s services and duties in connection with such Sale of the Company and its related service as the representative of the Stockholders, and (y) not to assert any claim or commence any suit against the Stockholder Representative or any other Stockholder with respect to any action or inaction taken or failed to be taken by the Stockholder Representative in connection with its service as the Stockholder Representative, absent fraud or willful misconduct.

## Exceptions

.[[13]](#footnote-13) Notwithstanding the foregoing, a Stockholder will not be required to comply with Subsection 3.2 above in connection with any proposed Sale of the Company (the “**Proposed Sale**”), unless:

### [any representations and warranties to be made by such Stockholder in connection with the Proposed Sale are limited to representations and warranties related to authority, ownership and the ability to convey title to such Shares, including, but not limited to, representations and warranties that (i) the Stockholder holds all right, title and interest in and to the Shares such Stockholder purports to hold, free and clear of all liens and encumbrances, (ii) the obli­gations of the Stockholder in connection with the transaction have been duly authorized, if applicable, (iii) the documents to be entered into by the Stockholder have been duly executed by the Stockholder and delivered to the acquirer and are enforceable against the Stockholder in accordance with their respective terms; and (iv) neither the execution and delivery of documents to be entered into in connection with the transaction, nor the performance of the Stockholder’s obligations thereunder, will cause a breach or violation of the terms of any agreement, law or judgment, order or decree of any court or governmental agency;

### the Stockholder shall not be liable for the inaccuracy of any representation or warranty made by any other Person in connection with the Proposed Sale, other than the Company (except to the extent that funds may be paid out of an escrow established to cover breach of representations, warranties and covenants of the Company as well as breach by any stockholder of any of identical representations, warranties and covenants provided by all stockholders);]

### the liability for indemnification, if any, of such Stockholder in the Proposed Sale and for the inaccuracy of any representations and warranties made by the Company or its Stockholders in connection with such Proposed Sale, is several and not joint with any other Person (except to the extent that funds may be paid out of an escrow established to cover breach of representations, warranties and covenants of the Company as well as breach by any stockholder of any of identical representations, warranties and covenants provided by all stockholders), and [subject to the provisions of the Restated Certificate related to the allocation of the escrow,][[14]](#footnote-14) is pro rata in proportion to, and does not exceed, the amount of consideration paid to such Stockholder in connection with such Proposed Sale;

### [liability shall be limited to such Stockholder's applicable share (determined based on the respective proceeds payable to each Stockholder in connection with such Proposed Sale in accordance with the provisions of the Restated Certificate) of a negotiated aggregate indemnification amount that applies equally to all Stockholders but that in no event exceeds the amount of consideration otherwise payable to such Stockholder in connection with such Proposed Sale, except with respect to claims related to fraud by such Stockholder, the liability for which need not be limited as to such Stockholder;]

### upon the consummation of the Proposed Sale (i) each holder of each class or series of the Company’s stock will receive the same form of consideration for their shares of such class or series as is received by other holders in respect of their shares of such same class or series of stock, (ii) each holder of a series of Preferred Stock will receive the same amount of consideration per share of such series of Preferred Stock as is received by other holders in respect of their shares of such same series, (iii) each holder of Common Stock will receive the same amount of consideration per share of Common Stock as is received by other holders in respect of their shares of Common Stock, and (iv) unless the holders of at least [*specify percentage*][[15]](#footnote-15) of the [Series A Preferred Stock] elect to receive a lesser amount by written notice given to the Company at least [\_\_] days prior to the effective date of any such Proposed Sale, the aggregate consideration receivable by all holders of the Preferred Stock and Common Stock shall be allocated among the holders of Preferred Stock and Common Stock on the basis of the relative liquidation preferences to which the holders of each respective series of Preferred Stock and the holders of Common Stock are entitled in a Deemed Liquidation Event (assuming for this purpose that the Proposed Sale is a Deemed Liquidation Event) in accordance with the Company’s Certificate of Incorporation in effect immediately prior to the Proposed Sale; provided*,* however*,* that, notwithstanding the foregoing, if the consideration to be paid in exchange for the Key Holder Shares or Investor Shares, as applicable, pursuant to this Subsection 3.3(e) includes any securities and due receipt thereof by any Key Holder or Investor would require under applicable law (x) the registration or qualification of such securities or of any person as a broker or dealer or agent with respect to such securities; or (y) the provision to any Key Holder or Investor of any information other than such information as a prudent issuer would generally furnish in an offering made solely to “accredited investors” as defined in Regulation D promulgated under the Securities Act, the Company may cause to be paid to any such Key Holder or Investor in lieu thereof, against surrender of the Key Holder Shares or Investor Shares, as applicable, which would have otherwise been sold by such Key Holder or Investor, an amount in cash equal to the fair value (as determined in good faith by the Company) of the securities which such Key Holder or Investor would otherwise receive as of the date of the issuance of such securities in exchange for the Key Holder Shares or Investor Shares, as applicable; and

### [subject to clause (e) above, requiring the same form of consideration to be available to the holders of any single class or series of capital stock, if any holders of any capital stock of the Company are given an option as to the form and amount of consideration to be received as a result of the Proposed Sale, all holders of such capital stock will be given the same option; provided*,* however, that nothing in this Subsection 3.3(f) shall entitle any holder to receive any form of consideration that such holder would be ineligible to receive as a result of such holder’s failure to satisfy any condition, requirement or limitation that is generally applicable to the Company’s stockholders.

## Restrictions on Sales of Control of the Company

.[[16]](#footnote-16) No Stockholder shall be a party to any Stock Sale unless all holders of Preferred Stock are allowed to participate in such transaction and the consideration received pursuant to such transaction is allocated among the parties thereto in the manner specified in the Company’s Certificate of Incorporation in effect immediately prior to the Stock Sale (as if such transaction were a Deemed Liquidation Event), unless the holders of at least [*specify percentage*][[17]](#footnote-17) of the [Series A Preferred Stock] elect otherwise by written notice given to the Company at least [\_\_] days prior to the effective date of any such transaction or series of related transactions.]

[See ADDENDUM at end of this document with alternative “Sale Rights” provisions.][[18]](#footnote-18)

# Remedies

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## Covenants of the Company

. The Company agrees to use its best efforts, within the requirements of applicable law, to ensure that the rights granted under this Agreement are effective and that the parties enjoy the benefits of this Agreement. Such actions include, without limitation, the use of the Company’s best efforts to cause the nomination and election of the directors as provided in this Agreement.

## [Irrevocable Proxy and Power of Attorney

. Each party to this Agreement hereby constitutes and appoints as the proxies of the party and hereby grants a power of attorney to the President of the Company, and a designee of the Selling Investors, and each of them, with full power of substitution, with respect to the matters set forth herein, including, without limitation, election of persons as members of the Board in accordance with Section 1 hereto, votes to increase authorized shares pursuant to Section 2 hereof and votes regarding any Sale of the Company pursuant to Section 3 hereof, and hereby authorizes each of them to represent and vote, if and only if the party (i) fails to vote, or (ii) attempts to vote (whether by proxy, in person or by written consent), in a manner which is inconsistent with the terms of this Agreement, all of such party’s Shares in favor of the election of persons as members of the Board determined pursuant to and in accordance with the terms and provisions of this Agreement or the increase of authorized shares or approval of any Sale of the Company pursuant to and in accordance with the terms and provi­sions of Sections 2 and , respectively, of this Agreement or to take any action necessary to effect Sections 2 and , respectively, of this Agreement. Each of the proxy and power of attorney granted pursuant to the immediately preceding sentence is given in consideration of the agreements and covenants of the Company and the parties in connection with the transactions contemplated by this Agreement and, as such, each is coupled with an interest and shall be irrevocable unless and until this Agreement terminates or expires pursuant to Section 6 hereof. Each party hereto hereby revokes any and all previous proxies or powers of attorney with respect to the Shares and shall not hereafter, unless and until this Agreement terminates or expires pursuant to Section 6 hereof, purport to grant any other proxy or power of attorney with respect to any of the Shares, deposit any of the Shares into a voting trust or enter into any agreement (other than this Agreement), arrangement or understanding with any person, directly or indirectly, to vote, grant any proxy or give instruc­tions with respect to the voting of any of the Shares, in each case, with respect to any of the matters set forth herein.][[19]](#footnote-19)

## Specific Enforcement

.[[20]](#footnote-20) Each party acknowledges and agrees that each party hereto will be irreparably damaged in the event any of the provisions of this Agreement are not performed by the parties in accordance with their specific terms or are otherwise breached. Accordingly, it is agreed that each of the Company and the Stockholders shall be entitled to an injunction to prevent breaches of this Agreement, and to specific enforcement of this Agreement and its terms and provisions in any action instituted in any court of the United States or any state having subject matter jurisdiction.

## Remedies Cumulative

. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

# “Bad Actor” Matters.[[21]](#footnote-21)

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## Representation

. Each Person with the right to designate or participate in the designation of a director pursuant to this Agreement hereby represents that none of the “bad actor” disqualifying events described in Rule 506(d)(1)(i)-(viii) promulgated under the Securities Act (a “**Disqualification Event**”) is applicable to such Person or any of its Rule 506(d) Related Parties, except, if applicable, for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable.[[22]](#footnote-22) For purposes of this Agreement, “Rule 506(d) Related Party” shall mean with respect to any Person any other Person that is a beneficial owner of such first Person’s securities for purposes of Rule 506(d) of the Securities Act.

## Covenant

. Each Person with the right to designate or participate in the designation of a director pursuant to this Agreement hereby agrees that it shall notify the Company promptly in writing in the event a Disqualification Event becomes applicable to such Person or any of its Rule 506(d) Related Parties, except, if applicable, for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable.[[23]](#footnote-23)

# Term

. This Agreement shall be effective as of the date hereof and shall continue in effect until and shall terminate upon the earliest to occur of (a) the consummation of the Com­pany’s first underwritten public offering of its Common Stock[[24]](#footnote-24) (other than a registration state­ment relating either to the sale of securities to employees of the Company pursuant to its stock option, stock purchase or similar plan or an SEC Rule 145 transaction); (b) the consummation of a Sale of the Company and distribution of proceeds to or escrow for the benefit of the Stockholders in accordance with the Restated Certificate, provided that the provisions of Section 3 hereof will continue after the closing of any Sale of the Company to the extent necessary to enforce the provisions of Section 3 with respect to such Sale of the Company; (c) termination of this Agreement in accordance with Subsection 7.8 below[; and (d) \_\_\_\_\_ \_\_, 20\_\_].

# Miscellaneous

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## Additional Parties

.

### Notwithstanding anything to the contrary contained herein, if the Company issues additional shares of Series [\_\_] Preferred Stock after the date hereof, as a con­dition to the issuance of such shares the Company shall require that any purchaser of at least \_\_\_\_ shares of Series [\_\_] Preferred Stock become a party to this Agreement by executing and delivering (i) the Adoption Agreement attached to this Agreement as Exhibit A, or (ii) a counterpart signature page hereto agreeing to be bound by and subject to the terms of this Agreement as an Investor and Stockholder hereunder. In either event, each such person shall thereafter shall be deemed an Investor and Stockholder for all purposes under this Agreement.

### [In the event that after the date of this Agreement, the Company enters into an agreement with any Person to issue shares of capital stock to such Person (other than to a purchaser of Preferred Stock described in Subsection 7.1(a) above), [following which such Person shall hold Shares constituting one percent (1%) or more of the Company’s then outstanding capital stock (treating for this purpose all shares of Common Stock issuable upon exercise of or conversion of outstanding options, warrants or convertible securities, as if exercised and/or converted or exchanged)], then, the Company shall cause such Person, as a condition precedent to entering into such agreement, to become a party to this Agreement by executing an Adoption Agreement in the form attached hereto as Exhibit A, agreeing to be bound by and subject to the terms of this Agreement as a Stockholder and thereafter such person shall be deemed a Stockholder for all purposes under this Agreement.] [[25]](#footnote-25)

## Transfers

. Each transferee or assignee of any Shares subject to this Agree­ment shall continue to be subject to the terms hereof, and, as a condition precedent to the Com­pany’s recognizing such transfer, each transferee or assignee shall agree in writing to be subject to each of the terms of this Agreement by executing and delivering an Adoption Agreement sub­stantially in the form attached hereto as Exhibit A. Upon the execution and delivery of an Adoption Agreement by any transferee, such transferee shall be deemed to be a party hereto as if such transferee were the transferor and such transferee’s signature appeared on the signature pages of this Agreement and shall be deemed to be an Investor and Stockholder, or Key Holder and Stockholder, as applicable. The Company shall not permit the transfer of the Shares subject to this Agreement on its books or issue a new certificate representing any such Shares unless and until such transferee shall have complied with the terms of this Subsection 7.2. Each certificate instrument, or book entry representing the Shares subject to this Agreement if issued on or after the date of this Agreement shall be notated by the Company with the legend set forth in Subsection 7.12.

## Successors and Assigns

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

## Governing Law

.[[26]](#footnote-26) This Agreement shall be governed by the internal law of the [State of Delaware].[[27]](#footnote-27)

## Counterparts

. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, *e.g.*, www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

## Titles and Subtitles

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

## Notices

. All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given upon the earlier of actual receipt or (a) personal delivery to the party to be notified, (b) when sent, if sent by electronic mail or facsimile during normal business hours of the recipient, and if not sent during normal business hours, then on the recipient’s next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) business day after the business day of deposit with a nationally recognized overnight courier, freight prepaid, specifying next business day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their address as set forth on Schedule A or Schedule B hereto, or to such email address, facsimile number or address as subsequently modified by written notice given in accordance with this Subsection 7.7. If notice is given to the Company, a copy shall also be sent to [*Company Counsel Name and Address*] and if notice is given to Stockholders, a copy shall also be given to [*Investor Counsel Name and Address*].

## Consent Required to Amend, Terminate or Waive

.[[28]](#footnote-28) This Agreement may be amended or terminated and the observance of any term hereof may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a written instrument executed by (a) the Company; (b) the Key Holders holding [*specify percentage*] of the Shares then held by the Key Holders [provided that such consent shall not be required if the Key Holders do not then own Shares representing at least [\_\_]% of the outstanding capital stock of the Company] [who are then providing services to the Company as officers, employees or consultants]; and (c) the hold­ers of [*specify percentage*] of the shares of Common Stock issued or issuable upon conversion of the shares of Series A [and B] Preferred Stock held by the Investors (voting as a single class and on an as-converted basis). Notwithstanding the foregoing:

### this Agreement may not be amended or terminated and the obser­vance of any term of this Agreement may not be waived with respect to any Investor or Key Holder without the written consent of such Investor or Key Holder unless such amendment, termination or waiver applies to all Inves­tors or Key Holders, as the case may be, in the same fashion;

### the consent of the Key Holders shall not be required for any amendment or waiver if such amendment or waiver either (A) is not directly applicable to the rights of the Key Holders hereunder; or (B) does not adversely affect the rights of the Key Holders in a manner that is different than the effect on the rights of the other parties hereto;

### Schedules A hereto may be amended by the Company from time to time in accordance with Subsection 1.3 of the Purchase Agreement to add informa­tion regarding additional Purchasers (as defined in the Purchase Agreement) without the consent of the other parties hereto;

### any provision hereof may be waived by the waiving party on such party’s own behalf, without the consent of any other party[; and

### Subsections 1.2(a) and 1.2(b) of this Agreement shall not be amended or waived without the written consent of [*Investor 1*] and [Investor 2], respectively, and Subsection 1.2(c) of this Agreement shall not be amended or waived without the written consent of [the Key Holders][the Key Holders who are at such time providing services to the Company as an officer, director, employee or consultant][the holders of [*specify percentage*] of shares of Common Stock].

The Company shall give prompt written notice of any amendment, termination, or waiver here­under to any party that did not consent in writing thereto. Any amendment, termination, or waiver effected in accordance with this Subsection 7.8 shall be binding on each party and all of such party’s successors and permitted assigns, whether or not any such party, successor or assignee entered into or approved such amendment, termination or waiver. For purposes of this Subsection 7.8, the requirement of a written instrument may be satisfied in the form of an action by written consent of the Stockholders circulated by the Company and executed by the Stockholder parties specified, whether or not such action by written consent makes explicit reference to the terms of this Agreement.

## Delays or Omissions

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

## Severability

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

## Entire Agreement

. [Upon the effectiveness of this Agreement, the Prior Agreement shall be deemed amended and restated to read in its entirety as set forth in this Agreement.][[29]](#footnote-29) This Agreement (including the Exhibits hereto), [and] the Restated Certificate [and the other Transaction Agreements (as defined in the Purchase Agreement)] constitute the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties is expressly canceled.

## Share Certificate Legend

. Each certificate, instrument, or book entry representing any Shares issued after the date hereof shall be notated by the Company with a legend reading substan­tially as follows:

“The Shares REPRESENTED hereby are subject to a Voting Agreement, AS MAY BE AMENDED FROM TIME TO TIME, (a copy of which may be obtained upon written request from the Company), and by accepting any interest in such Shares the person accepting such interest shall be deemed to agree to and shall become bound by all the provisions of that Voting Agreement, including certain restrictions on transfer and ownership set forth therein.”

The Company, by its execution of this Agreement, agrees that it will cause the certificates instruments, or book entry evi­dencing the Shares issued after the date hereof to be notated with the legend required by this Subsection 7.12 of this Agreement, and it shall supply, free of charge, a copy of this Agreement to any holder of such Shares upon written request from such holder to the Company at its principal office. The parties to this Agreement do hereby agree that the failure to cause the certificates, instruments, or book entry evidencing the Shares to be notated with the legend required by this Subsection 7.12 herein and/or the failure of the Company to supply, free of charge, a copy of this Agreement as provided hereunder shall not affect the validity or enforcement of this Agreement.

## Stock Splits, Stock Dividends, etc.

In the event of any issuance of Shares of the Company’s voting securities hereafter to any of the Stockholders (including, without limitation, in connection with any stock split, stock dividend, recapitalization, reorganization, or the like), such Shares shall become subject to this Agreement and shall be notated with the legend set forth in Subsection 7.12.

## Manner of Voting

. The voting of Shares pursuant to this Agreement may be effected in person, by proxy, by written consent or in any other manner permitted by applica­ble law. For the avoidance of doubt, voting of the Shares pursuant to the Agreement need not make explicit reference to the terms of this Agreement.

## Further Assurances

. At any time or from time to time after the date hereof, the parties agree to cooperate with each other, and at the request of any other party, to execute and deliver any further instruments or documents and to take all such further action as the other party may reasonably request in order to evidence or effectuate the consummation of the transactions contemplated hereby and to otherwise carry out the intent of the parties hereunder.

## Dispute Resolution

.[[30]](#footnote-30) The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of [*state*] and to the jurisdiction of the United States District Court for the District of [*judicial district*] for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of [*state*] or the United States District Court for the District of [*judicial district*], and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject personally to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Agreement or the subject matter hereof may not be enforced in or by such court.

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

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

[Each party will bear its own costs in respect of any disputes arising under this Agreement.] [The prevailing party shall be entitled to reasonable attorney’s fees, costs, and necessary disbursements in addition to any other relief to which such party may be entitled.] Each of the parties to this Agreement consents to personal jurisdiction for any equitable action sought in the U.S. District Court for the District of [\_\_\_\_\_] or any court of the [State][Commonwealth] of [s*tate*] having subject matter jurisdiction.]

## [Costs of Enforcement

. If any party to this Agreement seeks to enforce its rights under this Agreement by legal proceedings, the non-prevailing party shall pay all costs and expenses incurred by the prevailing party, including, without limitation, all reasonable attorneys’ fees.]

## Aggregation of Stock

. All Shares held or acquired by a Stockholder and/or its Affiliates shall be aggregated together for the purpose of determining the availability of any rights under this Agreement, and such Affiliated persons may apportion such rights as among themselves in any manner they deem appropriate.

## [Spousal Consent

. If any individual Stockholder is married on the date of this Agreement, such Stockholder’s spouse shall execute and deliver to the Company a consent of spouse in the form of Exhibit B hereto (“**Consent of Spouse**”), effective on the date hereof. Notwithstanding the execution and delivery thereof, such consent shall not be deemed to confer or convey to the spouse any rights in such Stockholder’s Shares that do not otherwise exist by operation of law or the agreement of the parties. If any individual Stockholder should marry or remarry subsequent to the date of this Agreement, such Stockholder shall within thirty (30) days thereafter obtain his/her new spouse’s acknowledgement of and consent to the existence and binding effect of all restrictions contained in this Agreement by causing such spouse to execute and deliver a Consent of Spouse acknowledging the restrictions and obligations contained in this Agreement and agreeing and consenting to the same.][[31]](#footnote-31)

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this [Amended and Restated] Voting Agreement as of the date first written above.

[*Insert Company Name*]

By:

Name:

Title:

KEY HOLDERS:

Signature:

Name:

INVESTORS:

By:

Name:

Title:

**SCHEDULE A**

**INVESTORS**

|  |  |
| --- | --- |
| **Name and Address** | **Number of Shares Held** |
|  |  |
|  |  |
|  |  |

**SCHEDULE B**

**KEY HOLDERS**

|  |  |
| --- | --- |
| **Name and Address** | **Number of Shares Held** |
|  |  |
|  |  |
|  |  |

**EXHIBIT A**

**ADOPTION AGREEMENT**

This Adoption Agreement (“**Adoption Agreement**”) is executed on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_, by the undersigned (the “**Holder**”) pursuant to the terms of that certain Voting Agreement dated as of [\_\_\_\_\_ \_\_, 20\_\_\_] (the “**Agreement**”), by and among the Company and certain of its Stockholders, as such Agreement may be amended or amended and restated hereafter. Capitalized terms used but not defined in this Adoption Agreement shall have the respective meanings ascribed to such terms in the Agreement. By the execution of this Adoption Agreement, the Holder agrees as follows.

1.1 Acknowledgement. Holder acknowledges that Holder is acquiring certain shares of the capital stock of the Company (the “**Stock**”)[ or options, warrants, or other rights to purchase such Stock (the “**Options**”)], for one of the following reasons (Check the correct box):

 As a transferee of Shares from a party in such party’s capacity as an “Investor” bound by the Agreement, and after such transfer, Holder shall be considered an “Investor” and a “Stockholder” for all purposes of the Agreement.

 As a transferee of Shares from a party in such party’s capacity as a “Key Holder” bound by the Agreement, and after such transfer, Holder shall be considered a “Key Holder” and a “Stockholder” for all purposes of the Agreement.

 As a new Investor in accordance with Subsection 7.1(a) of the Agreement, in which case Holder will be an “Investor” and a “Stockholder” for all purposes of the Agreement.

 In accordance with Subsection 7.1(b) of the Agreement, as a new party who is not a new Investor, in which case Holder will be a “Stockholder” for all purposes of the Agreement.

1.2 Agreement. Holder hereby (a) agrees that the Stock [Options], and any other shares of capital stock or securities required by the Agreement to be bound thereby, shall be bound by and subject to the terms of the Agreement and (b) adopts the Agreement with the same force and effect as if Holder were originally a party thereto.

1.3 Notice. Any notice required or permitted by the Agreement shall be given to Holder at the address or facsimile number listed below Holder’s signature hereto.

**HOLDER:** ACCEPTED AND AGREED:

By: **[COMPANY]**

Name and Title of Signatory

Address: By:

Title:

Facsimile Number:

**[EXHIBIT B**

**CONSENT OF SPOUSE]**

I, [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], spouse of [\_\_\_\_\_\_\_\_\_\_\_\_\_\_], acknowledge that I have read the [Amended and Restated] Voting Agreement, dated as of [\_\_\_\_\_ \_\_, 20\_\_\_], to which this Consent is attached as Exhibit B (the “**Agreement**”), and that I know the contents of the Agreement. I am aware that the Agreement contains provisions regarding the voting and transfer of shares of capital stock of the Company that my spouse may own, including any inter­est I might have therein.

I hereby agree that my interest, if any, in any shares of capital stock of the Com­pany subject to the Agreement shall be irrevocably bound by the Agreement and further under­stand and agree that any community property interest I may have in such shares of capital stock of the Company shall be similarly bound by the Agreement.

I am aware that the legal, financial and related matters contained in the Agree­ment are complex and that I am free to seek independent professional guidance or counsel with respect to this Consent. I have either sought such guidance or counsel or determined after reviewing the Agreement carefully that I will waive such right.

Dated:

[*Name of Key Holder’s Spouse*]

**ADDENDUM TO VOTING AGREEMENT: SAMPLE SALE RIGHTS[[32]](#footnote-32)**

Section \_\_. Sale Rights**.**

**\_\_\_.** Initiation of Sale Process.Upon written notice to the Company from the Electing Holders, the Company shall initiate a process (the “**Sale Process**”), in accordance with this Section \_, intended to result in a Sale of the Company. Such written notice shall include a designation of one individual (the “**Holder Representative**”) to act on behalf of the Electing Holders and to exercise the authority granted to the Holder Representative pursuant to Section \_\_\_ below. Each of the Stockholders and the Company agree to use his, her or its commercially reasonable efforts, in consultation with the Financial Advisor (as defined below) and Deal Counsel (as defined below), to facilitate a Sale of the Company. In furtherance of the foregoing, upon receipt of the notice described above the Company shall, and shall cause its officers, employees, consultants, counsel and advisors to take the actions set forth in Section below.

\_\_\_.1.Specific Obligations**.**

\_\_.1.1 Advisors. The Company shall engage an investment bank (the “**Financial Advisor**”) and a law firm (the “**Deal Counsel**”) reasonably satisfactory to the Holder Representative (which may be the Company’s existing investment bank and law firm) to assist with the Sale Process. The Financial Advisor and Deal Counsel, as well as any other advisors engaged pursuant to this Section \_\_(i), shall represent the Company, and only the Company, in the sale process, and the costs, fees and expenses of such advisors shall be paid by the Company pursuant to the terms of engagement letters that are approved by the Holder Representative (such approval not to be unreasonably withheld, conditioned or delayed). None of the Financial Advisor, Deal Counsel or any other advisor selected in accordance with this Section \_\_(i) shall be terminated by the Company without the written consent of the Holder Representative.

\_\_.1.2 Cooperation With Sale Process. Without limiting the generality of the provisions of Section \_\_.1, at the request of the Holder Representative, the Company shall, and shall cause its employees, officers, consultants, counsel and advisors to:

#### Assist the Financial Advisor in creating a list of potential acquirers;

#### Set up and maintain a virtual or actual data room (as elected by the Holder Representative) containing due diligence materials customarily provided in connection with transactions of the nature of a Sale of the Company, along with any other due diligence materials requested by the Holder Representative or reasonably requested by any potential acquirer;

#### Execute customary non-disclosure agreements with potential acquirers;

#### Provide incentive compensation to members of the Company’s management, and in an amount and form, all as determined by the Holder Representative to be necessary or helpful to the successful consummation of the Sale of the Company;

#### Prepare, or assist the Financial Advisor with the preparation of, any marketing, financial or other materials deemed by the Holder Representative or the Financial Advisor to be necessary or helpful in connection with a Sale of the Company;

#### Attend and participate in any meetings, conference calls, or presentations regarding the Company and its business with potential acquirers;

#### Execute a letter of intent or term sheet on terms reasonably acceptable to the Holder Representative with one or more potential acquirers;

#### Subject to Section \_.3, execute and perform the Company’s obligations contained in such definitive agreements relating to a Sale of the Company as are negotiated by the Holder Representative and the potential acquirer; and

#### Communicate regularly and promptly with each of the Financial Advisor and Deal Counsel regarding the Sale Process.

\_\_.1.3 Approval of the Terms and Conditions of a Proposed Sale of the Company; Failure to Approve a Sale of the Company.

#### The Company shall cause its management, together with the Financial Advisor and Deal Counsel, to deliver regular updates to its Board regarding material developments in the Sale Process and summarizing the status of the negotiation of the terms and conditions of the Sale of the Company. The Company shall, upon request of the Holder Representative, either call a meeting of its Board or seek the written consent of the Board approving the Sale of the Company and the entering into of the definitive agreements relating thereto.

#### In the event that the Board approval described in (i) above has not been obtained within the time period requested by the Holder Representative (such time period not to be less than three (3) business days), the Electing Holders shall have the right by written notice (the “**Redemption Notice**”) to require the Company to redeem all of the then outstanding shares of capital stock held by the Electing Holders at a price equal to the amount of proceeds that would have been paid in respect of their shares of capital stock were the Sale of the Company consummated or, in the case of a Sale of the Company that is structured as a sale of all or substantially all of the Company’s assets, the amount of proceeds that would have been paid in respect of their investment in the Company had all proceeds from the proposed Sale of the Company been distributed in a Deemed Liquidation Event (a “**Preferred Redemption**”). The Company and each Investor shall be obligated to effect the Preferred Redemption within ten (10) days of the delivery of the Redemption Notice.

\_\_.1.4 Appointment and Authority of Holder Representative.

#### The Stockholders have agreed that it is desirable to designate a representative to act on behalf of the Stockholders for the purposes described in this Section \_\_\_. The Holder Representative shall be selected by the Electing Holders and shall serve as the agent and representative of each Stockholder with respect to the matters set forth in this Agreement.

#### The Holder Representative shall have full power and authority to take all actions under this Agreement that are to be taken by the Holder Representative. The Holder Representative shall take any and all actions which it believes are necessary or appropriate under this Agreement, including giving and receiving any notice or instruction permitted or required under this Agreement by the Holder Representative, interpreting all of the terms and provisions of this Agreement, consenting to any actions on behalf of the Stockholders in connection with a Sale of the Company (except with respect to any approvals of the final terms and conditions of such Sale of the Company by the Investors in their capacities as such), conducting negotiations with any potential acquirer and its agents regarding such Sale of the Company, dealing with the Company under this Agreement, taking any and all other actions specified in or contemplated by this Agreement, and engaging counsel, accountants or other representatives to represent the Electing Holders in connection with the foregoing matters. Without limiting the generality of the foregoing, the Holder Representative shall have the full power and authority to interpret all the terms and provisions of this Agreement and amendment hereof or thereof in its capacity as Holder Representative.

#### The Holder Representative shall be indemnified for and shall be held harmless by the Investors against any Losses incurred by the Holder Representative or any of its Affiliates and any of their respective partners, directors, officers, employees, agents, stockholders, consultants, attorneys, accountants, advisors, brokers, representatives or controlling persons, in each case relating to the Holder Representative’s conduct as Holder Representative, other than damages or losses resulting from the Holder Representative’s gross negligence or willful misconduct in connection with its performance under this Agreement. This indemnification shall survive the termination of this Agreement. The Holder Representative may, in all questions arising under this Agreement, rely on the advice of counsel, and for anything done, omitted or suffered in good faith by the Holder Representative in accordance with such advice, the Holder Representative shall not be liable to the Stockholders. In no event shall the Holder Representative be liable hereunder or in connection herewith to the Stockholders for any indirect, punitive, special or consequential damages.

#### Any action taken by the Holder Representative pursuant to the authority granted in this Section \_ shall be effective and absolutely binding as the action of the Stockholders under this Agreement.

#### The Company shall be entitled to rely on the actions and determinations of the Holder Representative, and shall have no liability whatsoever with respect to any action or omission of them taken in reliance on the actions or omissions of the Holder Representative.

1. In most cases investors will want the term “Key Holders” to include major common stock or option holders in addition to the individuals who actually founded the Company. [↑](#footnote-ref-1)
2. The first alternative for the recital paragraph A assumes that the agreement concerns the sale of the Company’s first series of preferred stock. [↑](#footnote-ref-2)
3. Section 706(a) of the California General Corporation Law (the “*CGCL*”) and Section 218(c) of the Delaware General Corporation Law (the “*DGCL*”) specifically allow voting agreements between stockholders, provided such agreements are in writing and signed by the parties thereto. The powers created by these sections are not limited to board matters. [↑](#footnote-ref-3)
4. The second alternative for recital paragraph A assumes that a preexisting voting agreement is being superseded. It contemplates two or more different series of preferred stock. In the remainder of this Agreement, brackets indicate places where the drafter will have to take account of the existence of multiple series. [↑](#footnote-ref-4)
5. Appropriate modifications to this form will be required to reflect the actual series of preferred stock outstanding and the relative rights of such series. [↑](#footnote-ref-5)
6. Careful consideration should be given to ensure that the voting agreement does not contradict class or series votes created by the Certificate of Incorporation. In particular, if the Certificate of Incorporation provides for the creation of an additional series (*e.g.*, Series A-1) to effectuate “pay-to-play” provisions, care should be taken to ensure that such shares are also included in the appropriate places in this Agreement. In addition, especially for California corporations, consider the effects that cumulative voting may have on the class and series votes created by the Certificate of Incorporation. [↑](#footnote-ref-6)
7. The number of permutations of board composition are almost limitless. Some of the more common requirements are set forth in Section 1.2. [↑](#footnote-ref-7)
8. Careful consideration should be given whenever an individual is named to serve as a director who may have the ability to continue to serve at his or her pleasure. Alternative 1 provides that a founder director shall be elected by the majority of the Key Holders’ shares or the shares of common stock, depending upon which alternative is selected, but in fact the designated founder may have sufficient shares of stock to control that vote. Alternative 2 has a variety of choices: the first ties the Board seat to continued status as an officer or employee, which may be within the control of the majority of the board of directors; the other alternatives tie the right to designate a director only to continued minimum holdings of stock. [↑](#footnote-ref-8)
9. Alternatively, the agreement can enumerate the identity of each group whose consent is necessary to remove each director, but care should be given to ensure that the consent requirements conform to the exact subsets entitled to designate directors, *e.g.*, “the holders of a majority of the Shares held by the Key Holders who are then providing services to the Company as officers, employees or consultants.” [↑](#footnote-ref-9)
10. For flexibility reasons it may be useful to permit the Board to fill the vacancy in addition to the right of the stockholders to do so. If so, the drafter should provide that the person to fill the vacancy must be approved by the Person who has the right to nominate that director pursuant to this Voting Agreement, and should take care that the provision is in accord with the Certificate of Incorporation, the bylaws and the applicable corporations code. See Section 223 of the DGCL or Section 305 of the CGCL. [↑](#footnote-ref-10)
11. A drag-along right gives a defined group of stockholders the right to deliver all (or most) of the shares of a company without the need of effecting a freeze-out merger. The drafter should be mindful of the interplay between this provision and minority protections against changes in control that may be in the Certificate of Incorporation or the Investor Rights Agreement. Drag-along rights are less common than voting agreements regarding the composition of the board of directors, which are near universal. While drag-along agreements are not universal, it is arguable that a drag-along with a high voting percentage trigger is in the best interests of all parties. If so structured (and note that multiple voting constituencies can be defined as appropriate, such as all preferred together and/or each separate series, or all non-investor common and/or common held by existing management and employees), the objective of the drag-along is not to grant the investors the unilateral right to force a sale, but rather to ensure that all (or most) of the Company’s stockholders will approve a transaction approved by holders of a specified percentage of the Company’s stockholders. The voting rights of each group of constituents can be protected, while helping to prevent dissent by minority “cat and dog” stockholders. In this connection, it is important to note that many acquirors in M&A transactions will require the seller to deliver a certain percentage of the vote (or, stated differently, seek to reduce the risk of stockholders exercising appraisal rights). If such a “housekeeping” drag-along is included in the Voting Agreement, the Company should include similar provisions, and a waiver of dissenter’s rights, in its form of employee option agreements. [↑](#footnote-ref-11)
12. See footnote 32 (Addendum) for a discussion of why the drafters might elect not to include the Board as one of the parties necessary to trigger the drag-along, in light of the *Trados* decision. [↑](#footnote-ref-12)
13. Drafter should assess and make determination as to whether any or all of the listed conditions are appropriate for the relevant transaction. The non-bracketed conditions are the ones typically considered minimal to ensure that no one is treated unfairly as a result of invocation of the drag-along. [↑](#footnote-ref-13)
14. Include the bracketed language if you use the Allocation of Escrow provision (Section 2.3.4) of the Model Charter. [↑](#footnote-ref-14)
15. The vote required to waive the treatment of a particular transaction as a Deemed Liquidation Event should comport with the vote that would be required to amend the Certificate of Incorporation to remove the transaction from the definition of “Deemed Liquidation Event” and the notice period in this sentence should be the same as the notice period in the Deemed Liquidation Event definition in the Certificate of Incorporation. [↑](#footnote-ref-15)
16. The reason for this provision is that the “Deemed Liquidation Event” provisions of the Certificate of Incorporation cannot completely provide for the allocation of the purchase price paid in a sale of the Company if the sale is structured as a sale of stock by the Company’s stockholders. This is because the Company may not be a party to the stock sale transaction and will not have the opportunity to ensure that the purchase price is allocated as dictated in the Certificate of Incorporation. This covenant is intended to prevent a group of controlling stockholders from circumventing the liquidation preference provision by structuring the sale as a stock sale if those stockholders do not otherwise have sufficient voting power to amend the definition of a “Deemed Liquidation Event.” Co-sale provisions do not provide adequate protection for such a scenario either because (a) the co-sale right does not apply to the holders of preferred stock; or (b) if co-sale rights do apply, the preferred stockholders exercising those rights might receive the same purchase price for their preferred stock as the selling common stockholders receive for this common stock, thereby losing the benefits of their liquidation preferences. [↑](#footnote-ref-16)
17. See footnote 15. [↑](#footnote-ref-17)
18. See footnote 32 (Addendum). [↑](#footnote-ref-18)
19. The proxy is intended to give the holder of voting rights a tool to force other stockholders to abide by the terms of this Agreement, even if the other stockholders do not agree or refuse to take the action the holder requires. Many stockholders will not give up the right to determine if the actions sought to be taken by the holder of voting rights comport with the terms of this Agreement. There may be a difference of opinion, for example, as to whether a proposed sale of the Company meets all conditions sufficient to fall with the definition of that term. Some practitioners believe the proxy would likely be used in situations when there is a dispute as to which actions are required, and that any exercise of the proxy could be hazardous to the holder of the right at that time. Accordingly, the proxy may not be very useful in the very situations when it might be invoked. [↑](#footnote-ref-19)
20. Section 706(a) of the CGCL implies that specific performance is the preferred remedy in the case of voting agreements. [↑](#footnote-ref-20)
21. This provision has been drafted to facilitate to the greatest extent possible issuers conducting Rule 506 offerings based on the presumption that its stockholders are not “bad actors.” The rule does not preclude selling securities to bad actors and, therefore, this representation is not strictly necessary for purposes of the transaction in which the stockholder becomes a party to this Agreement. However, it is advisable for issuers to determine in advance whether a party that will become a stockholder is a bad actor to avoid being precluded from relying on Rule 506 for future offerings or future sales in the same offering if the bad actor is or becomes a 20% beneficial owner of the issuer’s voting securities. [↑](#footnote-ref-21)
22. Although Rule 506(d) does not disqualify issuers in the case of a “bad act” occurring prior to September 23, 2013, this representation is drafted under the assumption of no “bad acts,” either prior to or subsequent to such date. If disclosure of a pre-September 23 “bad act” by a Stockholder is required, this representation can be modified accordingly. [↑](#footnote-ref-22)
23. The intent of this covenant is to reduce the burden on issuers in ascertaining the “bad actor” status of its stockholders for Rule 506 offerings. A Compliance and Disclosure Interpretation promulgated by the Securities and Exchange Commission (Question 260.14) states that, “[a]n issuer may reasonably rely on a covered person’s agreement to provide notice of a potential or actual bad actor triggering event. . . .” It also notes, however, that if an offering is continuous, delayed or long-lived, the issuer must update its inquiry through bring-down representations, negative consent letters or other reasonable means. [↑](#footnote-ref-23)
24. Some voting agreements require a “qualified public offering” for the termination of the agreement. The blocking rights contained in the Certificate of Incorporation, however, should provide sufficient protection to the Investors. Retaining a “qualified public offering” requirement in the voting agreement creates possible blocking rights for individual investors not contemplated by the Certificate of Incorporation, and in any event gives rise to the need to obtain additional waivers and consents when one should be sufficient. The termination provision should conform to that in the Right of First Refusal and Co-sale Agreement and the Investors’ Rights Agreement (other than the registration rights termination provision). [↑](#footnote-ref-24)
25. This requirement cannot apply to any shares issued to an employee to which California Department of Corporations rules 260.140.41(l) or 260.140.42(i) apply. Voting rights must be unrestricted. [↑](#footnote-ref-25)
26. After choosing the applicable law, the parties should determine whether such law imposes any particular requirements, such as special legends or other notices, in order to make restrictions on transfer of shares effective. [↑](#footnote-ref-26)
27. Some practitioners may select Delaware law as it has historically been the richest source for corporation law precedent. Other practitioners will prefer to choose the (non-Delaware) jurisdiction in which they are admitted to practice, if for no other reason than not having to retain Delaware counsel in the event they are called upon to give an enforceability opinion. In *Abry Partners V v. F&W Acquisition LLC, Case No. C.A. 1756-N (Del Ch. Ct. Feb. 14, 2006)*, the Delaware Chancery Court stated that it would respect a Delaware choice of law provision so long as Delaware law has a material relationship to the transaction – which will very often be the case in venture financings (*e.g.*, parties are Delaware corporations, LLPs, or LLCs). However, it should be noted that if an action is brought in a jurisdiction other than the state whose governing law has been selected, that jurisdiction will apply its own choice of law principles in deciding whether or not to give effect to the governing law selected by the parties. Further, under the internal affairs doctrine of the state whose law is chosen to govern the agreement, whether or not the parties so provide, the DGCL will apply to certain provisions (*e.g.*, voting of shares of stock). [↑](#footnote-ref-27)
28. To the extent there are rights of individual parties to designate directors, care should be taken to ensure that the amendment section requires the vote of such party to amend the relevant sections of the document. [↑](#footnote-ref-28)
29. The drafter should ensure that the relevant signatories to the current agreement have authority to terminate the prior agreement under the terms of the latter. [↑](#footnote-ref-29)
30. In the prior version of the NVCA Model Documents it was noted that in 2009 Delaware enacted legislation permitting confidential arbitration of disputes before a sitting Delaware Chancery Court Chancellor so long as 1) at least one party is a Delaware business entity or has its principal place of business in Delaware; and 2) there is at least $1 million in controversy. However, in August 2012 the U.S. District Court for the District of Delaware held in *Delaware Coalition for Open Government v. Strine* *(D. Del. Aug. 30, 2012)* that such confidential arbitration violates the First Amendment’s right of access to civil trials. As long as this decision stands (the State of Delaware has appealed and a decision is pending), it seems imprudent to include a provision stipulating that disputes are to be arbitrated in the Delaware Court of Chancery. [↑](#footnote-ref-30)
31. To the extent any Key Holder or spouse thereof is a resident of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin, or the Commonwealth of Puerto Rico, a spousal consent may be needed. See Exhibit A. The necessity of such a consent should be researched carefully, since including this provision where the law is unclear may imply the existence of rights that would not otherwise exist. [↑](#footnote-ref-31)
32. The “Sale Rights” provisions in this Addendum have been drafted in response to the Delaware Chancery Court’s ruling in *In re Trados Inc. S’holder Litigation, Case No. C.A. 1512-CC (Del. Ch. Ct. July 24, 2009)*.  In that case, where a company was sold for less than the preferred stock liquidation preferences (leaving nothing for the common stockholders upon the sale), the Court concluded *that, in circumstances where the interests of the common stockholders may diverge from those of the preferred, a director can breach his or her duty by approving a sale which could be viewed as improperly favoring the interests of the preferred  over those of the common stockholders.*   The plaintiffs in that case argued that the company was on an upswing, and that if the company had been sold at a later date, there may have been proceeds for common stockholders. This ruling may expose directors to potential liability where they vote in favor of a sale at a price below the liquidation preferences that results in no proceeds for common stockholders. Accordingly,  the “Sale Rights” provisions are designed to insulate the Board from a *Trados*-type claim. In particular, since this section provides for redemption rights additional to any that may be included in the Certificate of Incorporation, selling the company may be the only means by which the Board is able to honor this contractual “put” obligation.

    Investors who are bridging a company to a sale may want to consider amending the Voting Agreement to include provisions such as those found in this Addendum, particularly where 1) there are no disinterested directors to vote on the sale transaction, and 2) the transaction is anticipated to result in proceeds below the liquidation preferences.

    The Company will need to consult with its accountants with respect to the accounting treatment of the “put right” provided for here; it is the drafters’ hope that it is attenuated enough that the Company’s accountants will not require it to be reflected as debt on the Company’s balance sheet.

    Finally, note that this provision is intended to work in conjunction with the drag-along provisions, and is not in lieu of them. It is the “Electing Holders” who trigger the provisions of this “Sale Rights” section – the same group that triggers the drag-along provisions in Section 3. These “Sale Rights” are not intended to give the Electing Holders (however defined) additional substantive rights, but rather to assist them in effecting the transaction they have approved. [↑](#footnote-ref-32)