VOTING AGREEMENT

THIS VOTING AGREEMENT (this “**Agreement**”) is made as of [\_\_\_\_\_\_\_\_], 20[\_\_], by and among [\_\_\_\_\_\_\_\_\_\_\_\_], a Delaware corporation (the “**Company**”), the Investors (as defined below) and the Key Holders[[1]](#footnote-1) (as defined below).

**RECITALS**

[*Alternative 1*:[[2]](#footnote-2)

**WHEREAS**, 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 Series A Preferred Stock (as defined below) 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)

**WHEREAS**, concurrently with the execution of this Agreement, the Company and 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 Series B Preferred Stock (as defined below). Certain of the Investors (the “**Existing Investors**”) and the Key Holders (the “**Existing Key Holders**”) are parties to that certain Voting Agreement, dated [\_\_\_\_\_], by and among the Company and the parties thereto (the “**Prior Agreement**”). The Company[, the undersigned Existing Key Holders] and the undersigned Existing Investors party to the Prior Agreement desire to amend and restate that agreement to provide those Investors purchasing shares of the Series B Preferred Stock pursuant to the Purchase Agreement 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.]

**WHEREAS**, as of the date hereof, the Certificate of Incorporation of the Company (the “**Restated Certificate**”) provides that: [(i) the holders of record of the shares of the Preferred Stock, $[\_\_\_] par value per share, of the Company (“**Preferred Stock**”), exclusively and as a separate class, shall be entitled to elect one director of the Company (the “**Preferred Director**”); (ii) the holders of record of the shares of common stock, $[\_\_\_] par value per share, of the Company (“**Common Stock**”), exclusively and as a separate class, shall be entitled to elect two directors of the Company (the “**Common Directors**”); and (iii) the holders of record of the shares of Common Stock and the Preferred Stock, voting together as a single class on an as-converted basis, shall be entitled to elect the balance of the total number of directors of the Company].[[5]](#footnote-5)

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

**NOW, THEREFORE,** the parties agree as follows:

# Voting Provisions Regarding the Board.[[6]](#footnote-6)

## Definitions. For purposes of this Agreement:

### “**Affiliate**” means, with respect to any specified Person, any other 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, director or trustee of such Person, or any venture capital fund or other investment fund now or hereafter existing that is controlled by one or more general partners, managing members or investment advisers of, or shares the same management company or investment adviser with, such Person.

### “**Investors**” means the persons named on Schedule A hereto, each person who hereafter becomes a party to this Agreement pursuant to Section 7.1(a) and each person to whom the rights of an Investor are assigned pursuant to Section 7.2.

### “**Key Holders**” means the persons named on Schedule B hereto[, each person who hereafter becomes a party to this Agreement pursuant to Section 7.1(b)][[7]](#footnote-7) and each person to whom the rights of a Key Holder are assigned pursuant to Section 7.2.

### “**Person**” means any individual, corporation, partnership, trust, limited liability company, association, or other entity.

### A “**Qualified Key Holder**” is a Key Holder and (i) if an individual, is providing services to the Company as an employee [or consultant (excluding service solely as member of the Board)] and (ii) if an entity, is owned or controlled by an individual providing services to the Company as an employee [or consultant (excluding service solely as member of the Board)].

### “**Sanctioned Party**” means any Person: (i) organized under the laws of, ordinarily resident in, or located in a country or territory that is the subject of comprehensive Sanctions (which as of the date of this Agreement comprise Cuba, Iran, North Korea, Syria, and the Crimea, Donetsk, and Luhansk regions of Ukraine (“**Restricted Countries**”)); (ii) 50% or more owned or controlled by the government of a Restricted Country; or (iii) (A) designated on a sanctioned parties list administered by the United States[, European Union, or United Kingdom], including, without limitation, the U.S. Department of the Treasury’s Office of Foreign Assets Control’s Specially Designated Nationals and Blocked Persons List, Foreign Sanctions Evaders List, Sectoral Sanctions Identification List[, the Consolidated List of Persons, Groups, and Entities Subject to EU Financial Sanctions, and the UK’s Consolidated Sanctions List] (collectively, “**Designated Parties**”); or (B) 50% or more owned or, where relevant under applicable Sanctions, controlled, individually or in the aggregate, by one or more Designated Party, in each case only to the extent that dealings with such Person is are prohibited pursuant to applicable Sanctions[[8]](#footnote-8).

### “**Sanctions**” means applicable laws and regulations pertaining to trade and economic sanctions administered by the United States[, European Union, or United Kingdom][[9]](#footnote-9).[[10]](#footnote-10)

### “**Shares**” shall mean and include any securities of the Company that the holders of which are entitled to vote for members of the Board, including, without limitation, all shares of Common Stock and 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.

### “**Stockholders**” means the Investors[,][ and] the Key Holders[, and each other stockholder of the Company that becomes party to this Agreement that is not an Investor or Key Holder (which other stockholders shall be set forth on Schedule C to this Agreement)].

### Any reference in this Agreement to “**vote**” or “**voting**” or similar language shall include, without limitation, action by written consent of the stockholders.

## Board Composition.[[11]](#footnote-11) 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, subject to Section 5, the following persons shall be elected to the Board: [[12]](#footnote-12)

### [As a Preferred Director, [*Alternative 1*: one person designated from time to time by [*Name of Investor*], for so long as [*Name of Investor*] and its Affiliates (i) continue to beneficially own an aggregate of at least [\_\_\_\_\_\_] shares of Preferred Stock, which number is subject to appropriate adjustment for any stock splits, stock dividends, combinations, recapitalizations and the like and (ii) are not Sanctioned Parties, which individual as of the date of this Agreement is [\_\_\_\_\_\_\_\_\_\_\_\_\_];][[*Alternative 2*: As a Preferred Director, one person designated from time to time by [*Name of Investor*], for so long as [*Name of Investor*] and its Affiliates (i) continue to beneficially own an aggregate of at least [\_\_\_\_\_]% of the outstanding capital stock of the Company on an as-converted basis, and (ii) are not Sanctioned Parties, which individual as of the date of this Agreement is[\_\_\_\_\_\_\_\_\_\_\_];]

### [As a Common Director, [*Alternative 1*: one individual who is designated by Qualified Key Holders holding a majority of the shares of Common Stock held by Qualified Key Holders, for so long as any Qualified Key Holder holds any shares of Common Stock, which individual as of the date of this Agreement is [\_\_\_\_\_\_\_\_\_\_\_];] [*Alternative 2***:** [*name of a Common Director*], for so long as such director [remains an employee [or consultant (excluding service solely as member of the Board)] of the Company][, except that if such director resigns or is unable to serve, then one individual who is designated by Qualified Key Holders holding a majority of the shares of Common Stock held by Qualified Key Holders for so long as any Qualified Key Holder holds any shares of Common Stock];[[13]](#footnote-13)]

### As the [other] Common Director, the Company’s Chief Executive Officer (the “**CEO Director**”), who as of the date of this Agreement is [\_\_\_\_\_], 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 from the position of CEO Director; and (ii) to elect the then-current Chief Executive Officer of the Company to serve as the new CEO Director; and]

### [As [each/the] Mutual Director, [one individual who is not otherwise an Affiliate of the Company or of any Investor and who is designated by mutual agreement of the other then-seated members of the Board (the “**Mutual Director**”), which individual as of the date of this Agreement is [\_\_\_\_\_\_\_\_\_\_\_]].

For clarity, to the extent that the election of a Director pursuant to any of foregoing clauses (a) through [(d)] above shall not be applicable, or shall cause the Company to violate applicable Sanctions, 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 Restated Certificate.

## Failure to Designate a Director Candidate; Vacancies. In the absence of any designation from the Person(s) with the right to designate a director as specified above, the individual then serving in such director position shall be reelected if willing to serve unless such individual has been removed as provided herein, and otherwise such Board seat shall remain vacant until filled as provided above. Similarly, in the absence of the requisite approval of the Board and/or the Company’s stockholders, as applicable, of an individual to serve as a director as specified above, the individual then serving in such director position shall be reelected if willing to serve unless such individual has been removed as provided herein, and otherwise such Board seat shall remain vacant until filled as provided above. [Any vacancies created by the resignation, removal or death of a director elected pursuant to Section 1.2 shall be filled only pursuant to the provisions of this Section 1.3].[[14]](#footnote-14)

## Removal of Board Members.[[15]](#footnote-15) 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:

### a director elected or serving pursuant to Section 1.2, or reelected pursuant to Section 1.3, shall be promptly removed from office upon the occurrence of any of the following: [(i) written request of any Person(s) who would be entitled to designate a replacement for such director pursuant to Section 1.2 to remove such director; (ii) written request of stockholders that hold the requisite votes to approve a replacement for such director pursuant to Section 1.2 to remove such director; (iii) if such director is the Mutual Director, upon the affirmative vote of a majority of the Person(s) entitled to designate such director; (iv) if such director is no longer entitled or eligible to occupy such Board seat pursuant to the applicable conditions of Section 1.2;or (v) either the Director or the Person or Entity entitled to designate the Director is a Sanctioned Party][[16]](#footnote-16);

### no director elected or serving pursuant to Section 1.2, or reelected pursuant to Section 1.3, may be removed from office [other than for cause] unless (i) such removal is made in accordance with Section 1.4(a); or (ii) the applicable subsection of Section 1.2 is no longer in effect pursuant to its terms.

## Stockholder Action. All Stockholders agree to execute any written consents required to perform the obligations of this Section 1, and the Company agrees to call a special meeting of stockholders for the purpose of electing, removing or replacing directors upon the written request of (i) any Person entitled to designate a director or (ii) the holders of the requisite number of shares of capital stock entitled to approve a director candidate pursuant to Section 1.2. [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 removal would be sufficient to elect such director if then cumulatively voted at an election of the entire Board.]

## No Liability for Election of Designated or Approved Directors. No Stockholder, nor any Affiliate of any Stockholder, shall have any liability as a result of designating or approving a person for election as a director for any act or omission by such designated or approved person in such person’s 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.

# 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.[[17]](#footnote-17)

## 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 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 then-outstanding shares of Preferred Stock (the “**Selling Investors**”); [[and] (ii) 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 Preferred Stock)]] held by Qualified Key Holders voting as a separate class [(collectively, [(i) and (ii) are] the “**Electing Holders**”)] [and [(iii)] the Board;][[18]](#footnote-18) approve a Sale of the Company (which approval of the Electing Holders must be in writing), specifying that this Section 3 shall apply to such transaction, then, subject to satisfaction of each of the conditions set forth in Section 3.3 below, each Stockholder and the Company hereby agree:[[19]](#footnote-19)

### 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 approve, such Sale of the Company [(together with any related amendment or restatement to the Restated Certificate required to implement such Sale of the Company)][and the related definitive agreement(s) pursuant to which the Sale of the Company is to be consummated] 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 Section 3.3 below, on the same terms and conditions as the other stockholders of the Company;

### 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, (i) executing and delivering instruments of conveyance and transfer, and any purchase agreement, merger agreement, any associated indemnity agreement, [any reasonably customary release agreement in the capacity of a securityholder, termination of investment related documents, accredited investor forms, documents evidencing the removal of board designees as power of attorneys] or escrow agreement, any associated voting, support, or joinder 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 and (ii) providing any information reasonably necessary for any public filings with the Securities and Exchange Commission in connection with the Sale of the Company;

### 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 acquirer in connection with the Sale of the Company;

### to refrain from (i) exercising any dissenters’ rights or rights of appraisal under applicable law at any time with respect to such Sale of the Company[[20]](#footnote-20), or [(ii); asserting any claim or commencing, joining or participating in any way (including, without limitation, as a member of a class in any action, suit or proceeding challenging the Sale of the Company, this Agreement, consummation of the transactions contemplated in connection with the Sale of the Company or this Agreement, without limitation, [(x)] challenging the validity of, or seeking to enjoin the operation of, or the definitive agreement(s) with respect to such Sale of the Company or [(y) alleging a breach of any fiduciary duty of the Selling Investors or any Affiliate or associate thereof[, directors of the Company or the acquirer(s)] (including, without limitation, aiding and abetting breach of fiduciary duty) in connection with the Sale of the Company or any action taken thereby with respect to such Sale of the Company];[[21]](#footnote-21)

### 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 of 1933, as amended (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 Board) 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, within the scope of the Stockholder Representative’s authority, in connection with its service as the Stockholder Representative, absent fraud, bad faith, [gross negligence] or willful misconduct.

## Conditions.[[22]](#footnote-22) Notwithstanding anything to the contrary set forth herein, a Stockholder will not be required to comply with Section 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 (subject to customary limitations) against the Stockholder in accordance with their respective terms; and (iv) neither the execution and delivery of documents to be entered into by the Stockholder 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 (including the Company’s or such Stockholder’s organizational documents) to which the Stockholder is a party, or any law or judgment, order or decree of any court or governmental agency that applies to the Stockholder;

### such Stockholder is not required to agree (unless such Stockholder is a Company officer, director, or employee) to any restrictive covenant in connection with the Proposed Sale (including, without limitation, any covenant not to compete or covenant not to solicit customers, employees or suppliers of any party to the Proposed Sale) or any release of claims other than a release in customary form of claims arising solely in such Stockholder’s capacity as a stockholder of the Company;

### such Stockholder and its Affiliates are not required to amend, extend or terminate any contractual or other relationship with the Company, the acquirer or their respective Affiliates, except that the Stockholder may be required to agree to terminate the investment-related documents between or among such Stockholder, the Company and/or other stockholders of the Company;

### the Stockholder is not liable for the breach of any representation, warranty or covenant 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)];

### 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 in no event exceeds the amount of consideration otherwise payable to such Stockholder in connection with such Proposed Sale in such person’s capacity as a stockholder of the Company, except with respect to claims related to fraud by such Stockholder, the liability for which need not be limited as to such Stockholder; [and]

### upon the consummation of the Proposed Sale (i) each holder of each class or series of the capital stock of the Company 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, [and if any holders of any capital stock of the Company are given a choice as to the form of consideration to be received as a result of the Proposed Sale, all holders of such capital stock will be given the same option][[23]](#footnote-23) (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 waived pursuant to the terms of the Restated Certificate or as may be required by law, 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 Restated Certificate in effect immediately prior to the Proposed Sale; provided*,* however*,* that, notwithstanding the foregoing provisions of this Section 3.3(f), if the consideration to be paid in exchange for the Shares held by the Stockholder pursuant to this Section 3.3(f) 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 held by the Stockholder, 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 Board) of the securities which such Stockholder would otherwise receive as of the date of the issuance of such securities in exchange for the Shares held by the Stockholder[; and][.]

### [subject to clause (f) 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 Section 3.3(g) 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.[[24]](#footnote-24) No Stockholder shall be a party to any Stock Sale unless (a) all holders of Preferred Stock are allowed to participate in such transaction(s) and (b) the consideration received pursuant to such transaction is allocated among the parties thereto in the manner specified in the Company’s Restated Certificate in effect immediately prior to the Stock Sale (as if such transaction(s) were a Deemed Liquidation Event), unless the holders of at least the requisite percentage required to waive treatment of the transaction(s) as a Deemed Liquidation Event pursuant to the terms of the Restated Certificate, elect to allocate the consideration differently by written notice given to the Company at least [\_\_] days prior to the effective date of any such transaction or series of related transactions.

## Effect of Sanctioned Party Status. For clarity, if any Stockholder is a Sanctioned Party, such Stockholder will not be required to take any action described in Section 3.2, and will not be entitled to receive any benefit described in Section 3.3, if such action would cause the Company or any other party to violate applicable Sanctions. The Shares held by such Stockholders shall be disregarded for the purpose of calculating any voting threshold set forth in this Agreement.]

*[See ADDENDUM 1 at end of this document with alternative “Sale Rights” provisions.][[25]](#footnote-25)*

# Remedies.

## Covenants of the Company. In addition to its obligations pursuant to Section 1.5 above, the Company covenants and agrees to call a special meeting of stockholders for the purposes of (a) increasing the number of authorized shares of Common Stock as contemplated by Section 2, upon the written request of any holder of Preferred Stock, and (b) approving a Sale of the Company, upon the written request of the Selling Investors in accordance with Section 3.3.[[26]](#footnote-26)

## [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 the Chairperson of the Board] (each, a “**Proxyholder**”), 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, votes regarding the composition of the Board, votes to increase authorized shares and votes regarding any Sale of the Company, and hereby authorizes each of them to represent and vote, if and only if the party (i) fails to vote within five business days after request by the Company, (ii) is prohibited from voting due to Sanctions or other applicable laws, or (iii) 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 or removal 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 this Agreement or to take any action reasonably necessary to effect this Agreement. The power of attorney granted hereunder shall authorize each Proxyholder to execute and deliver any documentation required by this Agreement on behalf of any party failing to do so within five business days after request by the Company. Each of the proxy and power of attorney granted pursuant to this Section 4.2 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.][[27]](#footnote-27)

## Specific Enforcement. 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; provided that no party that is regulated as a bank holding company under the Bank Holding Company Act of 1956, as amended, shall have the right to enforce against any Stockholder any provisions of this Agreement that (a) requires a Stockholder to vote for or against any matter or (b) restricts or conditions the ability of a Stockholder to transfer its Shares. Each party to this Agreement agrees to use commercially reasonable efforts to cooperate in seeking and agreeing to an expedited schedule in any litigation seeking an injunction or order of specific performance.

## 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” and Sanctioned Party Matters.[[28]](#footnote-28)

## Definitions. For purposes of this Agreement:

### “**Company Covered Person**” means, with respect to the Company as an “issuer” for purposes of Rule 506 promulgated under the Securities Act, any Person listed in the first paragraph of Rule 506(d)(1).

### “**Disqualified Designee**” means 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.

### “**Disqualification Event**” means a “bad actor” disqualifying event described in Rule 506(d)(1)(i)-(viii) promulgated under the Securities Act or any event which results in a director designee becoming a Sanctioned Party.

### “**Rule 506(d) Related Party**” means, 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) under the Securities Act.

## Representations.

### Each Person with the right to designate or participate in the designation of a director pursuant to this Agreement hereby represents that (i) such Person has exercised reasonable care to determine whether any Disqualification Event is applicable to such Person, any director designee designated by such Person pursuant to this Agreement or any of such Person’s Rule 506(d) Related Parties and (ii) no Disqualification Event is applicable to such Person, any Board member designated by such Person pursuant to this Agreement or, to such Person’s knowledge, any of such Person’s 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.[[29]](#footnote-29) Notwithstanding anything to the contrary in this Agreement, each Investor makes no representation regarding any Person that may be deemed to be a beneficial owner of the Company’s voting equity securities held by such Investor solely by virtue of that Person being or becoming a party to (x) this Agreement, as may be subsequently amended, or (y) any other contract or written agreement to which the Company and such Investor are parties regarding (1) the voting power, which includes the power to vote or to direct the voting of, such security; and/or (2) the investment power, which includes the power to dispose, or to direct the disposition of, such security.

### The Company hereby represents and warrants to the Investors that no Disqualification Event is applicable to the Company or, to the Company’s knowledge, any Company Covered Person, except for a Disqualification Event as to which Rule 506(d)(2)(ii)-(iv) or (d)(3) is applicable.

## Covenants. Each Person with the right to designate or participate in the designation of a director pursuant to this Agreement covenants and agrees (i) not to designate or participate in the designation of any director designee who, to such Person’s knowledge, is a Disqualified Designee, (ii) to exercise reasonable care to determine whether any director designee designated by such person is a Disqualified Designee, (iii) 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, and (iv) to 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, or, to such Person’s knowledge, to such Person’s initial designee named in Section 1.2, except, if applicable, for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable. [[30]](#footnote-30)

# 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[[31]](#footnote-31) (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)[, or Qualified Direct Listing (as defined in the Restated Certificate)]; (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 Section 7.8 below[; and (d) \_\_\_\_\_ \_\_, 20\_\_].

# Miscellaneous.

## Additional Parties.

### Notwithstanding anything to the contrary contained herein, if the Company issues additional shares of Preferred Stock after the date hereof, as a con­dition to the issuance of such shares the Company shall require that any purchaser of such shares become a party to this Agreement by executing and delivering a counterpart signature page to this Agreement agreeing to be bound by and subject to the terms of this Agreement as an Investor and Stockholder hereunder. Each such Person shall thereafter be deemed an Investor and Stockholder for all purposes under this Agreement. The Company shall amend Schedule A to include such purchaser as an Investor and Stockholder, but failure to update Schedule A shall not negate such Investor’s rights and obligations pursuant to 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 [or options or warrants to purchase shares of capital stock] to such Person (other than to a purchaser of Preferred Stock described in Section 7.1(a) above), [following which such Person shall hold Shares constituting 1% or more of the then outstanding capital stock of the Company (treating for this purpose all shares of Common Stock issuable upon exercise or conversion of outstanding options, warrants or convertible securities, as if exercised and/or converted or exchanged)], then the Company shall require such Person, as a condition precedent to entering into such agreement, to become a party to this Agreement by executing and delivering a counterpart signature page to this Agreement agreeing to be bound by and subject to the terms of this Agreement as a Stockholder and, if applicable, a Key Holder. Each such Person shall thereafter be deemed a Stockholder and, if applicable, a Key Holder for all purposes under this Agreement. The Company shall amend Schedule B to include such purchaser as a Key Holder[, if applicable, and shall amend Schedule C to include such purchaser as a Stockholder], but failure to update Schedule B [and/or Schedule C] shall not negate such Stockholder’s rights and obligations pursuant to this Agreement.

## 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 recognition of 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 a counterpart signature page in this Agreement, agreeing to be bound by and subject to the terms of this Agreement in the same capacity as the transferor. Upon the execution and delivery of a counterpart signature page to this 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 Section 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 Section 7.12. The Company shall amend the applicable Schedules to include such transferee as an Investor, Key Holder, and/or Stockholder, as applicable, but the Company’s failure to update the Schedules to this Agreement shall not negate such Stockholder’s rights and obligations pursuant to this Agreement.

## 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; provided, however, that the rights to designate members of the Board in Section[s] [1.2(a)-(b)] are nontransferable (and shall not be binding upon or inure to the benefit of successors and assigns) other than pursuant to an amendment effected in accordance with Section 7.8 below[[32]](#footnote-32). 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.[[33]](#footnote-33) This Agreement shall be governed by the internal law of the State of Delaware,[[34]](#footnote-34) 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.

## Counterparts. This Agreement may be executed in two 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. 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.

### General. All notices and other communications given or made pursuant to this Agreement shall be in writing (including electronic mail as permitted in this Agreement) 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 days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one 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 the Schedules to this Agreement, or (as to the Company) to the principal office of the Company and to the attention of the Chief Executive Officer, or, in any case, to such electronic mail address or address as subsequently modified by written notice given in accordance with this Section 7.7. If notice is given to the Company, a copy (which copy shall not constitute notice) shall also be sent to [*Company counsel name and address*].[[35]](#footnote-35)

### Consent to Electronic Notice. Each Stockholder 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 mail pursuant to Section 232 of the DGCL (or any successor thereto) at the electronic mail address set forth below such Stockholder’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 mail 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 Stockholder 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.

## Consent Required to Amend, Modify, Terminate or Waive.[[36]](#footnote-36) This Agreement may be amended, modified or terminated (other than pursuant to Section 6) 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 [Qualified] Key Holders holding [*specify percentage*]% of the Shares then held by the [Qualified] Key Holders [provided that such consent shall not be required if the [Qualified] Key Holders do not then own Shares representing at least [*specify percentage*]% of the outstanding capital stock of the Company]; and (c) the holders of at least [*specify percentage*]% of the shares of Preferred Stock then held by the Investors (voting together as a single class on an as-converted basis); provided that Shares held by a Sanctioned Party shall be disregarded for the purpose of the calculating the percentages set forth in this section. Notwithstanding the foregoing:

### this Agreement may not be amended, modified 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, modification, termination or waiver applies to all Investors or Key Holders, as the case may be, in the same fashion;

### the provisions of Section 1.2(a) and this Section 7.8(b) may not be amended, modified, terminated or waived without the written consent of [*Name of Investor 1*] for so long as [*Name of Investor 1*] continues to have rights pursuant to Section 1.2(a);

### the provisions of Section 1.2(a) and this Section 7.8(c) may not be amended, modified, terminated or waived without the written consent of [*Name of Investor 2*] for so long as [*Name of Investor 2*] continues to have rights pursuant to Section 1.2(a);

### the provisions of Section 1.2(b) and this Section 7.8(d) may not be amended, modified, terminated or waived without the written consent of [the [Qualified] Key Holders][the holders of [*specify percentage*] of shares of Common Stock];

### the consent of the Key Holders shall not be required for any amendment, modification, termination or waiver if such amendment, modification, termination, 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;

### the Schedules to this Agreement may be amended by the Company from time to time in accordance with Sections 7.1 and 7.2 without the consent of the other parties hereto; and

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

The Company shall give prompt written notice of any amendment, modification, termination, or waiver hereunder to any party that did not consent in writing thereto. Any amendment, modification, termination, or waiver effected in accordance with this Section 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, modification, termination or waiver. For purposes of this Section 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 and superseded and replaced in its entirety by this Agreement, and shall be of no further force or effect.][[37]](#footnote-37) This Agreement (including the Exhibits and Schedules hereto) together with the Restated Certificate and other Transaction Agreements (as defined in the Purchase Agreement)[[38]](#footnote-38) constitute the full and entire understanding and agreement among the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between or among any of the parties are 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 Section 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 Section 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, Dividends and Recapitalizations. In the event of any issuance of Shares or the voting securities of the Company 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 Section 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 carry out the intent of the parties hereunder.

## Dispute Resolution.[[39]](#footnote-39)

[*Alternative 1:* 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 30 days after names of potential arbitrators have been proposed by Judicial Arbitration and Mediation Services, Inc. (“**JAMS**”),[[40]](#footnote-40) then by one arbitrator having reasonable experience in corporate finance transactions of the type provided for in this Agreement and who is chosen by JAMS. The arbitration shall take place in [*location*], in accordance with the JAMS 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 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 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.][[41]](#footnote-41)

[*Alternative 2:*

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.

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.]

[WITH EITHER ALTERNATIVE][[42]](#footnote-42)

[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 AGREEMENTS, 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.][[43]](#footnote-43)

## Costs of Enforcement. [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.][[44]](#footnote-44)

## 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 Affiliates may apportion such rights as among themselves in any manner they deem appropriate.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this [Amended and Restated] Voting Agreement as of the date first written above.[[45]](#footnote-45)

COMPANY: [*Insert Company Name*]

By:

Name:

Title:   
Address:

Email: [[46]](#footnote-46)

INVESTORS: [*Insert Investor #1 Name]*

By:

Name:

Title:

[*Insert Investor #2 Name]*

By:

Name:

Title:

KEY HOLDERS: [*Insert Key Holder Name]*

Signature:

**SCHEDULE A**

INVESTORS

|  |
| --- |
| 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

|  |
| --- |
| [Key Holder Name  Address  Phone Number  Email] |
| [Key Holder Name  Address  Phone Number  Email] |
| [Key Holder Name  Address  Phone Number  Email] |

**ADDENDUM 1: SAMPLE SALE RIGHTS****[[47]](#footnote-47)**

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:

(i) assist the Financial Advisor in creating a list of potential acquirers;

(ii) 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;

(iii) execute customary non-disclosure agreements with potential acquirers;

(iv) 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;

(v) 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;

(vi) attend and participate in any meetings, conference calls, or presentations regarding the Company and its business with potential acquirers;

(vii) execute a letter of intent or term sheet on terms reasonably acceptable to the Holder Representative with one or more potential acquirers;

(viii) 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

(ix) 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.

(a) 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.

(b) In the event that the Board approval described in (a) above has not been obtained within the time period requested by the Holder Representative (such time period not to be less than three 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 days of the delivery of the Redemption Notice.

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

(a) 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.

(b) 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(s) hereof or thereof in its capacity as Holder Representative.

(c) 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.

(d) 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.

(e) 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.

**ADDENDUM 2: DRAA**

[Alternative dispute resolution provision:[[48]](#footnote-48)

(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 “**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 7.16, 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 hereby 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 understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section 7.16 and 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 (the “**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.[[49]](#footnote-49) 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 such location as the parties and the Arbitrator may agree.[[50]](#footnote-50)

(d) The Arbitration shall be presided over by one 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 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 45 days of the commencement of the Arbitration, or 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.[[51]](#footnote-51)

(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.[[52]](#footnote-52)

(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.[[53]](#footnote-53)

(g) The arbitral award (the “**Award**”) shall (i) be rendered within [120] days after the Arbitrator’s acceptance of the appointment;[[54]](#footnote-54) (ii) be delivered in writing; (iii) state the reasons for the Award;[[55]](#footnote-55) (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;[[56]](#footnote-56) 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 7.16 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; 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.[[57]](#footnote-57)

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,[[58]](#footnote-58) 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,][[59]](#footnote-59) 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.[[60]](#footnote-60) 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 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 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.][[61]](#footnote-61) [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.]

(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, the Respondent shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the 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 7.16, if any amendment to the DRAA is enacted after the date of this Agreement, and such amendment would render any provision of this Section 7.16 unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section 7.16 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.[[62]](#footnote-62)] [*Alternative A:*[[63]](#footnote-63) Any challenge to the final award of the Arbitrator shall be made before a panel of three appellate arbitrators, who shall be [*insert names or description of appellate arbitrators*].[[64]](#footnote-64) The appellate panel may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.[[65]](#footnote-65)] [*Alternative B:*[[66]](#footnote-66) Any challenge to the final award of the Arbitrator shall be made before a panel of three appellate arbitrators, who shall be [*insert names or description of appellate arbitrators*].[[67]](#footnote-67) 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.]]

1. In most cases, investors will want the term “Key Holders” to include holders of a significant number of common stock, or options to purchase a significant number of shares, 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 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. ***\*New Footnote\**** This sample recital should be updated to match the specific voting rights set forth in the Company’s certificate of incorporation. [↑](#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 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. ***\*New Footnote\**** If this language is kept, then the last checkbox of Section 1.1 of Exhibit A should be modified appropriately to include Key Holders. The deletion of the bracketed provision would mean that future common stockholders that join would not be deemed to be Key Holders, which may impact the voting dynamics under this Agreement. [↑](#footnote-ref-7)
8. **\**New Footnote*\*** Model language is to account for the fact that some listed parties may not be fully prohibited, but rather subject to more targeted restrictions. [↑](#footnote-ref-8)
9. **\**New Footnote*\*** Include to the extent that these jurisdictions that are relevant. [↑](#footnote-ref-9)
10. ***\*New Footnote\**** This model agreement provides flexibility to the Company to enable it to comply with any Sanctions. [↑](#footnote-ref-10)
11. Drafters should be mindful that the total number of directors will generally be determined by the Company’s bylaws (which typically allow the board to establish the size of the board), as well as any protective provisions set forth in the Certificate of Incorporation regarding increasing/decreasing the board size. [↑](#footnote-ref-11)
12. **\**Revised Footnote*\*** The number of permutations of board composition and their conditions are almost limitless. Section 1.2 provides a selection of common, but not exhaustive or exclusive, examples; additional positions can be added as needed and the provisions will need careful tailoring to the terms of the particular transaction and associated provisions of the certificate of incorporation. [↑](#footnote-ref-12)
13. ***\*Revised Footnote\**** 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 such person’s pleasure. Alternative 1 provides that a founder director shall be elected by either the majority of the shares of common stock held by the Key Holders, or the majority of the shares of common stock outstanding. It’s possible that the individual who will hold the common director seat may hold a sufficient number of shares of stock to control that vote. Alternative 2 has a variety of choices: the first ties the board seat to an individual’s 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 only to continued minimum stock holdings. [↑](#footnote-ref-13)
14. ***\*Revised Footnote\**** For flexibility, it may be useful to permit the Board to fill the vacancy in addition to the right of the stockholders to do so, in which case (i) this sentence should be deleted, and (ii) the drafter should add language that the vacancy can be filled by a majority of the directors elected by such class or classes or series thereof then in office, or by a sole remaining director so elected in compliance with Section 223 of the DGCL. The drafter should also take care that the provision is in accord with the Certificate of Incorporation and the bylaws. [↑](#footnote-ref-14)
15. Note the importance of following the formalities for resignations and removals of directors to ensure the valid composition of the board of directors. For example, if a director who wishes to resign simply ceases to act as a director but does not tender such person’s resignation to the Company or is not properly removed from the board of directors, he or she will continue to be a director. Accordingly, written consents that do not include such person’s signature will likely not be considered unanimous and, therefore, be ineffective. Moreover, if the director does not properly resign, a vacancy may not exist that the remaining directors are able to fill. [↑](#footnote-ref-15)
16. ***\*Revised Footnote\**** A director who is designated by agreement of multiple parties can be removed only by the consent of all of those parties unless otherwise specified in such agreement. This model Voting Agreement includes sample language where a Mutual Director could be removed by a majority of the Board, rather than the consent of all other directors. It should be carefully reviewed and adjusted depending on the conditions set forth in Section 1.2. [↑](#footnote-ref-16)
17. 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 acquirers 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-17)
18. See footnote 45 (ADDENDUM 1) for a discussion of why the drafters might elect not to include the board of directors as one of the parties necessary to trigger the drag-along, in light of the *Trados* decision. [↑](#footnote-ref-18)
19. Careful attention should be paid to the drafting as to what comprises the votes necessary to trigger the drag, including ensuring they do not conflict with the protective provisions, etc. [↑](#footnote-ref-19)
20. ***\*Revised Footnote\**** An express waiver of appraisal rights was upheld by the Delaware Supreme Court in *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199 (Del. 2021). In order to be valid, a waiver of appraisal rights must expressly reference “appraisal rights” – a more general waiver that does not expressly waive appraisal rights will not be effective. See *In re Altor Bioscience Corp.*, 2019 WL 2567853 (Del. Ch. June 20, 2019) (finding general waiver of claims that did not expressly reference appraisal rights was ineffective to waive appraisal rights); *Halpin v. Riverstone Nat’l, Inc.*, 2015 WL 854724 (Del Ch. Feb. 26, 2015) (finding that a voting agreement without an express waiver of appraisal rights did not waive appraisal rights). [↑](#footnote-ref-20)
21. ***\*Revised Footnote\**** Even if appraisal rights are waived, common and subordinate preferred stockholders are increasingly filing breach of fiduciary duty claims seeking damages that mirror the recovery available in an appraisal suit. In addition, suits have been filed by parties to drag-along provisions, seeking to avoid the application of those provisions. Because the directors are often representatives of the senior preferred holders, these suits are difficult to dismiss at an early stage. As a result, consideration should be given to including this agreement to refrain from challenging the enforceability of the drag-along provision or alleging the drag-along sale was a breach of fiduciary duty. Covenants not to sue have been upheld by the Delaware courts in several cases. The Delaware Court of Chancery has held that a waiver of fiduciary duty claims in connection with a drag-along sale is enforceable except against claims of intentional wrongdoing by the dragging stockholders. *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520 (Del. Ch. 2023). As with a waiver of appraisal rights, a covenant not to assert claims for breach of fiduciary duty in connection with a drag-along sale should be express. See *Manti Holdings, LLC v. Carlyle Grp. Inc.*, 2022 WL 444272 (Del. Ch. Feb. 14, 2022) (finding a covenant to “raise no objection” to a transaction insufficient to waive breach of fiduciary duty claims with respect to such transaction). Even if the covenant is express, its enforceability raises public policy issues. *Id*. In general, as with waivers of appraisal rights, enforceability of covenants not to bring fiduciary duty claims will depend on the facts and circumstances. See, *e.g.*, *In re Good Tech. Corp. S’holder Litig.*, 2017 WL 2537347 (Del. Ch. May 12, 2017) (declining to enforce a covenant not to sue in a drag-along where the affirmative defenses raised colorable breach of fiduciary duty claims). [↑](#footnote-ref-21)
22. ***\*Revised Footnote\**** Drafter should assess and make determination as to whether any or all of the listed conditions are appropriate. To the extent these conditions are not met, a waiver will be required. [↑](#footnote-ref-22)
23. This bracketed provision is an alternative to 3.3(g). [↑](#footnote-ref-23)
24. 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-24)
25. See footnote 45 (ADDENDUM 1). [↑](#footnote-ref-25)
26. ***\*New Footnote\**** Section 4.1 is being revised in light of *Chordia v. Lee*, 2024 WL 49850 (Del. Ch. 2024). [↑](#footnote-ref-26)
27. 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. The Delaware Chancery Court’s ruling in *Riverstone* reinforces the importance of having a proxy to vote all shares of the corporation that are not voluntarily voted in favor of a merger so as to extinguish appraisal rights as a matter of law. To achieve that result, however, the proxy must actually be used to vote, at a stockholders meeting or by written consent, all shares in favor of the merger that are not voluntarily voted in favor. Attempts to do so after approval or consummation of a merger will likely be ineffective under *Riverstone*. Note, however, that 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 be unlikely to 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-27)
28. This provision is intended to permit issuers to conduct Rule 506 offerings based on the assumption that their 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 an investor becomes a party to this Agreement. However, by determining in advance whether an investor is a bad actor issuers can avoid being precluded from relying on Rule 506 for future offerings or future sales in the same offering if the investor is or becomes a 20% beneficial owner of the issuer’s voting securities. [↑](#footnote-ref-28)
29. Although Rule 506(d) does not disqualify issuers for “bad acts” occurring prior to September 23, 2013, this representation addresses “bad acts” both before and after that date. If disclosure of a “bad act” by an investor prior to September 23, 2013 is required, this representation can be modified accordingly. [↑](#footnote-ref-29)
30. 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-30)
31. 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-31)
32. **\**New Footnote\**** This language clarifies that the Board seat does not transfer with the shares if an investor with designation rights sells shares; this is consistent with the premise of the share ownership threshold already contained in Section 1.2 (a)/(b) above. If the business deal is otherwise, tailor appropriately. [↑](#footnote-ref-32)
33. 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-33)
34. 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. [↑](#footnote-ref-34)
35. ***\*Revised Footnote\**** This revised model agreement provides that the stockholder counsel addresses be listed in the schedules for investors, since there is often more than one such counsel and this prevents one cc being replaced with another if different investors in later rounds use different counsel. [↑](#footnote-ref-35)
36. 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-36)
37. ***\*Revised Footnote\**** The drafter should ensure that the relevant signatories to the current agreement have authority to amend 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.”This provision has been updated to read the same across all stockholder agreements. [↑](#footnote-ref-37)
38. ***\*New Footnote\**** It may be appropriate to include if there are side letters or other agreements that cover similar aspects. [↑](#footnote-ref-38)
39. **\**New Footnote*\*** ADDENDUM 2 contains a dispute resolution provision for parties who may choose to resolve disputes under the Delaware Rapid Arbitration Act (“**DRAA**”). However, the two alternatives contained herein are generally preferred by parties, which is why the DRAA alternative is set forth in ADDENDUM 2. [↑](#footnote-ref-39)
40. Some parties prefer to use the American Arbitration Association (“**AAA**”) instead of JAMS. [↑](#footnote-ref-40)
41. **\**New Footnote*\*** Binding arbitration may be less expensive and more efficient than litigating disputes in court. Additionally, it may be more confidential. However, some investors dislike that the result cannot be appealed, and the arbitrator(s) is not bound to follow case law and precedent. [↑](#footnote-ref-41)
42. **\**New Footnote*\*** If Alternative 1 (arbitration) is being used for dispute resolution, the jury trial waiver language should always be included. If Alternative 2 (court) is being used for dispute resolution, then this provision is optional. [↑](#footnote-ref-42)
43. **\**New Footnote*\*** If the parties select California state court as the forum for any dispute resolution, a jury trial waiver will likely be unenforceable. Instead, the parties can choose to submit to trial by judicial referee, a private person (typically a retired judge) the parties select. All California rules of court, procedure and evidence govern judicial reference proceedings and, unlike with arbitration, the decision may be appealed. Accordingly, if the parties select California state court, and would like to backstop the jury waiver, we recommend including the following provision as a next paragraph:

    If the waiver of jury trial set forth in this section is not enforceable, then any claim or cause of action based upon or arising out of this Agreement, the other Transaction Agreements, the securities or the subject matter hereof or thereof shall be settled by judicial reference pursuant to California Code of Civil Procedure Section 638 *et seq.* before a referee sitting without a jury, such referee to be mutually acceptable to the parties. Each party will bear an equal share of the cost for the judicial referee. This paragraph shall not restrict a party from exercising remedies under the Uniform Commercial Code or from exercising pre‑judgment remedies under applicable law. [↑](#footnote-ref-43)
44. **\**New Footnote*\*** Conformed across documents. [↑](#footnote-ref-44)
45. ***\*Revised Footnote\**** This model agreement provides a simplified/condensed form of a signature page, which shall be adjusted as appropriate. [↑](#footnote-ref-45)
46. **\**New Footnote***\* The notice provision provides that notice address for the Company on the signature page and for Investors on Schedule A – accordingly, the Company’s notice address/email address need to be on the signature page and the Investors’ addresses should only be included in Schedule A. [↑](#footnote-ref-46)
47. The “Sale Rights” provisions in this ADDENDUM 1 are not typically included in venture capital financings; they are more common in later-stage private equity deals. They have been drafted in response to the Delaware Chancery Court’s ruling in *In re Trados Inc. S’holder Litig.*, 2009 WL 2225958 (Del. Ch. 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 such person’s 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 1, 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.

    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.

    Finally, note that this provision is also intended to address the Delaware Chancery Court’s rulings in *TCV VI, L.P. v. TradingScreen Inc.*, 2015 WL 1598045 (Del Ch. Feb. 26, 2015, redacted Mar. 27, 2015) and *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973 (Del. Ch. 2010), which placed significant limits on a preferred stockholder’s right to have a redemption obligation enforced. In *TradingScreen*, the Court suggested that a board’s decision regarding how much of a corporation’s capital can be applied to the redemption of stock from time to time is protected by the business judgment rule, even where the corporation has sufficient legal surplus to effect the redemption. [↑](#footnote-ref-47)
48. This ADDENDUM 2 includes a provision for parties who would prefer to resolve disputes under the Delaware Rapid Arbitration Act (the “**DRAA**”). The DRAA implements a number of new approaches in arbitration that make the statute unique among national and international arbitration regimes. First, the DRAA 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 30 days after its initiating filing is served, and the jurisdiction of the Court is highly limited. Second, the DRAA divests the courts of jurisdiction to hear and decide any issue concerning arbitrability or the scope of issues to be arbitrated. Instead, the DRAA 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 not apply to arbitrations under the DRAA, and neither party can seek to disrupt the commencement of a DRAA arbitration by running into court. Third, the DRAA 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 DRAA provides that, absent an agreement otherwise, all matters must be finally determined within 120 days of the arbitrator’s acceptance of appointment (which deadline may be extended to 180 days, but no longer, by unanimous consent of the parties). Furthermore, the DRAA 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 DRAA 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 DRAA 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. [↑](#footnote-ref-48)
49. The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this paragraph (b). [↑](#footnote-ref-49)
50. 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. This simply means that Delaware law governs the arbitration, wherever it occurs. [↑](#footnote-ref-50)
51. 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. [↑](#footnote-ref-51)
52. The DRAA empowers the parties to include one, both or neither of the provisions set forth in paragraph (e). If the parties wish to proceed without discovery, neither of the sentences in paragraph (e) 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 DRAA 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 DRAA 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. [↑](#footnote-ref-52)
53. 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. [↑](#footnote-ref-53)
54. The parties may specify a longer period for the arbitration. If they do not do so, the 120-day period of the DRAA is the default, and such period may be extended by no more than an additional 60 days, and then only upon consent of all parties to the arbitration. [↑](#footnote-ref-54)
55. A reasoned award is not required by the DRAA, but it may be required by the parties’ contract. [↑](#footnote-ref-55)
56. 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. Paragraph (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 paragraph (g) should not be included. [↑](#footnote-ref-56)
57. 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. [↑](#footnote-ref-57)
58. This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration. [↑](#footnote-ref-58)
59. Eliminate reference to “third party discovery proceedings” in the event that such proceedings were not contracted for in paragraph (e), above. [↑](#footnote-ref-59)
60. Clause (v) would be excluded in the event that third-party discovery was not provided for in paragraph (e) above. [↑](#footnote-ref-60)
61. 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. [↑](#footnote-ref-61)
62. 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 paragraph (g). [↑](#footnote-ref-62)
63. The following is an alternative appellate provision in the event that the parties do not to wish to proceed with an appeal before the Delaware Supreme Court and desire a limited scope of appeal in accordance with the FAA. [↑](#footnote-ref-63)
64. 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 or more senior Delaware lawyers. [↑](#footnote-ref-64)
65. 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. [↑](#footnote-ref-65)
66. The following is an alternative appellate provision for use in the event that the parties do not to wish to proceed with an appeal before the Delaware Supreme Court and desire that the scope of their appeal be as broad as possible. [↑](#footnote-ref-66)
67. 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 or more senior Delaware lawyers. [↑](#footnote-ref-67)