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## [AMENDED AND RESTATED] RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT

THIS [AMENDED AND RESTATED] RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT (this “**Agreement**”), is made as of [\_\_\_\_], 20[\_\_\_] by and among [\_\_\_\_], a [Delaware] corporation (the “**Company**”), the Investors (as defined below) listed on Schedule A and the Key Holders<sup>1</sup> (as defined below) listed on Schedule B.

*[Alternative 1:]*<sup>2</sup>

**WHEREAS**, each Key Holder is the beneficial owner of shares of Capital Stock, or of options to purchase Common Stock;

**WHEREAS**, the Company and the Investors are parties to that certain [Series A Preferred Stock] Purchase Agreement, of even date herewith (the “**Purchase Agreement**”), pursuant to which the Investors have agreed to purchase shares of the Series A Preferred Stock of the Company, par value \$\_\_ per share (“**Series A Preferred Stock**”); and

**WHEREAS**, the Key Holders and the Company desire to further induce the Investors to purchase the Series A Preferred Stock;]

*[Alternative 2:]*<sup>3</sup>

**WHEREAS**, each Key Holder is the beneficial owner of shares of Capital Stock, or of options to purchase Common Stock;

**WHEREAS**, the Company, the Key Holders and certain of the Investors (the “**Existing Investors**”) previously entered into [a][an] [Amended and Restated] Right of First Refusal and Co-Sale Agreement, dated [\_\_\_\_], 20[\_\_\_] (the “**Prior Agreement**”), in connection with the purchase of shares of Series [\_\_\_] Preferred Stock of the Company, par value \$\_\_ per share (“**Series [\_\_\_] Preferred Stock**”);

**WHEREAS**, the Key Holders, the Existing Investors and the Company desire to induce certain of the Investors to purchase shares of Series [\_\_\_] Preferred Stock of the Company, par value \$\_\_ per share (“**Series [\_\_\_] Preferred Stock**”), pursuant to that certain Series [\_\_\_] Preferred Stock Purchase Agreement dated as of the date hereof by and among the Company and

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<sup>1</sup> 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.

<sup>2</sup> This first set of recitals assumes that this Agreement is being entered into in connection with the sale of the Company’s first series of preferred stock.

<sup>3</sup> This second set of recitals assumes that a preexisting co-sale agreement is being superseded. It contemplates two (2) different series of preferred stock. Appropriate modifications to the form will be required based on the actual series of preferred stock outstanding and the relative right of such series.

such Investors (the “**Purchase Agreement**”) by [amending and restating][terminating] the Prior Agreement in its entirety to provide the Investors with the rights and privileges as set forth herein.]

**NOW, THEREFORE**, the Company, the Key Holders [and][,] the Investors [including the Existing Investors each hereby agree that the Prior Agreement is hereby amended and restated in its entirety by this Agreement, and the parties hereto further] agree as follows:

1. **Definitions.**

1.1 “**Affiliate**” means, with respect to any specified Investor, any other Investor who directly or indirectly, controls, is controlled by or is under common control with such Investor, including, without limitation, any general partner, managing member, officer, director or trustee of such Investor, or any venture capital fund or other investment fund now or hereafter existing which is controlled by one (1) or more general partners, managing members or investment advisers of, or shares the same management company or investment adviser with, such Investor.

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

1.3 “**Capital Stock**” means (a) shares of Common Stock and Preferred Stock (whether now outstanding or hereafter issued in any context), (b) shares of Common Stock issued or issuable upon conversion of Preferred Stock, and (c) shares of Common Stock issued or issuable upon exercise or conversion, as applicable, of stock options, warrants or other convertible securities of the Company, in each case now owned or subsequently acquired by any Key Holder, any Investor, or their respective successors or permitted transferees or assigns. For purposes of the number of shares of Capital Stock held by an Investor or Key Holder (or any other calculation based thereon), all shares of Preferred Stock shall be deemed to have been converted into Common Stock at the then-applicable conversion ratio.

1.4 “**Change of Control**” means 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.

1.5 “**Common Stock**” means shares of Common Stock of the Company, [ ] par value per share.

1.6 “**Company Notice**” means written notice from the Company notifying the selling Key Holders and each Investor that the Company intends to exercise its Right of First Refusal as to some or all of the Transfer Stock with respect to any Proposed Key Holder Transfer.

1.7 [“**DPA**” means Section 721 of the Defense Production Act, as amended, including all implementing regulations thereof.]<sup>4</sup>

1.8 [“**DPA Triggering Rights**” means (i) “control” (as defined in the DPA); (ii) access to any “material non-public technical information” (as defined in the DPA) in the possession of the Company; (iii) membership or observer rights on the Board of Directors or

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<sup>4</sup> To be included if needed for any of the CFIUS-related provisions below.

equivalent governing body of the Company or the right to nominate an individual to a position on the Board of Directors or equivalent governing body of the Company; (iv) any involvement, other than through the voting of shares, in substantive decision-making of the Company regarding (x) the use, development, acquisition or release of any Company “critical technology” (as defined in the DPA); (y) the use, development, acquisition, safekeeping, or release of “sensitive personal data” (as defined in the DPA) of U.S. citizens maintained or collected by the Company, or (z) the management, operation, manufacture, or supply of “covered investment critical infrastructure” (as defined in the DPA).]<sup>5</sup>

1.9 [“**Foreign Person**” means either (i) a Person or government that is a “foreign person” within the meaning of the DPA or (ii) a Person through whose investment a “foreign person” within the meaning of the DPA would obtain any DPA Triggering Rights.]<sup>6</sup>

1.10 “**Investor Notice**” means written notice from any Investor notifying the Company and the selling Key Holder(s) that such Investor intends to exercise its Secondary Refusal Right as to a portion of the Transfer Stock with respect to any Proposed Key Holder Transfer.

1.11 “**Investors**” means the persons named on Schedule A hereto, each person to whom the rights of an Investor are assigned pursuant to Section 6.9, each person who hereafter becomes a signatory to this Agreement pursuant to Section 6.11 and any one of them, as the context may require[; provided, however, that any such person shall cease to be considered an Investor for purposes of this Agreement at any time such person and his, her or its Affiliates collectively hold fewer than [ ] shares of Capital Stock (as adjusted for any stock combination, stock split, stock dividend, recapitalization or other similar transaction)<sup>7</sup>].

1.12 “**Key Holders**” means the persons named on Schedule B hereto, each person to whom the rights of a Key Holder are assigned pursuant to Section 3.1, each person who hereafter becomes a signatory to this Agreement pursuant to Section 6.9 or 6.17 and any one of them, as the context may require.

1.13 “**Preferred Stock**” means collectively, all shares of Series A Preferred Stock [and Series [ ] Preferred Stock].<sup>8</sup>

1.14 “**Proposed Key Holder Transfer**” means any assignment, sale, offer to sell, pledge, mortgage, hypothecation, encumbrance, disposition of or any other like transfer or encumbering of any Transfer Stock (or any interest therein) proposed by any of the Key Holders.

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<sup>5</sup> To be included if needed for any of the CFIUS-related provisions below.

<sup>6</sup> To be included if needed for any of the CFIUS-related provisions below.

<sup>7</sup> This minimum shareholding requirement is sometimes expressed in terms of a certain percentage of the Company’s fully-diluted capitalization, in which case the Investor runs the risk of losing rights under this agreement if it fails to participate in future issuances.

<sup>8</sup> This definition may not be necessary in a Series A Financing. If it is not included, all references to Preferred Stock should be changed to Series A Preferred Stock.

1.15 **“Proposed Transfer Notice”** means written notice from a Key Holder setting forth the terms and conditions of a Proposed Key Holder Transfer.

1.16 **“Prospective Transferee”** means any person to whom a Key Holder proposes to make a Proposed Key Holder Transfer.

1.17 **“Restated Certificate”** means the Company’s Amended and Restated Certificate of Incorporation, as amended and/or restated from time to time.

1.18 **“Right of Co-Sale”** means the right, but not an obligation, of an Investor to participate in a Proposed Key Holder Transfer on the terms and conditions specified in the Proposed Transfer Notice.

1.19 **“Right of First Refusal”** means the right, but not an obligation, of the Company, or its permitted transferees or assigns, to purchase some or all of the Transfer Stock with respect to a Proposed Key Holder Transfer, on the terms and conditions specified in the Proposed Transfer Notice.

1.20 **“Secondary Notice”** means written notice from the Company notifying the Investors and the selling Key Holder that the Company does not intend to exercise its Right of First Refusal as to all shares of any Transfer Stock with respect to a Proposed Key Holder Transfer, on the terms and conditions specified in the Proposed Transfer Notice.

1.21 **“Secondary Refusal Right”** means the right, but not an obligation, of each Investor to purchase up to its pro rata portion (based upon the total number of shares of Capital Stock then held by all Investors) of any Transfer Stock not purchased pursuant to the Right of First Refusal, on the terms and conditions specified in the Proposed Transfer Notice.

1.22 **“Transfer Stock”** means shares of Capital Stock owned by a Key Holder, or issued to a Key Holder after the date hereof (including, without limitation, in connection with any stock split, stock dividend, recapitalization, reorganization, or the like), but does not include any shares of Preferred Stock or of Common Stock that are issued or issuable upon conversion of Preferred Stock.<sup>9</sup>

1.23 **“Undersubscription Notice”** means written notice from an Investor notifying the Company and the selling Key Holder that such Investor intends to exercise its option to purchase all or any portion of the Transfer Stock not purchased pursuant to the Right of First Refusal or the Secondary Refusal Right.

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<sup>9</sup> This definition should be modified appropriately if transfers by holders other than Key Holders will be subject to rights of first refusal and co-sale. See footnote 11. Also note that this definition permits sales by Key Holders of any Preferred Stock owned by Key Holders and any Common Stock received upon conversion of any Preferred Stock owned by Key Holders, on the theory that those shares have been purchased and should be treated the same as shares of Investor Preferred Stock.

## 2. Agreement Among the Company, the Investors and the Key Holders.

### 2.1 Right of First Refusal.<sup>10</sup>

(a) Grant. Subject to the terms of Section 3 below, each Key Holder<sup>11</sup> hereby unconditionally and irrevocably grants to the Company a Right of First Refusal to purchase all or any portion of Transfer Stock that such Key Holder may propose to transfer in a Proposed Key Holder Transfer, at the same price and on the same terms and conditions as those offered to the Prospective Transferee.

(b) Notice. Each Key Holder proposing to make a Proposed Key Holder Transfer must deliver a Proposed Transfer Notice to the Company and each Investor not later than [forty-five (45)] days prior to the consummation of such Proposed Key Holder Transfer. Such Proposed Transfer Notice shall contain the material terms and conditions (including price and form of consideration) of the Proposed Key Holder Transfer, the identity of the Prospective Transferee and the intended date of the Proposed Key Holder Transfer. To exercise its Right of First Refusal under this Section 2, the Company must deliver a Company Notice to the selling Key Holder and the Investors within fifteen (15) days after delivery of the Proposed Transfer Notice specifying the number of shares of Transfer Stock to be purchased by the Company. [In the event of a conflict between this Agreement and any other agreement that may have been entered into by a Key Holder with the Company that contains a preexisting right of first refusal, the Company and the Key Holder acknowledge and agree that the terms of this Agreement shall control and the preexisting right of first refusal shall be deemed satisfied by compliance with Section 2.1(a) and this Section 2.1(b).] [In the event of a conflict between this Agreement and the Company's Bylaws containing a preexisting right of first refusal, the terms of the Bylaws will control and compliance with the Bylaws shall be deemed compliance with this Section 2.1(a) and (b) in full.]

(c) Grant of Secondary Refusal Right to the Investors. Subject to the terms of Section 3 below, each Key Holder hereby unconditionally and irrevocably grants to the Investors a Secondary Refusal Right to purchase all or any portion of the Transfer Stock not purchased by the Company pursuant to the Right of First Refusal, as provided in this Section

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<sup>10</sup> Note the Delaware Court of Chancery's holding in *Latesco, L.P. v. Wayport, Inc.*, Case No. C.A. 4167-VCL (Del. Ch. Ct. July 24, 2009), that fiduciary disclosure principles do not apply to purchases by insiders pursuant to contractual ROFR provisions. The court essentially ruled that, under Delaware law, companies (as well as their officers and directors), are not required to disclose material non-public information to a seller before buying shares pursuant to ROFR provisions unless (1) the ROFR agreement expressly requires such disclosure; or (2) the Company or the insiders purchasing the shares make statements to the seller that are misleading absent additional disclosure. The court's decision does not necessarily imply a similar result under the federal securities laws.

<sup>11</sup> This form assumes that only transfers by Key Holders will be subject to rights of first refusal and co-sale. In certain circumstances, the Company or other Investors may request that the Investors also be subject to the same limitations on transfer as the Key Holders. Some Investors may feel that imposing ROFR/co-sale obligations on other Investors is necessary to protect the Preferred Stock liquidation preference against acquisitions structured as a tender offer – because that would not ordinarily trigger application of the liquidation preference in the Company's Certificate of Incorporation (but note that co-sale provisions would ordinarily provide the Investors with the same purchase price paid to the holders of Common Stock, rather than a higher price reflecting the liquidation preferences of the Preferred Stock; for further discussion of this point, see footnote 21 in the Voting Agreement). In other cases, Investors may wish to impose such restrictions on one another as means to police the composition of the Company's stockholders, or to ensure that they have “first dibs” if and when other Investors sell their shares.

2.1(c). If the Company does not provide the Company Notice exercising its Right of First Refusal with respect to all Transfer Stock subject to a Proposed Key Holder Transfer, the Company must deliver a Secondary Notice to the selling Key Holder and to each Investor to that effect no later than fifteen (15) days after the selling Key Holder delivers the Proposed Transfer Notice to the Company. To exercise its Secondary Refusal Right, an Investor must deliver an Investor Notice to the selling Key Holder and the Company within ten (10) days after the Company's deadline for its delivery of the Secondary Notice as provided in the preceding sentence.

(d) Undersubscription of Transfer Stock. If options to purchase have been exercised by the Company and the Investors pursuant to Sections 2.1(b) and (c) with respect to some but not all of the Transfer Stock by the end of the ten (10) day period specified in the last sentence of Section 2.1(c) (the "**Investor Notice Period**"), then the Company shall, within five (5) days after the expiration of the Investor Notice Period, send written notice (the "**Company Undersubscription Notice**") to those Investors who fully exercised their Secondary Refusal Right within the Investor Notice Period (the "**Exercising Investors**"). Each Exercising Investor shall, subject to the provisions of this Section 2.1(d), have an additional option to purchase all or any part of the balance of any such remaining unsubscribed shares of Transfer Stock on the terms and conditions set forth in the Proposed Transfer Notice. To exercise such option, an Exercising Investor must deliver an Undersubscription Notice to the selling Key Holder and the Company within ten (10) days after the expiration of the Investor Notice Period. In the event there are two (2) or more such Exercising Investors that choose to exercise the last-mentioned option for a total number of remaining shares in excess of the number available, the remaining shares available for purchase under this Section 2.1(d) shall be allocated to such Exercising Investors pro rata based on the number of shares of Transfer Stock such Exercising Investors have elected to purchase pursuant to the Secondary Refusal Right (without giving effect to any shares of Transfer Stock that any such Exercising Investor has elected to purchase pursuant to the Company Undersubscription Notice). If the options to purchase the remaining shares are exercised in full by the Exercising Investors, the Company shall immediately notify all of the Exercising Investors and the selling Key Holder of that fact.

(e) [Forfeiture of Rights]. Notwithstanding the foregoing, if the total number of shares of Transfer Stock that the Company and the Investors have agreed to purchase in the Company Notice, Investor Notices and Undersubscription Notices is less than the total number of shares of Transfer Stock, then the Company and the Investors shall be deemed to have forfeited any right to purchase such Transfer Stock, and the selling Key Holder shall be free to sell all, but not less than all, of the Transfer Stock to the Prospective Transferee on terms and conditions substantially similar to (and in no event more favorable than) the terms and conditions set forth in the Proposed Transfer Notice, it being understood and agreed that (i) any such sale or transfer shall be subject to the other terms and restrictions of this Agreement, including, without limitation, the terms and restrictions set forth in Sections 2.2 and 6.9(b); (ii) any future Proposed Key Holder Transfer shall remain subject to the terms and conditions of this Agreement, including this Section 2; and (iii) such sale shall be consummated within forty-five (45) days after receipt of the Proposed Transfer Notice by the Company and, if such sale is not consummated within such forty-

five (45) day period, such sale shall again become subject to the Right of First Refusal and Secondary Refusal Right on the terms set forth herein.]<sup>12</sup>

(f) Consideration; Closing. If the consideration proposed to be paid for the Transfer Stock is in property, services or other non-cash consideration, the fair market value of the consideration shall be as determined in good faith by the Board of Directors and as set forth in the Company Notice. If the Company or any Investor cannot for any reason pay for the Transfer Stock in the same form of non-cash consideration, the Company or such Investor may pay the cash value equivalent thereof, as determined in good faith by the Board of Directors and as set forth in the Company Notice. The closing of the purchase of Transfer Stock by the Company and the Investors shall take place, and all payments from the Company and the Investors shall have been delivered to the selling Key Holder, by the later of (i) the date specified in the Proposed Transfer Notice as the intended date of the Proposed Key Holder Transfer; and (ii) [forty-five (45)] days after delivery of the Proposed Transfer Notice.

## 2.2 Right of Co-Sale.

(a) Exercise of Right. If any Transfer Stock subject to a Proposed Key Holder Transfer is not purchased pursuant to Section 2.1 above and thereafter is to be sold to a Prospective Transferee, each respective Investor may elect to exercise its Right of Co-Sale and participate on a pro rata basis in the Proposed Key Holder Transfer as set forth in Section 2.2(b) below and, subject to Section 2.2(d), otherwise on the same terms and conditions specified in the Proposed Transfer Notice. Each Investor who desires to exercise its Right of Co-Sale (each, a “**Participating Investor**”) must give the selling Key Holder written notice to that effect within fifteen (15) days after the deadline for delivery of the Secondary Notice described above, and upon giving such notice such Participating Investor shall be deemed to have effectively exercised the Right of Co-Sale.

(b) Shares Includable. Each Participating Investor may include in the Proposed Key Holder Transfer all or any part of such Participating Investor’s Capital Stock equal to the product obtained by multiplying (i) the aggregate number of shares of Transfer Stock subject to the Proposed Key Holder Transfer (excluding shares purchased by the Company or the Participating Investors pursuant to the Right of First Refusal or the Secondary Refusal Right) by (ii) a fraction, the numerator of which is the number of shares of Capital Stock owned by such Participating Investor immediately before consummation of the Proposed Key Holder Transfer [(including any shares that such Participating Investor has agreed to purchase pursuant to the Secondary Refusal Right)] and the denominator of which is the total number of shares of Capital Stock owned, in the aggregate, by all Participating Investors immediately prior to the consummation of the Proposed Key Holder Transfer [(including any shares that all Participating

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<sup>12</sup> The “all or nothing” concept contained in this paragraph makes the right of first refusal provisions less onerous for the Key Holder, in that the Company and the Investors cannot simply chip away at the deal he or she has struck with the Prospective Transferee; they must either purchase all of the Transfer Stock or let the sale to the Prospective Transferee proceed undisturbed, subject to the Right of Co-Sale. This paragraph would be particularly valuable to a Key Holder that had a controlling interest in the Company and was only able to attract a purchaser by offering to sell that interest to one (1) party (who would not be interested in purchasing a smaller interest). If this paragraph is included, it is probably a good idea to include the preceding paragraph regarding undersubscriptions so that one (1) Investor cannot cause everyone to lose their right of first refusal by refusing to purchase its pro rata share.

Investors have collectively agreed to purchase pursuant to the Secondary Refusal Right)], plus the number of shares of Transfer Stock held by the [selling Key Holder][Key Holders]. [To the extent one (1) or more of the Participating Investors exercise such right of participation in accordance with the terms and conditions set forth herein, the number of shares of Transfer Stock that the selling Key Holder may sell in the Proposed Key Holder Transfer shall be correspondingly reduced.]

(c) Purchase and Sale Agreement. The Participating Investors and the selling Key Holder agree that the terms and conditions of any Proposed Key Holder Transfer in accordance with this Section 2.2 will be memorialized in, and governed by, a written purchase and sale agreement with the Prospective Transferee (the “**Purchase and Sale Agreement**”) with customary terms and provisions for such a transaction, and the Participating Investors and the selling Key Holder further covenant and agree to enter into such Purchase and Sale Agreement as a condition precedent to any sale or other transfer in accordance with this Section 2.2.

(d) Allocation of Consideration.

(i) Subject to Section 2.2(d)(ii), the aggregate consideration payable to the Participating Investors and the selling Key Holder shall be allocated based on the number of shares of Capital Stock sold to the Prospective Transferee by each Participating Investor and the selling Key Holder as provided in Section 2.2(b), provided that if a Participating Investor wishes to sell Preferred Stock, the price set forth in the Proposed Transfer Notice shall be appropriately adjusted based on the conversion ratio of the Preferred Stock into Common Stock.

(ii) In the event that the Proposed Key Holder Transfer constitutes a Change of Control, the terms of the Purchase and Sale Agreement shall provide that the aggregate consideration from such transfer shall be allocated to the Participating Investors and the selling Key Holder in accordance with Sections 2.1 and 2.2 of Article IV(B) of the Restated Certificate [and, if applicable, the next sentence] as if (A) such transfer were a Deemed Liquidation Event (as defined in the Restated Certificate), and (B) the Capital Stock sold in accordance with the Purchase and Sale Agreement were the only Capital Stock outstanding.<sup>13</sup> [In the event that a portion of the aggregate consideration payable to the Participating Investor(s) and selling Key Holder is placed into escrow and/or is payable only upon satisfaction of contingencies, the Purchase and Sale Agreement shall provide that (x) the portion of such consideration that is not placed in escrow and is not subject to contingencies (the “**Initial Consideration**”) shall be allocated in accordance with Sections 2.1 and 2.2 of Article IV(B) of the Restated Certificate as if the Initial Consideration were the only consideration payable in connection with such transfer, and (y) any additional consideration which becomes payable to the Participating Investor(s) and selling Key Holder upon release from escrow or satisfaction of such contingencies shall be allocated in

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<sup>13</sup> This provision allows the investors to receive their liquidation preference in the event that the majority stockholders sell their shares directly to a third party.



accordance with Sections 2.1 and 2.2 of Article IV(B) of the Restated Certificate after taking into account the previous payment of the Initial Consideration as part of the same transfer.]<sup>14</sup>

(e) Purchase by Selling Key Holder; Deliveries. Notwithstanding Section 2.2(c) above, if any Prospective Transferee(s) refuse(s) to purchase securities subject to the Right of Co-Sale from any Participating Investor or Investors or upon the failure to negotiate [in good faith] a Purchase and Sale Agreement [reasonably] satisfactory to the Participating Investors, no Key Holder may sell any Transfer Stock to such Prospective Transferee(s) unless and until, simultaneously with such sale, such Key Holder purchases all securities subject to the Right of Co-Sale from such Participating Investor or Investors on the same terms and conditions (including the proposed purchase price) as set forth in the Proposed Transfer Notice and as provided in Section 2.2(d)(i); provided, however, if such sale constitutes a Change of Control, the portion of the aggregate consideration paid by the selling Key Holder to such Participating Investor or Investors shall be made in accordance with the first sentence of Section 2.2(d)(ii). In connection with such purchase by the selling Key Holder, such Participating Investor or Investors shall deliver to the selling Key Holder any stock certificate or certificates, properly endorsed for transfer, representing the Capital Stock being purchased by the selling Key Holder (or request that the Company effect such transfer in the name of the selling Key Holder). Any such shares transferred to the selling Key Holder will be transferred to the Prospective Transferee against payment therefor in consummation of the sale of the Transfer Stock pursuant to the terms and conditions specified in the Proposed Transfer Notice, and the selling Key Holder shall concurrently therewith remit or direct payment to each such Participating Investor the portion of the aggregate consideration to which each such Participating Investor is entitled by reason of its participation in such sale as provided in this Section 2.2(e).

(f) Additional Compliance. If any Proposed Key Holder Transfer is not consummated within [forty-five (45)]<sup>15</sup> days after receipt of the Proposed Transfer Notice by the Company, the Key Holders proposing the Proposed Key Holder Transfer may not sell any Transfer Stock unless they first comply in full with each provision of this Section 2. The exercise or election not to exercise any right by any Investor hereunder shall not adversely affect its right to participate in any other sales of Transfer Stock subject to this Section 2.2.

### 2.3 Effect of Failure to Comply.

(a) Transfer Void; Equitable Relief. Any Proposed Key Holder Transfer not made in compliance with the requirements of this Agreement shall be null and void ab initio, shall not be recorded on the books of the Company or its transfer agent and shall not be recognized by the Company. Each party hereto acknowledges and agrees that any breach of this Agreement would result in substantial harm to the other parties hereto for which monetary damages alone could not adequately compensate. Therefore, the parties hereto unconditionally and irrevocably agree that any non-breaching party hereto shall be entitled to seek protective orders, injunctive relief and other remedies available at law or in equity (including, without

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<sup>14</sup> Use the bracketed language if you use Section 2.3.4 (Allocation of Escrow) from the Model Certificate of Incorporation.

<sup>15</sup> Logistical considerations may make a sixty (60) day period more reasonable.

limitation, seeking specific performance or the rescission of purchases, sales and other transfers of Transfer Stock not made in strict compliance with this Agreement).

(b) Violation of First Refusal Right. If any Key Holder becomes obligated to sell any Transfer Stock to the Company or any Investor under this Agreement and fails to deliver such Transfer Stock in accordance with the terms of this Agreement, the Company and/or such Investor may, at its option, in addition to all other remedies it may have, send to such Key Holder the purchase price for such Transfer Stock as is herein specified and transfer to the name of the Company or such Investor (or request that the Company effect such transfer in the name of an Investor) on the Company's books any certificates, instruments, or book entry representing the Transfer Stock to be sold.

(c) Violation of Co-Sale Right. If any Key Holder purports to sell any Transfer Stock in contravention of the Right of Co-Sale (a "**Prohibited Transfer**"), each Participating Investor who desires to exercise its Right of Co-Sale under Section 2.2 may, in addition to such remedies as may be available by law, in equity or hereunder, require such Key Holder to purchase from such Participating Investor the type and number of shares of Capital Stock that such Participating Investor would have been entitled to sell to the Prospective Transferee had the Prohibited Transfer been effected in compliance with the terms of Section 2.2. The sale will be made on the same terms, including, without limitation, as provided in Section 2.2(d)(i) and the first sentence of Section 2.2(d)(ii), as applicable, and subject to the same conditions as would have applied had the Key Holder not made the Prohibited Transfer, except that the sale (including, without limitation, the delivery of the purchase price) must be made within ninety (90) days after the Participating Investor learns of the Prohibited Transfer, as opposed to the timeframe proscribed in Section 2.2. Such Key Holder shall also reimburse each Participating Investor for any and all reasonable and documented out-of-pocket fees and expenses, including reasonable legal fees and expenses, incurred pursuant to the exercise or the attempted exercise of the Participating Investor's rights under Section 2.2.

2.4 [Limitation on Foreign Person Investors. Notwithstanding the covenants set forth in this Section 2, no Investor that is a Foreign Person shall be permitted to obtain greater than nine and nine-tenths percent (9.9%) of the outstanding voting shares of the Company.]<sup>16</sup>

### 3. Exempt Transfers.<sup>17</sup>

3.1 Exempted Transfers. Notwithstanding the foregoing or anything to the contrary herein, the provisions of Sections 2.1 and 2.2 shall not apply (a) in the case of a Key Holder that is an entity, upon a transfer by such Key Holder to its stockholders, members, partners or other equity holders, (b) to a repurchase of Transfer Stock from a Key Holder by the Company

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<sup>16</sup> Inclusion of this limitation is appropriate in cases in which there is a foreign person investing into the Company but that investor intends to avoid obtaining any rights that might trigger CFIUS intervention. In such cases, depending on the nature of the U.S. business, the foreign investor may need to avoid obtaining "control," and in order to do so may need to stay below the CFIUS-designated passivity threshold of ten percent (10%) of outstanding voting shares.

<sup>17</sup> Often the definition of a "Permitted Transfer" is negotiated on a case-by-case basis. For example, a Key Holder may wish to be permitted to Transfer a *de minimis* amount of Shares to a third party, such as a charity. However, the examples set forth herein are fairly standard and found in many Co-Sale Agreements.

at a price no greater than that originally paid by such Key Holder for such Transfer Stock and pursuant to an agreement containing vesting and/or repurchase provisions approved by a majority of the Board of Directors, [(c) to a pledge of Transfer Stock that creates a mere security interest in the pledged Transfer Stock, provided that the pledgee thereof agrees in writing in advance to be bound by and comply with all applicable provisions of this Agreement to the same extent as if it were the Key Holder making such pledge,] [or] (d) in the case of a Key Holder that is a natural person, upon a transfer of Transfer Stock by such Key Holder made for bona fide estate planning purposes, either during his or her lifetime or on death by will or intestacy to his or her spouse, including any life partner or similar statutorily-recognized domestic partner, child (natural or adopted), or any other direct lineal descendant of such Key Holder (or his or her spouse, including any life partner or similar statutorily-recognized domestic partner) (all of the foregoing collectively referred to as “family members”), or any other [relative/person] approved by [unanimous consent of] the Board of Directors, or any custodian or trustee of any trust, partnership or limited liability company for the benefit of, or the ownership interests of which are owned wholly by such Key Holder or any such family members; [or (e) to the sale by the Key Holder of up to [\_\_%] of the Transfer Stock held by such Key Holder as of the date that such Key Holder first became party to this Agreement]; provided that in the case of clause(s) [(a)], [(c)], [(d)] or [(e)], the Key Holder shall deliver prior written notice to the Investors of such pledge, gift or transfer and such shares of Transfer Stock shall at all times remain subject to the terms and restrictions set forth in this Agreement and such transferee shall, as a condition to such Transfer, deliver a counterpart signature page to this Agreement as confirmation that such transferee shall be bound by all the terms and conditions of this Agreement as a Key Holder (but only with respect to the securities so transferred to the transferee), including the obligations of a Key Holder with respect to Proposed Key Holder Transfers of such Transfer Stock pursuant to Section 2]; and provided further in the case of any transfer pursuant to clause (a) or (d) above, that such transfer is made pursuant to a transaction in which there is no consideration actually paid for such transfer].

3.2 Exempted Offerings. Notwithstanding the foregoing or anything to the contrary herein, the provisions of Section 2 shall not apply to the sale of any Transfer Stock (a) to the public in an offering pursuant to an effective registration statement under the Securities Act of 1933, as amended (a “**Public Offering**”); or (b) pursuant to a Deemed Liquidation Event (as defined in the Restated Certificate).

3.3 [Prohibited Transferees. Notwithstanding the foregoing, no Key Holder shall transfer any Transfer Stock to (a) any entity which, in the determination of the Board of Directors, directly or indirectly competes with the Company; (b) any customer, distributor or supplier of the Company, if the Board of Directors should determine that such transfer would result in such customer, distributor or supplier receiving information that would place the Company at a competitive disadvantage with respect to such customer, distributor or supplier; or (c) any Foreign Person that pursuant to any such transfer would acquire any DPA Triggering Rights, unless otherwise approved by the Board of Directors.]

4. Legend. Each certificate, instrument, or book entry representing shares of Transfer Stock held by the Key Holders or issued to any permitted transferee in connection with a transfer permitted by Section 3.1 hereof shall be notated with the following legend:

THE SALE, PLEDGE, HYPOTHECATION, OR TRANSFER OF THE SECURITIES REPRESENTED HEREBY IS SUBJECT TO, AND IN CERTAIN CASES PROHIBITED BY, THE TERMS AND CONDITIONS OF A CERTAIN RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT BY AND AMONG THE STOCKHOLDER, THE CORPORATION AND CERTAIN OTHER HOLDERS OF STOCK OF THE CORPORATION. COPIES OF SUCH AGREEMENT MAY BE OBTAINED UPON WRITTEN REQUEST TO THE SECRETARY OF THE CORPORATION.

Each Key Holder agrees that the Company may instruct its transfer agent to impose transfer restrictions on the shares notated with the legend referred to in this Section 4 above to enforce the provisions of this Agreement, and the Company agrees to promptly do so. The legend shall be removed upon termination of this Agreement at the request of the holder.

5. Lock-Up.

5.1 Agreement to Lock-Up. Each Key Holder hereby agrees that it will not, without the prior written consent of the managing underwriter, during the period commencing on the date of the final prospectus relating to the Company's initial public offering (the "IPO") and ending on the date specified by the Company and the managing underwriter [(such period not to exceed one hundred eighty (180) days)], or such other period as may be requested by the Company or an underwriter to accommodate regulatory restrictions on (1) the publication or other distribution of research reports; and (2) analyst recommendations and opinions, including, but not limited to, the restrictions contained in applicable FINRA rules, or any successor provisions or amendments thereto,]<sup>18</sup> (a) lend, offer, pledge, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase, or otherwise transfer or dispose of, directly or indirectly, any shares of Capital Stock held immediately prior to the effectiveness of the registration statement for the IPO; or (b) enter into any swap or other arrangement that transfers to another, in whole or in part, any of the economic consequences of ownership of the Capital Stock, whether any such transaction described in clause (a) or (b) above is to be settled by delivery of Capital Stock or other securities, in cash or otherwise. The foregoing provisions of this Section 5 shall not apply to the sale of any shares to an underwriter pursuant to an underwriting agreement [or to the establishment of a trading plan pursuant to Rule 10b5-1, provided that such plan does not permit transfers during the restricted period], and shall only be applicable to the Key Holders if all officers, directors and holders of more than one percent (1%) of the outstanding Common Stock (after giving effect to the conversion into Common Stock of all outstanding [Series A] Preferred Stock) enter into similar agreements. The underwriters in connection with the IPO are intended third-party beneficiaries of this Section 5 and shall have the right, power and authority to enforce the provisions hereof as

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<sup>18</sup> The bracketed language is intended to address FINRA rules designed to limit conflicts of interest between the research and investment banking divisions of financial institutions by prohibiting the publication or other distribution of a research report or the making of a public appearance concerning a subject Company by a member during a "quiet period" prior to and after the expiration, waiver or termination of a lock-up agreement or any other agreement that the member has entered into with a subject company or its shareholders that restricts or prohibits the sale of securities held by the subject company or its shareholders after the completion of a securities offering, unless the securities are "actively traded" within the meaning of Rule 101(c)(1) of Regulation M under the Exchange Act.

though they were a party hereto. Each Key Holder further agrees to execute such agreements as may be reasonably requested by the underwriters in the IPO that are consistent with this Section 5 or that are necessary to give further effect thereto.

5.2 Stop Transfer Instructions. In order to enforce the foregoing covenant, the Company may impose stop-transfer instructions with respect to the shares of Capital Stock of each Key Holder (and transferees and assignees thereof) until the end of such restricted period.

6. Miscellaneous.

6.1 Term. This Agreement shall automatically terminate upon the earlier of (a) immediately prior to the consummation of the Company's IPO; and (b) the consummation of a Deemed Liquidation Event (as defined in the Restated Certificate).

6.2 Stock Split. All references to numbers of shares in this Agreement shall be appropriately adjusted to reflect any stock dividend, split, combination or other recapitalization affecting the Capital Stock occurring after the date of this Agreement.

6.3 Ownership. Each Key Holder represents and warrants that such Key Holder is the sole legal and beneficial owner of the shares of Transfer Stock subject to this Agreement and that no other person or entity has any interest in such shares (other than a community property interest as to which the holder thereof has acknowledged and agreed in writing to the restrictions and obligations hereunder).

6.4 Dispute Resolution. 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*<sup>19</sup>: 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 (1) 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 (1) 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 [state] having subject matter jurisdiction.]

[*Alternative 2*:<sup>20</sup>

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a

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<sup>19</sup> Some lawyers prefer to include a binding arbitration provision as the sole means of dispute resolution on the theory that arbitration is confidential and may be less expensive and more efficient. Some investors, however, dislike arbitration because the result cannot be appealed, and the arbitrator(s) is not bound to follow case law and precedent.

<sup>20</sup> This arbitration provision is offered as an alternative to the AAA provision for parties that would prefer to resolve disputes under the Delaware Rapid Arbitration Act. The DRAA implements a number of new approaches in arbitration that make the statute unique among national and international arbitration regimes. First, the Act provides for a truncated "summary" proceeding before the Delaware Court of Chancery to select an arbitrator where such selection was not made in the agreement to arbitrate. By statute, this proceeding must be concluded no more than thirty (30) days after its initial filing is served, and the jurisdiction of the Court is highly limited. Second, the Act divests the courts of jurisdiction to hear and decide any issue concerning arbitrability or the scope of issues to be arbitrated. Instead, the Act vests the arbitrator, and only the arbitrator, with the power and authority to decide such issues. Thus, the body of law relating to whether an issue presented at the outset is "substantive" or "procedural" does

“**Dispute**”) shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 Del. C § 5801, et seq. (the “**DRAA**”). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the “**Arbitration**”) in accordance with this Section 6.4, and each party represents and warrants that it is not a “consumer” as such term is defined in 6 Del. C. § 2731. By executing this Agreement, (i) each party waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in Sections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party agrees that it will raise no objection to the submission of the Dispute to Arbitration in accordance with this Section 6.4 and understands that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.<sup>21</sup> To be effective, any departure from the Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.<sup>22</sup>

(d) The Arbitration shall be presided over by one (1) arbitrator (the “**Arbitrator**”) who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person’s appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the “**Replacement Arbitrator**”). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or

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not apply to arbitrations under the Act, and neither party can seek to disrupt the commencement of a DRAA arbitration by running into court. Third, the Act vests the arbitrator with power to enjoin any conduct of a party to the arbitration and divests the courts of power in this regard after an arbitrator is appointed, thus avoiding the need for parallel proceedings to compel or enjoin arbitration. Finally, the Act provides that, absent an agreement otherwise, all matters must be finally determined within one hundred twenty (120) days of the arbitrator’s acceptance of appointment (which deadline may be extended to one hundred eighty (180) days, but no longer, by unanimous consent of the parties). Furthermore, the Act imposes a financial penalty on an arbitrator who does not decide the matter within the allotted timeframe: the forfeiture of the arbitrator’s fees. The Act makes challenges to the arbitrator’s final award available directly to the Delaware Supreme Court in accordance with the limited standards set forth in the Federal Arbitration Act, eliminating any intermediate level of review. The Act also provides that the parties may waive any right to challenge or appeal the arbitrator’s final award by agreement or, where the parties wish to maintain confidentiality or allow more searching review, they may proceed with an arbitral appeal.

<sup>21</sup> The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this Section (c).

<sup>22</sup> The parties may elect to hold the arbitration in a different location. Note, however, that the “seat” of the arbitration is, by statute, in Delaware.

the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.<sup>23</sup>

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.<sup>24</sup>

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.<sup>25</sup>

(g) The arbitral award (the “**Award**”) shall (i) be rendered within [one hundred twenty (120)] days after the Arbitrator’s acceptance of his or her appointment;<sup>26</sup> (ii) be delivered in writing; (iii) state the reasons for the Award;<sup>27</sup> (iv) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties without the possibility of challenge or appeal, which are hereby waived;<sup>28</sup> and (v) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section 6.4 shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief;

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<sup>23</sup> The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications.

<sup>24</sup> The DRAA empowers the parties to include one, both or neither of the provisions set forth in Section (f). If the parties wish to proceed without discovery, neither of the sentences in Section (f) would be included. If they wish to proceed with only party discovery, then only the first sentence would be used. The second sentence would be used only where the parties wished to be able to take discovery from third parties. The Act would also permit the taking of only documentary discovery (as opposed to deposition or other testimony) or, alternatively, only oral testimony (as opposed to documents). The Act contemplates that the scope of discovery is customizable in this agreement, so in all events, this issue should be addressed. The statutory default, which would come into play if this provision was not included in some form, would be for the Arbitrator to be empowered to summon party witnesses and evidence, but not third-party evidence or witnesses.

<sup>25</sup> The DRAA provides that the agreement may modify or eliminate the foregoing processes. Elimination may be appropriate in circumstances where the parties agree to present a pure issue of law for resolution, or in circumstances where a narrow, technical issue is the subject of the arbitration.

<sup>26</sup> The parties may specify a longer period for the arbitration. If they do not do so, the one hundred twenty (120) day period of the DRAA is the default, and such period may be extended by no more than an additional sixty (60) days, and then only upon consent of all parties to the arbitration.

<sup>27</sup> A reasoned award is not required by the Act, but may be required by the parties’ contract.

<sup>28</sup> The DRAA allows the parties to waive the right to appeal. This provision should only be included if the parties intend to waive appellate rights. Section (l) below is included in the event that the parties wish to preserve the right to appeal the Arbitrator’s award, in which case clause (iv) of Section (g) should not be included.



provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.<sup>29</sup>

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,<sup>30</sup> and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, [any third-party discovery proceedings, including any discovery obtained pursuant thereto,]<sup>31</sup> and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery.<sup>32</sup> In all events, the parties [and any third parties] participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half (1/2) of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.<sup>33</sup>

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the “**Respondent**”) is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the

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<sup>29</sup> Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

<sup>30</sup> This phrase would be included only in the event that one (1) or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

<sup>31</sup> Eliminate reference to “third party discovery proceedings” in the event that such proceedings were not contracted for in Section (f), above.

<sup>32</sup> Clause (v) would be excluded in the event that third-party discovery was not provided for in Section (f) above.

<sup>33</sup> The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the event that the parties wish to vary this provision, they should do so here. Such variations could include a “loser pays” provision or an “arbitrator chooses” provision, which is not prohibited by the DRAA.

extent possible, sufficient information to such court to allow it to determine whether the doctrines of res judicata, collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section 6.4, if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section 6.4 unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section 6.4 shall be enforced to the fullest extent permitted by law.

(l) [Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.<sup>34</sup>] [*Alternative A:*<sup>35</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>36</sup> The appellate panel may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.<sup>37</sup>] [*Alternative B:*<sup>38</sup> Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].<sup>39</sup> The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.]]

## 6.5 Notices.

(a) 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 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 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 hereof, as the case may be, or to

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<sup>34</sup> The DRAA permits the parties to waive appellate review, to proceed with a limited review in the Delaware Supreme Court, or to proceed with a private appellate arbitral review. This provision contemplates a review in the Delaware Supreme Court. In the event it is used, the parties should eliminate clause (iv) of Section (h).

<sup>35</sup> The following is an alternative appellate provision in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire a limited scope of appeal in accordance with the FAA.

<sup>36</sup> In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one (1) or more senior Delaware lawyers.

<sup>37</sup> This provision contemplates a scope of challenge to the Arbitrator's final judgment limited to the grounds for review of an arbitral award under the Federal Arbitration Act. Parties who wish a broader scope of review may wish to consider the succeeding alternate provision set forth above.

<sup>38</sup> The following is an alternative appellate provision for use in the event that the parties do not wish to proceed with an appeal before the Delaware Supreme Court and desire that the scope of their appeal be as broad as possible.

<sup>39</sup> See footnote 36 above.

such email address or address as subsequently modified by written notice given in accordance with this Section 6.5. If notice is given to the Company, it shall be sent to [*Company Address, Attention: \_\_\_\_\_*]; and a copy (which copy shall not constitute notice) shall also be sent to [*Company Counsel Name and Address*]; and if notice is given to the Investors, a copy (which copy shall not constitute notice) shall also be given to [*Investor Counsel Name and Address*]<sup>40</sup>.

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

6.6 Entire Agreement. This Agreement (including, the Exhibits and Schedules hereto) [together with the other Transaction Documents (as defined in the Purchase Agreement)]<sup>41</sup> constitutes the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties are expressly canceled.

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

6.8 Amendment; Waiver and Termination. This Agreement may be amended, modified or terminated (other than pursuant to Section 6.1 above) 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 of Transfer Stock then held by all of the Key Holders [provided that such consent shall not be required if the Key Holders do not then own shares of

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<sup>40</sup> Consider moving the counsel cc address to the schedules for investors, since often more than one.

<sup>41</sup> It may be appropriate to include if there are side letters or other agreements that cover similar aspects.

Capital Stock 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 then outstanding shares of Preferred Stock held by the Investors (voting as a single separate class and on an as-converted basis). Any amendment, modification, termination or waiver so effected shall be binding upon the Company, the Investors, the Key Holders and all of their respective successors and permitted assigns whether or not such party, assignee or other shareholder entered into or approved such amendment, modification, termination or waiver. [Notwithstanding the foregoing, (i) this Agreement may not be amended, modified or terminated and the observance of any term hereunder 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, modification, termination or waiver applies to all Investors and Key Holders, respectively, in the same fashion, (ii) this Agreement may not be amended, modified or terminated and the observance of any term hereunder may not be waived with respect to any Investor without the written consent of such Investor, if such amendment, modification, termination or waiver would adversely affect the rights of such Investor in a manner disproportionate to any adverse effect such amendment, modification, termination or waiver would have on the rights of the other Investors under this Agreement, (iii) the consent of the Key Holders shall not be required for any amendment, modification, termination or waiver if such amendment, modification, termination or waiver does not apply to the Key Holders, and (iv) Schedule A hereto may be amended by the Company from time to time in accordance with the Purchase Agreement to add information regarding Additional Purchasers (as defined in the Purchase Agreement) without the consent of the other parties hereto.]<sup>42</sup> The Company shall give prompt written notice of any amendment, modification or termination hereof or waiver hereunder to any party hereto that did not consent in writing to such amendment, modification, termination or waiver. No waivers of or exceptions to any term, condition or provision of this Agreement, in any one (1) or more instances, shall be deemed to be, or construed as, a further or continuing waiver of any such term, condition or provision.

#### 6.9 Assignment of Rights.

(a) The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and permitted 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 permitted assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

(b) Any successor or permitted assignee of any Key Holder, including any Prospective Transferee who purchases shares of Transfer Stock in accordance with the terms hereof, shall deliver to the Company and the Investors, as a condition to any transfer or assignment, a counterpart signature page hereto pursuant to which such successor or permitted assignee shall confirm their agreement to be subject to and bound by all of the provisions set forth in this

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<sup>42</sup> There may be situations when a party is asked to waive or amend a right but not all similarly situated parties are required to do so. Consider a provision that indicates a party may waive or amend his own rights without having to obtain the consent of all of the others who are a part of his or her group.

Agreement that were applicable to the predecessor or assignor of such successor or permitted assignee.<sup>43</sup>

(c) The rights of the Investors hereunder are not assignable without the Company's written consent (which shall not be unreasonably withheld, delayed or conditioned), except (i) by an Investor to any Affiliate, or (ii) to an assignee or transferee who acquires at least [ ] shares of Capital Stock (as adjusted for any stock combination, stock split, stock dividend, recapitalization or other similar transaction), it being acknowledged and agreed that any such assignment, including an assignment contemplated by the preceding clauses (i) or (ii) shall be subject to and conditioned upon any such assignee's delivery to the Company and the other Investors of a counterpart signature page hereto pursuant to which such assignee shall confirm their agreement to be subject to and bound by all of the provisions set forth in this Agreement that were applicable to the assignor of such assignee.

(d) Except in connection with an assignment by the Company by operation of law to the acquirer of the Company, the rights and obligations of the Company hereunder may not be assigned under any circumstances.

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

6.11 Additional Investors. Notwithstanding anything to the contrary contained herein, if the Company issues additional shares of the Company's Series [ ] Preferred Stock after the date hereof, any purchaser of such shares of Series [ ] Preferred Stock may become a party to this Agreement by executing and delivering an additional counterpart signature page to this Agreement and thereafter shall be deemed an "Investor" for all purposes hereunder.

6.12 Governing Law.<sup>44</sup> This Agreement shall be governed by the internal law of the [State of Delaware],<sup>45</sup> without regard to conflict of law principles that would result in the application of any law other than the law of the [State of Delaware].

6.13 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.

6.14 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 electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, *e.g.*,

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<sup>43</sup> It can be a point of negotiation as to whether a Key Holder transferee should be required to take shares subject to the first refusal and co-sale restrictions of the agreement.

<sup>44</sup> 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.

<sup>45</sup> 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.

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.

6.15 Aggregation of Stock. All shares of Capital Stock held or acquired by Affiliated entities or persons 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.

6.16 Specific Performance. In addition to any and all other remedies that may be available at law in the event of any breach of this Agreement, each Investor shall be entitled to specific performance of the agreements and obligations of the Company and the Key Holders hereunder and to such other injunction or other equitable relief as may be granted by a court of competent jurisdiction.

6.17 [Additional Key Holders]. In the event that after the date of this Agreement, the Company issues shares of Common Stock, or options to purchase Common Stock, to any employee or consultant, which shares or options would collectively constitute with respect to such employee or consultant (taking into account all shares of Common Stock, options and other purchase rights held by such employee or consultant) one percent (1%) or more of the Company's then outstanding Common 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 or converted), the Company shall, as a condition to such issuance, cause such employee or consultant to execute a counterpart signature page hereto as a Key Holder, and such person shall thereby be bound by, and subject to, all the terms and provisions of this Agreement applicable to a Key Holder.]

6.18 [Effect on Prior Agreement]. Upon the effectiveness of this Agreement, the Prior Agreement shall be deemed amended and restated and superseded and replaced in its entirety by this Agreement, and shall be of no further force or effect.]<sup>46</sup>

[Signature Page Follows]

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<sup>46</sup> The drafter should ensure that the relevant signatories to the current agreement have authority to terminate the Prior Agreement under the terms of the Prior Agreement. Alternatively, if the Prior Agreement is terminated rather than amended and restated, "the Prior Agreement shall terminate and be of no further force and or effect and shall be superseded and replaced in its entirety by this Agreement."

IN WITNESS WHEREOF, the parties have executed this [Amended and Restated] Right of First Refusal and Co-Sale Agreement as of the date first written above.

COMPANY:

*[Insert Company Name]*

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

KEY HOLDERS:

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

INVESTORS:<sup>47</sup>

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

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<sup>47</sup> Insert customized signature blocks

## **SCHEDULE A**

### **INVESTORS**

#### **Name and Address**

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]

Investor Name  
Address  
Phone Number  
Email  
[Counsel cc, if any]]



## **SCHEDULE B**

### **KEY HOLDERS**

#### **Name and Address**

[Key Holder Name  
Address  
Phone Number  
Email]

[Key Holder Name  
Address  
Phone Number  
Email]

[Key Holder Name  
Address  
Phone Number  
Email]