

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

PROSOMNUS, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 24-10972 (JTD)

(Jointly Administered)

Re: Docket Nos. 192 and 195

**PLAN SUPPLEMENT FOR AMENDED JOINT CHAPTER 11 PLAN OF
REORGANIZATION OF PROSOMNUS, INC. AND ITS DEBTOR AFFILIATES**

PLEASE TAKE NOTICE that on June 26, 2024, the Debtors filed the *Debtors' Amended Joint Chapter 11 Plan of ProSomnus, Inc. and its Debtor Affiliates* [Docket No. 192] (as modified, amended, or supplemented from time to time, the “**Plan**”).

PLEASE TAKE FURTHER NOTICE that on June 26, 2024, the Court entered the *Order (I) Approving Disclosure Statement and Form and Manner of Notice of Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling Confirmation Hearing, (IV) Establishing Notice and Objection Procedures for Confirmation of Plan, and (V) Granting Related Relief* [Docket No. 195] (the “**Confirmation Scheduling Order**”).

PLEASE TAKE FURTHER NOTICE that as contemplated by the Plan and the Confirmation Scheduling Order, the Debtors hereby file the Plan Supplement in accordance with Section 12.08 of the Plan, which consists of the following documents that contemplate the occurrence of certain restructuring transactions in conjunction with the Debtors' reorganization (collectively, the “**Restructuring Transaction Documents**”): (i) the Amended and Restated Certificate of Incorporation of ProSomnus Sleep Technologies, Inc., in substantially the form attached hereto as **Exhibit 1**; (ii) the Bylaws of ProSomnus Sleep Technologies, Inc., in substantially the form attached hereto as **Exhibit 2**; (iii) the ProSomnus Sleep Technologies, Inc. Voting Agreement, in substantially the form attached hereto as **Exhibit 3**; (iv) the ProSomnus Sleep Technologies, Inc. Investors' Rights Agreement, in substantially the form attached hereto as **Exhibit 4**; (v) the ProSomnus Sleep Technologies, Inc. Common Stock Purchase Agreement, in substantially the form attached hereto as **Exhibit 5**; and (vi) the ProSomnus Sleep Technologies, Inc. Note Purchase and Security Agreement, in substantially the form attached hereto as **Exhibit 6**. Additionally, **Exhibit 7** hereto identifies the members of the new board of directors of ProSomnus Sleep Technologies, Inc.

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: ProSomnus, Inc. (8216), ProSomnus Holdings, Inc. (3855), and ProSomnus Sleep Technologies, Inc. (0766). The location of the Debtors' principal place of business and the Debtors' mailing address is 5675 Gibraltar Dr., Pleasanton, California 94588.

PLEASE TAKE FURTHER NOTICE that the Debtors intend to execute the Restructuring Transaction Documents in substantially the forms attached hereto as **Exhibit 1** through **Exhibit 6**, but reserve the right to amend, modify, and supplement such documents and all exhibits contained therein to the extent necessary for the successful consummation of the Debtors' reorganization and restructuring transaction in accordance with the terms of the Plan.

PLEASE TAKE FURTHER NOTICE that the Debtors further reserve all rights to amend, modify, or supplement the Plan Supplement, and any of the documents contained therein to and through the Effective Date in accordance with the terms of the Plan.

Dated: July 16, 2024
Wilmington, Delaware

Respectfully submitted,

POLSINELLI PC

/s/ Shanti M. Katona

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*Counsel to the Debtors and
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Exhibit 1

Amended and Restated Certificate of Incorporation of ProSomnus Sleep Technologies, Inc.

**AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
PROSOMNUS SLEEP TECHNOLOGIES, INC.**

(Pursuant to Sections 242, 245 and 303 of the
General Corporation Law of the State of Delaware)

ProSomnus Sleep Technologies, Inc., a corporation organized and existing under and by virtue of the provisions of the General Corporation Law of the State of Delaware (the “**General Corporation Law**”),

DOES HEREBY CERTIFY:

1. That the name of this corporation is ProSomnus Sleep Technologies, Inc. and that this corporation was originally incorporated pursuant to the General Corporation Law on March 2, 2016 under the name MD Sleep Corp.

2. The Corporation filed an amended plan of reorganization under chapter 11 of title 11 of the United States Code on [____], 2024 (the “**Plan**”).

3. This amended and restated Certificate of Incorporation has been deemed approved without the need for Board of Directors of this corporation (the “**Board of Directors**”) or stockholder approval pursuant to Section 303 of the General Corporation Law because it is adopted pursuant to the Plan, as confirmed on [____], 2024 by the United States Bankruptcy Court for the District of Delaware.

4. Pursuant to the provisions of Section 242, 245 and 303 of the General Corporation Law, the Certificate of Incorporation of this corporation is hereby amended and restated in its entirety to read as follows:

FIRST: The name of this corporation is ProSomnus Sleep Technologies, Inc. (the “**Corporation**”).

SECOND: The address of the registered office of the Corporation in the State of Delaware is 251 Little Falls Drive, in the City of Wilmington, County of New Castle, Delaware 19808. The name of its registered agent at such address is Corporation Service Company.

THIRD: The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law.

FOURTH: This Company is authorized to issue one class of stock to be designated Common Stock. The total number of shares of Common Stock the Corporation has authority to issue is 36,600,000 with par value of \$0.00001 per share.

The following is a statement of the designations and the powers, preferences and special rights, and the qualifications, limitations or restrictions thereof in respect of each class of capital stock of the Corporation.

A. COMMON STOCK

1. Voting.

1.1 **General.** Except as otherwise provided herein or by applicable law, the holders of the Common Stock shall be entitled to one vote for each share of Common Stock held as of the applicable record date for each meeting of stockholders (and written actions in lieu of meetings); provided, however, that, except as otherwise required by law, holders of Common Stock, as such, shall not be entitled to vote on any amendment to this Amended and Restated Certificate of Incorporation (this “**Certificate of Incorporation**”) that relates solely to the terms of one or more outstanding series of capital stock if the holders of such affected series are entitled, either separately or together with the holders of one or more other such series, to vote thereon pursuant to this Certificate of Incorporation or pursuant to the General Corporation Law. There shall be no cumulative voting.

1.2 **Protective Provisions.** At any time when any Major Investor (as defined in that certain Investors’ Rights Agreement dated on or about the date of the initial issuance of Common Stock between the Corporation and the other parties thereto, as the same may be amended and/or restated from time to time (the “**Investors’ Rights Agreement**”), continues to qualify as a Major Investor, the Corporation shall not, either directly or indirectly by amendment, merger, consolidation, domestication, transfer, continuance, recapitalization, reclassification, waiver, statutory conversion, or otherwise, effect any of the following acts or transactions without (in addition to any other vote required by law or this Certificate of Incorporation) the written consent or affirmative vote each of the Major Investors:

1.2.1 liquidate, dissolve or wind-up the business and affairs of the Corporation or effect any Deemed Liquidation Event (as defined in the Investors Rights Agreement) or any other merger, consolidation, statutory conversion, transfer, domestication or continuance;

1.2.2 amend, alter, or repeal (i) any provision of this Certificate of Incorporation or Bylaws of the Corporation in a manner that adversely affects the special rights, powers and preferences of the Common Stock or (ii) any provision of this Section A.1.2 of this Article Fourth;

1.2.3 issue Common Stock, Options (as defined in the Investors’ Rights Agreement) or Convertible Securities (as defined in the Investors’ Rights Agreement) within 12 months of the Initial Closing (as defined in the Purchase Agreement (as defined in the Investors’ Rights Agreement)), other than Common Stock, Options or Convertible Securities issuable (i) pursuant to the Plan (as defined in the Purchase Agreement), or (ii) pursuant to the Purchase Agreement.

1.2.4 create or issue any additional class or series of capital stock, or any Options or Convertible Securities exercisable for or convertible into any additional class or series of capital stock, unless such class or series of capital stock ranks junior to the Common Stock with respect to the distribution of assets on the liquidation, dissolution or winding up of the Corporation, the payment of dividends and rights of redemption,

1.2.5 purchase or redeem (or permit any subsidiary to purchase or redeem) or pay or declare any dividend or make any distribution on, any shares of capital stock of the Corporation other than (i) redemptions of or dividends or distributions on the Common Stock as expressly authorized herein, (ii) dividends or other distributions payable on the Common Stock solely in the form of additional shares of Common Stock, and (iii) repurchases of stock from former employees, officers, directors, consultants or other persons who performed services for the Corporation or any subsidiary in connection with the cessation of such employment or service at no greater than the original purchase price thereof.

1.2.6 (i) create or adopt any equity (or equity-linked) compensation plan (other than the Management Incentive Plan (as defined in the Investor’s Right Agreement)); or (ii) amend any such plan to increase the number of shares authorized for issuance thereunder;

1.2.7 unless the aggregate indebtedness of the Corporation and its subsidiaries for borrowed money following such action would not exceed \$20,000,000, and other than equipment leases, bank lines of credit, working capital facilities or trade payables incurred in the ordinary course of business, create, or issue, any debt security, create any lien or security interest (except for purchase money liens or statutory liens of landlords, mechanics, materialmen, workmen, warehousemen and other similar persons arising or incurred in the ordinary course of business), or incur other indebtedness for borrowed money, including but not limited to obligations and contingent obligations under guarantees, or permit any subsidiary to take any such action with respect to any debt security lien, security interest or other indebtedness for borrowed money;

1.2.8 create, or hold capital stock in, any subsidiary that is not wholly owned (either directly or through one or more other subsidiaries) by the Corporation, or permit any subsidiary to create, or issue or obligate itself to issue, any shares of any class or series of capital stock, or sell, transfer or otherwise dispose of any capital stock of any direct or indirect subsidiary of the Corporation, or permit any direct or indirect subsidiary to sell, lease, transfer, exclusively license or otherwise dispose (in a single transaction or series of related transactions) of all or substantially all of the assets of such subsidiary;

1.2.9 increase or decrease the authorized number of directors constituting the Board of Directors to greater or less than five (5) directors, change the number of votes entitled to be cast by any director or directors under this Certificate of Incorporation, or adopt any provision inconsistent with Article Sixth;

1.2.10 make, or permit any subsidiary to, own any stock or other securities of, any subsidiary or other corporation, partnership, or other entity unless it is wholly owned by the Corporation;

1.2.11 make, or permit any subsidiary to make, any loan or advance to any person, including, without limitation, any employee or director of the Corporation or any subsidiary, except (i) advances and similar expenditures in the ordinary course of business, (ii) under the terms of an employee stock or option plan approved by the Board of Directors (including the Management Incentive Plan); or (iii) amongst the Corporation and /or one or more of Corporations wholly owned subsidiaries;

1.2.12 guarantee, directly or indirectly, or permit any subsidiary to guarantee, directly or indirectly, any indebtedness except for (i) trade accounts of the Corporation or any subsidiary arising in the ordinary course of business, and (ii) transactions that would not require the approval of each of the Major Investors pursuant to section A.1.2.7 of this Article Fourth;

1.2.13 change the principal business of the Corporation;

1.2.14 sell, assign, license, pledge, or encumber material technology or intellectual property, other than in connection with (i) ordinary course product sales or licenses, and (ii) transactions that would not require the approval of each of the Major Investors pursuant to section A.1.2.7 of this Article Fourth; or

1.2.15 enter into any corporate strategic relationship involving the payment, contribution, or assignment by the Corporation of money or assets having a value (as determined by the Board of Directors in a manner consistent with the agreements governing such relationship) greater than \$20,000,000.

2. **Dividends.** Holders of shares of Common Stock shall be entitled to receive such dividends and other distributions in cash, stock or property of the Corporation when, as and if declared thereon by the Board of Directors from time to time in respect of the Common Stock out of assets or funds of the Corporation legally available therefor.

3. **Liquidation, Dissolution, etc.** In the event of any liquidation, dissolution or winding up (either voluntary or involuntary) of the Corporation, the holders of shares of Common Stock shall be entitled to receive the assets and funds of the Corporation available for distribution after payments to creditors in proportion to the number of shares held by them.

4. **Merger, etc.** In the event of a merger, consolidation, statutory conversion, transfer, domestication, or continuance of the Corporation with or into another entity (whether or not the Corporation is the surviving entity), the holders of each share of Common Stock shall be entitled to receive the same per share consideration on a per share basis.

5. **Waiver.** Except as otherwise set forth herein or required by law, and, for avoidance of doubt, subject to Section A.1.2.2 of this Article Fourth, any of the rights, powers, preferences and other terms of the Common Stock set forth herein may be waived on behalf of all holders of Common Stock by the affirmative written consent or vote of the holders that would otherwise be required to amend such right, power, preference or other term.

6. **Notices.** Any notice required or permitted by the provisions of this Article Fourth to be given to a holder of shares of Common Stock shall be mailed, postage prepaid, to the post office address last shown on the records of the Corporation, or given by electronic transmission in compliance with the provisions of the General Corporation Law, and shall be deemed sent upon such mailing or electronic transmission.

FIFTH: Subject to any additional vote required by this Certificate of Incorporation or the Bylaws of the Corporation, in furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, repeal, alter, amend and rescind any or all of the Bylaws of the Corporation.

SIXTH: Subject to any additional vote required by this Certificate of Incorporation, the number of directors of the Corporation shall be determined in the manner set forth in the Bylaws of the Corporation. Each director shall be entitled to one vote on each matter presented to the Board of Directors.

SEVENTH: Elections of directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

EIGHTH: Meetings of stockholders may be held within or outside of the State of Delaware, as the Bylaws of the Corporation may provide. The books of the Corporation may be kept (subject to any provision of applicable law) outside of the State of Delaware at such place or places or in such manner or manners as may be designated from time to time by the Board of Directors or in the Bylaws of the Corporation.

NINTH: To the fullest extent permitted by law, a director or officer of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director or officer. If the General Corporation Law or any other law of the State of Delaware is amended after approval by the stockholders of this Article Ninth to authorize corporate action further eliminating or limiting the personal liability of directors or officers, then the liability of a director

or officer of the Corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law as so amended.

Any amendment, repeal or elimination of the foregoing provisions of this Article Ninth by the stockholders of the Corporation shall not adversely affect any right or protection of a director or officer of the Corporation existing at the time of, or increase the liability of any director or officer of the Corporation with respect to any acts or omissions of such director or officer occurring prior to, such amendment, repeal or elimination.

All references to an officer of the Corporation in this Article Ninth shall mean a person who is an officer of the Corporation for purposes of Section 102(b)(7) of the General Corporation Law.

TENTH: To the fullest extent permitted by applicable law, the Corporation is authorized to provide indemnification of (and advancement of expenses to) directors, officers and agents of the Corporation (and any other persons to which the General Corporation Law permits the Corporation to provide indemnification) through Bylaw provisions, agreements with such agents or other persons, vote of stockholders or disinterested directors or otherwise, in excess of the indemnification and advancement otherwise permitted by Section 145 of the General Corporation Law.

Any amendment, repeal, modification or elimination of the foregoing provisions of this Article Tenth shall not (a) adversely affect any right or protection of any director, officer or other agent of the Corporation existing at the time of such amendment, repeal, modification or elimination; or (b) increase the liability of any director, officer or agent of the Corporation with respect to any acts or omissions of such director, officer or agent occurring prior to such amendment, repeal, modification or elimination.

ELEVENTH: The Corporation renounces, to the fullest extent permitted by law, any interest or expectancy of the Corporation in, or in being offered an opportunity to participate in, any Excluded Opportunity. An “**Excluded Opportunity**” is any matter, transaction or interest that is presented to, or acquired, created or developed by, or which otherwise comes into the possession of (i) any director of the Corporation who is not an employee of the Corporation or any of its subsidiaries, or (ii) any holder of Common Stock or any partner, member, director, stockholder, employee, affiliate or agent of any such holder, other than someone who is an officer or employee of the Corporation or any of its subsidiaries (collectively, the persons referred to in clauses (i) and (ii) are “**Covered Persons**”), unless such matter, transaction or interest is presented to, or acquired, created or developed by, or otherwise comes into the possession of, a Covered Person expressly and solely in such Covered Person’s capacity as a director of the Corporation. Any repeal or modification of this Article Eleventh will only be prospective and will not affect the rights under this Article Eleventh in effect at the time of the occurrence of any actions or omissions to act giving rise to liability. Notwithstanding anything to the contrary contained elsewhere in this Certificate of Incorporation, in addition to any other vote required by law or this Certificate of Incorporation, the affirmative vote of the holders of at least a majority of the shares of Common Stock then outstanding will be required to amend or repeal, or to adopt any provisions inconsistent with this Article Eleventh.

TWELFTH: Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery in the State of Delaware shall be the sole and exclusive forum for any stockholder (including a beneficial owner) to bring (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim against the Corporation, its directors, officers or employees arising pursuant to any provision of the General Corporation Law or the Corporation’s certificate of incorporation or bylaws or (iv) any action asserting a claim against the Corporation, its directors, officers or employees governed by the internal affairs doctrine or that otherwise relates to the internal affairs of the Corporation, except for, as

to each of (i) through (iv) above, any claim as to which the Court of Chancery determines that there is an indispensable party not subject to the jurisdiction of the Court of Chancery (and the indispensable party does not consent to the personal jurisdiction of the Court of Chancery within ten days following such determination), which is vested in the exclusive jurisdiction of a court or forum other than the Court of Chancery, or for which the Court of Chancery does not have subject matter jurisdiction.

THIRTEENTH: If any provision or provisions of this Certificate of Incorporation shall be held to be invalid, illegal or unenforceable as applied to any person or entity or circumstance for any reason whatsoever, then, to the fullest extent permitted by law, the validity, legality and enforceability of such provisions in any other circumstance and of the remaining provisions of this Certificate of Incorporation (including, without limitation, each portion of any sentence of this Certificate of Incorporation containing any such provision held to be invalid, illegal or unenforceable that is not itself held to be invalid, illegal or unenforceable) and the application of such provision to other persons or entities and circumstances shall not in any way be affected or impaired thereby.

FOURTEENTH: For purposes of Section 500 of the California Corporations Code (to the extent applicable), in connection with any repurchase of shares of Common Stock permitted under this Certificate of Incorporation from employees, officers, directors or consultants of the Corporation in connection with a termination of employment or services pursuant to agreements or arrangements approved by the Board of Directors (in addition to any other consent required under this Certificate of Incorporation), such repurchase may be made without regard to any “preferential dividends arrears amount” or “preferential rights amount” (as those terms are defined in Section 500 of the California Corporations Code). Accordingly, for purposes of making any calculation under California Corporations Code Section 500 in connection with such repurchase, the amount of any “preferential dividends arrears amount” or “preferential rights amount” (as those terms are defined therein) shall be deemed to be zero.

FIFTEENTH: The Corporation shall not issue non-voting equity securities; *provided, however*, that the foregoing restriction shall (a) have no further force and effect beyond that required under section 1123(a)(6) of Chapter 11 of Title 11 of the United States Code, as amended (the “Bankruptcy Code”), (b) only have such force and effect for so long as section 1123 of the Bankruptcy Code is in effect and applicable to the Corporation, and (c) in all events may be amended or eliminated in accordance with applicable law as from time to time may be in effect. The prohibition on the issuance of non-voting equity securities is included in this Certificate of Incorporation in compliance with section 1123(a)(6) of the Bankruptcy Code (11 U.S.C. § 1123(a)(6)).

* * *

5. That this Certificate of Incorporation, which restates and integrates and further amends the provisions of the Corporation’s Certificate of Incorporation, has been duly executed in accordance with Section 303 of the General Corporation Law.

(signature page follows)

IN WITNESS WHEREOF, this Amended and Restated Certificate of Incorporation has been executed by a duly authorized officer of this corporation on [_____], 2024.

By: _____
President

Exhibit 2

Bylaws of ProSomnus Sleep Technologies, Inc.

**BYLAWS OF
PROSOMNUS SLEEP TECHNOLOGIES, INC.**

Adopted [_____]

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BYLAWS

ARTICLE I — MEETINGS OF STOCKHOLDERS

1.1 Place of Meetings. Meetings of stockholders of ProSomnus Sleep Technologies, Inc. (the “**Company**”) shall be held at any place, within or outside the State of Delaware, determined by the Company’s board of directors (the “**Board**”). The Board may, in its sole discretion, determine that a meeting of stockholders shall not be held at any place, but may instead be held solely by means of remote communication as authorized by Section 211(a)(2) of the Delaware General Corporation Law or any successor legislation (the “**DGCL**”). In the absence of any such designation or determination, stockholders’ meetings shall be held at the Company’s principal executive office. The Board may cancel, postpone, or reschedule any previously scheduled meeting of stockholders at any time, before or after the notice for such meeting has been given to the stockholders.

1.2 Annual Meeting. Unless directors are elected by written consent in lieu of an annual meeting as permitted by Section 211(b) of the DGCL, an annual meeting of stockholders shall be held for the election of directors at such date and time as may be designated by resolution of the Board from time to time. Stockholders may, unless the certificate of incorporation otherwise provides, act by written consent to elect directors; *provided, however*, that, if such consent is less than unanimous, such action by written consent may be in lieu of holding an annual meeting only if all of the directorships to which directors could be elected at an annual meeting held at the effective time of such action are vacant and are filled by such action. Any other proper business may be transacted at the annual meeting.

1.3 Special Meeting. A special meeting of the stockholders may be called at any time by the Board, Chairperson of the Board, Chief Executive Officer or President (in the absence of a Chief Executive Officer).

If a special meeting of the stockholders has been called, the Company shall cause notice to be given to the stockholders entitled to vote at such meeting, in accordance with these bylaws, that a meeting will be held at the time requested by the person or persons calling the meeting. No business may be transacted at such special meeting other than the business specified in such notice to stockholders. Nothing contained in this paragraph of this **section 1.3** shall be construed as limiting, fixing, or affecting the time when a meeting of stockholders called by action of the Board may be held or the business that may be transacted at such meeting.

1.4 Notice of Stockholders’ Meetings. Whenever stockholders are required or permitted to take any action at a meeting, a notice of the meeting shall be given in accordance with Section 232 of the DGCL and **section 7.1** of these bylaws, and such notice shall state the place, if any, date and hour of the meeting, the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such meeting, the record date for determining the stockholders entitled to vote at the meeting, if such date is different from the record date for determining stockholders entitled to notice of the meeting, and, in the case of a special meeting, the purpose or purposes for which the meeting is called. Except as otherwise provided in the DGCL, the certificate of incorporation or these bylaws, the notice of any meeting of stockholders shall be given not less than 10 nor more than 60 days before the date of the meeting to each stockholder entitled to vote at such meeting as of the record date for determining the stockholders entitled to notice of the meeting.

1.5 Quorum. Except as otherwise provided by law, the certificate of incorporation or these bylaws, at each meeting of stockholders the presence in person or by proxy of the holders of shares of stock

having a majority of the votes which could be cast by the holders of all outstanding shares of stock entitled to vote at the meeting shall be necessary and sufficient to constitute a quorum. Where a separate vote by a class or series or classes or series is required, a majority of the voting power of the outstanding shares of such class or series or classes or series, present in person or represented by proxy, shall constitute a quorum entitled to take action with respect to that vote on that matter, except as otherwise provided by law, the certificate of incorporation or these bylaws.

If, however, such quorum is not present or represented at any meeting of the stockholders, then either (i) the chairperson of the meeting, or (ii) the stockholders entitled to vote at the meeting, present in person or represented by proxy, shall have the power to adjourn the meeting from time to time, in the manner provided in **section 1.6** of these bylaws, until a quorum is present or represented.

1.6 Adjourned Meeting; Notice. Any meeting of stockholders, annual or special, may adjourn from time to time to reconvene at the same or some other place (including an adjournment taken to address a technical failure to convene or continue a meeting using remote communication), and notice need not be given of the adjourned meeting if the time, place, if any, thereof, and the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such adjourned meeting are (i) announced at the meeting at which the adjournment is taken, (ii) displayed, during the time scheduled for the meeting, on the same electronic network used to enable stockholders and proxy holders to participate in the meeting by means of remote communication or (iii) set forth in the notice of meeting given in accordance with Section 222(a) of the DGCL and **section 1.4** of these bylaws. At the adjourned meeting, the Company may transact any business which might have been transacted at the original meeting. If the adjournment is for more than 30 days, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting. If after the adjournment a new record date for stockholders entitled to vote is fixed for the adjourned meeting, the Board shall fix a new record date for notice of such adjourned meeting in accordance with Section 213(a) of the DGCL and **section 1.10** of these bylaws, and shall give notice of the adjourned meeting to each stockholder of record entitled to vote at such adjourned meeting as of the record date fixed for notice of such adjourned meeting.

1.7 Conduct of Business. The chairperson of any meeting of stockholders shall be designated by the Board; in the absence of such designation, the Chairperson of the Board, if any, or the Chief Executive Officer (in the absence of the Chairperson of the Board) or the President (in the absence of the Chairperson of the Board and the Chief Executive Officer), or in their absence any other executive officer of the Company, shall serve as chairperson of the stockholder meeting. The Secretary shall act as secretary of the meeting, but in his or her absence the chairperson of the meeting may appoint any person to act as secretary of the meeting. The chairperson of any meeting of stockholders shall determine the order of business and the procedure at the meeting, including such regulation of the manner of voting and the conduct of business, and shall have the power to adjourn the meeting to another place, if any, date or time, whether or not a quorum is present.

1.8 Voting. The stockholders entitled to vote at any meeting of stockholders shall be determined in accordance with the provisions of **section 1.10** of these bylaws, subject to Section 217 (relating to voting rights of fiduciaries, pledgors and joint owners of stock) and Section 218 (relating to voting trusts and other voting agreements) of the DGCL.

Except as may be otherwise provided in the certificate of incorporation, each stockholder entitled to vote at any meeting of stockholders shall be entitled to one vote for each share of capital stock held by such stockholder as of the applicable record date which has voting power upon the matter in question. Voting at meetings of stockholders need not be by written ballot and, unless otherwise required by law, need not be conducted by inspectors of election unless so determined by the holders of shares of stock having a majority of the votes which could be cast by the holders of all outstanding shares of stock entitled

to vote thereon which are present in person or by proxy at such meeting. If authorized by the Board, such requirement of a written ballot shall be satisfied by a ballot submitted by electronic transmission, *provided* that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the stockholder or proxy holder.

Except as otherwise required by law, the certificate of incorporation or these bylaws, in all matters other than the election of directors, the affirmative vote of a majority of the voting power of the shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders. Except as otherwise required by law, the certificate of incorporation or these bylaws, directors shall be elected by a plurality of the voting power of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. Where a separate vote by a class or series or classes or series is required, in all matters other than the election of directors, the affirmative vote of the majority of the voting power of the outstanding shares of such class or series or classes or series present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of such class or series or classes or series, except as otherwise provided by law, the certificate of incorporation or these bylaws.

1.9 Stockholder Action by Consent Without a Meeting. Unless otherwise provided in the certificate of incorporation, any action required by the DGCL to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent or consents, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.

A consent must be set forth in writing or in an electronic transmission. No consent shall be effective to take the corporate action referred to therein unless consents signed by a sufficient number of holders to take action are delivered to the Company in the manner required by Section 228 of the DGCL within 60 days of the first date on which a consent is so delivered to the Company. Any person executing a consent may provide, whether through instruction to an agent or otherwise, that such consent will be effective at a future time, including a time determined upon the happening of an event, occurring not later than 60 days after such instruction is given or such provision is made, if evidence of the instruction or provision is provided to the Company. If the person is not a stockholder of record when the consent is executed, the consent shall not be valid unless the person is a stockholder of record as of the record date for determining stockholders entitled to consent to the action. Unless otherwise provided, any such consent shall be revocable prior to its becoming effective. All references to a consent in this **section 1.9** mean a consent permitted by this **section 1.9**.

A consent permitted by this **section 1.9** shall be delivered (i) to the principal place of business of the Company; (ii) to an officer or agent of the Company having custody of the book in which proceedings of meetings of stockholders are recorded; (iii) to the registered office of the Company in the State of Delaware by hand or by certified or registered mail, return receipt requested; or (iv) subject to the next sentence, in accordance with Section 116 of the DGCL to an information processing system, if any, designated by the Company for receiving such consents. In the case of delivery pursuant to the foregoing clause (iv), such consent must set forth or be delivered with information that enables the Company to determine the date of delivery of such consent and the identity of the person giving such consent, and, if such consent is given by a person authorized to act for a stockholder as proxy, such consent must comply with the applicable provisions of Section 212(c)(2) and (3) of the DGCL. A consent may be documented and signed in accordance with Section 116 of the DGCL, and when so documented or signed shall be deemed to be in writing for purposes of the DGCL; *provided* that if such consent is delivered pursuant to

clause (i), (ii) or (iii) of the first sentence of this paragraph, such consent must be reproduced and delivered in paper form.

In the event that the Board shall have instructed the officers of the Company to solicit the vote or consent of the stockholders of the Company, an electronic transmission of a stockholder consent given pursuant to such solicitation, to be effective, must be delivered by electronic mail (as defined in **section 7.1** of these bylaws) or facsimile telecommunications to the Secretary or the President of the Company or to a person designated by the Company for receiving such consent, or delivered to an information processing system designated by the Company for receiving such consent.

If an action by consent has been taken by stockholders by less than unanimous consent, prompt notice of the taking of the action by consent shall be given to those stockholders as of the record date for the action by consent who have not consented and who would have been entitled to notice of the meeting if the action had been taken at a meeting and the record date for the notice of the meeting were the record date for the action by consent. In the event that the action which is consented to is such as would have required the filing of a certificate under any provision of the DGCL, if such action had been voted on by stockholders at a meeting thereof, the certificate filed under such provision shall state, in lieu of any statement required by such provision concerning any vote of stockholders, that consent has been given in accordance with Section 228 of the DGCL.

1.10 Record Dates. In order that the Company may determine the stockholders entitled to notice of any meeting of stockholders or any adjournment thereof, the Board may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board and which record date shall not be more than 60 nor less than 10 days before the date of such meeting. If the Board so fixes a date, such date shall also be the record date for determining the stockholders entitled to vote at such meeting unless the Board determines, at the time it fixes such record date, that a later date on or before the date of the meeting shall be the date for making such determination.

If no record date is fixed by the Board, the record date for determining stockholders entitled to notice of and to vote at a meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given, or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held.

A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; *provided, however*, that the Board may fix a new record date for determination of stockholders entitled to vote at the adjourned meeting, and in such case shall also fix as the record date for stockholders entitled to notice of such adjourned meeting the same or an earlier date as that fixed for determination of stockholders entitled to vote in accordance with the provisions of Section 213 of the DGCL and this **section 1.10** at the adjourned meeting.

In order that the Company may determine the stockholders entitled to consent to corporate action without a meeting in accordance with Section 228 of the DGCL, the Board may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board, and which date shall not be more than 10 days after the date upon which the resolution fixing the record date is adopted by the Board. If no record date has been fixed by the Board, the record date for determining stockholders entitled to consent to corporate action without a meeting, when no prior action by the Board is required by law, shall be the first date on which a signed consent setting forth the action taken or proposed to be taken is delivered to the Company in accordance with Section 228(d) of the DGCL. If no record date has been fixed by the Board and prior action by the Board is required by law, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting shall be at the close of business on the day on which the Board adopts the resolution taking such prior action.

In order that the Company may determine the stockholders entitled to receive payment of any dividend or other distribution or allotment of any rights or the stockholders entitled to exercise any rights in respect of any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted, and which record date shall be not more than 60 days prior to such action. If no record date is fixed, the record date for determining stockholders for any such purpose shall be at the close of business on the day on which the Board adopts the resolution relating thereto.

1.11 Proxies. Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting, or such stockholder's authorized officer, director, employee or agent, may authorize another person or persons to act for such stockholder by proxy authorized by a document or by a transmission permitted by law filed in accordance with the procedure established for the meeting, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. The authorization of a person to act as a proxy may be documented, signed and delivered in accordance with Section 116 of the DGCL, *provided* that such authorization shall set forth, or be delivered with information enabling the Company to determine, the identity of the stockholder granting such authorization. The revocability of a proxy that states on its face that it is irrevocable shall be governed by the provisions of Section 212 of the DGCL.

1.12 List of Stockholders Entitled to Vote. The Company shall prepare, no later than the tenth day before each meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting; *provided, however*, if the record date for determining the stockholders entitled to vote is less than 10 days before the meeting date, the list shall reflect the stockholders entitled to vote as of the tenth day before the meeting date, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. The Company shall not be required to include electronic mail addresses or other electronic contact information on such list. Such list shall be open to the examination of any stockholder for any purpose germane to the meeting for a period of ten days ending on the day before the meeting date: (i) on a reasonably accessible electronic network, *provided* that the information required to gain access to such list is provided with the notice of the meeting, or (ii) during ordinary business hours, at the Company's principal place of business. In the event that the Company determines to make the list available on an electronic network, the Company may take reasonable steps to ensure that such information is available only to stockholders of the Company.

ARTICLE II — DIRECTORS

2.1 Powers. The business and affairs of the Company shall be managed by or under the direction of the Board, except as may be otherwise provided in the DGCL or the certificate of incorporation.

2.2 Number of Directors. The Board shall consist of one or more members, each of whom shall be a natural person. Unless the certificate of incorporation fixes the number of directors, the number of directors shall be determined from time to time by resolution of the Board. No reduction of the authorized number of directors shall have the effect of removing any director before that director's term of office expires.

2.3 Election, Qualification and Term of Office of Directors. Except as provided in **section 2.4** of these bylaws, and subject to **sections 1.2** and **1.9** of these bylaws, directors shall be elected at each annual meeting of stockholders. Directors need not be stockholders unless so required by the certificate of incorporation or these bylaws. The certificate of incorporation or these bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier death, resignation or removal.

2.4 Resignation and Vacancies. Any director may resign at any time upon notice given in writing or by electronic transmission to the Company. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable. Unless otherwise provided in the certificate of incorporation or these bylaws, when one or more directors resign from the Board, effective at a future date, a majority of the directors then in office, including those who have so resigned, shall have power to fill such vacancy or vacancies, the vote thereon to take effect when such resignation or resignations shall become effective.

Unless otherwise provided in the certificate of incorporation or these bylaws or permitted in the specific case by resolution of the Board, and subject to the rights of holders of preferred stock of the Company:

(i) Vacancies and newly created directorships resulting from any increase in the authorized number of directors elected by all of the stockholders having the right to vote as a single class may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director.

(ii) Whenever the holders of any class or classes of stock or series thereof are entitled to elect one or more directors by the provisions of the certificate of incorporation, vacancies and newly created directorships of such class or classes or series may 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.

If at any time, by reason of death or resignation or other cause, the Company should have no directors in office, then any officer or any stockholder or an executor, administrator, trustee or guardian of a stockholder, or other fiduciary entrusted with like responsibility for the person or estate of a stockholder, may call a special meeting of stockholders in accordance with the provisions of the certificate of incorporation or these bylaws, or may apply to the Court of Chancery for a decree summarily ordering an election as provided in Section 211 of the DGCL.

If, at the time of filling any vacancy or any newly created directorship, the directors then in office constitute less than a majority of the whole Board (as constituted immediately prior to any such increase), the Court of Chancery may, upon application of any stockholder or stockholders holding at least 10% of the voting stock at the time outstanding having the right to vote for such directors, summarily order an election to be held to fill any such vacancies or newly created directorships, or to replace the directors chosen by the directors then in office as aforesaid, which election shall be governed by the provisions of Section 211 of the DGCL as far as applicable.

A director elected to fill a vacancy shall be elected for the unexpired term of his or her predecessor in office and until such director's successor is elected and qualified, or until such director's earlier death, resignation or removal.

2.5 Place of Meetings; Meetings by Telephone. The Board may hold meetings, both regular and special, either within or outside the State of Delaware.

Unless otherwise restricted by the certificate of incorporation or these bylaws, members of the Board, or any committee designated by the Board or any subcommittee, may participate in a meeting of the Board, or any such committee or subcommittee, by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and such participation in a meeting shall constitute presence in person at the meeting.

2.6 Conduct of Business. Meetings of the Board shall be presided over by the Chairperson of the Board, if any, or in his or her absence by the Vice Chairperson of the Board, if any, or in the absence of the foregoing persons by a chairperson designated by the Board, or in the absence of such designation by a chairperson chosen at the meeting. The Secretary shall act as secretary of the meeting, but in his or her absence the chairperson of the meeting may appoint any person to act as secretary of the meeting.

2.7 Regular Meetings. Regular meetings of the Board may be held without notice at such time and at such place as shall from time to time be determined by the Board.

2.8 Special Meetings; Notice. Special meetings of the Board for any purpose or purposes may be called at any time by the Chairperson of the Board, the Chief Executive Officer, the President, the Secretary or any two directors; *provided* that the person(s) authorized to call a special meeting of the Board may authorize another person or persons to send notice of such meeting.

Notice of the time and place of special meetings shall be:

- (i) delivered personally by hand, by courier or by telephone;
- (ii) sent by United States first-class mail, postage prepaid; or
- (iii) given by electronic transmission,

directed to each director at that director's address or telephone number, or by means of electronic transmission, as the case may be, as shown on the Company's records.

If the notice is delivered personally by hand, by courier, or by telephone, or given by means of electronic transmission, it shall be delivered, sent or otherwise directed to each director, as applicable, at least 24 hours before the time of the holding of the meeting. If the notice is sent by United States mail, it shall be deposited in the United States mail at least four days before the time of the holding of the meeting. Any oral notice of the time and place of the meeting may be communicated to the director in lieu of written notice if such notice is communicated at least 24 hours before the time of the holding of the meeting. The notice need not specify the place of the meeting (if the meeting is to be held at the Company's principal executive office) nor the purpose of the meeting, to the fullest extent permitted by applicable law.

2.9 Quorum; Voting. At all meetings of the Board, the presence of at least a majority of the directors in office from time to time shall constitute a quorum for the transaction of business; *provided* that in no case shall the presence of less than 1/3 of the total authorized directorships constitute a quorum. If a quorum is not present at any meeting of the Board, then the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present.

The affirmative vote of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board, except as may be otherwise specifically provided by statute, the certificate of incorporation or these bylaws.

If the certificate of incorporation provides that one or more directors shall have more or less than one vote per director on any matter, every reference in these bylaws to a majority or other proportion of the directors shall refer to a majority or other proportion of the votes of the directors.

2.10 Board Action by Consent Without a Meeting. Unless otherwise restricted by the certificate of incorporation or these bylaws, (i) any action required or permitted to be taken at any meeting

of the Board, or of any committee or subcommittee thereof, may be taken without a meeting if all members of the Board or committee or subcommittee, as the case may be, consent thereto in writing or by electronic transmission; and (ii) a consent may be documented, signed and delivered in any manner permitted by Section 116 of the DGCL. Any person (whether or not then a director) may provide, whether through instruction to an agent or otherwise, that a consent to action will be effective at a future time (including a time determined upon the happening of an event), no later than 60 days after such instruction is given or such provision is made and such consent shall be deemed to have been given for purposes of this **section 2.10** at such effective time so long as such person is then a director and did not revoke the consent prior to such time. Any such consent shall be revocable prior to its becoming effective. After an action is taken, the consent or consents relating thereto shall be filed with the minutes of the proceedings of the Board, or the committee or subcommittee thereof, in the same paper or electronic form as the minutes are maintained.

2.11 Fees and Compensation of Directors. Unless otherwise restricted by the certificate of incorporation or these bylaws, the Board shall have the authority to fix the compensation of directors.

2.12 Removal of Directors. Unless otherwise restricted by statute, the certificate of incorporation or these bylaws, any director or the entire Board may be removed, with or without cause, by the holders of a majority of the voting power of the shares then entitled to vote at an election of directors.

No reduction of the authorized number of directors shall have the effect of removing any director prior to the expiration of such director's term of office.

ARTICLE III — COMMITTEES

3.1 Committees of Directors. The Board may designate one or more committees, each committee to consist of one or more of the directors of the Company. The Board may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another member of the Board to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the Board or in these bylaws, shall have and may exercise all the powers and authority of the Board in the management of the business and affairs of the Company, and may authorize the seal of the Company to be affixed to all papers that may require it; but no such committee shall have the power or authority to (i) approve or adopt, or recommend to the stockholders, any action or matter (other than the election or removal of directors) expressly required by the DGCL to be submitted to stockholders for approval or (ii) adopt, amend or repeal any bylaw of the Company.

3.2 Committee Minutes. Each committee and subcommittee shall keep regular minutes of its meetings.

3.3 Meetings and Actions of Committees. A majority of the directors then serving on a committee or subcommittee shall constitute a quorum for the transaction of business by the committee or subcommittee, unless the certificate of incorporation, these bylaws, a resolution of the Board or a resolution of a committee that created the subcommittee requires a greater or lesser number, *provided* that in no case shall a quorum be less than 1/3 of the directors then serving on the committee or subcommittee. The vote of the majority of the members of a committee or subcommittee present at a meeting at which a quorum is present shall be the act of the committee or subcommittee, unless the certificate of incorporation, these bylaws, a resolution of the Board or a resolution of a committee that created the subcommittee requires a

greater number. Unless the Board otherwise specifies, meetings and actions of committees and subcommittees shall otherwise be governed by, and held and taken in accordance with, the provisions of:

- (i) **section 2.5** (Place of Meetings; Meetings by Telephone);
- (ii) **section 2.7** (Regular Meetings);
- (iii) **section 2.8** (Special Meetings; Notice);
- (iv) **section 2.9** (Quorum; Voting);
- (v) **section 2.10** (Board Action by Consent Without a Meeting); and
- (vi) **section 7.4** (Waiver of Notice)

with such changes in the context of those bylaws as are necessary to substitute the committee or subcommittee and its members for the Board and its members. *However:*

- (i) the time and place of regular meetings of committees or subcommittees may be determined either by resolution of the Board or by resolution of the committee or subcommittee;
- (ii) special meetings of committees or subcommittees may also be called by resolution of the Board or the committee or subcommittee; and
- (iii) notice of special meetings of committees and subcommittees shall also be given to all alternate members, as applicable, who shall have the right to attend all meetings of the committee or subcommittee. The Board, or, in the absence of any such action by the Board, the committee or subcommittee, may also adopt other rules for the government of any committee or subcommittee.

Any provision in the certificate of incorporation providing that one or more directors shall have more or less than one vote per director on any matter shall apply to voting in any committee or subcommittee, unless otherwise provided in the certificate of incorporation or these bylaws.

3.4 Subcommittees. Unless otherwise provided in the certificate of incorporation, these bylaws or the resolutions of the Board designating the committee, a committee may create one or more subcommittees, each subcommittee to consist of one or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee.

ARTICLE IV — OFFICERS

4.1 Officers. The officers of the Company shall be a President and a Secretary. The Company may also have, at the discretion of the Board, a Chairperson of the Board, a Vice Chairperson of the Board, a Chief Executive Officer, one or more Vice Presidents, a Chief Financial Officer, a Treasurer, one or more Assistant Treasurers, one or more Assistant Secretaries and any such other officers as may be appointed in accordance with the provisions of these bylaws. Any number of offices may be held by the same person.

4.2 Appointment of Officers. The Board shall appoint the officers of the Company, except such officers as may be appointed in accordance with the provisions of **section 4.3** of these bylaws.

4.3 Delegation of Authority to Appoint Officers. The Board may empower any officer to appoint any other officers as the business of the Company may require.

4.4 Removal and Resignation of Officers. Any officer may be removed, either with or without cause, by the Board or, for the avoidance of doubt, any duly authorized committee or subcommittee thereof or by any officer upon whom such power of removal has been conferred by the Board or, for the avoidance of doubt, any duly authorized committee or subcommittee thereof.

Any officer may resign at any time by giving notice, in writing or by electronic transmission, to the Company. Any resignation shall take effect at the date of the receipt of that notice or at any later time specified in that notice. Unless otherwise specified in the notice of resignation, the acceptance of the resignation shall not be necessary to make it effective. Any resignation is without prejudice to the rights, if any, of the Company under any contract to which the officer is a party.

4.5 Vacancies in Offices. Any vacancy occurring in any office of the Company shall be filled by the Board or as provided in **section 4.3** of these bylaws.

4.6 Representation of Securities of Other Corporations or Entities. Unless otherwise directed by the Board, the Chief Executive Officer or, in the absence of a Chief Executive Officer, the President or any other person authorized by the Board, the Chief Executive Officer or, in the absence of a Chief Executive Officer, the President is authorized to vote, represent and exercise on behalf of the Company all rights incident to any and all shares or other securities or interests in, or issued by, any other entity or entities, and all rights incident to any management authority conferred on the Company in accordance with the governing documents of any entity or entities, standing in the name of the Company, including the right to act by consent in lieu of a meeting. The authority granted herein may be exercised either by such person directly or by any other person authorized to do so by proxy or power of attorney duly executed by such person having the authority.

4.7 Authority and Duties of Officers. Except as otherwise provided in these bylaws, the officers of the Company shall hold office for such period and have such powers and duties in the management of the Company as may be designated from time to time by the Board or, for the avoidance of doubt, any duly authorized committee or subcommittee thereof or by any officer who has been conferred such power of designation and, to the extent not so provided, as generally pertain to such offices, subject to the control of the Board.

ARTICLE V — INDEMNIFICATION

5.1 Indemnification of Directors and Officers in Third Party Proceedings. Subject to the other provisions of this **Article V**, the Company shall indemnify, to the fullest extent permitted by the DGCL, as now or hereinafter in effect, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (a “**Proceeding**”) (other than an action by or in the right of the Company) by reason of the fact that such person is or was a director or officer of the Company, or is or was a director or officer of the Company serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys’ fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with such Proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Company, and, with respect to any criminal action or proceeding, had no reasonable cause to believe such person’s conduct was unlawful. The termination of any Proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which such person reasonably believed to be in or not opposed to the best interests of the Company,

and, with respect to any criminal action or proceeding, had reasonable cause to believe that such person's conduct was unlawful.

5.2 Indemnification of Directors and Officers in Actions by or in the Right of the Company. Subject to the other provisions of this **Article V**, the Company shall indemnify, to the fullest extent permitted by the DGCL, as now or hereinafter in effect, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed Proceeding by or in the right of the Company to procure a judgment in its favor by reason of the fact that such person is or was a director or officer of the Company, or is or was a director or officer of the Company serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection with the defense or settlement of such Proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Company; except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Company unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

5.3 Successful Defense. To the extent that a present or former director or officer (for purposes of this **section 5.3** only, as such term is defined in Section 145(c)(1) of the DGCL) of the Company has been successful on the merits or otherwise in defense of any Proceeding described in **section 5.1** or **section 5.2** of these bylaws, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith. The Company may indemnify any other person who is not a present or former director or officer of the Company against expenses (including attorneys' fees) actually and reasonably incurred by such person to the extent he or she has been successful on the merits or otherwise in defense of any Proceeding described in **section 5.1** or **section 5.2**, or in defense of any claim, issue or matter therein.

5.4 Indemnification of Others. Subject to the other provisions of this **Article V**, the Company shall have power to indemnify its employees and agents, or any other persons, to the extent not prohibited by the DGCL or other applicable law. The Board shall have the power to delegate to any person or persons identified in subsections (1) through (4) of Section 145(d) of the DGCL the determination of whether employees or agents shall be indemnified.

5.5 Advanced Payment of Expenses. Expenses (including attorneys' fees) actually and reasonably incurred by an officer or director of the Company in defending any Proceeding shall be paid by the Company in advance of the final disposition of such Proceeding upon receipt of a written request therefor (together with documentation reasonably evidencing such expenses) and an undertaking by or on behalf of the person to repay such amounts if it shall ultimately be determined that the person is not entitled to be indemnified under this **Article V** or the DGCL. Such expenses (including attorneys' fees) actually and reasonably incurred by former directors and officers or other employees and agents of the Company or by persons serving at the request of the Company as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the Company deems appropriate. The right to advancement of expenses shall not apply to any Proceeding (or any part of any Proceeding) for which indemnity is excluded pursuant to these bylaws, but shall apply to any Proceeding (or any part of any Proceeding) referenced in **section 5.6(ii)** or **5.6(iii)** of these bylaws prior to a determination that the person is not entitled to be indemnified by the Company.

5.6 Limitation on Indemnification. Subject to the requirements in **section 5.3** of these bylaws and the DGCL, the Company shall not be obligated to indemnify any person pursuant to this **Article V** in connection with any Proceeding (or any part of any Proceeding):

(i) for which payment has actually been made to or on behalf of such person under any statute, insurance policy, indemnity provision, vote or otherwise, except with respect to any excess beyond the amount paid;

(ii) for an accounting or disgorgement of profits pursuant to Section 16(b) of the Securities Exchange Act of 1934, as amended, or similar provisions of federal, state or local statutory law or common law, if such person is held liable therefor (including pursuant to any settlement arrangements);

(iii) for any reimbursement of the Company by such person of any bonus or other incentive-based or equity-based compensation or of any profits realized by such person from the sale of securities of the Company, in either case as required under any clawback or compensation recovery policy adopted by the Company, applicable securities exchange and association listing requirements, including, without limitation, those adopted in accordance with Rule 10D-1 under the Securities Exchange Act of 1934, as amended, and/or the Securities Exchange Act of 1934, as amended (including, without limitation, any such reimbursements that arise from an accounting restatement of the Company pursuant to Section 304 of the Sarbanes-Oxley Act of 2002 (the “**Sarbanes-Oxley Act**”), or the payment to the Company of profits arising from the purchase and sale by such person of securities in violation of Section 306 of the Sarbanes-Oxley Act), if such person is held liable therefor (including pursuant to any settlement arrangements);

(iv) initiated by such person, including any Proceeding (or any part of any Proceeding) initiated by such person against the Company or its directors, officers, employees, agents or other indemnitees, unless (a) the Board authorized the Proceeding (or the relevant part of the Proceeding) prior to its initiation, (b) the Company provides the indemnification, in its sole discretion, pursuant to the powers vested in the Company under applicable law, (c) otherwise required to be made under **section 5.7** of these bylaws or (d) otherwise required by applicable law; or

(v) if prohibited by applicable law.

5.7 Determination; Claim. If a claim for indemnification or advancement of expenses under this **Article V** is not paid by the Company or on its behalf within 90 days after receipt by the Company of a written request therefor, the claimant shall be entitled to an adjudication by a court of competent jurisdiction of his or her entitlement to such indemnification or advancement of expenses. To the extent not prohibited by law, the Company shall indemnify such person against all expenses actually and reasonably incurred by such person in connection with any action for indemnification or advancement of expenses from the Company under this **Article V**, to the extent such person is successful in such action. In any such suit, the Company shall, to the fullest extent not prohibited by law, have the burden of proving that the claimant is not entitled to the requested indemnification or advancement of expenses.

5.8 Non-Exclusivity of Rights. The indemnification and advancement of expenses provided by, or granted pursuant to, this **Article V** shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under the certificate of incorporation or any statute, bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person’s official capacity and as to action in another capacity while holding such office. The Company is specifically authorized to enter into individual contracts with any or all of its directors, officers, employees or agents respecting indemnification and advancement of expenses, to the fullest extent not prohibited by the DGCL or other applicable law.

5.9 Insurance. The Company may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Company, or is or was serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the Company would have the power to indemnify such person against such liability under the provisions of the DGCL.

5.10 Survival. The rights to indemnification and advancement of expenses conferred by this **Article V** shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

5.11 Effect of Repeal or Modification. A right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to or repeal or elimination of the certificate of incorporation or these bylaws after the occurrence of the act or omission that is the subject of the Proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

5.12 Certain Definitions. For purposes of this **Article V**, references to the "**Company**" shall include, in addition to the resulting entity, any constituent entity (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, employees or agents, so that any person who is or was a director, officer, employee or agent of such constituent entity, or is or was serving at the request of such constituent entity as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under the provisions of this **Article V** with respect to the resulting or surviving entity as such person would have with respect to such constituent entity if its separate existence had continued. For purposes of this **Article V**, references to "**other enterprises**" shall include employee benefit plans; references to "**finances**" shall include any excise taxes assessed on a person with respect to an employee benefit plan; references to "**serving at the request of the Company**" shall include any service as a director, officer, employee or agent of the Company which imposes duties on, or involves services by, such director, officer, employee or agent with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner such person reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "**not opposed to the best interests of the Company**" as referred to in this **Article V**.

ARTICLE VI — STOCK

6.1 Stock Certificates; Partly Paid Shares. The shares of the Company shall be represented by certificates, *provided* that the Board may provide by resolution or resolutions that some or all of any or all classes or series of its stock shall be uncertificated shares. Any such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the Company. Unless otherwise provided by resolution of the Board, every holder of stock represented by certificates shall be entitled to have a certificate signed by, or in the name of, the Company by any two officers of the Company representing the number of shares registered in certificate form. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate has ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the Company with the same effect as if such person were such officer, transfer agent or registrar at the date of issue. The Company shall not have power to issue a certificate in bearer form.

The Company may issue the whole or any part of its shares as partly paid and subject to call for the remainder of the consideration to be paid therefor. Upon the face or back of each stock certificate issued to represent any such partly paid shares, or upon the books and records of the Company in the case of uncertificated partly paid shares, the total amount of the consideration to be paid therefor and the amount paid thereon shall be stated. Upon the declaration of any dividend on fully paid shares, the Company shall declare a dividend upon partly paid shares of the same class, but only upon the basis of the percentage of the consideration actually paid thereon.

6.2 Special Designation on Certificates. If the Company is authorized to issue more than one class of stock or more than one series of any class, then the powers, designations, preferences and relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights shall be set forth in full or summarized on the face or back of the certificate that the Company shall issue to represent such class or series of stock; *provided* that, except as otherwise provided in Section 202 of the DGCL, in lieu of the foregoing requirements, there may be set forth on the face or back of the certificate that the Company shall issue to represent such class or series of stock, a statement that the Company will furnish without charge to each stockholder who so requests the powers, designations, preferences and relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights. Within a reasonable time after the issuance or transfer of uncertificated stock, the registered owner thereof shall be given a notice, in writing or by electronic transmission, containing the information required to be set forth or stated on certificates pursuant to this **section 6.2** or Sections 156, 202(a), 218(a) or 364 of the DGCL or with respect to this **section 6.2** a statement that the Company will furnish without charge to each stockholder who so requests the powers, designations, preferences and relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights. Except as otherwise expressly provided by law, the rights and obligations of the holders of uncertificated stock and the rights and obligations of the holders of certificates representing stock of the same class and series shall be identical.

6.3 Lost Certificates. Except as provided in this **section 6.3**, no new certificates for shares shall be issued to replace a previously issued certificate unless the latter is surrendered to the Company and cancelled at the same time. The Company may issue a new certificate of stock or uncertificated shares in the place of any certificate theretofore issued by it, alleged to have been lost, stolen or destroyed, and the Company may require the owner of the lost, stolen or destroyed certificate, or such owner's legal representative, to give the Company a bond sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft or destruction of any such certificate or the issuance of such new certificate or uncertificated shares.

6.4 Dividends. The Board, subject to any restrictions contained in the certificate of incorporation or applicable law, may declare and pay dividends upon the shares of the Company's capital stock. Dividends may be paid in cash, in property or in shares of the Company's capital stock, subject to the provisions of the certificate of incorporation.

The Board may set apart out of any of the funds of the Company available for dividends a reserve or reserves for any proper purpose and may abolish any such reserve.

6.5 Stock Transfer Agreements. The Company shall have power to enter into and perform any agreement with any number of stockholders of any one or more classes or series of stock of the Company to restrict the transfer of shares of stock of the Company of any one or more classes or series owned by such stockholders in any manner not prohibited by the DGCL.

6.6 Registered Stockholders. The Company:

(i) shall be entitled to treat the person registered on its books as the owner of any share or shares as the person exclusively entitled to receive dividends, vote, receive notifications and otherwise exercise all the rights and powers of an owner of such share or shares; and

(ii) shall not be bound to recognize any equitable or other claim to or interest in such share or shares on the part of another person, whether or not it shall have express or other notice thereof, except as otherwise provided by the laws of Delaware.

6.7 Transfers. Transfers of record of shares of stock of the Company shall be made only upon its books by the holders thereof, in person or by an attorney duly authorized, and, if such stock is certificated, upon the surrender of a certificate or certificates for a like number of shares, properly endorsed or accompanied by proper evidence of succession, assignation or authority to transfer.

6.8 Market Stand-Off. Each stockholder who at the time of a Direct Listing (as defined below) or Initial Public Offering (as defined below), is not bound by the “Market Stand-Off Agreement” provision in Section [2.11] (or any successor provision thereto) of that certain Investors’ Rights Agreement between the Company and the parties listed on Schedule A thereto, dated as of [____], 2024 (as may be amended and/or restated from time to time), shall not, without the prior written consent of the Company (in connection with a Direct Listing) or the Company and the managing underwriter (in connection with an Initial Public Offering), sell or otherwise transfer, make any short sale of, grant any option for the purchase of, or enter into any hedging or similar transaction with the same economic effect as a sale of, any Common Stock (or other equity securities) of the Company held by such stockholder immediately prior to the Direct Listing or Initial Public Offering, as applicable, (other than those included in the registration) during the period commencing on the date of the effective date of a registration statement for the Company’s Initial Public Offering or Direct Listing filed under the Securities Act of 1933 (as amended, or any similar successor federal statute and the rules and regulations thereunder, all as the same shall be in effect from time to time, the “**Securities Act**”) and ending on the date specified by the Company or the managing underwriter (for an Initial Public Offering) or the Company (for a Direct Listing) (such period not to exceed 180 days); *provided, however*, that the transfer restrictions shall not be applicable to the transfer of any shares to an affiliate of the stockholder, provided that the affiliate agrees in writing to be bound by the restrictions set forth herein. The obligations described in this **section 6.8** shall not apply to (i) a Direct Listing that involves no registration of primary shares for issuance and sale by the Company, (ii) a registration relating solely to employee benefit plans on Form S-1 or Form S-8 or similar forms that may be promulgated in the future, or (iii) a registration relating solely to a transaction on Form S-4 or similar forms that may be promulgated in the future. The Company may impose stop-transfer instructions with respect to the equity securities of the Company subject to the foregoing restriction and may stamp each certificate representing equity securities of the Company subject to the foregoing restriction with the legend set forth in **section 6.9** until the end of such one hundred eighty (180) day (or other) period. Each stockholder subject to the foregoing restrictions agrees to execute a such agreements as may be reasonably requested by the Company or underwriters (in connection with an Initial Public Offering) or the Company (in connection with a Direct Listing) consistent with the provisions of this **section 6.8** or that is necessary to give further effect thereto.

A “**Direct Listing**” is an initial listing of Common Stock (or other equity securities) of the Company on the Nasdaq Stock Market, the New York Stock Exchange or another exchange or marketplace approved by the Board by means of an effective registration statement filed by the Company with the Securities and Exchange Commission, without a related underwritten offering of such Common Stock (or other equity securities).

An “**Initial Public Offering**” is the closing of the Company’s first firm commitment underwritten public offering of the Company’s Common Stock registered under the Securities Act.

6.9 Legend. The certificates representing shares of equity securities of the Company subject to the restrictions set forth in **section 6.8** shall bear on their face the following legend so long as the obligations described in **section 6.8** remain in effect:

“THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE, INCLUDING A LOCK-UP PERIOD IN THE EVENT OF A PUBLIC OFFERING OR DIRECT LISTING, AS SET FORTH IN THE BYLAWS OF THE COMPANY.”

ARTICLE VII — MANNER OF GIVING NOTICE AND WAIVER

7.1 Delivery of Notice; Notice by Electronic Transmission.

(a) Without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders given by the Company under any provision of the DGCL, the certificate of incorporation or these bylaws may be given in writing directed to the stockholder’s mailing address (or by electronic transmission directed to the stockholder’s electronic mail address, as applicable) as it appears on the records of the Company and shall be given (i) if mailed, when the notice is deposited in the U.S. mail, postage prepaid, (ii) if delivered by courier service, the earlier of when the notice is received or left at such stockholder’s address or (iii) if given by electronic mail, when directed to such stockholder’s electronic mail address unless the stockholder has notified the Company in writing or by electronic transmission of an objection to receiving notice by electronic mail or such notice is prohibited by **section 7.1(e)** of these bylaws. A notice by electronic mail must include a prominent legend that the communication is an important notice regarding the Company.

(b) Without limiting the manner by which notice otherwise may be given effectively to stockholders, but subject to **section 7.1(e)** of these bylaws, any notice to stockholders given by the Company under any provision of the DGCL, the certificate of incorporation or these bylaws shall be effective if given by a form of electronic transmission consented to by the stockholder to whom the notice is given. Any such consent shall be revocable by the stockholder by written notice or electronic transmission to the Company. The Company may give a notice by electronic mail in accordance with **section 7.1(a)** of these bylaws without obtaining the consent required by this **section 7.1(b)**.

(c) Notice given pursuant to **section 7.1(b)** of these bylaws shall be deemed given:

(1) if by facsimile telecommunication, when directed to a number at which the stockholder has consented to receive notice;

(2) if by a posting on an electronic network together with separate notice to the stockholder of such specific posting, upon the later of (A) such posting and (B) the giving of such separate notice; and

(3) if by any other form of electronic transmission, when directed to the stockholder.

(d) For purposes of the DGCL, the certificate of incorporation and these bylaws, (i) “**electronic transmission**” means any form of communication, not directly involving the physical

transmission of paper, including the use of, or participation in, one or more electronic networks or databases (including one or more distributed electronic networks or databases), that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process; (ii) “**electronic mail**” means an electronic transmission directed to a unique electronic mail address (which electronic mail shall be deemed to include any files attached thereto and any information hyperlinked to a website if such electronic mail includes the contact information of an officer or agent of the Company who is available to assist with accessing such files and information); and (iii) “**electronic mail address**” means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the “local part” of the address) and a reference to an internet domain (commonly referred to as the “domain part” of the address), whether or not displayed, to which electronic mail can be sent or delivered.

(e) Notwithstanding the foregoing, a notice may not be given by an electronic transmission from and after the time that (i) the Company is unable to deliver by such electronic transmission two consecutive notices given by the Company and (ii) such inability becomes known to the Secretary or an Assistant Secretary of the Company or to the transfer agent, or other person responsible for the giving of notice; *provided, however*, the inadvertent failure to discover such inability shall not invalidate any meeting or other action.

(f) An affidavit of the Secretary or an Assistant Secretary or of the transfer agent or other agent of the Company that notice has been given shall, in the absence of fraud, be *prima facie* evidence of the facts stated therein.

(g) No provision of this **section 7.1**, except for **subsections 7.1(a)(i), 7.1(d)(ii) and 7.1(d)(iii)**, shall apply to Sections 164, 296, 311, 312 or 324 of the DGCL.

7.2 Notice to Stockholders Sharing an Address. Except as otherwise prohibited under the DGCL, without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders given by the Company under the provisions of the DGCL, the certificate of incorporation or these bylaws shall be effective if given by a single written notice to stockholders who share an address if consented to by the stockholders at that address to whom such notice is given. Any such consent shall be revocable by the stockholder by written notice to the Company. Any stockholder who fails to object in writing to the Company, within 60 days of having been given written notice by the Company of its intention to send the single notice, shall be deemed to have consented to receiving such single written notice.

7.3 Notice to Person with Whom Communication is Unlawful. Whenever notice is required to be given, under the DGCL, the certificate of incorporation or these bylaws, to any person with whom communication is unlawful, the giving of such notice to such person shall not be required and there shall be no duty to apply to any governmental authority or agency for a license or permit to give such notice to such person. Any action or meeting which shall be taken or held without notice to any such person with whom communication is unlawful shall have the same force and effect as if such notice had been duly given. In the event that the action taken by the Company is such as to require the filing of a certificate under the DGCL, the certificate shall state, if such is the fact and if notice is required, that notice was given to all persons entitled to receive notice except such persons with whom communication is unlawful.

7.4 Waiver of Notice. Whenever notice is required to be given under any provision of the DGCL, the certificate of incorporation or these bylaws, a written waiver, signed by the person entitled to notice, or a waiver by electronic transmission by the person entitled to notice, whether before or after the time of the event for which notice is to be given, shall be deemed equivalent to notice. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a

meeting for the express purpose of objecting at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the stockholders need be specified in any written waiver of notice or any waiver by electronic transmission unless so required by the certificate of incorporation or these bylaws.

ARTICLE VIII — GENERAL MATTERS

8.1 Fiscal Year. The fiscal year of the Company shall be fixed by resolution of the Board and may be changed by the Board.

8.2 Seal. The Company may adopt a corporate seal, which shall be in such form as may be approved from time to time by the Board. The Company may use the corporate seal by causing it or a facsimile thereof to be impressed or affixed or in any other manner reproduced.

8.3 Annual Report. The Company shall cause an annual report to be sent to the stockholders of the Company to the extent required by applicable law. If and so long as there are fewer than 100 holders of record of the Company's shares, the requirement of sending an annual report to the stockholders of the Company is expressly waived (to the extent permitted under applicable law).

8.4 Construction; Definitions. Unless the context requires otherwise, the general provisions, rules of construction and definitions in the DGCL shall govern the construction of these bylaws. Without limiting the generality of this provision, the singular number includes the plural, the plural number includes the singular, and the term "**person**" includes a corporation, any other entity and a natural person. Any reference in these bylaws to a section of the DGCL shall be deemed to refer to such section as amended from time to time and any successor provisions thereto.

ARTICLE IX— AMENDMENTS

These bylaws may be adopted, amended or repealed by the stockholders entitled to vote. However, the Company may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors. The fact that such power has been so conferred upon the directors shall not divest the stockholders of the power, nor limit their power to adopt, amend or repeal bylaws.

A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the Board.

Exhibit 3

ProSomnus Sleep Technologies, Inc. Voting Agreement

**PROSOMNUS SLEEP TECHNOLOGIES, INC.
VOTING AGREEMENT**

THIS VOTING AGREEMENT (this “**Agreement**”) is made as of [_____], 2024 by and among ProSomnus Sleep Technologies, Inc., a Delaware corporation (the “**Company**”), the Investors (as defined below).

RECITALS

WHEREAS, concurrently with the execution of this Agreement, the Company and the Investors are entering into a Common Stock Purchase Agreement (the “**Purchase Agreement**”) providing for the sale of shares of the Common Stock, par value \$0.0001 (the “**Common Stock**”), and in connection with that agreement the parties desire to provide the Investors with the right, among other rights, to designate the election of certain members of the board of directors of the Company (the “**Board**”) in accordance with the terms of this Agreement.

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 certain matters.

NOW, THEREFORE, the parties agree as follows:

1. Voting Provisions Regarding the Board.

1.1 Definitions. For purposes of this Agreement:

(a) “**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.

(b) “**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.

(c) “**Investors’ Rights Agreement**” means that certain Investors’ Rights Agreement dated [_____], 2024 between the Company and the other parties thereto, as the same may be amended and/or restated from time to time.

(d) “**Management Incentive Plan**” means the Company’s 2024 Equity Incentive Plan (as may be amended and/or restated from time to time) which shall be consistent in all respects with the terms contained in the Company’s Restructuring Support Agreement in the form provided to the Investors prior to the Closing (as defined in the Purchase Agreement).

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

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

(g) “**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 are prohibited pursuant to applicable Sanctions.

(h) “**Sanctions**” means applicable laws and regulations pertaining to trade and economic sanctions administered by the United States, European Union, or United Kingdom.

(i) “**Shares**” means and includes 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, 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.

(j) “**Sponsoring Noteholders**” means SMC, Crossing Bridge, and Cetus (each as defined below).

(k) “**Stockholders**” means the Investors, and each other stockholder of the Company that becomes party to this Agreement that is not an Investor (which other stockholders shall be set forth on **Schedule B** to this Agreement).

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

1.2 **Board Composition.** Each Stockholder agrees to vote, or cause to be voted, all Shares owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that at each annual or special meeting of stockholders at which an election of directors is held or pursuant to any written consent of the stockholders, subject to Section 5, the following persons shall be elected to the Board:

(a) one person designated from time to time by Masters Special Situations, LLC (“**MSS**”), for so long as MSS and/or its Affiliates (i) continue to beneficially own an aggregate of at least 15% of the issued and outstanding shares of Common Stock, and at least 1,840,000 shares of Common Stock purchased pursuant to the Purchase Agreement, 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 Anthony Raab;

(b) one person designated from time to time by SMC Holdings II, LP (“**SMC**”), in consultation with the other Sponsoring Noteholders, for so long as SMC and its Affiliates (i) continue to beneficially own an aggregate of at least 15% of the issued and outstanding shares of

Common Stock, and at least 1,556,965 shares of Common 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 Jason Orchard;

(c) one person designated from time to time by CrossingBridge Low Duration High Yield Fund (“**Crossing Bridge**”), in consultation with the other Sponsoring Noteholders, for so long as Crossing Bridge and its Affiliates (i) continue to beneficially own an aggregate of at least 15% of the issued and outstanding shares of Common Stock, and at least 1,569,562 shares of Common 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 Bruce Falbaum;

(d) one person designated from time to time by Cetus Capital VI, L.P. (“**Cetus**”), in consultation with the other Sponsoring Noteholders, for so long as Cetus and its Affiliates (i) continue to beneficially own an aggregate of at least 15% of the issued and outstanding shares of Common Stock, and at least 1,906,292 shares of Common 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 Benjamin Roei Gurvitz; and

(e) the Company’s Chief Executive Officer (the “**CEO Director**”), who as of the date of this Agreement is Len Liptak, *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.

For clarity, to the extent that the election of a director pursuant to any of the foregoing clauses above in this Section 1.2 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.

1.3 **Failure to Designate a Director Candidate; Vacancies.**

(a) 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.

(b) Any vacancies created by the resignation, removal or death of a director elected, appointed or serving pursuant to Section 1.2, or reelected pursuant to Section 1.3(a), shall be filled in accordance with the provisions of this Section 1.

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

(a) a director elected, appointed 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 no longer entitled or eligible to occupy such Board seat pursuant to the applicable conditions of Section 1.2; or (iv) either the Director or the Person or entity entitled to designate the Director is a Sanctioned Party; and

(b) no director elected, appointed 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.

1.5 **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 (a) any Person(s) entitled to designate a director or (b) the holders of the requisite number of shares of capital stock entitled to designate or approve a director candidate pursuant to Section 1.2.

1.6 **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.

2. **Vote to Approve Share Reserve Under the Management Incentive Plan.** 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 (i) authorize and approve the reservation of at least that number of shares of Common Stock for issuance under the Management Incentive Plan to ensure that the Management Incentive Plan has an available pool equal to 10% of the Company's fully diluted capitalization as of the date of the Closing (as defined in the Purchase Agreement) (the "**Post Closing MIP Pool**"), and (ii) if an insufficient number of authorized shares of Common Stock available for issuance to give effect to the Post Closing MIP Pool, to amend the Company's then-current certificate of incorporation to ensure that a sufficient number of shares of Common Stock are authorized to and available for issuance to give effect to the Post Closing MIP Pool.

3. **Reserved.**

4. **Remedies.**

4.1 **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 increasing the number of authorized shares of Common Stock as contemplated by Section 2, upon the written request of any holder of Common Stock.

4.2 **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 Chief Executive Officer of the Company and the Chairperson of the Board (each, a "**Proxyholder**"), and each of them, with full power of substitution, with respect to the matters set forth herein, including, without limitation, election of persons as members of the Board in accordance with Section 1 hereto and votes with

respect to the matters described in Section 2 hereof, 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 Section 1 of this Agreement or the increase of authorized shares in accordance with the terms and provisions of Section 2 of this Agreement or to take any action necessary to effect Sections 1 and 2, respectively, of 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.

4.3 **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.

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

5. **"Bad Actor" and Sanctioned Party Matters.**

5.1 **Definitions.** For purposes of this Agreement:

(a) **"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).

(b) **"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.

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

(d) **“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.

5.2 **Representations.**

(a) Each Person with the right to designate or participate in the designation of a director pursuant to this Agreement hereby represents and warrants 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. 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.

(b) 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.

5.3 **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 any director designee designated by such Person, except, if applicable, for a Disqualification Event as to which Rule 506(d)(2)(ii) or (iii) or (d)(3) is applicable.

6. **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 (i) first underwritten public offering of its Common Stock (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 (ii) initial listing of its Common Stock (or other equity securities of the Company) on the Nasdaq Stock Market, the New York Stock Exchange or another exchange or marketplace approved by the Board by means of an effective registration statement filed by the Company with the Securities and Exchange Commission, without a related underwritten offering of such Common Stock (or

other equity securities); (b) the consummation of a Deemed Liquidation Event (as defined in the Investors' Rights Agreement); or (c) termination of this Agreement in accordance with Section 7.8 below.

7. Miscellaneous.

7.1 Additional Parties. Notwithstanding anything to the contrary contained herein, if the Company issues additional shares of Common Stock after the date hereof (i) pursuant to the Purchase Agreement or (ii) to persons who, following such issuance would hold shares constituting 5% 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 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.

7.2 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 to 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 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 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.

7.3 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 1.2(a) and Section 1.2(b) are transferable to an assignee of a party acquiring at least 15% of the total issued and outstanding shares of Common Stock of the Company from such assigning party and otherwise are nontransferable, and the right to designate a member of the Board in Section 1.2(c) is nontransferable (and, in either case, 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. 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.

7.4 Governing Law. This Agreement shall be governed by the internal law of the State of Delaware, 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.

7.5 **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.

7.6 **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.

7.7 **Notices.**

(a) *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 Wilson Sonsini Goodrich & Rosati, P.C., 650 Page Mill Road, Palo Alto, CA 94304; Attention: Andrew D. Hoffman.

(b) *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. 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.

7.8 **Consent Required to Amend, Modify, Terminate or Waive.** 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; and (b) the holders of a majority of the shares of Common 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 calculating the percentages set forth in this section. Notwithstanding the foregoing:

(a) 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 without the written consent of such Investor unless such amendment, modification, termination or waiver applies to all Investors, as the case may be, in the same fashion;

(b) the provisions of Section 1.2(a), 1.3 (as it relates to MSS), 1.4(as it relates to MSS), this Section 7.8(b) and any other clauses applicable to the MSS' right to elect and/or remove

directors may not be amended, modified, terminated or waived without the written consent of MMS, in each case for so long as MMS continues to have rights pursuant to Section 1.2(a);

(c) the provisions of Sections 1.1(j) (as it relates to SMC), 1.2(b), 1.3 (as it relates to SMC), 1.4 (as it relates to SMC), this Section 7.8(c) and any other clauses applicable to SMC's right to elect and/or remove directors may not be amended, modified, terminated or waived without the written consent of SMC for so long as SMC continues to have rights pursuant to the provisions of Section 1.2(b);

(d) the provisions of Sections 1.1(j) (as it relates to Crossing Bridge), 1.2(c), 1.3 (as it relates to Crossing Bridge), 1.4 (as it relates to Crossing Bridge), this Section 7.8(d) and any other clauses applicable to Crossing Bridge's right to elect and/or remove directors may not be amended, modified, terminated or waived without the written consent of Crossing Bridge for so long as Crossing Bridge continues to have rights pursuant to the provisions of Section 1.2(c);

(e) the provisions of Sections 1.1(j) (as it relates to Cetus), 1.2(d), 1.3 (as it relates to Cetus), 1.4 (as it relates to Cetus), this Section 7.8(e) and any other clauses applicable to Cetus' right to elect and/or remove directors may not be amended, modified, terminated or waived without the written consent of Cetus for so long as Cetus continues to have rights pursuant to the provisions of Section 1.2(d);

(f) 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

(g) 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.

7.9 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.

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

7.11 **Entire Agreement.** This Agreement (including the Exhibits and Schedules hereto), together with the Restated Certificate and other Transaction Agreements (as defined in the Purchase Agreement), 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 is expressly canceled.

7.12 **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.

7.13 **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.

7.14 **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.

7.15 **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.

7.16 **Dispute Resolution.**

(a) The parties (i) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of Delaware and to the jurisdiction of the United States District Court for the District of Delaware for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (ii) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of Delaware or the United States District Court for the District of

Delaware, and (iii) 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.

(b) **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.

7.17 **Costs of Enforcement.** Each party will bear its own costs in respect of any disputes arising under this Agreement.

7.18 **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.

7.19 **Exercise of Statutory Authority and Duties of the Board.** To the extent any of the provisions in this Agreement (that are not otherwise sufficiently addressed in the Restated Certificate) constitute (individually or in combination) governance restrictions that would otherwise invalidly constrain the authority of the Board in a manner that violates Section 141(a) or 141(c) of the DGCL, the Company's obligations under those provisions will be subject to the exercise by the Board of its statutory authority under the DGCL and its fiduciary duties.

(signature page follows)

The parties have executed this Voting Agreement as of the date first written above.

PROSOMNUS SLEEP TECHNOLOGIES, INC.

(Signature)

(Print name)

(Print title)

The parties have executed this Voting Agreement as of the date first written above.

KEY HOLDER

(Signature)

(Print name)

The parties have executed this Voting Agreement as of the date first written above.

INVESTOR

(Print **Investor** name)

(Signature)

(Print name of **signatory**, if signing for an entity)

(Print title of **signatory**, if signing for an entity)

SCHEDULE A

INVESTORS

Masters Special Situations, LLC

[*address*]

[*phone*]

[*email*]

[*counsel cc, if any*]

Cetus Capital VI, L.P.

[*address*]

[*phone*]

[*email*]

[*counsel cc, if any*]

SMC Holdings II, LP

[*address*]

[*phone*]

[*email*]

[*counsel cc, if any*]

SCHEDULE B

STOCKHOLDERS NOT OTHERWISE INVESTORS

[*name*]

[*address*]

[*phone*]

[*email*]

Exhibit 4

ProSomnus Sleep Technologies, Inc. Investors' Rights Agreement

PROSOMNUS SLEEP TECHNOLOGIES, INC.

INVESTORS' RIGHTS AGREEMENT

THIS INVESTORS' RIGHTS AGREEMENT (this "**Agreement**"), is made as of [____], 2024, by and among ProSomnus Sleep Technologies, Inc., a Delaware corporation (the "**Company**") and the Investors (as defined below).

RECITALS

WHEREAS, the Company and the Investors are parties to that certain Common Stock Purchase Agreement of even date herewith (as may be amended and/or restated from time to time, the "**Purchase Agreement**"); and

WHEREAS, in order to induce the Company to enter into the Purchase Agreement and to induce the Investors to invest funds in the Company pursuant to the Purchase Agreement, the Investors and the Company hereby agree that this Agreement shall govern the rights of the Investors to cause the Company to register shares of Common Stock issuable to the Investors, to receive certain information from the Company, and to participate in future equity offerings by the Company, and shall govern certain other matters as set forth in this Agreement;

NOW, THEREFORE, the parties agree as follows:

1. **Definitions.** For purposes of this Agreement:

1.1 **"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 adviser of, or shares the same management company or investment adviser with, such Person.

1.2 **"Approved Annual Budget"** means an annual budget and business plan for the next fiscal year (the "**Annual Budget**"), as may be revised by, and as approved by, the Board of Directors.

1.3 **"Board of Directors"** means the board of directors of the Company.

1.4 **"Certificate of Incorporation"** means the Company's Amended and Restated Certificate of Incorporation, as amended and/or restated from time to time.

1.5 **"Common Stock"** means shares of the Company's common stock, par value \$0.00001 per share.

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

1.7 **"Competitor"** means a Person engaged, directly or indirectly (including through any partnership, limited liability company, corporation, joint venture or similar arrangement (whether now existing or formed hereafter)), in the business of the Company, but shall not include any financial

investment firm or collective investment vehicle that, together with its Affiliates, holds less than 20% of the outstanding equity of any Competitor and does not, nor do any of its Affiliates, have a right to designate any members of the board of directors of any Competitor.

1.8 **“Convertible Securities”** means any evidences of indebtedness, shares or other securities directly or indirectly convertible into or exchangeable for Common Stock, but excluding Options.

1.9 **“CTA”** means the Corporate Transparency Act, 31 U.S.C § 5336, and all rules and regulations promulgated thereunder, as each may be amended or replaced from time to time.

1.10 **“Damages”** means any loss, damage, claim or liability (joint or several) to which a party hereto may become subject under the Securities Act, the Exchange Act, or other federal or state law, insofar as such loss, damage, claim or liability (or any action in respect thereof) arises out of or is based upon: (i) any untrue statement or alleged untrue statement of a material fact contained in any registration statement of the Company, including any preliminary prospectus or final prospectus contained therein or any amendments or supplements thereto; (ii) an omission or alleged omission to state therein a material fact required to be stated therein, or necessary to make the statements therein not misleading; or (iii) any violation or alleged violation by the indemnifying party (or any of its agents or Affiliates) of the Securities Act, the Exchange Act, any state securities law, or any rule or regulation promulgated under the Securities Act, the Exchange Act, or any state securities law.

1.11 **“Deemed Liquidation Event”** means (a) a merger, consolidation, statutory conversion, transfer, domestication, or continuance in which (i) the Company is a constituent party or (ii) a subsidiary of the Company is a constituent party and the Company issues shares of its capital stock pursuant to such merger, consolidation, statutory conversion, transfer, domestication, or continuance, except any such merger, consolidation, statutory conversion, transfer, domestication, or continuance involving the Company or a subsidiary in which the shares of capital stock of the Company outstanding immediately prior to such merger, consolidation, statutory conversion, transfer, domestication, or continuance continue to represent, or are converted into or exchanged for shares of capital stock or other equity interests that represent, immediately following such merger, consolidation, statutory conversion, transfer, domestication, or continuance, at least a majority, by voting power, of the capital stock or other equity interests of (1) the surviving or resulting corporation or entity; or (2) if the surviving or resulting corporation or entity is a wholly owned subsidiary of another corporation or entity immediately following such merger, consolidation, statutory conversion, transfer, domestication, or continuance, the parent corporation or entity of such surviving or resulting corporation or entity; or (b) (i) the sale, lease, transfer, exclusive license or other disposition, in a single transaction or series of related transactions, by the Company or any subsidiary of the Company of all or substantially all the assets of the Company and its subsidiaries taken as a whole, or (ii) the sale or disposition (whether by merger, consolidation, statutory conversion, trans-fer, domestication, continuance or otherwise, and whether in a single transaction or a series of related transactions) of one or more subsidiaries of the Company if substantially all of the assets of the Company and its subsidiaries taken as a whole are held by such subsidiary or subsidiaries, except where such sale, lease, transfer, exclusive license or other disposition is to a wholly owned subsidiary of the Company.

1.12 **“Derivative Securities”** means any securities or rights convertible into, or exercisable or exchangeable for (in each case, directly or indirectly), Common Stock, including options and warrants.

1.13 **“Direct Listing”** means the initial listing of the Common Stock (or other equity securities of the Company) on the Nasdaq Stock Market, the New York Stock Exchange or another exchange or marketplace approved by the Board of Directors by means of an effective registration statement

filed by the Company with the SEC, without a related underwritten offering of such Common Stock (or other equity securities).

1.14 “**Exchange Act**” means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

1.15 “**Excluded Registration**” means (i) a registration relating to the sale or grant of securities to employees of the Company or a subsidiary pursuant to a stock option, stock purchase, equity incentive or similar plan; (ii) a registration relating to an SEC Rule 145 transaction; (iii) a registration on any form that does not include substantially the same information as would be required to be included in a registration statement covering the sale of the Registrable Securities; or (iv) a registration in which the only Common Stock being registered is Common Stock issuable upon conversion of debt securities that are also being registered.

1.16 “**Exempted Securities**” means:

(a) shares of Common Stock, Options or Convertible Securities issued by reason of a dividend, stock split, split up or other distribution on shares of Common Stock;

(b) shares of Common Stock, Options or Convertible Securities issued to banks, equipment lessors or other financial institutions, or to real property lessors, pursuant to a debt financing, equipment leasing or real property leasing transaction approved (A) by the Board of Directors, and (B) if required by Article Fourth, Part A, Section 1.2 of the Certificate of Incorporation or any successor provision thereto (the “**Protective Provisions**”), by the Major Investors;

(c) shares of Common Stock or Options issued to employees or directors of, or consultants or advisors to, the Company or any of its subsidiaries pursuant to (i) the Management Incentive Plan (as defined in the Voting Agreement) or (ii) any other plan, agreement or arrangement approved (A) by the Board of Directors, and (B) if required by the Protective Provisions, by the Major Investors;

(d) shares of Common Stock or Convertible Securities actually issued upon the exercise of Options or shares of Common Stock actually issued upon the conversion or exchange of Convertible Securities, in each case provided such issuance is pursuant to the terms of such Option or Convertible Security;

(e) shares of Common Stock, Options or Convertible Securities issued to suppliers or third party service providers in connection with the provision of goods or services pursuant to transactions approved (A) by the Board of Directors, and (B) if required by the Protective Provisions, by the Major Investors;

(f) shares of Common Stock, Options or Convertible Securities issued as acquisition consideration pursuant to the acquisition of another corporation by the Company by merger, purchase of substantially all of the assets or other reorganization or to a joint venture agreement, provided that such issuances are approved (A) by the Board of Directors, and (B) if required by the Protective Provisions, by the Major Investors;

(g) shares of Common Stock issued in connection with an IPO; and

(h) shares of Common Stock, Options or Convertible Securities issued in connection with sponsored research, collaboration, technology license, development, OEM, marketing or

other similar agreements or strategic partnerships approved (A) by the Board of Directors, and (B) if required by the Protective Provisions, by the Major Investors.

1.17 **“FinCEN”** means the Financial Crimes Enforcement Network, a bureau of the U.S. Department of the Treasury.

1.18 **“FOIA Party”** means a Person that, in the reasonable determination of the Board of Directors, may be subject to, and thereby required to disclose non-public information furnished by or relating to the Company under, the Freedom of Information Act, 5 U.S.C. 552 (**“FOIA”**), any state public records access law, any state or other jurisdiction’s laws similar in intent or effect to FOIA, or any other similar statutory or regulatory requirement.

1.19 **“Form S-1”** means such form under the Securities Act as in effect on the date hereof or any successor registration form under the Securities Act subsequently adopted by the SEC.

1.20 **“Form S-3”** means such form under the Securities Act as in effect on the date hereof or any registration form under the Securities Act subsequently adopted by the SEC that permits forward incorporation of substantial information by reference to other documents filed by the Company with the SEC.

1.21 **“GAAP”** means generally accepted accounting principles in the United States as in effect from time to time.

1.22 **“Holder”** means any holder of Registrable Securities who is a party to this Agreement.

1.23 **“Immediate Family Member”** means a child, stepchild, grandchild, parent, stepparent, grandparent, spouse, life partner or similar statutorily-recognized domestic partner, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships, of a natural person referred to herein.

1.24 **“Initiating Holders”** means, collectively, Holders who properly initiate a registration request under this Agreement.

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

1.26 **“Investors”** means the persons named on **Schedule A** hereto, each person to whom the rights of an Investor are assigned pursuant to Section 7.1, and each person who hereafter becomes a party to this Agreement pursuant to Section 7.9.

1.27 **“IPO”** means the Company’s first underwritten public offering of its Common Stock under the Securities Act.

1.28 **“Major Investor”** means any Investor that, individually or together with such Investor’s Affiliates, holds at least 6,271,626 shares of Registrable Securities (as adjusted for any stock split, stock dividend, combination, or other recapitalization or reclassification effected after the date hereof).

1.29 **“New Securities”** means, collectively, equity securities of the Company, whether or not currently authorized, as well as rights, options, or warrants to purchase such equity securities, or

securities of any type whatsoever that are, or may become, convertible or exchangeable into or exercisable for such equity securities.

1.30 “**Option**” means any rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock or Convertible Securities.

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

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

1.33 “**Proposed Transfer Notice**” means written notice from an Investor setting forth the terms and conditions of a Proposed Investor Transfer.

1.34 “**Prospective Transferee**” means any Person to whom an Investor proposes to make a Proposed Investor Transfer.

1.35 “**Registrable Securities**” means (i) any Common Stock, or any Common Stock issued or issuable (directly or indirectly) upon conversion and/or exercise of any other securities of the Company, held by the Investors from time to time; and (ii) any Common Stock issued as (or issuable upon the conversion or exercise of any warrant, right, or other security that is issued as) a dividend or other distribution with respect to, or in exchange for or in replacement of, the shares referenced in clauses (i) above; excluding in all cases (other than the restrictions on transfer and legend requirements in Section 2.12), however, any Registrable Securities sold by a Person in a transaction in which the applicable rights under this Agreement are not assigned pursuant to Section 7.1, and excluding for purposes of Section 2 any shares for which registration rights have terminated pursuant to Section 2.13.

1.36 “**Registrable Securities then outstanding**” means the number of shares determined by adding the number of shares of outstanding Common Stock that are Registrable Securities and the number of shares of Common Stock issuable (directly or indirectly) pursuant to then exercisable and/or convertible securities that are Registrable Securities.

1.37 “**Restricted Securities**” means the securities of the Company required to be notated with the legend set forth in Section 2.12(b) hereof.

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

1.39 “**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 are prohibited pursuant to applicable Sanctions.

1.40 “**Sanctions**” means applicable laws and regulations pertaining to trade and economic sanctions administered by the United States, European Union, or United Kingdom.

1.41 “**SEC**” means the Securities and Exchange Commission.

1.42 “**SEC Rule 144**” means Rule 144 promulgated by the SEC under the Securities Act.

1.43 “**SEC Rule 145**” means Rule 145 promulgated by the SEC under the Securities Act.

1.44 “**Securities Act**” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

1.45 “**Selling Expenses**” means all underwriting discounts, selling commissions, and stock transfer taxes applicable to the sale of Registrable Securities, and fees and disbursements of counsel for any Holder, except for the fees and disbursements of the Selling Holder Counsel borne and paid by the Company as provided in Section 2.6.

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

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

1.48 “**Transfer Stock**” means Registrable Securities then outstanding owned by an Investor, or issued to an Investor after the date hereof (including, without limitation, in connection with any stock split, stock dividend, recapitalization, reorganization, or the like).

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

2. **Registration Rights.** The Company covenants and agrees as follows:

2.1 **Demand Registration.**

(a) *Form S-1 Demand.* If at any time after 180 days after the effective date of the registration statement for the IPO or Direct Listing, as applicable, the Company receives a request from Holders of at least 50% of the Registrable Securities then outstanding that the Company file a Form S-1 registration statement with respect to at least 40% of the Registrable Securities then outstanding, then the Company shall: (x) within ten days after the date such request is given, give notice thereof (the “**Demand Notice**”) to all Holders other than the Initiating Holders; and (y) as soon as practicable, and in any event

within 60 days after the date such request is given by the Initiating Holders, file a Form S-1 registration statement under the Securities Act covering all Registrable Securities that the Initiating Holders requested to be registered and any additional Registrable Securities requested to be included in such registration by any other Holders, as specified by notice given by each such Holder to the Company within 20 days of the date the Demand Notice is given, and in each case, subject to the limitations of Sections 2.1(c) and 2.3.

(b) *Form S-3 Demand.* If at any time when it is eligible to use a Form S-3 registration statement, the Company receives a request from Holders of at least 20% of the Registrable Securities then outstanding that the Company file a Form S-3 registration statement with respect to outstanding Registrable Securities of such Holders having an anticipated aggregate offering price, net of Selling Expenses, of at least \$5,000,000, then the Company shall (i) within ten days after the date such request is given, give a Demand Notice to all Holders other than the Initiating Holders; and (ii) as soon as practicable, and in any event within 45 days after the date such request is given by the Initiating Holders, file a Form S-3 registration statement under the Securities Act covering all Registrable Securities requested to be included in such registration by any other Holders, as specified by notice given by each such Holder to the Company within 20 days of the date the Demand Notice is given, and in each case, subject to the limitations of Sections 2.1(c) and 2.3.

(c) Notwithstanding the foregoing obligations, if the Company furnishes to Holders requesting a registration pursuant to this Section 2.1 a certificate signed by the Company's chief executive officer stating that in the good faith judgment of the Board of Directors it would be materially detrimental to the Company for such registration statement to either become effective or remain effective for as long as such registration statement otherwise would be required to remain effective, because such action would (i) materially interfere with a significant acquisition, corporate reorganization, or other similar transaction involving the Company; (ii) require premature disclosure of material information that the Company has a bona fide business purpose for preserving as confidential; or (iii) render the Company unable to comply with requirements under the Securities Act or Exchange Act, then the Company shall have the right to defer taking action with respect to such filing, and any time periods with respect to filing or effectiveness thereof shall be tolled correspondingly, for a period of not more than 120 days after the request of the Initiating Holders is given; *provided, however*, that the Company may not invoke this right more than once in any 12-month period; and *provided further* that the Company shall not register any securities for its own account or that of any other stockholder during such 120-day period other than an Excluded Registration.

(d) The Company shall not be obligated to effect, or to take any action to effect, any registration pursuant to Section 2.1(a), (i) during the period that is 60 days before the Company's good faith estimate of the date of filing of, and ending on a date that is 180 days after the effective date of, a Company-initiated registration, *provided* that the Company is actively employing in good faith commercially reasonable efforts to cause such registration statement to become effective; (ii) after the Company has effected two registrations pursuant to Section 2.1(a); or (iii) if the Initiating Holders propose to dispose of shares of Registrable Securities that may be immediately registered on Form S-3 pursuant to a request made pursuant to Section 2.1(b). The Company shall not be obligated to effect, or to take any action to effect, any registration pursuant to Section 2.1(b), (i) during the period that is 30 days before the Company's good faith estimate of the date of filing of, and ending on a date that is 90 days after the effective date of, a Company-initiated registration, *provided* that the Company is actively employing in good faith commercially reasonable efforts to cause such registration statement to become effective; or (ii) if the Company has effected two registrations pursuant to Section 2.1(b) within the 12-month period immediately preceding the date of such request. A registration shall not be counted as "effected" for purposes of this Section 2.1(d) until such time as the applicable registration statement has been declared effective by the SEC, unless the Initiating Holders withdraw their request for such registration, elect not to pay the registration expenses therefor, and forfeit their right to one demand registration statement pursuant to

Section 2.6, in which case such withdrawn registration statement shall be counted as “effected” for purposes of this Section 2.1(d); *provided*, that if such withdrawal is during a period the Company has deferred taking action pursuant to Section 2.1(c), then the Initiating Holders may withdraw their request for registration and such registration will not be counted as “effected” for purposes of this Section 2.1(d).

2.2 Company Registration. If the Company proposes to register (including for this purpose a registration effected by the Company for stockholders other than the Holders) any of its Common Stock under the Securities Act in connection with the public offering of such securities solely for cash (other than in an Excluded Registration, a registration pursuant to Section 2.1, an IPO or a Direct Listing), the Company shall, at such time, promptly give each Holder notice of such registration. Upon the request of each Holder given within 20 days after such notice is given by the Company, the Company shall, subject to the provisions of Section 2.3, cause to be registered all of the Registrable Securities that each such Holder has requested to be included in such registration. The Company shall have the right to terminate or withdraw any registration initiated by it under this Section 2.2 before the effective date of such registration, whether or not any Holder has elected to include Registrable Securities in such registration. The expenses (other than Selling Expenses) of such withdrawn registration shall be borne by the Company in accordance with Section 2.6.

2.3 Underwriting Requirements.

(a) If, pursuant to Section 2.1, the Initiating Holders intend to distribute the Registrable Securities covered by their request by means of an underwriting, they shall so advise the Company as a part of their request made pursuant to Section 2.1, and the Company shall include such information in the Demand Notice. The underwriter(s) will be selected by the Board of Directors and shall be reasonably acceptable to a majority in interest of the Initiating Holders. In such event, the right of any Holder to include such Holder’s Registrable Securities in such registration shall be conditioned upon such Holder’s participation in such underwriting and the inclusion of such Holder’s Registrable Securities in the underwriting to the extent provided herein. All Holders proposing to distribute their securities through such underwriting shall (together with the Company as provided in Section 2.4(e)) enter into an underwriting agreement in customary form with the underwriter(s) selected for such underwriting; *provided*, however, that no Holder (or any of their assignees) shall be required to make any representations, warranties or indemnities except as they relate to such Holder’s ownership of shares and authority to enter into the underwriting agreement and to such Holder’s intended method of distribution, and the liability of such Holder shall be several and not joint, and limited to an amount equal to the net proceeds from the offering received by such Holder. Notwithstanding any other provision of this Section 2.3, if the underwriter(s) advise(s) the Initiating Holders in writing that marketing factors require a limitation on the number of shares to be underwritten, then the Initiating Holders shall so advise all Holders of Registrable Securities that otherwise would be underwritten pursuant hereto, and the number of Registrable Securities that may be included in the underwriting shall be allocated among such Holders of Registrable Securities, including the Initiating Holders, in proportion (as nearly as practicable) to the number of Registrable Securities owned by each Holder or in such other proportion as shall mutually be agreed to by all such selling Holders; *provided, however*, that the number of Registrable Securities held by the Holders to be included in such underwriting shall not be reduced unless all other securities are first entirely excluded from the underwriting. To facilitate the allocation of shares in accordance with the above provisions, the Company or the underwriters may round the number of shares allocated to any Holder to the nearest 100 shares.

(b) In connection with any offering involving an underwriting of shares of the Company’s capital stock pursuant to Section 2.2, the Company shall not be required to include any of the Holders’ Registrable Securities in such underwriting unless the Holders accept the terms of the underwriting as agreed upon between the Company and its underwriters, and then only in such quantity as the

underwriters in their sole discretion determine will not jeopardize the success of the offering by the Company. If the total number of securities, including Registrable Securities, requested by stockholders to be included in such offering exceeds the number of securities to be sold (other than by the Company) that the underwriters in their reasonable discretion determine is compatible with the success of the offering, then the Company shall be required to include in the offering only that number of such securities, including Registrable Securities, which the underwriters and the Company in their sole discretion determine will not jeopardize the success of the offering. If the underwriters determine that less than all of the Registrable Securities requested to be registered can be included in such offering, then the Registrable Securities that are included in such offering shall be allocated among the selling Holders in proportion (as nearly as practicable to) the number of Registrable Securities owned by each selling Holder or in such other proportions as shall mutually be agreed to by all such selling Holders. To facilitate the allocation of shares in accordance with the above provisions, the Company or the underwriters may round the number of shares allocated to any Holder to the nearest 100 shares. Notwithstanding the foregoing, in no event shall (i) the number of Registrable Securities included in the offering be reduced unless all other securities (other than securities to be sold by the Company) are first entirely excluded from the offering, or (ii) the number of Registrable Securities included in the offering be reduced below 20% of the total number of securities included in such offering, unless such offering is the IPO, in which case the selling Holders may be excluded further if the underwriters make the determination described above and no other stockholder's securities are included in such offering. For purposes of the provision in this Section 2.3(b) concerning apportionment, for any selling Holder that is a partnership, limited liability company, or corporation, the partners, members, retired partners, retired members, stockholders, and Affiliates of such Holder, or the estates and Immediate Family Members of any such partners, retired partners, members, and retired members and any trusts for the benefit of any of the foregoing Persons, shall be deemed to be a single "selling Holder," and any pro rata reduction with respect to such "selling Holder" shall be based upon the aggregate number of Registrable Securities owned by all Persons included in such "selling Holder," as defined in this sentence.

(c) For purposes of Section 2.1, a registration shall not be counted as "effected" if, as a result of an exercise of the underwriter's cutback provisions in Section 2.3(a), fewer than 50% of the total number of Registrable Securities that Holders have requested to be included in such registration statement are actually included.

2.4 Obligations of the Company. Whenever required under this Section 2 to effect the registration of any Registrable Securities, the Company shall, as expeditiously as reasonably possible:

(a) prepare and file with the SEC a registration statement with respect to such Registrable Securities and use its commercially reasonable efforts to cause such registration statement to become effective and, upon the request of the Holders of a majority of the Registrable Securities registered thereunder, keep such registration statement effective for a period of up to 120 days or, if earlier, until the distribution contemplated in the registration statement has been completed; *provided, however*, that such 120-day period shall be extended for a period of time equal to the period the Holder refrains, at the request of an underwriter of Common Stock (or other securities) of the Company, from selling any securities included in such registration;

(b) prepare and file with the SEC such amendments and supplements to such registration statement, and the prospectus used in connection with such registration statement, as may be necessary to comply with the Securities Act in order to enable the disposition of all securities covered by such registration statement;

(c) furnish to the selling Holders such numbers of copies of a prospectus, including a preliminary prospectus, as required by the Securities Act, and such other documents as the Holders may reasonably request in order to facilitate their disposition of their Registrable Securities;

(d) use its commercially reasonable efforts to register and qualify the securities covered by such registration statement under such other securities or blue-sky laws of such jurisdictions as shall be reasonably requested by the selling Holders; *provided* that the Company shall not be required to qualify to do business or to file a general consent to service of process in any such states or jurisdictions, unless the Company is already subject to service in such jurisdiction and except as may be required by the Securities Act;

(e) in the event of any underwritten public offering, enter into and perform its obligations under an underwriting agreement, in usual and customary form, with the underwriter(s) of such offering;

(f) use its commercially reasonable efforts to cause all such Registrable Securities covered by such registration statement to be listed on a national securities exchange or trading system and each securities exchange and trading system (if any) on which similar securities issued by the Company are then listed;

(g) provide a transfer agent and registrar for all Registrable Securities registered pursuant to this Agreement and provide a CUSIP number for all such Registrable Securities, in each case not later than the effective date of such registration;

(h) promptly make available for inspection by the selling Holders, any underwriter(s) participating in any disposition pursuant to such registration statement, and any attorney or accountant or other agent retained by any such underwriter or selected by the selling Holders, all financial and other records, pertinent corporate documents, and properties of the Company, and cause the Company's officers, directors, employees, and independent accountants to supply all information reasonably requested by any such seller, underwriter, attorney, accountant, or agent, in each case, as necessary or advisable to verify the accuracy of the information in such registration statement and to conduct appropriate due diligence in connection therewith;

(i) notify each selling Holder, promptly after the Company receives notice thereof, of the time when such registration statement has been declared effective or a supplement to any prospectus forming a part of such registration statement has been filed; and

(j) after such registration statement becomes effective, notify each selling Holder of any request by the SEC that the Company amend or supplement such registration statement or prospectus.

In addition, the Company shall ensure that, at all times after any registration statement covering a public offering of securities of the Company under the Securities Act shall have become effective, its insider trading policy shall provide that the Company's directors may implement a trading program under Rule 10b5-1 of the Exchange Act.

2.5 Furnish Information. It shall be a condition precedent to the obligations of the Company to take any action pursuant to this Section 2 with respect to the Registrable Securities of any selling Holder that such Holder shall furnish to the Company such information regarding itself, the Registrable Securities held by it, and the intended method of disposition of

such securities as is reasonably required to effect the registration of such Holder's Registrable Securities.

2.6 Expenses of Registration. All expenses (other than Selling Expenses) incurred in connection with registrations, filings, or qualifications pursuant to Section 2, including all registration, filing, and qualification fees; printers' and accounting fees; fees and disbursements of counsel for the Company; and the reasonable fees and disbursements, not to exceed \$50,000 per registration, of one counsel for the selling Holders selected by Holders of a majority of the Registrable Securities to be registered ("**Selling Holder Counsel**"), shall be borne and paid by the Company; *provided, however*, that the Company shall not be required to pay for any expenses of any registration proceeding begun pursuant to Section 2.1 if the registration request is subsequently withdrawn at the request of the Holders of a majority of the Registrable Securities to be registered (in which case all selling Holders shall bear such expenses pro rata based upon the number of Registrable Securities that were to be included in the withdrawn registration), unless the Holders of a majority of the Registrable Securities agree to forfeit their right to one registration pursuant to Sections 2.1(a) or 2.1(b), as the case may be; *provided further* that if, at the time of such withdrawal, the Holders shall have learned of a material adverse change in the condition, business, or prospects of the Company from that known to the Holders at the time of their request and have withdrawn the request with reasonable promptness after learning of such information then the Holders shall not be required to pay any of such expenses and shall not forfeit their right to one registration pursuant to Sections 2.1(a) or 2.1(b). All Selling Expenses relating to Registrable Securities registered pursuant to this Section 2 (other than fees and disbursements of counsel to any Holder, other than the Selling Holder Counsel, which shall be borne solely by the Holder engaging such counsel) shall be borne and paid by the Holders pro rata on the basis of the number of Registrable Securities registered on their behalf.

2.7 Delay of Registration. No Holder shall have any right to obtain or seek an injunction restraining or otherwise delaying any registration pursuant to this Agreement as the result of any controversy that might arise with respect to the interpretation or implementation of this Section 2.

2.8 Indemnification. If any Registrable Securities are included in a registration statement under this Section 2:

(a) To the extent permitted by law, the Company will indemnify and hold harmless each selling Holder, and the partners, members, officers, directors, and stockholders of each such Holder; legal counsel and accountants for each such Holder; any underwriter (as defined in the Securities Act) for each such Holder; and each Person, if any, who controls such Holder or underwriter within the meaning of the Securities Act or the Exchange Act, against any Damages, and the Company will pay to each such Holder, underwriter, controlling Person, or other aforementioned Person any legal or other expenses reasonably incurred thereby in connection with investigating or defending any claim or proceeding from which Damages may result, as such expenses are incurred; *provided, however*, that the indemnity agreement contained in this Section 2.8(a) shall not apply to amounts paid in settlement of any such claim or proceeding if such settlement is effected without the consent of the Company, which consent shall not be unreasonably withheld, nor shall the Company be liable for any Damages to the extent that they arise out of or are based upon actions or omissions made in reliance upon and in conformity with written information furnished by or on behalf of any such Holder, underwriter, controlling Person, or other aforementioned Person expressly for use in connection with such registration, except to the extent such information has been corrected in a subsequent writing reasonably prior to the sale of Registrable Securities to the Person asserting the claim.

(b) To the extent permitted by law, each selling Holder, severally and not jointly, will indemnify and hold harmless the Company, and each of its directors, each of its officers who has signed the registration statement, each Person (if any), who controls the Company within the meaning of the Securities Act, legal counsel and accountants for the Company, any underwriter (as defined in the Securities Act), any other Holder selling securities in such registration statement, and any controlling Person of any such underwriter or other Holder, against any Damages, in each case only to the extent that such Damages arise out of or are based upon actions or omissions made in reliance upon and in conformity with written information furnished by or on behalf of such selling Holder expressly for use in connection with such registration and that has not been corrected in a subsequent writing reasonably prior to the sale of Registrable Securities to the Person asserting the claim; and each such selling Holder will pay to the Company and each other aforementioned Person any legal or other expenses reasonably incurred thereby in connection with investigating or defending any claim or proceeding from which Damages may result, as such expenses are incurred; *provided, however*, that the indemnity agreement contained in this Section 2.8(b) shall not apply to amounts paid in settlement of any such claim or proceeding if such settlement is effected without the consent of the Holder, which consent shall not be unreasonably withheld; and *provided further* that in no event shall the aggregate amounts payable by any Holder by way of indemnity or contribution under Sections 2.8(b) and 2.8(d) exceed the proceeds from the offering received by such Holder (net of any Selling Expenses paid by such Holder), except in the case of fraud or willful misconduct by such Holder.

(c) Promptly after receipt by an indemnified party under this Section 2.8 of notice of the commencement of any action (including any governmental action) for which a party may be entitled to indemnification hereunder, such indemnified party will, if a claim in respect thereof is to be made against any indemnifying party under this Section 2.8, give the indemnifying party notice of the commencement thereof. The indemnifying party shall have the right to participate in such action and, to the extent the indemnifying party so desires, participate jointly with any other indemnifying party to which notice has been given, and to assume the defense thereof with counsel mutually satisfactory to the parties; *provided, however*, that an indemnified party (together with all other indemnified parties that may be represented without conflict by one counsel) shall have the right to retain one separate counsel, with the fees and expenses to be paid by the indemnifying party, if representation of such indemnified party by the counsel retained by the indemnifying party would be inappropriate due to actual or potential differing interests between such indemnified party and any other party represented by such counsel in such action. The failure to give notice to the indemnifying party within a reasonable time of the commencement of any such action shall relieve such indemnifying party of any liability to the indemnified party under this Section 2.8, only to the extent that such failure materially prejudices the indemnifying party's ability to defend such action. The failure to give notice to the indemnifying party will not relieve it of any liability that it may have to any indemnified party otherwise than under this Section 2.8.

(d) To provide for just and equitable contribution to joint liability under the Securities Act in any case in which either: (i) any party otherwise entitled to indemnification hereunder makes a claim for indemnification pursuant to this Section 2.8 but it is judicially determined (by the entry of a final judgment or decree by a court of competent jurisdiction and the expiration of time to appeal or the denial of the last right of appeal) that such indemnification may not be enforced in such case, notwithstanding the fact that this Section 2.8 provides for indemnification in such case, or (ii) contribution under the Securities Act may be required on the part of any party hereto for which indemnification is provided under this Section 2.8, then, and in each such case, such parties will contribute to the aggregate losses, claims, damages, liabilities, or expenses to which they may be subject (after contribution from others) in such proportion as is appropriate to reflect the relative fault of each of the indemnifying party and the indemnified party in connection with the statements, omissions, or other actions that resulted in such loss, claim, damage, liability, or expense, as well as to reflect any other relevant equitable considerations. The relative fault of the indemnifying party and of the indemnified party shall be determined

by reference to, among other things, whether the untrue or allegedly untrue statement of a material fact, or the omission or alleged omission of a material fact, relates to information supplied by the indemnifying party or by the indemnified party and the parties' relative intent, knowledge, access to information, and opportunity to correct or prevent such statement or omission; *provided, however*, that, in any such case (x) no Holder will be required to contribute any amount in excess of the public offering price of all such Registrable Securities offered and sold by such Holder pursuant to such registration statement, and (y) no Person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) will be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentation; and *provided further* that in no event shall a Holder's liability pursuant to this Section 2.8(d), when combined with the amounts paid or payable by such Holder pursuant to Section 2.8(b), exceed the proceeds from the offering received by such Holder (net of any Selling Expenses paid by such Holder), except in the case of willful misconduct or fraud by such Holder.

(e) Notwithstanding the foregoing, to the extent that the provisions on indemnification and contribution contained in the underwriting agreement entered into in connection with the underwritten public offering are in conflict with the foregoing provisions, the provisions in the underwriting agreement shall control; *provided, however*, that any matter expressly provided for or addressed by the foregoing provisions of this Section 2.8 that is not expressly provided for or addressed by the underwriting agreement shall be controlled by the foregoing provisions.

(f) Unless otherwise superseded by an underwriting agreement entered into in connection with the underwritten public offering, the obligations of the Company and Holders under this Section 2.8 shall survive the completion of any offering of Registrable Securities in a registration under this Section 2, and otherwise shall survive the termination of this Agreement or any provisions of this Agreement.

2.9 Reports Under Exchange Act. With a view to making available to the Holders the benefits of SEC Rule 144 and any other rule or regulation of the SEC that may at any time permit a Holder to sell securities of the Company to the public without registration or pursuant to a registration on Form S-3, the Company shall:

(a) make and keep available adequate current public information, as those terms are understood and defined in SEC Rule 144, at all times after the effective date of the registration statement filed by the Company for the IPO or Direct Listing, as applicable;

(b) use commercially reasonable efforts to file with the SEC in a timely manner all reports and other documents required of the Company under the Securities Act and the Exchange Act (at any time after the Company has become subject to such reporting requirements); and

(c) furnish to any Holder, so long as the Holder owns any Registrable Securities, forthwith upon request (i) to the extent accurate, a written statement by the Company that it has complied with the reporting requirements of SEC Rule 144 (at any time after 90 days after the effective date of the registration statement filed by the Company for the IPO or Direct Listing, as applicable), the Securities Act, and the Exchange Act (at any time after the Company has become subject to such reporting requirements), or that it qualifies as a registrant whose securities may be resold pursuant to Form S-3 (at any time after the Company so qualifies); and (ii) such other information as may be reasonably requested in availing any Holder of any rule or regulation of the SEC that permits the selling of any such securities without registration (at any time after the Company has become subject to the reporting requirements under the Exchange Act) or pursuant to Form S-3 (at any time after the Company so qualifies to use such form).

2.10 Limitations on Subsequent Registration Rights. From and after the date of this Agreement, the Company shall not, without the prior written consent of the Holders of a majority of the Registrable Securities then outstanding, enter into any agreement with any holder or prospective holder of any securities of the Company that would provide to such holder or prospective holder the right to include securities in any registration on other than either a pro rata basis with respect to the Registrable Securities or on a subordinate basis after all Holders have had the opportunity to include in the registration and offering all shares of Registrable Securities that they wish to so include; *provided* that this limitation shall not apply to Registrable Securities acquired by any additional Investor that becomes a party to this Agreement in accordance with Section 7.9.

2.11 “Market Stand-off” Agreement. Each Holder hereby agrees that it will not, without the prior written consent of the managing underwriter (in connection with an IPO) or the Company (in connection with a Direct Listing), during the period commencing on the date of the effectiveness of the registration statement for the IPO or Direct Listing, and ending on the date specified by the Company or the managing underwriter (for an IPO) or the Company (for a Direct Listing) (such period not to exceed 180 days or, if the Company is not then an emerging growth company as defined in the applicable SEC regulations, such other period as may be requested by the Company or an underwriter to accommodate regulatory restrictions on (1) the publication or other distribution of research reports and (2) analyst recommendations and opinions, including, but not limited to, the restrictions contained in applicable FINRA rules, or any successor provisions or amendments thereto), (i) lend; offer; pledge; sell; contract to sell; sell any option or contract to purchase; purchase any option or contract to sell; grant any option, right, or warrant to purchase; or otherwise transfer or dispose of, directly or indirectly, any shares of Common Stock (or other equity securities of the Company) or any securities convertible into or exercisable or exchangeable (directly or indirectly) for such Common Stock or other equity securities, whether such shares or any such securities are then owned by the Holder or are thereafter acquired, or (ii) engage in any hedging or other transaction or arrangement (including, without limitation, any short sale or the purchase or sale of, or entry into, any put or call option, or combination thereof, forward, swap or any other derivative transaction or instrument, however described or defined) that is designed to, or that reasonably could be expected to, lead to or result in a sale or disposition (whether by the Holder or someone other than the Holder), or a transfer of any of the economic consequences of ownership, in whole or in part, directly or indirectly, of any shares of such securities, whether or not any such transaction or arrangement (or instrument provided for thereunder) would be settled by delivery of Common Stock or other securities, in cash, or otherwise. The foregoing provisions of this Section 2.11 (A) shall not apply to the sale of any shares to an underwriter pursuant to an underwriting agreement in an IPO, or to the transfer of any shares to any trust for the direct or indirect benefit of the Holder or one or more of the Holder’s Immediate Family Members, *provided* that the trustee of the trust agrees to be bound in writing by the restrictions set forth herein, and *provided further* that any such transfer shall not involve a disposition for value; and (B) shall be applicable to the Holders only if all officers and directors of the Company are subject to the same restrictions and the Company uses commercially reasonable efforts to obtain a similar agreement from all stockholders individually owning more than 1% of the Company’s outstanding Common Stock (after giving effect to the conversion into Common Stock of all of the Company’s outstanding capital stock convertible into Common Stock). The underwriters in connection with an IPO are intended third-party beneficiaries of this Section 2.11 and shall have the right, power and authority to enforce the provisions hereof as though they were a party hereto. Each Holder further agrees to execute such agreements as may be reasonably requested by the Company or the underwriters (in connection with an IPO) or the Company (in connection with a Direct Listing) that are consistent with this Section 2.11 or that are necessary to give further effect thereto.

2.12 Restrictions on Transfer.

(a) The Common Stock and the Registrable Securities shall not be sold, pledged, or otherwise transferred, and the Company shall not recognize and shall issue stop-transfer instructions to its transfer agent with respect to any such sale, pledge, or transfer, except upon the conditions specified in this Agreement, which conditions are intended to ensure compliance with the provisions of the Securities Act and all other applicable U.S. laws and regulations. A transferring Holder will cause any proposed purchaser, pledgee, or transferee of the Common Stock and the Registrable Securities held by such Holder to agree to take and hold such securities subject to the provisions and upon the conditions specified in this Agreement. Notwithstanding the foregoing, the Company shall not require any transferee of shares pursuant to an effective registration statement or, following the IPO or Direct Listing, as applicable, SEC Rule 144, in each case, to be bound by the terms of this Section 2.12. Each Holder agrees not to sell, assign, transfer, pledge or otherwise dispose of any securities of the Company, or any beneficial interest therein, in violation of any transfer restrictions in the Company's Bylaws.

(b) Each certificate, instrument, or book entry representing (i) the Common Stock, (ii) the Registrable Securities, and (iii) any other securities issued in respect of the securities referenced in clauses (i) and (ii), upon any stock split, stock dividend, recapitalization, merger, consolidation, or similar event, shall (unless otherwise permitted by the provisions of Section 2.12(c)) be notated with a legend substantially in the following form:

THE SECURITIES REPRESENTED HEREBY HAVE BEEN ACQUIRED FOR INVESTMENT AND HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933. SUCH SHARES MAY NOT BE SOLD, PLEDGED, OR TRANSFERRED IN THE ABSENCE OF SUCH REGISTRATION OR A VALID EXEMPTION FROM THE REGISTRATION AND PROSPECTUS DELIVERY REQUIREMENTS OF SAID ACT.

THE SECURITIES REPRESENTED HEREBY MAY BE TRANSFERRED ONLY IN ACCORDANCE WITH THE TERMS OF AN AGREEMENT BETWEEN THE COMPANY AND THE STOCKHOLDER, A COPY OF WHICH IS ON FILE WITH THE SECRETARY OF THE COMPANY.

The Holders consent to the Company making a notation in its records and giving instructions to any transfer agent of the Restricted Securities in order to implement the restrictions on transfer set forth in this Section 2.12.

(c) The holder of such Restricted Securities, by acceptance of ownership thereof, agrees to comply in all respects with the provisions of this Section 2. Before any proposed sale, pledge, or transfer of any Restricted Securities, unless there is in effect a registration statement under the Securities Act covering the proposed transaction, the Holder thereof shall give notice to the Company of such Holder's intention to effect such sale, pledge, or transfer. Each such notice shall describe the manner and circumstances of the proposed sale, pledge, or transfer in sufficient detail and, if reasonably requested by the Company, shall be accompanied at such Holder's expense by either (i) a written opinion of legal counsel who shall, and whose legal opinion shall, be reasonably satisfactory to the Company, addressed to the Company, to the effect that the proposed transaction may be effected without registration under the Securities Act; (ii) a "no action" letter from the SEC to the effect that the proposed sale, pledge, or transfer of such Restricted Securities without registration will not result in a recommendation by the staff of the SEC that action be taken with respect thereto; or (iii) any other evidence reasonably satisfactory to counsel to the Company to the effect that the proposed sale, pledge, or transfer of the Restricted Securities may be effected without registration under the Securities Act, whereupon the Holder of such Restricted Securities

shall be entitled to sell, pledge, or transfer such Restricted Securities in accordance with the terms of the notice given by the Holder to the Company. The Company will not require such a legal opinion or “no action” letter (x) in any transaction that the Company and the Holder agree is in compliance with SEC Rule 144; or (y) in any transaction in which such Holder distributes Restricted Securities to an Affiliate of such Holder for no consideration; *provided* that, with respect to transfers under the foregoing clause (y), each transferee agrees in writing to be subject to the terms of this Section 2.12. Each certificate, instrument, or book entry representing the Restricted Securities transferred as above provided shall be notated with, except if such transfer is made pursuant to SEC Rule 144, the appropriate restrictive legend set forth in Section 2.12(b), except that such certificate, instrument, or book entry shall not be notated with such restrictive legend if, in the opinion of counsel for such Holder and the Company, such legend is not required in order to establish compliance with any provisions of the Securities Act and the Company will use commercially reasonable efforts to cause any such legend to be removed.

2.13 Termination and Suspension of Registration Rights. The right of any Holder to request registration or inclusion of Registrable Securities in any registration pursuant to Section 2.1 or 2.2 shall terminate, as to such Holder, upon the earliest to occur of:

- (a) The closing of a Deemed Liquidation Event;
- (b) such time after consummation of an IPO or Direct Listing, whichever is earlier, when the Holder (i) together with its “affiliates” (as determined under SEC Rule 144) holds less than 1% of the outstanding capital stock of the Company and (ii) may immediately sell all of the Holder’s Registrable Securities under SEC Rule 144 without volume limitation, or another similar exemption under the Securities Act is available for the sale of all of such Holder’s shares without limitation, during a three-month period without registration; and
- (c) the third anniversary of the IPO or Direct Listing, as applicable.

The right of any Holder to request registration or inclusion of Registrable Securities in any registration pursuant to Section 2.1 or 2.2 shall be suspended during any time as such Holder is a Sanctioned Party.

3. Information Rights.

3.1 Delivery of Financial Statements. The Company shall deliver to each Major Investor (and Masters Special Situations, LLC, so long as it holds at least 3,135,813 shares of Registrable Securities) and each Sponsoring Noteholder (as defined in the Voting Agreement), *provided* that the Board of Directors has not reasonably determined that such Major Investor is a Competitor:

- (a) as soon as practicable, but in any event within 120 days after the end of each fiscal year of the Company (i) a balance sheet as of the end of such year; (ii) statements of income and of cash flows for such year; and (iii) a statement of stockholders’ equity as of the end of such year;
- (b) as soon as practicable, but in any event within 45 days after the end of each of the first three quarters of each fiscal year of the Company, unaudited statements of income and cash flows for such fiscal quarter, and an unaudited balance sheet as of the end of such fiscal quarter, all prepared in accordance with GAAP (except that such financial statements may (i) be subject to normal year-end audit adjustments; and (ii) not contain all notes thereto that may be required in accordance with GAAP);
- (c) as soon as practicable, but in any event within 45 days after the end of each quarter of each fiscal year of the Company, a statement showing the number of shares of each class and

series of capital stock and securities convertible into or exercisable for shares of capital stock outstanding at the end of the period, the Common Stock issuable upon conversion or exercise of any outstanding securities convertible or exercisable for Common Stock and the exchange ratio or exercise price applicable thereto, and the number of shares of issued stock options and stock options not yet issued but reserved for issuance, if any, all in sufficient detail as to permit the Major Investors to calculate their respective percentage equity ownership in the Company;

(d) as soon as practicable, but in any event within 30 days after the end of each month, an unaudited statement of cash flows for such month prepared in accordance with GAAP (except that such statement of cash flows may (i) be subject to normal year-end audit adjustments; and (ii) not contain all notes thereto that may be required in accordance with GAAP);

(e) as soon as practicable, the Company's Approved Annual Budget; and

(f) such other information relating to the financial condition, business, prospects, or corporate affairs of the Company as any Major Investor may from time to time reasonably request; *provided, however*, that the Company shall not be obligated under this Section 3.1(f) to provide information (i) that the Company reasonably determines in good faith to be a trade secret or similar highly confidential information; or (ii) the disclosure of which would reasonably be expected to adversely affect the attorney-client privilege between the Company and its counsel.

If, for any period, the Company has any subsidiary whose accounts are consolidated with those of the Company, then in respect of such period the financial statements delivered pursuant to the foregoing sections shall be the consolidated and consolidating financial statements of the Company and all such consolidated subsidiaries.

If reasonably requested by a Major Investor, the Company shall provide the information required by, or reasonably requested pursuant to, this Section 3.1 to such Major Investor by uploading the information to a portfolio management platform.

Notwithstanding anything else in this Section 3.1 to the contrary, the Company may cease providing the information set forth in this Section 3.1 during the period starting with the date 60 days before the Company's good-faith estimate of the date of filing of a registration statement if it reasonably concludes it must do so to comply with the SEC rules applicable to such registration statement and related offering; *provided* that the Company's covenants under this Section 3.1 shall be reinstated at such time as the Company is no longer actively employing its commercially reasonable efforts to cause such registration statement to become effective.

3.2 Inspection. The Company shall permit each Major Investor (*provided* that the Board of Directors has not reasonably determined that such Major Investor is a Competitor), at such Major Investor's expense, to visit and inspect the Company's properties; examine its books of account and records; and discuss the Company's affairs, finances, and accounts with its officers, during normal business hours of the Company as may be reasonably requested by the Major Investor; *provided, however*, that the Company shall not be obligated pursuant to this Section 3.2 to provide access to any information that it reasonably and in good faith considers to be a trade secret or confidential information or the disclosure of which would adversely affect the attorney-client privilege between the Company and its counsel.

3.3 Termination of Information Rights. The covenants set forth in Section 3.1 and Section 3.2 shall terminate and be of no further force or effect (i) immediately before the consummation of the IPO or Direct Listing, as applicable; (ii) with respect to any

Investor that is or becomes a Sanctioned Party, for so long as such Investor is a Sanctioned Party; (iii) when the Company first becomes subject to the periodic reporting requirements of Section 12(g) or 15(d) of the Exchange Act; or (iv) upon the closing of a Deemed Liquidation Event, whichever event occurs first.

3.4 **Confidentiality.** Each Investor agrees that such Investor will keep confidential and will not disclose, divulge, or use for any purpose (other than to monitor or make decisions with respect to its investment in the Company) any confidential information obtained from the Company (including notice of the Company's intention to file a registration statement), unless such confidential information (a) is known or becomes known to the public in general (other than as a result of a breach of this Section 3.4 by such Investor), (b) is or has been independently developed or conceived by such Investor without use of the Company's confidential information, or (c) is or has been made known or disclosed to such Investor by a third party without a breach of any obligation of confidentiality such third party may have to the Company; *provided, however*, that an Investor may disclose confidential information (i) to its attorneys, accountants, consultants, and other professionals to the extent reasonably necessary to obtain their services in connection with monitoring its investment in the Company; (ii) to any prospective purchaser of any Registrable Securities from such Investor, if such prospective purchaser agrees to be bound by the provisions of this Section 3.4; (iii) to any Affiliate, partner, member, stockholder, or wholly owned subsidiary of such Investor in the ordinary course of business, *provided* that such Investor informs such Person that such information is confidential and directs such Person to maintain the confidentiality of such information; or (iv) as may otherwise be required by law, regulation, rule, court order or subpoena, *provided* that such Investor promptly notifies the Company of such disclosure and takes reasonable steps to minimize the extent of any such required disclosure.

3.5 **Reserved.**

3.6 **Waiver of Statutory Information Rights.**

(a) Each Investor hereby acknowledges and agrees that until the consummation of the earlier of the IPO or Direct Listing, as applicable, such Investor shall hereby be deemed to have unconditionally and irrevocably, to the fullest extent permitted by law, on behalf of such Investor and all beneficial owners of the shares of Common Stock or other capital stock owned by such Investor (a "**Beneficial Owner**"), waived, and does hereby so waive, any rights such Investor or a Beneficial Owner might otherwise have had under Section 220 of the Delaware General Corporation Law (or under similar rights under other applicable law) to inspect for any proper purpose and to make copies and extracts from the Company's stock ledger, a list of its stockholders and its other books and records or the books and records of any subsidiary. This waiver applies only in such Investor's capacity as a stockholder and does not affect any other information and inspection rights such Investor may expressly have pursuant to Section 3.1, 3.2 or 3.6(b) of this Agreement. Each Investor hereby further warrants and represents that such Investor has reviewed this waiver with its legal counsel, and that such Investor knowingly and voluntarily waives its rights as a stockholder otherwise provided by Section 220 of the Delaware General Corporation Law (or under similar rights under other applicable law).

(b) Within 15 days after request by any Investor that is not a Major Investor (but no more frequently than once per each quarter of each fiscal year of the Company), the Company shall deliver to such requesting Investor a statement showing the number of shares of each class and series of capital stock and securities convertible into or exercisable for shares of capital stock outstanding at the end of the period, the Common Stock issuable upon conversion or exercise of any outstanding securities convertible or exercisable for Common Stock and the exchange ratio or exercise price applicable thereto, and the number of shares of issued stock options and stock options not yet issued but reserved for issuance,

if any, all in sufficient detail as to permit the relevant Investors to calculate its respective percentage equity ownership in the Company.

4. **Rights to Future Stock Issuances.**

4.1 **Right of First Offer.** Subject to the terms and conditions of this Section 4.1 and applicable securities laws, if the Company proposes to offer or sell any New Securities, the Company shall first offer such New Securities to each Investor. Each Investor shall be entitled to apportion the right of first offer hereby granted to it in such proportions as it deems appropriate, among (i) itself, (ii) its Affiliates and (iii) its beneficial interest holders, such as limited partners, members or any other Person having “beneficial ownership,” as such term is defined in Rule 13d-3 promulgated under the Exchange Act, of such Investor (“**Investor Beneficial Owners**”); *provided* that each such Affiliate or Investor Beneficial Owner (x) is not a Competitor or FOIA Party, unless such party’s purchase of New Securities is otherwise consented to by the Board of Directors, and (y) agrees to enter into this Agreement and the Voting Agreement of even date herewith among the Company, the Investors and the other parties named therein (the “**Voting Agreement**”), as an “**Investor**” under each such agreement (*provided* that any Competitor or FOIA Party shall not be entitled to any rights as an Investor under Sections 3.1, 3.2 and 4.1 hereof), and *provided* that the Company shall not be obligated to offer or sell any New Securities to any person or entity that is a Sanctioned Party.

(a) The Company shall give notice (the “**Offer Notice**”) to each Investor, stating (i) its bona fide intention to offer such New Securities, (ii) the number of such New Securities to be offered, and (iii) the price and terms, if any, upon which it proposes to offer such New Securities.

(b) By notification to the Company within 20 days after the Offer Notice is given, each Investor may elect to purchase or otherwise acquire, at the price and on the terms specified in the Offer Notice, up to that portion of such New Securities which equals the proportion that the Common Stock then held by such Investor (including all shares of Common Stock then issuable (directly or indirectly) upon conversion and/or exercise, as applicable, of any Derivative Securities then held by such Investor) bears to the total Common Stock of the Company then outstanding (assuming full conversion and/or exercise, as applicable, of all other shares of any Derivative Securities then outstanding). At the expiration of such 20 day period, the Company shall promptly notify each Major Investor that elects to purchase or acquire all the shares available to it (each, a “**Fully Exercising Investor**”) of any other Investor’s failure to do likewise. During the ten-day period commencing after the Company has given such notice, each Fully Exercising Investor may, by giving notice to the Company, elect to purchase or acquire, in addition to the number of shares specified above, up to that portion of the New Securities for which Investors were entitled to subscribe but that were not subscribed for by the Investors which is equal to the proportion that the Common Stock issued and held, or issuable (directly or indirectly) upon conversion and/or exercise, as applicable, of any other Derivative Securities then held, by such Fully Exercising Investor bears to the Common Stock issued and held, or issuable (directly or indirectly) upon conversion and/or exercise, as applicable, of any other Derivative Securities then held, by all Fully Exercising Investors who wish to purchase such unsubscribed shares. The closing of any sale pursuant to this Section 4.1(b) shall occur within the later of 90 days of the date that the Offer Notice is given and the date of initial sale of New Securities pursuant to Section 4.1(c).

(c) If all New Securities referred to in the Offer Notice are not elected to be purchased or acquired as provided in Section 4.1(b), the Company may, during the 90 day period following the expiration of the periods provided in Section 4.1(b), offer and sell the remaining unsubscribed portion of such New Securities to any Person or Persons at a price not less than, and upon terms no more favorable to the offeree than, those specified in the Offer Notice. If the Company does not enter into an agreement

for the sale of the New Securities within such period, or if such agreement is not consummated within 30 days of the execution thereof, the right provided hereunder shall be deemed to be revived and such New Securities shall not be offered unless first reoffered to the Investors in accordance with this Section 4.1.

(d) The right of first offer in this Section 4.1 shall not be applicable to (i) Exempted Securities; (ii) shares of Common Stock issued in an IPO; and (iii) the issuance of shares of Common Stock pursuant to the Purchase Agreement.

4.2 **Termination.** The covenants set forth in Section 4.1 shall terminate and be of no further force or effect (i) immediately before the consummation of the IPO or Direct Listing, as applicable; or (ii) upon the closing of a Deemed Liquidation Event, whichever event occurs first.

5. **Right of First Refusal Agreement Among the Company, the Investors.**

5.1 **Right of First Refusal.**

(a) *Grant.* Subject to the terms of Section 5.2(b) below, each Investor hereby unconditionally and irrevocably grants to the Company a Right of First Refusal to purchase all or any portion of Transfer Stock that such Investor may propose to include in a Proposed Investor Transfer, at the same price and on the same terms and conditions as those offered to the Prospective Transferee.

(b) *Notice.* Each Investor proposing to make a Proposed Investor Transfer must deliver a Proposed Transfer Notice to the Company and each Major Investor not later than 45 days prior to the consummation of such Proposed Investor Transfer. Such Proposed Transfer Notice shall contain the material terms and conditions (including price and form of consideration) of the Proposed Investor Transfer, the identity of the Prospective Transferee and the intended date of the Proposed Investor Transfer. To exercise its Right of First Refusal under this Section 5, the Company must deliver a Company Notice to the selling Investor and the Major Investors within 15 days after delivery of the Proposed Transfer Notice specifying the number of shares of Transfer Stock to be purchased by the Company. In the event of a conflict between this Agreement and any other agreement that may have been entered into by an Investor with the Company that contains a preexisting right of first refusal, the Company, the Investor and the Major Investors acknowledge and agree that the terms of this Agreement shall control and the preexisting right of first refusal shall be deemed satisfied by compliance with Section 5.1(a) and this Section 5.1(b). In the event of a conflict between this Agreement and the Company's Bylaws containing a preexisting right of first refusal, the terms of the Bylaws will control and compliance with the Bylaws shall be deemed compliance with Section 5.1(a) and this Section 5.1(b) in full.

(c) *Grant of Secondary Refusal Right to the Investors.* Subject to the terms of Section 5.2(b) below, each Investor hereby unconditionally and irrevocably grants to the Major Investors a Secondary Refusal Right to purchase all or any portion of the Transfer Stock not purchased by the Company pursuant to the Right of First Refusal, as provided in this Section 5.1(c). If the Company does not provide the Company Notice exercising its Right of First Refusal with respect to all Transfer Stock subject to a Proposed Investor Transfer, the Company must deliver a Secondary Notice to the selling Investor and to each Major Investor to that effect no later than 15 days after the selling Investor delivers the Proposed Transfer Notice to the Company. To exercise its Secondary Refusal Right, a Major Investor must deliver an Investor Notice to the selling Investor and the Company within ten days after the Company's deadline for its delivery of the Secondary Notice as provided in the preceding sentence.

(d) *Undersubscription of Transfer Stock.* If options to purchase have been exercised by the Company and the Major Investors pursuant to Sections 5.1(b) and (c) with respect to some

but not all of the Transfer Stock by the end of the ten-day period specified in the last sentence of Section 5.1(c) (the “**Investor Notice Period**”), then the Company shall, within five days after the expiration of the Investor Notice Period, send written notice (the “**Company Undersubscription Notice**”) to those Major Investors who fully exercised their Secondary Refusal Right within the Investor Notice Period (the “**Exercising Major Investors**”). Each Exercising Major Investor shall, subject to the provisions of this Section 5.1(d), have an additional option to purchase all or any part of the balance of any such remaining unsubscribed shares of Transfer Stock on the terms and conditions set forth in the Proposed Transfer Notice. To exercise such option, an Exercising Major Investor must deliver an Undersubscription Notice to the selling Investor and the Company within ten days after the expiration of the Investor Notice Period. In the event there are two or more such Exercising Major Investors that choose to exercise the last-mentioned option for a total number of remaining shares in excess of the number available, the remaining shares available for purchase under this Section 5.1(d) shall be allocated to such Exercising Major Investors pro rata based on the number of shares of Transfer Stock such Exercising Major Investors have elected to purchase pursuant to the Secondary Refusal Right (without giving effect to any shares of Transfer Stock that any such Exercising Major Investor has elected to purchase pursuant to the Company Undersubscription Notice). If the options to purchase the remaining shares are exercised in full by the Exercising Major Investors, the Company shall immediately notify all of the Exercising Major Investors and the selling Investor of that fact.

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

(f) *Additional Compliance.* If any Proposed Investor Transfer is not consummated within 120 days after receipt of the Proposed Transfer Notice by the Company, the Investors proposing the Proposed Investor Transfer may not sell any Transfer Stock unless they first comply in full with each provision of this Section 5.

5.2 **Effect of Failure to Comply**

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

(b) *Violation of First Refusal Right.* If any Investor becomes obligated to sell any Transfer Stock to the Company or any Major Investor under this Agreement and fails to deliver such Transfer Stock in accordance with the terms of this Agreement, the Company and/or such Major Investor may, at its option, in addition to all other remedies it may have, send to such Investor the purchase price for

such Transfer Stock as is herein specified and transfer to the name of the Company or such Major Investor (or request that the Company effect such transfer in the name of a Major Investor) on the Company's books any certificates, instruments, or book entry representing the Transfer Stock to be sold.

5.3 Exempt Transfers

(a) Notwithstanding the foregoing or anything to the contrary herein, the provisions of Section 5.1 shall not apply (a) in the case of an Investor that is an entity, upon a transfer by such Investor to its stockholders, members, partners or other equity holders or to any Affiliate, (b) in the case of an Investor that is a natural person, upon a transfer of Transfer Stock by such Investor made for bona fide estate planning purposes, either during such person's lifetime or on death by will or intestacy to such person's spouse, including any life partner or similar statutorily-recognized domestic partner, child (natural or adopted), or any other direct lineal descendant of such Investor (or such person's spouse, including any life partner or similar statutorily-recognized domestic partner) (all of the foregoing collectively referred to as "family members"), or any other relative/person approved by a majority of the Board of Directors, or any custodian or trustee of any trust, partnership, limited liability company or other corporate entity for the benefit of, or the ownership interests of which are owned wholly by such Investor or any such family members; *provided* that in the case of clauses (a) or (b), the Investor shall deliver prior written notice to the Investors of such pledge, gift or transfer and such shares of Transfer Stock shall at all times remain subject to the terms and restrictions set forth in this Agreement and such transferee shall, as a condition to such transfer, deliver a counterpart signature page to this Agreement as confirmation that such transferee shall be bound by all the terms and conditions of this Agreement as a Investor (but only with respect to the securities so transferred to the transferee), including the obligations of a Investor with respect to Proposed Investor Transfers of such Transfer Stock pursuant to Section 5; and *provided further* in the case of any transfer pursuant to clause (a) or (b) above, that such transfer is made pursuant to a transaction in which there is no consideration actually paid for such transfer.

5.4 **Exempted Offerings.** Notwithstanding the foregoing or anything to the contrary herein, the provisions of Section 5 shall not apply to the sale of any Transfer Stock (a) to the public in an offering pursuant to an effective registration statement under the Securities Act of 1933, as amended (including an IPO or Direct Listing); or (b) pursuant to a Deemed Liquidation Event.

5.5 **Prohibited Transferees.** Notwithstanding the foregoing, no Investor shall transfer any Transfer Stock to (a) any entity which, in the determination of the majority of the Board of Directors, directly or indirectly competes with the Company; (b) any customer, distributor or supplier of the Company, if the majority of the Board of Directors should determine that such transfer would result in such customer, distributor or supplier receiving information that would place the Company at a competitive disadvantage with respect to such customer, distributor or supplier; or (c) any Person that is a Sanctioned Party.

5.6 **Legend; Restriction.** Each certificate, instrument, or book entry representing shares of Transfer Stock held by the Investors or issued to any permitted transferee in connection with a transfer permitted by Section 5.3 hereof shall be notated with the following legend:

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

Each Investor agrees that the Company may instruct its transfer agent to impose transfer restrictions on the shares notated with the legend referred to in this Section 5.6 to enforce the provisions of this Agreement, and the Company agrees to promptly do so. The legend shall be removed upon termination of this Agreement at the request of the holder. Each Investor agrees not to sell, assign, transfer, pledge or otherwise dispose of any securities of the Company, or any beneficial interest therein, in violation of any transfer restrictions in the Company's Bylaws.

5.7 **Termination.** The covenants set forth in Section 5 shall terminate and be of no further force or effect (i) immediately before the consummation of the IPO or Direct Listing, as applicable; or (ii) upon the closing of a Deemed Liquidation Event, whichever event occurs first.

6. **Additional Covenants.**

6.1 **Board Matters.** The Company shall reimburse the non-employee directors for all reasonable out-of-pocket travel expenses incurred (consistent with the Company's travel policy) in connection with attending meetings of the Board of Directors.

6.2 **Annual Budget.** The Company shall, at least 30 days before the end of each fiscal year, prepare an Annual Budget. The Company shall submit the Annual Budget to the Board of Directors for approval and the Annual Budget, as may be revised by the Board of Directors, shall be approved as set forth in the definition of Approved Annual Budget.

6.3 **Successor Indemnification.** If the Company or any of its successors or assignees consolidates with or merges into any other Person and is not the continuing or surviving corporation or entity of such consolidation or merger, then to the extent necessary, but subject to Section 6.9, proper provision shall be made so that the successors and assignees of the Company assume the obligations of the Company with respect to indemnification of members of the Board of Directors as in effect immediately before such transaction, whether such obligations are contained in the Company's Bylaws, the Certificate of Incorporation, or elsewhere, as the case may be.

6.4 **Indemnification Matters.** The Company hereby acknowledges that one or more of the directors nominated to serve on the Board of Directors by one or more Investors (each an "**Investor Director**") may have certain rights to indemnification, advancement of expenses and/or insurance provided by one or more of the Investors and certain of their Affiliates (collectively, the "**Investor Indemnitors**"). The Company hereby agrees (a) that it is the indemnitor of first resort (*i.e.*, its obligations to any such Investor Director are primary and any obligation of the Investor Indemnitors to advance expenses or to provide indemnification for the same expenses or liabilities incurred by such Investor Director are secondary); (b) that it shall be required to advance the full amount of expenses incurred by such Investor Director and shall be liable for the full amount of all expenses, judgments, penalties, fines and amounts paid in settlement by or on behalf of any such Investor Director to the extent legally permitted and as required by the Certificate of Incorporation or Bylaws of the Company (or any agreement between the Company and such Investor Director), without regard to any rights such Investor Director may have against the Investor Indemnitors; and (c) that it irrevocably waives, relinquishes and releases the Investor Indemnitors from any and all claims against the Investor Indemnitors for contribution, subrogation or any other recovery of any kind in respect thereof. The Company further agrees that no advancement or payment by the Investor Indemnitors on behalf of any such Investor Director with respect to any claim for which such Investor Director has sought indemnification from the Company shall affect the foregoing and the Investor Indemnitors shall have a right of contribution and/or be subrogated to the extent of such advancement or payment to all of the rights of recovery

of such Investor Director against the Company. The Investor Directors and the Investor Indemnitors are intended third-party beneficiaries of this Section 6.4 and shall have the right, power and authority to enforce the provisions of this Section 6.4 as though they were a party to this Agreement.

6.5 Right to Conduct Activities. The Company hereby agrees and acknowledges that the Major Investors (the “**Professional Investment Organizations**”) are professional investment organizations, and as such review the business plans and related proprietary information of many enterprises, some of which may compete directly or indirectly with the Company’s business (as currently conducted or as currently propose to be conducted). Nothing in this Agreement shall preclude or in any way restrict the Professional Investment Organizations from evaluating or purchasing securities, including publicly traded securities, of a particular enterprise, or investing or participating in any particular enterprise whether or not such enterprise has products or services that compete with those of the Company; and the Company hereby agrees that, to the extent permitted under applicable law, no such Professional Investment Organizations shall be liable to the Company for any claim arising out of, or based upon, (i) the investment by such Professional Investment Organizations in any entity competitive with the Company, or (ii) actions taken by any partner, officer, employee or other representative of such Professional Investment Organizations to assist any such competitive company, whether or not such action was taken as a member of the board of directors of such competitive company or otherwise, and whether or not such action has a detrimental effect on the Company; *provided, however*, that the foregoing shall not contravene the confidentiality obligations in Section 3.4 or otherwise in this Agreement or relieve (x) any of the Investors from liability associated with the unauthorized disclosure of the Company’s confidential information obtained pursuant to this Agreement, or (y) any director or officer of the Company from any liability associated with such person’s fiduciary duties to the Company.

6.6 Real Property Holding Corporation. Within a reasonable period following (and in any event within 20 days after receipt of) written request by an Investor, the Company shall provide such Investor with a written statement informing such Investor whether such Investor’s interest in the Company constitutes a United States real property interest. The Company shall use commercially reasonable efforts to ensure its determination complies with the requirements of Treasury Regulation Section 1.897-2(h)(1) or any successor regulation, and the Company shall provide timely notice to the Internal Revenue Service, in accordance with and to the extent required by Treasury Regulation Section 1.897-2(h)(2) or any successor regulation, that such statement has been made. The Company’s obligation to furnish such written statement shall continue notwithstanding the fact that a class of the Company’s stock may be regularly traded on an established securities market or the fact that there is no Common Stock then outstanding; *provided* that the Company’s obligations under this Section 6.6 shall terminate as to any particular Investor when the Investor no longer owns shares of Common Stock.

6.7 Corporate Transparency Act. Each Investor shall reasonably cooperate with the Company to make available information reasonably necessary (if any) to enable the Company to comply with its reporting obligations (if any) pursuant to the CTA. To the extent permitted by the CTA and authorized by FinCEN, an Investor may provide the Company with the applicable “FinCEN identifier(s)” (as defined in the CTA) in satisfaction of the corresponding information required to be provided pursuant to the preceding sentence.

6.8 Termination of Covenants. The covenants set forth in this Section 6, except for Sections 6.3, 6.4 or 6.9, shall terminate and be of no further force or effect (i) immediately before the consummation of the IPO or Direct Listing, as applicable; (ii) upon a

Deemed Liquidation Event; or (iii) with respect to any obligation to an Investor that is or becomes a Sanctioned Party, for so long as such Holder is a Sanctioned Party.

6.9 **Fiduciary Duties.** The Company's obligations set forth in Sections 6.3 that are qualified by this Section 6.9 shall not be applicable to the extent (and only to the extent) that the Board of Directors determines in good faith that compliance would be inconsistent with the exercise of the fiduciary duties of the Board of Directors.

7. **Miscellaneous.**

7.1 **Successors and Assigns.** The rights under this Agreement may be assigned (but only with all related obligations) by a Holder to a transferee of Registrable Securities that (i) is an Affiliate of a Holder; (ii) is a Holder's Immediate Family Member or trust for the benefit of an individual Holder or one or more of such Holder's Immediate Family Members; or (iii) after such transfer, together with its Affiliates, would be a Major Investor; *provided, however*, that (x) the Company is, within a reasonable time after such transfer, furnished with written notice of the name and address of such transferee and the Registrable Securities with respect to which such rights are being transferred; (y) such transferee agrees in a written instrument delivered to the Company to be bound by and subject to the terms and conditions of this Agreement, including the provisions of Section 2.11; and (z) such assignee is not a Sanctioned Party. For the purposes of determining the number of shares of Registrable Securities held by a transferee, the holdings of a transferee (1) that is an Affiliate or stockholder of a Holder; (2) who is a Holder's Immediate Family Member; or (3) that is a trust for the benefit of an individual Holder or such Holder's Immediate Family Member shall be aggregated together and with those of the transferring Holder; *provided further* that all transferees who would not qualify individually for assignment of rights shall, as a condition to the applicable transfer, establish a single attorney-in-fact for the purpose of exercising any rights, receiving notices, or taking any action under this Agreement. The terms and conditions of this Agreement inure to the benefit of and are binding upon the respective successors and permitted assignees of the parties. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and permitted assignees any rights, remedies, obligations or liabilities under or by reason of this Agreement, except as expressly provided herein.

7.2 **Governing Law.** This Agreement shall be governed by the internal law of the State of Delaware, 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.

7.3 **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. federal ESIGN Act of 2000, *e.g.*, www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

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

7.5 **Notices.**

(a) **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 (i) personal delivery to the party to be notified; (ii) when sent, if sent by electronic mail during the recipient's normal business hours, and if not sent during normal business hours, then on the recipient's next business day; (iii) five days after having been sent by registered or certified mail, return receipt requested, postage prepaid; or (iv) one business day after the business day of deposit with a nationally recognized overnight courier, freight prepaid, specifying next-day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their addresses as set forth on **Schedule A** hereto, 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 email address or address as subsequently modified by written notice given in accordance with this Section 7.5. If notice is given to the Company, a copy (which copy shall not constitute notice) shall also be sent to Wilson Sonsini Goodrich & Rosati, P.C., 650 Page Mill Road, Palo Alto, CA 94304; Attention: Andrew D. Hoffman.

(b) *Consent to Electronic Notice.* Each party to this Agreement 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 party'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. Each party to this Agreement agrees to promptly notify the Company of any change in such stockholder's electronic mail address, and that failure to do so shall not affect the foregoing.

7.6 **Amendments and Waivers.** Any term of this Agreement may be amended, modified or terminated and the observance of any term of this Agreement may be waived (either generally or in a particular instance, and either retroactively or prospectively) only with the written consent of the Company and the holders of a majority of the Registrable Securities then outstanding; *provided* that the Company may in its sole discretion waive compliance with Sections 2.12(c) (and the Company's failure to object promptly in writing after notification of a proposed assignment allegedly in violation of Section 2.12(c) shall be deemed to be a waiver) and 5.1(a); and *provided further* that any provision hereof may be waived by any waiving party on such party's own behalf, without the consent of any other party. For the avoidance of doubt, Registrable Securities do not include any shares held by a person or entity that is a Sanctioned Party. Notwithstanding the foregoing, (a) this Agreement may not be amended, modified or terminated and the observance of any term hereof may not be waived with respect to any Investor without the written consent of such Investor, unless such amendment, modification, termination, or waiver applies to all Investors in the same fashion (it being agreed that a waiver of the provisions of Section 4 with respect to a particular transaction shall be deemed to apply to all Investors in the same fashion if such waiver does so by its terms, notwithstanding the fact that certain Investors may nonetheless, by agreement with the Company, purchase securities in such transaction), *provided further* that the Company may in its sole discretion waive compliance with any provision of this Agreement if observance of the terms would cause the Company or any Investor to be in violation of applicable Sanctions; and (b) Sections 3.1, 3.2, 5.1(c) and any other section of this Agreement specifically applicable to the Major Investors (including this clause (b) of this Section 7.6) may be amended, modified, terminated or waived with only (and only with) the written consent of the Company and each Major Investor. Notwithstanding the foregoing, **Schedule A** hereto may be amended by the Company from time to time to add transferees of any Registrable Securities in compliance with the terms of this Agreement without the consent of the other parties; and **Schedule A** hereto may also be amended by the Company after the date of this Agreement without the consent of the other parties to add information regarding any additional Investor who becomes a party to this Agreement in accordance with Section 7.9. The Company shall give prompt notice of any amendment, modification or termination hereof or waiver hereunder to any party hereto that did not consent in writing to such amendment, modification, termination, or waiver. Any amendment, modification, termination, or waiver effected in accordance with this Section 7.6

shall be binding on all parties hereto, regardless of whether any such party has consented thereto. No waivers of or exceptions to any term, condition, or provision of this Agreement, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such term, condition, or provision.

7.7 **Severability.** In case any provision contained in this Agreement is for any reason held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement, and such invalid, illegal, or unenforceable provision shall be reformed and construed so that it will be valid, legal, and enforceable to the maximum extent permitted by law.

7.8 **Aggregation of Stock; Apportionment.** All shares of Registrable Securities held or acquired by 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.

7.9 **Additional Investors.** Notwithstanding anything to the contrary contained herein, if the Company issues additional shares of Common Stock after the date hereof pursuant to the Purchase Agreement, any such purchaser of such shares of Common Stock may become a party to this Agreement by executing and delivering a counterpart signature page to this Agreement, and thereafter shall be deemed an “Investor” for all purposes hereunder. No action or consent by the Investors shall be required for such joinder to this Agreement by such additional Investor, so long as such additional Investor has agreed in writing to be bound by all of the obligations as an “Investor” hereunder.

7.10 **Entire Agreement.** This Agreement (including any Exhibits and the Schedules hereto) together with the Certificate of Incorporation and the other Transaction Agreements (as defined in the Purchase Agreement) 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 is expressly canceled.

7.11 **Dispute Resolution.**

(a) The parties (i) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of Delaware and to the jurisdiction of the United States District Court for the District of Delaware for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (ii) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of Delaware or the United States District Court for the District of Delaware, and (iii) 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.

(b) **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.

7.12 **Costs of Enforcement.** Each party will bear its own costs in respect of any disputes arising under this Agreement.

7.13 **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 nonbreaching or nondefaulting party, nor shall it be construed to be a waiver of or acquiescence to any such breach or default, or to any similar breach or default thereafter occurring, nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. All remedies, whether under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

7.14 **Exercise of Statutory Authority and Duties of Board of Directors.** To the extent any of the provisions in this Agreement (that are not otherwise sufficiently addressed in the Certificate of Incorporation) constitute (individually or in combination) governance restrictions that would otherwise invalidly constrain the authority of the Board of Directors in a manner that violates Section 141(a) or 141(c) of the Delaware General Corporation Law, the Company's obligations under those provisions will be subject to the exercise by the Board of Directors of its statutory authority under the Delaware General Corporation Law and its fiduciary duties.

(signature page follows)

The parties have executed this Investors' Rights Agreement as of the date first written above.

COMPANY:

ProSomnus Sleep Technologies, Inc.

By: _____

Name:

Title:

The parties have executed this Investors' Rights Agreement as of the date first written above.

INVESTOR

(Print **Investor** name)

(Signature)

(Print name of **signatory**, if signing for an entity)

(Print title of **signatory**, if signing for an entity)

SCHEDULE A

Investors

Masters Special Situations, LLC

[*address*]

[*phone*]

[*email*]

[*Counsel cc, if any*]

Cetus Capital VI, L.P.

[*address*]

[*phone*]

[*email*]

[*Counsel cc, if any*]

SMC Holdings II, LP

[*address*]

[*phone*]

[*email*]

[*Counsel cc, if any*]

Exhibit 5

ProSomnus Sleep Technologies, Inc. Common Stock Purchase Agreement

**PROSOMNUS SLEEP TECHNOLOGIES, INC.
COMMON STOCK PURCHASE AGREEMENT**

THIS COMMON STOCK PURCHASE AGREEMENT (this “**Agreement**”), is made as of [____], 2024 by and among ProSomnus Sleep Technologies, Inc., a Delaware corporation (the “**Company**”), and the investors listed on **Exhibit A** attached to this Agreement (each a “**Purchaser**” and together the “**Purchasers**”).

The parties hereby agree as follows:

1. Purchase and Sale of Common Stock.

1.1 Sale and Issuance of Common Stock.

(a) *Authorization of Common Stock.* The Company shall have adopted and filed with the Secretary of State of the State of Delaware on or before the Closing (as defined below) the Amended and Restated Certificate of Incorporation in the form of **Exhibit B** attached to this Agreement (the “**Restated Certificate**”).

(b) *Purchase and Sale of Shares.* Subject to the terms and conditions of this Agreement, each Purchaser agrees to purchase, and the Company agrees to sell and issue to each Purchaser, at the Closing (as defined below) that number of shares of Common Stock, \$0.00001 par value per share (the “**Common Stock**”), set forth opposite each Purchaser’s name on **Exhibit A** with respect to the Closing, at a purchase price as set forth on **Exhibit A**. The shares of Common Stock issued to the Purchasers pursuant to Section 1.1(b) of this Agreement shall be referred to in this Agreement as the “**Investment Shares**.”

(c) *Commitment Fee Shares.* In consideration for the commitment by SMC Holdings II, LP (“**SMC**”) and Cetus Capital VI, L.P. (“**Cetus**”, and together with SMC, the “**Commitment Investors**”) to purchase at least 9,000,000 Investment Shares (the “**Commitment Shares**”), subject to a syndication right by the Commitment Investors, and provided that all of the Commitment Shares have been purchased at the Closing by Commitment Investors and/or one or more Purchasers reasonably acceptable to the Company (with the Company’s consent not to be unreasonably withheld) to whom the Commitment Investors have syndicated the Commitment Shares, the Company will issue 360,000 shares of Common Stock (the “**Commitment Fee Shares**” and together with the Investment Shares, the “**Shares**”) to each of SMC and Cetus (for an aggregate of 720,000 Commitment Fee Shares), provided, however, that if (i) all of the Commitment Shares are purchased by Commitment Investors and/or one or more Purchasers reasonably acceptable to the Company (with the Company’s consent not to be unreasonably withheld) to whom the Commitment Investors have syndicated the Commitment Shares (including one or more investment vehicles (the “**MSS Purchasers**”) affiliated with Masters Special Situations, LLC (“**MSS**”), and (ii) the MSS Purchasers purchase at least 7,000,000 Commitment Shares, the Company shall issue 180,000 Commitment Fee Shares to each of Cetus and SMC, and 360,000 Commitment Fee Shares to MSS and/or the MSS Purchasers (as directed by MSS) (for an aggregate of 720,000 Commitment Fee Shares).

1.2 Closing; Delivery.

(a) The initial purchase and sale of the Shares shall take place remotely via the exchange of documents and signatures on the date of this Agreement at such time as is mutually agreed upon, orally or in writing, by the Company and the Purchasers (which time and place are designated as the “**Closing**”).

(b) At the Closing, the Company shall deliver to each Purchaser a certificate representing the Shares being purchased by such Purchaser at the Closing (or other evidence of Share ownership) against payment of the purchase price therefor by check payable to the Company, by wire transfer to a bank account designated by the Company, by cancellation or conversion of indebtedness or other convertible securities of the Company to Purchaser, including interest, or by any combination of such methods.

1.3 **Defined Terms Used in this Agreement.** In addition to the terms defined above, the following terms used in this Agreement shall be construed to have the meanings set forth or referenced below.

(a) **“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 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.

(b) **“Bankruptcy Code”** means title 11 of the United States Code, 11 U.S.C. §§ 101–1532, as amended from time to time.

(c) **“Bankruptcy Court”** means the United States Bankruptcy Court for the District of Delaware.

(d) **“Board of Directors”** means the Board of Directors of the Company.

(e) **“Code”** means the Internal Revenue Code of 1986, as amended.

(f) **“Confirmation Order”** means the final and non-appealable order of the Bankruptcy Court confirming the Plan pursuant to, *inter alia*, section 1129 of the Bankruptcy Code, which order shall be consistent with the terms of the Restructuring Support Agreement, including the consent rights contained therein.

(g) **“Copyrights”** are any and all copyright rights, copyright applications, copyright registrations and like protections in each work of authorship and derivative work thereof, whether published or unpublished and whether or not the same also constitutes a trade secret.

(h) **“CTA”** means the Corporate Transparency Act, 31 U.S.C § 5336, and all rules and regulations promulgated thereunder, as each may be amended or replaced from time to time.

(i) **“DIP Facility”** has the meaning ascribed thereto in the Plan.

(j) **“DIP Financing”** means debtor-in-possession financing provided under the DIP Facility.

(k) **“DIP Orders”** has the meaning ascribed thereto in the Plan.

(l) **“DPA”** means the Defense Production Act of 1950, as amended, including all implementing regulations thereof.

(m) **“FinCEN”** means the Financial Crimes Enforcement Network, a bureau of the U.S. Department of the Treasury.

(n) **“Indemnification Agreement”** means the agreement between the Company and each of Len Liptak, Jason Orchard, Bruce Falbaum, Benjamin Roei Gurvitz and Anthony Raab, in the form of **Exhibit D** attached to this Agreement.

(o) **“Intellectual Property”** means, with respect to any Person, all of such Person’s right, title, and interest in and to the following:

- (i) its Copyrights, Trademarks and Patents;
- (ii) any and all trade secrets and trade secret rights, including, without limitation, any rights to unpatented inventions, know-how, operating manuals;
- (iii) any and all source code;
- (iv) any and all design rights which may be available to such Person;
- (v) any and all claims for damages by way of past, present and future infringement of any of the foregoing, with the right, but not the obligation, to sue for and collect such damages for said use or infringement of the Intellectual Property rights identified above; and
- (vi) all amendments, renewals and extensions of any of the Copyrights, Trademarks or Patents.

(p) **“Investors’ Rights Agreement”** means the agreement among the Company and the Purchasers dated as of the date of the Closing, in the form of **Exhibit E** attached to this Agreement.

(q) **“Knowledge”** including the phrase **“to the Company’s knowledge”** means the Knowledge Parties’ actual knowledge.

(r) **“Knowledge Parties”** means the Officers.

(s) **“Material Adverse Effect”** means a material adverse effect on the business, assets (including intangible assets), liabilities, financial condition, property or results of operations of the Company.

(t) **“Officer”** means Len Liptak and Brian Dow.

(u) **“Patents”** means all patents, patent applications and like protections including without limitation improvements, divisions, continuations, renewals, reissues, extensions and continuations-in-part of the same.

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

(w) **“Petition Date”** means May 7, 2024.

(x) “**Plan**” means the *Amended Joint Chapter 11 Plan of Reorganization of Prosomnus, Inc. and its Debtor Affiliates*, dated as of June 24, 2024 (as the same may be amended, modified, or supplemented from time to time).

(y) “**Restructuring Support Agreement**” has the meaning ascribed thereto in the Plan.

(z) “**Restructuring Term Sheet**” has the meaning ascribed thereto in the Plan.

(aa) “**Securities Act**” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

(bb) “**Transaction Agreements**” means this Agreement, the Investors’ Rights Agreement and the Voting Agreement.

(cc) “**Trademarks**” means any trademark and servicemark rights, whether registered or not, applications to register and registrations of the same and like protections, and the entire goodwill of the business of the Company connected with and symbolized by such trademarks.

(dd) “**Voting Agreement**” means the agreement among the Company, the Purchasers and certain other stockholders of the Company, dated as of the date of the Closing, in the form of **Exhibit F** attached to this Agreement.

2. **Representations and Warranties of the Company.** The Company hereby represents and warrants to each Purchaser that, except as set forth on the Disclosure Schedule attached as **Exhibit C** to this Agreement, which exceptions shall be deemed to be part of the representations and warranties made hereunder, the following representations are true and correct as of the date of the Closing, except as otherwise indicated. The Disclosure Schedule shall be arranged in sections corresponding to the numbered and lettered sections contained in this Section 2, and the disclosures in any section of the Disclosure Schedule shall qualify other sections in this Section 2 only to the extent it is readily apparent from a reading of the disclosure that such disclosure is applicable to such other sections. For purposes of these representations and warranties (other than those in Sections 2.2, 2.3, 2.4, 2.5, 2.6, 2.11 and 2.12), the term the “**Company**” shall include any subsidiaries of the Company, unless otherwise noted herein.

2.1 **Organization, Good Standing, Corporate Power and Qualification.** The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has all requisite corporate power and authority to carry on its business as now conducted and as presently proposed to be conducted. The Company is duly qualified to transact business and is in good standing in each jurisdiction in which the failure to so qualify would have a Material Adverse Effect.

2.2 **Capitalization.**

(a) The authorized capital of the Company consists, immediately prior to the Closing, of 36,600,000 shares of Common Stock, 21,638,127 shares of which are issued and outstanding immediately prior to the Closing. All of the outstanding shares of capital stock have been duly authorized, are fully paid and nonassessable and were issued in compliance with all applicable federal and state securities laws.

2.3 **Subsidiaries.** Other than ProSomnus Germany GmbH and ProSomnus International LLC, the Company does not currently own or control, directly or indirectly, any interest in

any other corporation, partnership, trust, joint venture, limited liability company, association, or other business entity. The Company is not a participant in any joint venture, partnership or similar arrangement.

2.4 Authorization. All corporate action required to be taken by the Board of Directors and the Company's stockholders in order to authorize the Company to enter into the Transaction Agreements, and to issue the Shares at the Closing has been taken. All action on the part of the officers of the Company necessary for the execution and delivery of the Transaction Agreements, the performance of all obligations of the Company under the Transaction Agreements to be performed as of the Closing, and the issuance and delivery of the Shares has been taken. The Transaction Agreements, when executed and delivered by the Company, shall constitute valid and legally binding obligations of the Company, enforceable against the Company in accordance with their respective terms except (i) as limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance, or other laws of general application relating to or affecting the enforcement of creditors' rights generally; (ii) as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies; or (iii) to the extent the indemnification provisions contained in the Investors' Rights Agreement and the Indemnification Agreement may be limited by applicable federal or state securities laws.

2.5 Valid Issuance of Shares. The Shares, when issued, sold and delivered in accordance with the terms and for the consideration set forth in this Agreement, will be validly issued, fully paid and nonassessable and free of restrictions on transfer other than restrictions on transfer under the Transaction Agreements and Bylaws, applicable state and federal securities laws and liens or encumbrances created by or imposed by a Purchaser. Assuming the accuracy of the representations of the Purchasers in Section 3 of this Agreement and subject to the filings described in Section 2.4 of this Agreement, the Shares will be issued in compliance with all applicable federal and state securities laws.

2.6 Governmental Consents and Filings. Assuming the accuracy of the representations made by the Purchasers in Section 3 of this Agreement, no consent, approval, order or authorization of, or registration, qualification, designation, declaration or filing with, any federal, state or local governmental authority is required on the part of the Company in connection with the consummation of the transactions contemplated by this Agreement, except for (i) the filing of the Restated Certificate, which will have been filed as of the Closing; (ii) the filing of an initial or an updated report with FinCEN pursuant to the CTA (if required); and (iii) filings pursuant to applicable securities laws, which have been made or will be made in a timely manner.

2.7 Compliance with Other Instruments. The Company is not in violation or default (a) of any provisions of its Restated Certificate or Bylaws; (b) of any judgment, order, writ or decree; or (c) to the Company's knowledge, of any provision of any federal or state statute, rule or regulation applicable to the Company, the violation of which would have a Material Adverse Effect. The execution, delivery and performance of the Transaction Agreements and the consummation of the transactions contemplated by the Transaction Agreements will not result in any such violation or be in conflict with or constitute, with or without the passage of time and giving of notice, either (i) a default under any such provision, judgment, order, writ or decree; or (ii) an event which results in the creation of any lien, charge or encumbrance upon any assets of the Company or the suspension, revocation, forfeiture, or nonrenewal of any material permit or license applicable to the Company.

2.8 Intellectual Property. The Company is the sole owner of the Intellectual Property which it owns or purports to own except for (a) non-exclusive licenses granted to its customers in the ordinary course of business and licenses that may be exclusive as to territory but only as to discrete geographical areas outside of the United States of America, provided that such licenses of Intellectual Property neither result in a legal transfer of title of the licensed Intellectual Property nor have the same effect as a sale of such Intellectual Property, (b) over-the-counter software that is commercially available

to the public, and (c) material Intellectual Property licensed to the Company. Each Patent which it owns or purports to own and which is material to the Company's business is valid and enforceable, and no part of the Intellectual Property which the Company owns or purports to own and which is material to the Company's business has been judged invalid or unenforceable, in whole or in part. The Company has not received any written notice of any claim that any part of the Intellectual Property violates the rights of any third party except to the extent such claim could not reasonably be expected to have a Material Adverse Effect.

2.9 **Material Agreements.** The Company is not in default under any agreement to which it is a party or by which it is bound in which the default could reasonably be expected to have a Material Adverse Effect.

2.10 **Compliance with Sanctions, Anti-Money Laundering and Anti-Corruption Laws.** The Company, or to the knowledge of the Company, its Affiliates, directors, officers, employees, agents or representatives will not, directly or indirectly, use the proceeds from the sale of Shares, or lend, contribute or otherwise make available such proceeds to any subsidiary, joint venture partner or any other person (i) to fund or facilitate any activities or business of or with any individual, entity or government that is, or is owned or controlled by one or more persons that are, at the time of such funding or facilitation, the subject of any economic or financial sanctions or trade embargoes administered or enforced by the U.S. Department of Treasury's Office of Foreign Assets Control, the U.S. Department of State, the United Nations Security Council, the Council of the European Union or Her Majesty's Treasury (United Kingdom), or any other relevant sanctions authority) (collectively, "**Sanctions**"), or resident, located or organized in any country or territory that is the subject of comprehensive territorial Sanctions (currently including, Crimea, the so-called Donetsk People's Republic and so-called Luhansk People's Republic regions of Ukraine, Cuba, Iran, North Korea, and Syria) (each, a "**Sanctioned Jurisdiction**"); or (ii) in any other manner that would result in a violation of any Sanctions by the Company, any Purchaser or any other person. Neither the Company, nor to the knowledge of the Company, any Affiliates, directors, officers, or employees of the Company, is the subject of any Sanctions or resident, located or organized in a Sanctioned Jurisdiction. The Company has conducted its businesses in compliance with (i) Sanctions; (ii) applicable anti-corruption laws, rules, and regulations, including without limitation the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act, each as may be amended, and any rules or regulations thereunder (collectively, "**Anti-Corruption Laws**"); and (iii) applicable anti-money laundering laws, rules, and regulations, including without limitation the Money Laundering Control Act of 1986, as amended from time (collectively, "**Anti-Money Laundering Laws**"). The Company, will not use, directly or, to the knowledge of the Company, will not use indirectly, the proceeds of the financing contemplated hereby in any manner or for any purpose that would result in a violation of any Anti-Corruption Laws or Anti-Money Laundering Laws by the Company or Affiliates, any Purchaser or any other person or entity.

2.11 **Regulatory Compliance.** The Company is not an "investment company" or a company "controlled" by an "investment company" under the Investment Company Act of 1940, as amended. The Company is not engaged as one of its important activities in extending credit for margin stock (under Regulations X, T and U of the Federal Reserve Board of Governors). The Company (a) has complied in all material respects with all requirements of applicable law, and (b) has not violated any requirements of applicable law the violation of which could reasonably be expected to have a Material Adverse Effect. None of the Company's or any of its subsidiaries' properties or assets have been used by the Company or any subsidiary or, to the Company's knowledge, by previous persons, in disposing, producing, storing, treating, or transporting any hazardous substance other than in compliance in all material respects with applicable law. The Company and each of its subsidiaries have obtained all consents, approvals and authorizations of, made all declarations or filings with, and given all notices to, all governmental authorities that are necessary to continue their respective businesses as currently conducted,

except to the extent that failure to obtain, make or file the same could not reasonably be expected to have a Material Adverse Effect.

2.12 Tax Returns and Payments. . The Company has timely filed all required U.S. federal and other material tax returns and reports, and the Company has timely paid all material taxes owed by the Company except (a) to the extent such taxes are being contested in good faith by appropriate proceedings promptly instituted and diligently conducted, so long as such reserve or other appropriate provision, if any, as shall be required in conformity with GAAP shall have been made therefor, or (b) if such taxes, assessments, deposits and contributions do not, individually or in the aggregate, exceed Two Hundred Fifty Thousand Dollars (\$250,000). The Company is unaware of any claims or adjustments proposed for any of the Company's prior tax years which could result in additional taxes becoming due and payable by the Company in excess of Two Hundred Fifty Thousand Dollars (\$250,000).

2.13 Changes. Since the July 1, 2024, there has not been any change in the assets, liabilities, financial condition or operating results of the Company, except changes in the ordinary course of business that have not caused, in the aggregate, a Material Adverse Effect.

2.15 Full Disclosure. No written representation, warranty or other statement of the Company in any certificate or written statement given to any Purchaser, as of the date such representation, warranty, or other statement was made, taken together with all such written certificates and written statements given to such Purchaser, contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements contained in the certificates or statements not misleading (it being recognized by the Purchasers that the projections and forecasts provided by the Company in good faith and based upon reasonable assumptions are not viewed as facts and that actual results during the period or periods covered by such projections and forecasts may differ from the projected or forecasted results).

3. Representations and Warranties of the Purchasers. Each Purchaser hereby represents and warrants to the Company, severally and not jointly, that:

3.1 Authorization. The Purchaser has full power and authority to enter into the Transaction Agreements. The Transaction Agreements to which the Purchaser is a party, when executed and delivered by the Purchaser, will constitute valid and legally binding obligations of the Purchaser, enforceable against such Purchaser in accordance with their terms, except (a) as limited by applicable bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and any other laws of general application affecting enforcement of creditors' rights generally, and as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies, or (b) to the extent the indemnification provisions contained in the Investors' Rights Agreement may be limited by applicable federal or state securities laws.

3.2 Purchase Entirely for Own Account. This Agreement is made with the Purchaser in reliance upon the Purchaser's representation to the Company, which by the Purchaser's execution of this Agreement, the Purchaser hereby confirms, that the Shares to be acquired by the Purchaser will be acquired for investment for the Purchaser's own account, not as a nominee or agent, and not with a view to the resale or distribution of any part thereof, and that the Purchaser has no present intention of selling, granting any participation in, or otherwise distributing the same. By executing this Agreement, the Purchaser further represents that the Purchaser does not presently have any contract, undertaking, agreement or arrangement with any Person to sell, transfer or grant participations to such Person or to any third Person, with respect to any of the Shares. The Purchaser has not been formed for the specific purpose of acquiring the Shares.

3.3 Disclosure of Information. The Purchaser has had an opportunity to discuss the Company's business, management, financial affairs and the terms and conditions of the offering of the

Shares with the Company's management and has had an opportunity to review the Company's facilities. The foregoing, however, does not limit or modify the representations and warranties of the Company in Section 2 of this Agreement or the right of the Purchasers to rely thereon.

3.4 **Restricted Securities.** The Purchaser understands that the Shares have not been, and will not be, registered under the Securities Act, by reason of a specific exemption from the registration provisions of the Securities Act which depends upon, among other things, the bona fide nature of the investment intent and the accuracy of the Purchaser's representations as expressed herein. The Purchaser understands that the Shares are "restricted securities" under applicable U.S. federal and state securities laws and that, pursuant to these laws, the Purchaser must hold the Shares indefinitely unless they are registered with the Securities and Exchange Commission and qualified by state authorities, or an exemption from such registration and qualification requirements is available. The Purchaser acknowledges that the Company has no obligation to register or qualify the Shares, or the Common Stock into which it may be converted, for resale except as set forth in the Investors' Rights Agreement. The Purchaser further acknowledges that if an exemption from registration or qualification is available, it may be conditioned on various requirements including, but not limited to, the time and manner of sale, the holding period for the Shares, and on requirements relating to the Company which are outside of the Purchaser's control, and which the Company is under no obligation and may not be able to satisfy.

3.5 **No Public Market.** The Purchaser understands that no public market now exists for the Shares, and that the Company has made no assurances that a public market will ever exist for the Shares.

3.6 **Legends.** The Purchaser understands that the Shares and any securities issued in respect of or exchange for the Shares, may be notated with one or all of the following legends:

"THE SHARES REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AND HAVE BEEN ACQUIRED FOR INVESTMENT AND NOT WITH A VIEW TO, OR IN CONNECTION WITH, THE SALE OR DISTRIBUTION THEREOF. NO SUCH TRANSFER MAY BE EFFECTED WITHOUT AN EFFECTIVE REGISTRATION STATEMENT RELATED THERETO OR AN OPINION OF COUNSEL IN A FORM SATISFACTORY TO THE COMPANY THAT SUCH REGISTRATION IS NOT REQUIRED UNDER THE SECURITIES ACT OF 1933."

(a) Any legend set forth in, or required by, the other Transaction Agreements.

(b) Any legend required by the securities laws of any state to the extent such laws are applicable to the Shares represented by the certificate, instrument, or book entry so legended.

3.7 **Accredited Investor.** The Purchaser is an accredited investor as defined in Rule 501(a) of Regulation D promulgated under the Securities Act.

3.8 **Foreign Investors.** If the Purchaser is not a United States person (as defined by Section 7701(a)(30) of the Code), the Purchaser hereby represents that it has satisfied itself as to the full observance of the laws of its jurisdiction in connection with any invitation to subscribe for the Shares or any use of this Agreement, including (i) the legal requirements within its jurisdiction for the purchase of the Shares, (ii) any foreign exchange restrictions applicable to such purchase, (iii) any governmental or other consents that may need to be obtained, and (iv) the income tax and other tax consequences, if any, that may be relevant to the purchase, holding, redemption, sale, or transfer of the Shares. The Purchaser's subscription and payment for and continued beneficial ownership of the Shares will not violate any applicable securities or other laws of the Purchaser's jurisdiction.

3.9 **CFIUS Foreign Person Status.** The Purchaser is not a “foreign person” or a “foreign entity,” as defined in Section 721 of the DPA. The Purchaser is not controlled by a “foreign person,” as defined in the DPA. The Purchaser does not permit any foreign person affiliated with the Purchaser, whether affiliated as a limited partner or otherwise, to obtain through the Purchaser any of the following with respect to the Company: (i) access to any “material nonpublic technical information” (as defined in the DPA) in the possession of the Company; (ii) membership or observer rights on the Board of Directors or equivalent governing body of the Company or the right to nominate an individual to a position on the Board of Directors or equivalent governing body of the Company; (iii) any involvement, other than through the voting of shares, in the substantive decision-making of the Company regarding (x) the use, development, acquisition, or release of any “critical technology” (as defined in the DPA), (y) the use, development, acquisition, safekeeping, or release of “sensitive personal data” (as defined in the DPA) of U.S. citizens maintained or collected by the Company, or (z) the management, operation, manufacture, or supply of “covered investment critical infrastructure” (as defined in the DPA); or (iv) “control” of the Company (as defined in the DPA).

3.10 **Sanctions.** Neither the Purchaser, nor any of its officers, directors, employees, agents, stockholders or partners, is not a Sanctioned Party (as defined in the Investors’ Rights Agreement).

3.11 **No General Solicitation.** Neither the Purchaser, nor any of its officers, directors, employees, agents, stockholders or partners has either directly or indirectly, including, through a broker or finder (a) engaged in any general solicitation, or (b) published any advertisement in connection with the offer and sale of the Shares.

3.12 **Exculpation Among Purchasers.** The Purchaser acknowledges that it is not relying upon any Person, other than the Company and its officers and directors, in making its investment or decision to invest in the Company. The Purchaser agrees that neither any Purchaser nor the respective controlling Persons, officers, directors, partners, agents, or employees of any Purchaser shall be liable to any other Purchaser for any action heretofore taken or omitted to be taken by any of them in connection with the purchase of the Shares.

3.13 **Residence.** If the Purchaser is an individual, then the Purchaser resides in the state or province identified in the address of the Purchaser set forth on the Purchaser’s signature page or **Exhibit A**; if the Purchaser is a partnership, corporation, limited liability company or other entity, then the office or offices of the Purchaser in which it has its principal place of business is identified in the address or addresses of the Purchaser set forth on the Purchaser’s signature page or **Exhibit A**.

3.14 **Corporate Transparency Act.** If the Purchaser is not a natural person, and if the Purchaser, together with any Affiliate, will own 25% or more of the Company upon the Closing, no natural person will (a) own (directly or indirectly) 25% or more of the ownership interests of the Company or (b) control (directly or indirectly) the Purchaser’s ownership interest in the Company. If the Purchaser is not a natural person and will, directly or indirectly, have “substantial control” (as defined in the CTA) over the Company, no natural person affiliated with such Purchaser will, directly or indirectly, exercise substantial control over the Company.

4. **Conditions to the Purchasers’ Obligations at Closing.** The obligations of each Purchaser to purchase Shares at the Closing are subject to the fulfillment, on or before the Closing, of each of the following conditions, unless otherwise waived:

4.1 **Representations and Warranties.** The representations and warranties of the Company contained in Section 2 shall be true and correct in all respects as of the Closing.

4.2 **Performance.** The Company shall have performed and complied with all covenants, agreements, obligations and conditions contained in this Agreement that are required to be performed or complied with by the Company in all respects on or before the Closing.

4.3 **Compliance Certificate.** The Chief Executive Officer or President of the Company shall deliver to the Purchasers at the Closing a certificate certifying that the conditions specified in Sections 4.1 and 4.2 have been fulfilled in all material respects.

4.4 **Qualifications.** All authorizations, approvals or permits, if any, of any governmental authority or regulatory body of the United States or of any state that are required in connection with the lawful issuance and sale of the Shares pursuant to this Agreement shall be obtained and effective as of the Closing.

4.5 **Board of Directors.** At the Closing, the authorized size of the Board of Directors shall be five, and the Board of Directors shall be comprised of Anthony Raab, Jason Orchard, Bruce Falbaum, Benjamin Roei Gurvitz and Len Liptak.

4.6 **Indemnification Agreement.** The Company shall have executed and delivered the Indemnification Agreements.

4.7 **Investors' Rights Agreement.** The Company and each Purchaser (other than the Purchaser relying upon this condition to excuse such Purchaser's performance hereunder) shall have executed and delivered the Investors' Rights Agreement.

4.8 **Voting Agreement.** The Company, each Purchaser (other than the Purchaser relying upon this condition to excuse such Purchaser's performance hereunder), and the other stockholders of the Company named as parties thereto shall have executed and delivered the Voting Agreement.

4.9 **Restated Certificate.** The Company shall have filed the Restated Certificate with the Secretary of State of Delaware on or prior to the Closing, which shall continue to be in full force and effect as of the Closing.

4.10 **Secretary's Certificate.** The Secretary of the Company shall have delivered to the Purchasers at the Closing a certificate certifying the Certificate of Incorporation and Bylaws of the Company as in effect at the Closing.

4.11 **Proceedings and Documents.** All corporate and other proceedings in connection with the transactions contemplated at the Closing and all documents incidental thereto shall be reasonably satisfactory in form and substance to each Purchaser, and each Purchaser (or its respective counsel) shall have received all such counterpart original and certified or other copies of such documents as reasonably requested. Such documents may include good standing certificates.

4.12 **Minimum Number of Shares at Closing.** A minimum of 9,000,000 Investment Shares must be sold at the Closing.

4.13 **Confirmation Order.** The Company shall have obtained entry of the Confirmation Order on terms reasonably satisfactory to the Commitment Investors, and such Confirmation Order shall not have been vacated or stayed.

4.14 **Effectiveness of the Plan.** All conditions to the occurrence of the Effective Date of the Plan (as defined therein) shall be satisfied or waived (other than the occurrence of the Closing); and

(a) the Effective Date of the Plan (as defined therein) will have occurred no later than 105 calendar days following the Petition Date, and (b) there shall be no (i) order modifying or terminating the Company's exclusive right to file and solicit acceptances of a plan of reorganization (including the Plan), (ii) temporary restraining order, preliminary or permanent injunction or other order issued by any governmental authority preventing the consummation of the restructuring contemplated by the Plan in effect, (iii) trustee or examiner with expanded powers appointed in any of the Company's bankruptcy cases, or (iv) order dismissing the Company's bankruptcy cases or converting such bankruptcy cases to cases under Chapter 7 of the Bankruptcy Code.

4.15 **DIP Financing.** The entry of DIP Orders approving the DIP Facility (which shall be consistent in all material respects with the terms set forth in the Restructuring Term Sheet), and such DIP Facility not being subsequently terminated during the pendency of the Company's bankruptcy cases or in default as of the Effective Date of the Plan (as defined therein).

5. **Conditions of the Company's Obligations at the Closing.** The obligations of the Company to sell Shares to the Purchasers at the Closing are subject to the fulfillment, on or before the Closing, of each of the following conditions, unless otherwise waived:

5.1 **Representations and Warranties.** The representations and warranties of each Purchaser purchasing Shares in the Closing contained in Section 3 shall be true and correct in all respects as of the Closing.

5.2 **Performance.** The Purchasers purchasing Shares in the Closing shall have performed and complied with all covenants, agreements, obligations and conditions contained in this Agreement that are required to be performed or complied with by them on or before the Closing.

5.3 **Qualifications.** All authorizations, approvals or permits, if any, of any governmental authority or regulatory body of the United States or of any state that are required in connection with the lawful issuance and sale of the Shares pursuant to this Agreement shall be obtained and effective as of the Closing.

5.4 **Investors' Rights Agreement.** Each Purchaser shall have executed and delivered the Investors' Rights Agreement.

5.5 **Voting Agreement.** Each Purchaser and the other stockholders of the Company named as parties thereto shall have executed and delivered the Voting Agreement.

5.6 **Minimum Number of Shares at the Closing.** A minimum of 9,000,000 Investment Shares must be sold at the Closing.

5.7 **Confirmation Order.** The Company shall have obtained entry of the Confirmation Order on terms reasonably satisfactory to the Company, and such Confirmation Order shall not have been vacated or stayed.

5.8 **Effectiveness of the Plan.** All conditions to the occurrence of the Effective Date of the Plan (as defined therein) shall be satisfied or waived (other than the occurrence of the Closing); and (a) the Effective Date of the Plan (as defined therein) will have occurred no later than 105 calendar days following the Petition Date, and (b) there shall be no (i) order modifying or terminating the Company's exclusive right to file and solicit acceptances of a plan of reorganization (including the Plan), (ii) temporary restraining order, preliminary or permanent injunction or other order issued by any governmental authority preventing the consummation of the restructuring contemplated by the Plan in effect, (iii) trustee or

examiner with expanded powers appointed in any of the Company's bankruptcy cases, or (iv) order dismissing the Company's bankruptcy cases or converting such bankruptcy cases to cases under Chapter 7 of the Bankruptcy Code.

5.9 **DIP Financing.** the entry of DIP Orders approving the DIP Facility (which shall be consistent in all material respects with the terms set forth in the Restructuring Term Sheet), and such DIP Facility not being subsequently terminated during the pendency of the Company's bankruptcy cases or in default as of the Effective Date of the Plan (as defined therein).

6. **Miscellaneous.**

6.1 **Survival of Warranties.** Unless otherwise set forth in this Agreement, the representations and warranties of the Company and the Purchasers contained in or made pursuant to this Agreement shall survive the execution and delivery of this Agreement and the Closing and shall in no way be affected by any investigation or knowledge of the subject matter thereof made by or on behalf of the Purchasers or the Company.

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

6.3 **Governing Law.** This Agreement shall be governed by the internal law of the State of Delaware, without regard to conflict of law principles that would result in the application of any law other than the law of the State of Delaware.

6.4 **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. federal ESIGN Act of 2000, *e.g.*, www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes.

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

6.6 **Notices.**

(a) **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 (i) personal delivery to the party to be notified; (ii) 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; (iii) five days after having been sent by registered or certified mail, return receipt requested, postage prepaid; or (iv) one business day after deposit with a nationally recognized overnight courier, freight prepaid, specifying next business day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their address as set forth on the signature page or **Exhibit A**, 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 email address or address as subsequently modified by written notice given in accordance with this Section 6.6. If notice

is given to the Company, a copy (which copy shall not constitute notice) shall also be sent to Wilson Sonsini Goodrich & Rosati, P.C., 650 Page Mill Road, Palo Alto, CA 94304; Attention: Andrew D. Hoffman.

(b) **Consent to Electronic Notice.** Each Purchaser 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 email address set forth below such Purchaser’s name on the signature page or **Exhibit A**, as updated from time to time by notice to the Company. Each party agrees to promptly notify the other parties of any change in its email address, and that failure to do so shall not affect the foregoing.

6.7 **No Finder’s Fees.** Each party represents that it neither is nor will be obligated for any finder’s fee or commission in connection with this transaction. Each Purchaser agrees to indemnify and to hold harmless the Company from any liability for any commission or compensation in the nature of a finder’s or broker’s fee arising out of this transaction (and the costs and expenses of defending against such liability or asserted liability) for which each Purchaser or any of its officers, employees or representatives is responsible. The Company agrees to indemnify and hold harmless each Purchaser from any liability for any commission or compensation in the nature of a finder’s or broker’s fee arising out of this transaction (and the costs and expenses of defending against such liability or asserted liability) for which the Company or any of its officers, employees or representatives is responsible.

6.8 **Costs of Enforcement.** Each party will bear its own costs in respect of any disputes arising under this Agreement.

6.9 **Amendments and Waivers.** Except as set forth in Section 1.3(a) of this Agreement, any term of this Agreement may be amended, terminated or waived only with the written consent of the Company and the holders of at least a majority of the then-outstanding Shares. Any amendment or waiver effected in accordance with this Section 6.9 shall be binding upon the Purchasers and each transferee of the Shares (or the Common Stock issuable upon conversion thereof), each future holder of all such securities, and the Company.

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

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

6.12 **Entire Agreement.** This Agreement (including the Exhibits hereto), the Restated Certificate and the other Transaction Agreements constitute the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties are expressly canceled.

6.13 **Dispute Resolution.**

(a) The parties (i) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of Delaware and to the jurisdiction of the United States District Court for the District of Delaware for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (ii) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of Delaware or the United States District Court for the District of Delaware, and (iii) 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.

(b) **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.

6.14 **Waiver of Conflicts.** Each party to this Agreement acknowledges that Wilson Sonsini Goodrich & Rosati, P.C., counsel for the Company, may have in the past performed, and may continue to or in the future perform, legal services for certain of the Purchasers in matters that are similar, but not substantially related, to the transactions described in this Agreement, including the representation of such Purchasers in venture capital financings and other matters. Accordingly, each party to this Agreement hereby acknowledges that (a) they have had an opportunity to ask for information relevant to this disclosure, and (b) Wilson Sonsini Goodrich & Rosati, P.C. represents only the Company with respect to the Agreement and the transactions contemplated hereby. The Company gives its informed consent to Wilson Sonsini Goodrich & Rosati, P.C.'s existing and/or future representation of such Purchasers in matters not substantially related to this Agreement, and each of the Purchasers hereby gives its informed consent to Wilson Sonsini Goodrich & Rosati, P.C.'s representation of the Company in connection with this Agreement and the transactions contemplated hereby.

(signature page follows)

The parties have executed this Common Stock Purchase Agreement as of the date first written above.

COMPANY:

ProSomnus Sleep Technologies, Inc.

By: _____

Name:

Title:

Address:

Email:

The parties have executed this Common Stock Purchase Agreement as of the date first written above.

PURCHASER

(Print **Purchaser** name)

(Signature)

(Print name of **signatory**, if signing for an entity)

(Print title of **signatory**, if signing for an entity)

(Print address)

(Print email address)

EXHIBIT A**SCHEDULE OF PURCHASERS**

Investor	Price Per Share	Cash Amount	Cash Shares	Commitment Fee Amount	Commitment Fee Shares	Total Shares
Masters Special Situations, LLC	\$1.00	\$7,000,000.00	7,000,000	\$360,000.00	360,000	7,360,000
Cetus Capital VI, L.P.	\$1.00	\$1,000,000.00	1,000,000	\$180,000.00	180,000	1,180,000
SMC Holdings II, LP	\$1.00	\$1,000,000.00	1,000,000	\$180,000.00	180,000	1,180,000
Total						9,720,000

EXHIBIT B

**FORM OF AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION**

EXHIBIT C

DISCLOSURE SCHEDULE

EXHIBIT D

FORM OF INDEMNIFICATION AGREEMENT

EXHIBIT E

FORM OF INVESTORS' RIGHTS AGREEMENT

EXHIBIT F

FORM OF VOTING AGREEMENT

Exhibit 6

ProSomnus Sleep Technologies, Inc. Note Purchase and Security Agreement

PROSOMNUS SLEEP TECHNOLOGIES, INC.

NOTE PURCHASE AND SECURITY AGREEMENT

Issue Date: July [], 2024

\$[15,829,039.00]

This NOTE PURCHASE AND SECURITY AGREEMENT (as amended, restated, modified or otherwise supplemented from time to time, this “**Agreement**”) is entered into as of July [], 2024, by and among WILMINGTON SAVINGS FUND SOCIETY, FSB, as collateral agent (in such capacity, together with its successors or permitted assigns, “**Agent**”), the Holders from time to time party hereto (each, a “**Holder**” and collectively, the “**Holders**”), and PROSOMNUS SLEEP TECHNOLOGIES, INC. a Delaware corporation (“**Issuer**”).

RECITALS

WHEREAS, in accordance with the *Amended Joint Chapter 11 Plan of Reorganization of Prosomnus, Inc. and its Debtor Affiliates* (the “**Plan**”), and that certain order of the United States Bankruptcy Court for the District of Delaware confirming the Plan, entered on [], 2024, the Issuer wishes to issue the Notes (as defined below), and the Holders desire to receive from Issuer the Notes in return for the cancellation of the Holders’ Existing Notes (as defined below) and in full satisfaction of the Holders’ Allowed Senior Notes Claims (as defined in the Plan) (such issuance and cancellation, the “**Transaction**”). This Agreement sets forth the terms on which the Holders will receive the Notes from Issuer for the cancellation of the Holders’ Existing Notes and in full satisfaction of the Holders’ Allowed Senior Notes Claims (as defined in the Plan) and Issuer will issue the Notes, and repay the amounts owing, to the Holders under the Notes.

AGREEMENT

1. NOTE TERMS.

1.1 Issuance and Prepayments.

(a) Notes Issuance. Subject to the terms and conditions of this Agreement, on the Issue Date, each Holder shall receive a secured promissory note, in the form attached hereto as Exhibit D (as amended, restated, amended and restated, supplemented or otherwise modified from time to time, the “**Notes**,” and each, a “**Note**”) in accordance with each Holder’s Allocation as set forth on Schedule 1.1 hereto, for payment in the form of the cancellation of the aggregate principal amount of such Holder’s Existing Notes set forth on Schedule 1.1 hereto and in full satisfaction of the Holders’ Allowed Senior Notes Claims (as defined in the Plan).

(b) Scheduled Payment at Maturity. The Outstanding Principal Balance of each Note, all accrued interest thereon and all other amounts owed under the Note Documents are due and payable in full on the Maturity Date. The Notes may not be prepaid, except as set forth in subsection (c)(ii), subsection (c)(iii) and subsection (d) of this Section 1.1. In connection with any prepayment of the Notes pursuant to subsection (c) or subsection (d) shall be accompanied by a notice from the Issuer to the Agent and the Holders specifying the provision pursuant to which such prepayment shall be made.

(c) Mandatory Prepayment of the Notes.

(i) Upon an Acceleration. If the Notes are accelerated following the occurrence and during the continuance of an Event of Default, Issuer shall deliver, or cause to be delivered, to the Agent an amount equal to the sum of: (i) the Outstanding Principal Balance of each Note plus any accrued and unpaid interest thereon and (ii) all other sums, if any, that shall have become due and payable pursuant to the Note Documents.

(ii) Upon a Change of Control. In the event of a Change of Control, an amount equal to 101% of the Outstanding Principal Balance of each Note plus any accrued and unpaid interest thereon plus all other amounts, if any, under the Note Documents shall be due and payable concurrently with the consummation of such Change of Control.

(iii) Upon a Disposition. Promptly upon receipt by the Issuer or any Subsidiary of the proceeds of the Disposition of any assets (other than a Disposition permitted by Section 7.1), the Issuer shall deliver, or cause to be delivered, to the Agent an amount equal to 100% of the net proceeds from such Disposition to the prepayment of the Outstanding Principal Balance of each Note on a pro rata basis in accordance with the terms hereof.

(iv) In connection with any prepayment pursuant to subsection (c)(i) or subsection (c)(ii) of this Section 1.1(c), the Issuer shall provide written notice to the Agent of such prepayment at least five (5) Business Days (or such shorter period as the Agent may agree to) prior to such prepayment, specifying the provision pursuant to which such prepayment shall be made.

(d) Permitted Optional Prepayment of the Notes. Issuer shall have the option to prepay the Notes, in whole or in part, without premium or penalty, provided Issuer provides written notice to the Agent and the Holders of its election to prepay the Notes at least ten (10) Business Days prior to such prepayment, specifying the provision pursuant to which such prepayment shall be made. In the case of any prepayment pursuant to this Section 1.1(d), Issuer shall pay, on the date of such prepayment, (A) an amount equal to the Outstanding Principal Balance of each Note to be prepaid plus any accrued and unpaid interest thereon as of the date of prepayment and (B) all other sums, if any, that shall become due and payable pursuant to the Note Documents; provided that, notwithstanding the foregoing, any such notice of prepayment may be conditioned upon the effectiveness of other credit facilities or other transactions, in which case such notice may be revoked or delayed by Issuer (by notice to Agent and the Holders on or prior to the specified effective date) if such condition is not satisfied.

1.2 Interest.

(a) Accrual of Interest. Interest shall accrue daily on the Outstanding Principal Balance of each Note from (and including) the Issue Date until (but excluding) the Maturity Date, or such earlier date of prepayment for such Note, at a per annum rate equal to eight percent (8.00%).

(b) Payment of Interest. Prior to and on June 30, 2025 (the “**PIK Interest Termination Date**”), accrued and unpaid interest on each Note shall be payable quarterly in arrears on each January 1, April 1, July 1 and October 1 (each, a “**Payment Date**”), commencing on October 1, 2024, by adding such accrued interest to the Outstanding Principal Balance of such Note on such Payment Date, which addition of accrued interest will be effective as of the open of business on such Payment Date. After the PIK Interest Termination Date, accrued and unpaid interest on each Note shall be payable in cash quarterly in arrears on each Payment Date.

(c) 360-Day Year. Interest shall be computed on the basis of a 360-day year composed of twelve 30-day months and, for partial months, on the basis of the number of days actually elapsed in a 30-day month.

(d) Default Interest. At the request of any Holder to the Issuer (with a copy to the Agent) while any Event of Default has occurred and is continuing (or automatically while any Event of Default under Section 8.5 has occurred and is continuing), the Issuer shall pay interest (after as well as before entry of judgment thereon to the extent permitted by law) on all of the Notes and, to the extent permitted by applicable law, past due interest thereon, if any, from and after the date of occurrence of such Event of Default, at a rate per annum which is determined by adding five percent (5.0%) per annum to the interest rate that is otherwise applicable thereto. All such interest shall be payable in cash on demand of the Agent (acting at the direction of the Required Holders) or any Holder (who shall copy the Agent with respect to such demand).

(e) Maximum Lawful Rate. Notwithstanding anything herein to the contrary, the obligations of the Issuer hereunder shall be subject to the limitation that payments of interest shall not be required, for any period for which interest is computed hereunder, to the extent (but only to the extent) that contracting for or receiving such payment by the respective Holder would be contrary to the provisions of any law applicable to such Holder limiting the highest rate of interest which may be lawfully contracted for, charged or received by such Holder, and in such event the Issuer shall pay such Holder interest at the highest rate permitted by applicable law (“**Maximum Lawful Rate**”); provided, however, that if at any time thereafter the rate of interest payable hereunder is less than the Maximum Lawful Rate, the Issuer shall continue to pay interest hereunder at the Maximum Lawful Rate until such time as the total interest received by such Holder is equal to the total interest that would have been received had the interest payable hereunder been (but for the operation of this paragraph) the interest rate payable since the Issue Date as otherwise provided in this Agreement.

(f) Each determination by the Agent of an interest rate hereunder shall be conclusive and binding for all purposes, absent manifest error.

1.3 Payments.

(a) Generally. Issuer shall pay all amounts due and payable under any Note Document promptly when due. All payments (including prepayments) to be made by Issuer on account of principal, interest, fees and other amounts required hereunder shall be made without set off, recoupment, counterclaim or deduction of any kind, shall, except as otherwise expressly provided herein, be made to the Agent (for the ratable account of the Holders), and shall be made in Dollars and by wire transfer or ACH transfer in immediately available funds (which shall be the exclusive means of payment hereunder) to such account of Agent specified in writing by Agent to Issuer. Payments received after 3:00 p.m. Eastern time are, at the discretion of the Agent, considered received at the opening

of business on the next Business Day. When a payment would otherwise be due on a day that is not a Business Day, the payment is due the next Business Day and additional fees or interest, as applicable, shall continue to accrue. All payments (including prepayments) of the Notes shall be allocated to each then outstanding Note on a pro rata basis based upon the proportion that the Outstanding Principal Balance of such Note bears to the total aggregate Outstanding Principal Balance of all Notes until all such Notes have been paid in full.

(b) Taxes.

(i) Payments received by Agent, on its own behalf or on behalf of a Holder, with respect to Obligations will be made free and clear of and without deduction for any and all present and future taxes, levies, imposts, duties, deductions, withholdings, assessments, fees or other charges imposed by any Governmental Authority (including any interest, additions to tax or penalties applicable thereto) (“**Taxes**”) except as required by any Governmental Authority, applicable law, regulation or international agreement, in which case, to the extent such withholding or deduction is on account of Indemnified Taxes, the amount due with respect to such payment or other sum payable hereunder will be increased to the extent necessary to ensure that, after the making of such required withholding or deduction (including any withholding or deduction made with respect to such additional amounts payable pursuant to this sentence), each Holder receives a net sum equal to the sum which it would have received had no withholding or deduction been required. Issuer will, upon request, furnish each Holder with proof reasonably satisfactory to each Holder indicating that Issuer has made such withholding payment.

(ii) Issuer shall indemnify, and within ten (10) Business Days of demand therefor, pay Agent and each affected Holder for the full amount of Indemnified Taxes and other reasonable expenses and costs related thereto (including, without limitation, reasonable attorneys’ fees or Tax advisors’ fees and disbursements and Taxes imposed on amounts received under this Section 1.3(b)) that are paid by, or imposed on, Agent or such Holder (and any of their respective Affiliates), whether or not such Indemnified Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to Issuer by a Holder (with a copy to Agent) or by the Agent on its own behalf, shall be conclusive absent manifest error.

(iii) If a Holder determines, in its sole discretion exercised in good faith, that it has received a refund of any Indemnified Taxes as to which it has been indemnified pursuant to this Section 1.3(b) (including by the payment of additional amounts pursuant to this Section 1.3(b)), it shall pay to the indemnifying party an amount equal to such refund (but only to the extent of indemnity payments made under this Section 1.3(b) with respect to the Indemnified Taxes giving rise to such refund), net of all out-of-pocket expenses (including Taxes) of such indemnified party incurred in connection with obtaining such refund and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund). Such indemnifying party, upon the written request of such indemnified party, shall repay to such indemnified party the amount paid over pursuant to this Section 1.3(b)(iii) (plus any penalties, interest or other charges or additions to Tax imposed by the relevant Governmental Authority) in the event that such indemnified party is required to repay such refund to such Governmental Authority. Notwithstanding anything to the contrary in this Section 1.3(b)(iii), in no event will the indemnified party be required to pay any amount to an indemnifying party pursuant to this Section 1.3(b)(iii) the payment of which would place the indemnified party in a less favorable net after-Tax position than the indemnified party would have been in if the Tax subject to indemnification and giving rise to such refund had not been deducted, withheld or otherwise imposed and the indemnification payments or additional amounts with respect to such Tax had never been paid. This paragraph shall not be construed to require any indemnified party to make available its Tax returns (or any information relating to its Taxes that it deems confidential) to the indemnifying party or any other Person.

(iv) The agreements and obligations of the parties contained in this Section 1.3(b) shall survive the termination, expiration, or termination of the Obligations and the Note Documents, the repayment, satisfaction or discharge of all other obligations under the Note Documents, and the earlier resignation or removal of the Agent.

(c) Register. Agent, acting for this purpose as a non-fiduciary agent of Issuer, shall maintain at one of its offices a register for the recordation of the names and addresses of the Holders and principal and stated interest amounts of the Notes owing to, each Holder pursuant to the terms hereof from time to time (the “**Register**”). The entries in the Register shall be conclusive absent manifest error, and Issuer, the Guarantors, Agent and the Holders shall treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Holder hereunder for all purposes of this Agreement, notwithstanding notice to the contrary; provided that failure to make any such recordation, or any error in such recordation, shall not affect Issuer’s obligations in respect of any Note. The Register

shall be available for inspection by Issuer, Agent and, solely with respect to its Notes, any Holder, at any reasonable time and from time to time upon reasonable prior notice.

1.4 Increased Costs and Reduced Return. If any Change in Law shall subject any Recipient to Taxes (other than (i) Indemnified Taxes and (ii) Taxes described in clauses (b) through (d) of the definition of Excluded Taxes) with respect to any Note or other obligations, or its liabilities or capital attributable thereto, and the result thereof shall be to increase the cost to Agent or any Holder of making or maintaining any Notes, or to increase the cost to Agent or any Holder, or to reduce the amount of any sum received or receivable by a Holder hereunder (whether of principal, interest or any other amount) then, upon request of Agent or such Holder, Issuer will pay to it such additional amount(s) as will compensate it for the additional actual costs incurred or reduction suffered. Failure or delay on the part of Agent or any Holder to demand compensation pursuant to this Section 1.4 shall not constitute a waiver of its right to demand such compensation, but Issuer shall not be required to compensate Agent or any Holder for any increased costs or reductions suffered more than six (6) months (plus any period of retroactivity of the Change in Law giving rise to the demand) prior to the date that Agent or any Holder notifies Issuer of the applicable Change in Law and of such Agent's or Holder's intention to claim compensation therefor.

2. CONDITIONS TO NOTE ISSUANCE.

Issuer confirms that the conditions to issuance set forth on Schedule 1 to this Agreement have been satisfied as of the Issue Date.

3. CREATION OF SECURITY INTEREST.

(a) Grant of Security Interest. Issuer hereby grants to Agent, for the benefit of the Agent and each Holder (collectively, the "Secured Parties"), to secure the payment and performance in full of all of the Obligations, a continuing security interest in, and pledges to Agent, the Collateral, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof.

(b) Pledge of Shares. Without limiting the foregoing: Issuer hereby pledges and grants to Agent, for the benefit of the Secured Parties, a security interest in all the Shares, together with all proceeds and substitutions thereof, all cash, stock and other moneys and property paid thereon, all rights to subscribe for securities declared or granted in connection therewith, and all other cash and noncash proceeds of the foregoing, as security for the performance of the Obligations. To the extent required by the terms and conditions governing the Shares, Issuer shall cause the books of each entity whose Shares are part of the Collateral and any transfer agent to reflect the pledge of the Shares. Upon the occurrence and during the continuance of an Event of Default hereunder, Agent may effect the transfer of any securities included in the Collateral (including but not limited to the Shares) into the name of Agent and cause new (as applicable) certificates representing such securities to be issued in the name of Agent or its transferee. Unless an Event of Default shall have occurred and be continuing, Issuer shall be entitled to exercise any voting rights with respect to the Shares and to give consents, waivers and ratifications in respect thereof, provided that no vote shall be cast or consent, waiver or ratification given or action taken which would be inconsistent with any of the terms of this Agreement or which would constitute or create any violation of any of such terms. All such rights to vote and give consents, waivers and ratifications shall terminate upon written notice from Agent upon the occurrence and continuance of an Event of Default.

(c) Perfection of Security Interest. Issuer hereby authorizes (without obligation) Agent (or its agent or designees) to file financing statements, without notice to Issuer, at Issuer's expense, with all appropriate jurisdictions to perfect or protect Agent's interest or rights hereunder. Any such financing statements may indicate the Collateral as all assets of the debtor now owned or hereafter acquired or words of similar effect, regardless of whether any particular asset comprised in the Collateral falls within the scope of Article 9 of the UCC of such jurisdiction. Issuer will execute and deliver such documents, and take or cause to be taken such actions, as Agent or the Required Lenders may reasonably request to perfect or continue the perfection of Agent's security interest in the Collateral, including the Shares. Agent reserves the right to take such steps in any jurisdiction of organization of any Foreign Subsidiary to perfect and maintain the perfection of any security interest granted with respect to the Shares constituting Collateral of any Foreign Subsidiary.

(d) Termination. If this Agreement is terminated, Agent's Lien in the Collateral granted hereunder shall continue until the Obligations (other than inchoate indemnity obligations and any other obligations which, by their terms, are to survive the termination of this Agreement) are repaid in full in cash. Upon payment in full in cash of the Obligations (other than inchoate indemnity obligations and any other obligations which, by their

terms, are to survive the termination of this Agreement), Agent's Lien shall be automatically released and all rights therein shall revert to Issuer.

(e) Release of Collateral. Prior to the termination of this Agreement pursuant to its terms, any release of Collateral (other than a release upon a Disposition permitted by Section 7.1, which release shall be automatic) from the Lien of the Agent created pursuant to this Agreement or any other Note Document shall require the consent of all Holders, notwithstanding any other provision of this Agreement or any other Note Document. In connection with any termination or release of any Lien of the Agent, the Agent, at the reasonable request of the Borrower, shall execute and deliver, at the Borrower's expense, all documents (in form and substance reasonably satisfactory to the Agent and the Required Holders) that the Borrower shall prepare and reasonably request to evidence such termination or release. Any execution and delivery of such documents shall be without recourse to or warranty by the Agent. The parties hereto acknowledge and agree that the Agent may rely conclusively upon, and shall be fully protected in so relying upon, a certificate or similar instrument provided to it by the Borrower, certifying that such release, termination or subordination, and the execution of the documents presented to it for execution, are authorized and permitted under this Agreement and the other Note Documents and all conditions precedent thereto have been satisfied, without further inquiry or investigation, which certificate shall be delivered to the Agent upon request. Upon request by the Agent at any time, the Required Holders will confirm in writing the Agent's authority to release particular types or items of Collateral pursuant to this Agreement and the other Note Documents.

4. REPRESENTATIONS AND WARRANTIES OF THE ISSUER.

Issuer represents and warrants as follows:

(a) Due Organization and Qualification. Issuer and any Subsidiary is (i) duly existing and in good standing in its jurisdiction of organization and (ii) is qualified and licensed to do business and is in good standing in any jurisdiction in which the conduct of its business or its ownership of property requires that it be qualified except where the failure to do so could not reasonably be expected to have a material adverse effect on its business.

(b) Authorization, Power and Authority. The execution, delivery and performance by Issuer of the Note Documents to which it is a party and the consummation of the transactions contemplated thereby: (i) have been duly authorized by Issuer, and constitute legal, valid and binding obligations of Issuer, enforceable in accordance with their respective terms, except as the enforceability thereof may be limited by bankruptcy, insolvency or other similar laws of general application relating to or affecting the enforcement of creditor's rights or by general principles of equity (regardless of whether enforcement is sought in equity or at law); (ii) do not conflict with Issuer's organizational documents; (iii) do not contravene, conflict or violate any applicable order, writ, judgment, injunction, decree, determination or award of any Governmental Authority by which Issuer or any of its Subsidiaries or any of their property or assets may be bound or affected; (iv) do not require any action by, or approval from, any Governmental Approval (except such Governmental Approvals which have already been obtained and are in full force and effect); and (v) do not conflict with, contravene, constitute a default or breach under, or result in or permit the termination or acceleration of, any material agreement by which Issuer or any of its Subsidiaries is bound.

(c) Collateral. Issuer has good title to, rights in, and the power to transfer each item of the Collateral upon which it purports to grant a Lien hereunder, free and clear of any and all Liens except Permitted Liens. As of the date hereof, Issuer has no Collateral Accounts at or with any bank or financial institution except for the Collateral Accounts described in the Perfection Certificate delivered to the Agent and Holders in connection herewith. The Accounts are bona fide, existing obligations of the Account Debtors. All Inventory is in all material respects of good and marketable quality, free from all material defects, except for Inventory for which adequate reserves have been made.

(d) Intellectual Property. Issuer is the sole owner of the Intellectual Property which it owns or purports to own except for (a) non-exclusive licenses granted to its customers in the ordinary course of business and licenses that may be exclusive as to territory but only as to discrete geographical areas outside of the United States of America, provided that such licenses of Intellectual Property neither result in a legal transfer of title of the licensed Intellectual Property nor have the same effect as a sale of such Intellectual Property, (b) over-the-counter software that is commercially available to the public, and (c) material Intellectual Property licensed to Issuer and noted on the Perfection Certificate. Each Patent which it owns or purports to own and which is material to Issuer's business is valid and enforceable, and no part of the Intellectual Property which Issuer owns or purports to own and which is material to Issuer's business has been judged invalid or unenforceable, in whole or in part. Issuer has not received any written notice of any claim that any part of the Intellectual Property violates the rights of any third party except

to the extent such claim could not reasonably be expected to have a material adverse effect on Issuer's business. All Intellectual Property material to the business of Issuer and its Subsidiaries that is owned by Issuer or a Subsidiary as of the date hereof is set forth in the Perfection Certificate.

(e) Financial Statements, Financial Condition. All financial statements for Issuer and its Subsidiaries delivered to Agent or any Holder pursuant to this Agreement fairly present in all material respects Issuer's and Subsidiaries' financial condition and results of operations as of the date thereof and for the period represented thereby, and there has not been any material deterioration in Issuer's or any Subsidiary's financial condition since the date of the most recent financial statements submitted to Agent or such Holder pursuant to this Agreement.

(f) Litigation. Except as disclosed in the Perfection Certificate, there are no actions or proceedings pending by or against any Issuer or any Subsidiary before any court or administrative agency involving more than Two Hundred Fifty Thousand Dollars (\$250,000).

(g) Perfection Certificate. All information set forth on the Perfection Certificate is accurate and complete in all material respects, provided that Issuer may from time to time update certain information in the Perfection Certificate after the Issue Date to reflect updated information resulting from changes not restricted by this Agreement or as otherwise approved in writing by Holders, and, from and after such update, all references to the Perfection Certificate in this Agreement shall be the Perfection Certificate as so updated; provided, however, any representations, warranties or covenants in this Agreement specifically relating to a date certain (including the Issue Date) shall not be so modified by such updates to the Perfection Certificate.

(h) Material Agreements. Neither Issuer nor any of its Subsidiaries is in default under any agreement to which it is a party or by which it is bound in which the default could reasonably be expected to have a material adverse effect on Issuer's or such Subsidiary's business.

(i) Compliance with Sanctions, Anti-Money Laundering and Anti-Corruption Laws. Issuer and its Subsidiaries, or to the knowledge of Issuer and its Subsidiaries, its Affiliates, directors, officers, employees, agents or representatives will not, directly or indirectly, use the proceeds from any Note, or lend, contribute or otherwise make available such proceeds to any Subsidiary, joint venture partner or any other person (i) to fund or facilitate any activities or business of or with any individual, entity or government that is, or is owned or controlled by one or more persons that are, at the time of such funding or facilitation, the subject of any economic or financial sanctions or trade embargoes administered or enforced by the U.S. Department of Treasury's Office of Foreign Assets Control, the U.S. Department of State, the United Nations Security Council, the Council of the European Union or Her Majesty's Treasury (United Kingdom), or any other relevant sanctions authority) (collectively, "**Sanctions**"), or resident, located or organized in any country or territory that is the subject of comprehensive territorial Sanctions (currently including, Crimea, the so-called Donetsk People's Republic and so-called Luhansk People's Republic regions of Ukraine, Cuba, Iran, North Korea, and Syria) (each, a "**Sanctioned Jurisdiction**"); or (ii) in any other manner that would result in a violation of any Sanctions by Issuer, any Holder or any other person. Neither Issuer nor any of its Subsidiaries nor, to the knowledge of Issuer, any Affiliates, directors, officers, or employees of Issuer or any of its Subsidiaries, is the subject of any Sanctions or resident, located or organized in a Sanctioned Jurisdiction. Issuer and its Subsidiaries have conducted their businesses in compliance with (i) Sanctions; (ii) applicable anti-corruption laws, rules, and regulations, including without limitation the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act, each as may be amended, and any rules or regulations thereunder (collectively, "**Anti-Corruption Laws**"); and (iii) applicable anti-money laundering laws, rules, and regulations, including without limitation the Money Laundering Control Act of 1986, as amended from time (collectively, "**Anti-Money Laundering Laws**"). Neither Issuer nor its Subsidiaries, will use, directly or, to the knowledge of Issuer and its Subsidiaries, indirectly, the proceeds of the financing contemplated hereby in any manner or for any purpose that would result in a violation of any Anti-Corruption Laws or Anti-Money Laundering Laws by Issuer, or its Subsidiaries or Affiliates, any Holder or any other person or entity.

(j) Regulatory Compliance. Issuer is not an "investment company" or a company "controlled" by an "investment company" under the Investment Company Act of 1940, as amended. Issuer is not engaged as one of its important activities in extending credit for margin stock (under Regulations X, T and U of the Federal Reserve Board of Governors). Issuer (a) has complied in all material respects with all Requirements of Law, and (b) has not violated any Requirements of Law the violation of which could reasonably be expected to have a material adverse effect on its business. None of Issuer's or any of its Subsidiaries' properties or assets has been used by Issuer or any Subsidiary or, to Issuer's knowledge, by previous Persons, in disposing, producing, storing, treating, or transporting any hazardous substance other than in compliance in all material respects with applicable law. Issuer and each of its

Subsidiaries have obtained all consents, approvals and authorizations of, made all declarations or filings with, and given all notices to, all Governmental Authorities that are necessary to continue their respective businesses as currently conducted, except to the extent that failure to obtain, make or file the same could not reasonably be expected to have a material adverse effect on its business.

(k) Investments. Issuer does not own any stock, partnership, or other ownership interest or other equity securities except for Permitted Investments.

(l) Tax Returns and Payments; Pension Contributions. Issuer has timely filed all required U.S. federal and other material Tax returns and reports (taking into account extensions timely requested in the ordinary course of business), and Issuer has timely paid all material Taxes owed by Issuer except (a) to the extent such Taxes are being contested in good faith by appropriate proceedings timely instituted and diligently conducted, so long as such reserve or other appropriate provision, if any, as shall be required in conformity with GAAP shall have been made therefor, or (b) if such Taxes, assessments, deposits and contributions do not, individually or in the aggregate, exceed Two Hundred Fifty Thousand Dollars (\$250,000). Issuer is unaware of any claims or adjustments proposed in writing for any of Issuer's prior Tax years which would reasonably be expected to result in additional Taxes becoming due and payable by Issuer in excess of Two Hundred Fifty Thousand Dollars (\$250,000). Issuer and each of its Subsidiaries have paid all amounts necessary to fund all present pension, profit sharing and deferred compensation plans in accordance with their terms, and neither Issuer nor any of its Subsidiaries have, withdrawn from participation in, and have not permitted partial or complete termination of, or permitted the occurrence of any other event with respect to, any such plan which could reasonably be expected to result in any material liability of Issuer or its Subsidiaries.

(m) Shares. Issuer has full power and authority to create a first lien on the Shares and no disability or contractual obligation exists that would prohibit Issuer from pledging the Shares pursuant to this Agreement. To Issuer's knowledge, there are no subscriptions, warrants, rights of first refusal or other restrictions on transfer relative to, or options exercisable with respect to the Shares. The Shares have been and will be duly authorized and validly issued, and, to the extent applicable, are fully paid and non-assessable. To Issuer's knowledge, the Shares are not the subject of any present or threatened in writing suit, action, arbitration, administrative or other proceeding, and Issuer knows of no reasonable grounds for the institution of any such proceedings.

(n) Full Disclosure. No written representation, warranty or other statement of Issuer or any Subsidiary in any certificate or written statement given to Agent or any Holder, as of the date such representation, warranty, or other statement was made, taken together with all such written certificates and written statements given to Agent or any Holder, contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements contained in the certificates or statements not misleading (it being recognized by Agent and the Holders that the projections and forecasts provided by Issuer in good faith and based upon reasonable assumptions are not viewed as facts and that actual results during the period or periods covered by such projections and forecasts may differ from the projected or forecasted results).

(o) Definition of "Knowledge." For purposes of the Note Documents, whenever a representation or warranty is made to Issuer's knowledge or awareness, to the "best of" Issuer's knowledge, or with a similar qualification, knowledge or awareness means the actual knowledge, after reasonable investigation, of any Responsible Officer.

5. REPRESENTATIONS AND WARRANTIES OF THE HOLDERS.

Each Holder represents and warrants as follows:

(a) Such Holder is a corporation, limited partnership, limited liability company or other entity, as the case may be, duly formed, validly existing and in good standing under the laws of the jurisdiction of its formation.

(b) Such Holder has full power and authority to deliver, assign and transfer its Existing Notes for cancellation and to enter into this Agreement and perform all obligations required to be performed by such Holder hereunder. Schedule 1.1 hereto is a true, correct and complete list of (A) the name of such Holder, and (B) the principal amount of such Holder's Existing Notes.

(c) No consent, approval, order or authorization of, or registration, declaration or filing with, or exemption or review by, any Governmental Entity is required on the part of such Holder in connection with the

execution, delivery and performance by the Holder of this Agreement and the consummation by such Holder of the Transaction.

(d) Each Holder has received a copy of the Note Documents. Each Holder acknowledges that the Issuer and its Subsidiaries do not take any responsibility for, and cannot provide any assurance as to the reliability of, any other information that may have been provided to such Holder.

(e) Each Holder understands and accepts that acquiring the Notes in the Transaction involves risks. Each Holder has such knowledge, skill and experience in business, financial and investment matters that such Holder is capable of evaluating the merits and risks of the Transaction and an investment in the Notes. With the assistance of its own professional advisors (to the extent such Holder has deemed appropriate), each Holder has made its own legal, tax, accounting and financial evaluation of the merits and risks of an investment in the Notes and the consequences of the Transaction and this Agreement. Each Holder has considered the suitability of the Notes as an investment in light of its own circumstances and financial condition, and such Holder is able to bear the risks associated with an investment in the Notes.

(f) Each Holder is a “qualified institutional buyer” as defined in Rule 144A under the Securities Act of 1933, as amended (the “**Securities Act**”) or an “accredited investor” as that term is defined in Rule 501(a) of Regulation D. Each Holder agrees to furnish any additional information reasonably requested by the Issuer or any of their affiliates to assure compliance with applicable U.S. federal and state securities laws in connection with the Transaction.

(g) Each Holder has been advised that the Notes have not been registered under the Securities Act, or any state securities laws and, therefore, cannot be resold unless they are registered under the Securities Act and applicable state securities laws or unless an exemption from such registration requirements is available. Each Holder is aware that the Issuer is under no obligation to effect any such registration with respect to the Notes or to file for or comply with any exemption from registration. Each Holder has not been formed solely for the purpose of making this investment and is purchasing the Notes to be acquired hereunder for its own account for investment, not as a nominee or agent, and not with a view to, or for resale in connection with, the distribution thereof, and each Holder does not have present intention of selling, granting any participation in, or otherwise distributing the same.

(h) No Holder is directly, or indirectly through one or more intermediaries, controlling or controlled by, or under direct or indirect common control with, the Issuer and is not, and has not been for the immediately preceding three months, an “affiliate” (within the meaning of Rule 144 under the Securities Act) of the Issuer.

(i) Each Holder understands that the Issuer is relying upon the representations and agreements contained in this Agreement (and any supplemental information) for the purpose of determining whether each Holder’s participation in the Transaction meets the requirements for the exemptions referenced in clause 5(g) above.

6. AFFIRMATIVE COVENANTS

6.1 Government Compliance. Issuer shall, and shall cause any Subsidiary, to (i) maintain its legal existence and good standing in its jurisdiction of organization and maintain qualification in each jurisdiction in which the failure to so qualify could reasonably be expected to have a material adverse effect on Issuer’s or such Subsidiary’s business or operations; (ii) comply with all laws, ordinances and regulations to which it is subject except where the failure to comply could not reasonably be expected to have a material adverse effect on Issuer’s business or operations; (iii) obtain all of Governmental Approvals necessary for the performance by Issuer or any Subsidiary of its obligations under the Note Documents to which it is a party; (iv) timely file all required U.S. federal and other material Tax returns and reports, and pay prior to delinquency all material U.S. federal and material state, local foreign Taxes, assessments, deposits and contributions owed by Issuer or such Subsidiary, except to the extent payment is deferred in connection with Taxes, assessments, deposits and contributions being contested by appropriate proceedings timely instituted and diligently conducted and posting a bond or taking any other steps required to prevent the Governmental Authority levying such contested Taxes from obtaining a Lien upon any of the Collateral that is other than a “Permitted Lien”, and (v) maintain and comply with, and shall cause each of its Subsidiaries to maintain and comply with, in force all licenses, approvals and agreements, the loss of which or failure to comply with which could reasonably be expected to have a material adverse effect on Issuer’s business or operations.

6.2 Financial Statements, Reports, Certificates.

Issuer shall:

(a) Deliver to each Holder for as long as this Agreement is outstanding: (i) as soon as available, but no later than thirty (30) days after the last day of each quarter, a company prepared consolidated balance sheet, income statement and cash flow statement covering Issuer's consolidated operations for such quarter certified by a Responsible Officer and in a form reasonably acceptable to the Holders; (ii) as soon as available, but in any event within one hundred twenty (120) days after the end of Issuer's fiscal year, audited consolidated financial statements of Issuer prepared in accordance with GAAP, consistently applied, together with an unqualified opinion on such financial statements from an independent certified public accounting firm reasonably acceptable to Required Holders; (iii) promptly after approval by Issuer's board of directors (but in no event later than forty-five (45) days after last day of Issuer's fiscal year), and promptly but in any event within ten (10) days after any update from time to time thereto approved by Issuer's board of directors, annual operating budgets for such fiscal year (including income statements, balance sheets and cash flow statements, by month) as approved by Issuer's board of directors, together with annual financial projections for such fiscal year (on a quarterly basis) as approved by Issuer's board of directors, and any related business forecasts used in the preparation of such annual financial projections; (iv) a prompt report of any legal actions pending or threatened in writing against Issuer or any of its Subsidiaries that could result in damages or costs to Issuer or any of its Subsidiaries of Two Hundred Fifty Thousand Dollars (\$250,000) or more or invalidation of any material Intellectual Property; (v) a prompt report of all material returns, recoveries, disputes and claims with Account Debtors of Issuer or any Subsidiary; (vi) prompt notice of an event that materially and adversely affects the value of the Intellectual Property owned by Issuer or any Subsidiary or could have a material adverse effect on Issuer's business; (vii) any financial statements, notices, reports or other information not delivered pursuant to this Agreement provided to holders of Subordinated Debt and any amendments or other agreements entered into with respect to Subordinated Debt; and (viii) any budgets, sales projections, operating plans and other information or reports as Required Holders may reasonably request from time to time. In the event that Issuer becomes subject to the reporting requirements under the Exchange Act within five (5) days of filing, Issuer shall deliver to Holders all reports on Form 10-K, 10-Q and 8-K filed with the Securities and Exchange Commission or notify Holders that a link thereto has been posted on Issuer's or another website on the Internet.

(b) Together with the financial statements referred to in Section 6.2(a)(i) and (a)(ii), deliver a duly completed Compliance Certificate signed by a Responsible Officer.

(c) Allow Agent (or its designee) (acting at the direction of the Required Holders) to audit or inspect the Collateral at reasonable times and during normal business hours and upon reasonable prior notice, at Issuer's sole expense. Such audits or inspections shall be conducted no more often than once every twelve (12) months, unless an Event of Default has occurred and is continuing, in which case such inspections and audits shall occur as often as Agent (acting at the direction of the Required Holders) shall determine is necessary.

(d) Deliver to the Holders a copy of every 409A valuation report with respect to Issuer's capital stock received by Issuer after the Issue Date within thirty (30) days after Issuer's receipt thereof.

(e) Give prompt written notice to Agent of any litigation or governmental proceedings pending or threatened (in writing) against Issuer or any of its Subsidiaries, which could reasonably be expected to result in damages or costs to Issuer or any of its Subsidiaries of Two Hundred Fifty Thousand Dollars (\$250,000) or more or which could reasonably be expected to have a Material Adverse Effect.

(f) Without limiting or contradicting any other more specific provision of this Agreement, promptly (and in any event within two (2) Business Days) upon Issuer becoming aware of the existence of any Event of Default or event which, with the giving of notice or passage of time, or both, would constitute an Event of Default, Issuer shall give written notice to Agent and Holders of such occurrence, which such notice shall include a reasonably detailed description of such Event of Default.

6.3 Collateral. Issuer shall, and shall cause any Subsidiary, to (i) maintain good title to, rights in, and the power to transfer each item of the Collateral upon which it purports to grant a Lien hereunder, free and clear of any and all Liens except Permitted Liens; (ii) maintain possession of all Collateral, except for third party bailees in the ordinary course of business, Inventory in transit and movable items of personal property such as laptop computers; and (iii) maintain all Equipment and personal property in good operating condition and Inventory in good marketable condition, free from material defects, ordinary wear and tear excepted. In the event that Issuer or any of its Subsidiaries

intends to add any new offices or business locations, including warehouses, or otherwise store any portion of the Collateral valued in excess of Two Hundred Fifty Thousand Dollars (\$250,000) in the aggregate, or deliver any portion of the Collateral valued in excess of Two Hundred Fifty Thousand Dollars (\$250,000) in the aggregate, to a bailee, in each case, in accordance with the terms of this Agreement, then Issuer or such Subsidiary shall obtain from such bailee or landlord, as applicable, a bailee waiver or landlord waiver, as applicable, in form and substance reasonably satisfactory to Required Holders prior to the addition of any new offices or business locations, or any such storage with or delivery to any such bailee, as the case may be (unless waived by the Required Holders in their reasonable discretion, which waiver or extension may be accomplished via email by the Required Holders or their counsel).

6.4 Inventory; Returns. Issuer shall, and shall cause its Subsidiaries to, keep all Inventory in good and marketable condition, free from material defects. Returns and allowances between Issuer or a Subsidiary and its Account Debtors shall follow Issuer's customary practices as they exist at the Issue Date. Issuer must promptly notify Agent and Holders of all returns, recoveries, disputes and claims that involve more than Two Hundred Fifty Thousand Dollars (\$250,000.00).

6.5 Insurance. Issuer shall, and shall cause any Subsidiary, to keep its business and the Collateral insured for risks and in amounts standard for companies in Issuer's industry and location and as Required Holders may reasonably request. Insurance policies shall be in a form, with companies, and in amounts that are reasonably satisfactory to Required Holders. Subject to 6.12(c), all property policies covering real and personal property with respect to Issuer shall have a lender loss payable endorsement showing Agent as lender loss payee and waive subrogation against Agent and Holders, and all commercial general, products and auto liability policies shall show, or have endorsements showing, Agent as an additional insured. Proceeds payable under any policy of Issuer as a result of property casualty with respect to any Collateral shall be payable to Agent, for the benefit of the Secured Parties on account of the Obligations. Notwithstanding the foregoing, (a) so long as no Event of Default has occurred and is continuing, Issuer shall have the option of applying proceeds with respect to any Collateral of any casualty policy of Issuer toward the replacement or repair of destroyed or damaged property, or the purchase of property that is otherwise useful to Issuer's business within one hundred eighty (180) days of receipt of such proceeds; provided that any such replaced or repaired property (i) shall be of equal or like value as the replaced or repaired Collateral and (ii) shall be deemed Collateral in which Agent has been granted a security interest, subject to Permitted Liens, and (b) after the occurrence and during the continuance of an Event of Default and written notice from Agent (acting at the direction of the Required Holders) or the Required Holders, all proceeds with respect to Collateral payable under such casualty policy shall be payable to Agent, for the benefit of the Secured Parties, on account of the Obligations.

6.6 Intellectual Property.

(a) Issuer shall, and shall cause any Subsidiaries, to: (a) protect, defend and maintain the validity and enforceability of the Intellectual Property that is material to its business; (b) promptly advise Agent and Holders in writing of material infringements of its Intellectual Property material to its business; and (c) not allow any Intellectual Property material to Issuer's or any Subsidiary's business to be abandoned, forfeited or dedicated to the public without Required Holders' written consent. Issuer and Guarantors are and shall remain the sole owner of its Intellectual Property, except for (a) non-exclusive licenses granted to its customers in the ordinary course of business and licenses that may be exclusive as to territory but only as to discrete geographical areas outside of the United States of America, provided that such licenses of Intellectual Property neither result in a legal transfer of title of the licensed Intellectual Property nor have the same effect as a sale of such Intellectual Property, (b) over-the-counter software that is commercially available to the public, and (c) material Intellectual Property licensed to Issuer and noted on the Perfection Certificate. As used in this Agreement, the term "non-exclusive license" shall include any license that provides limited exclusivity to the licensee based on geography outside the United States or distinct market segments (provided, in all events, such license is not actually, tantamount to, or deemed to be for accounting purposes, a sale or other transfer of the underlying Intellectual Property).

(b) If Issuer or any Subsidiary that is a Guarantor (i) obtains any patent, registered trademark or servicemark, registered copyright, registered mask work, or any pending application for any of the foregoing, or (ii) applies for any patent or the registration of any trademark or servicemark, then Issuer shall provide written notice thereof concurrently with the delivery of a Compliance Certificate pursuant to Section 6.2(b) to Agent and Holders and shall execute such IP Agreements and other documents and take such other actions as Required Holders shall request to perfect and maintain a perfected security interest (subject to Permitted Liens) in favor of Agent for the benefit of the Secured Parties in such property. If Issuer or any Subsidiary decides to register any copyrights or mask works in the United States Copyright Office, Issuer shall: (x) provide Agent and Holders with at least thirty (30) days prior written notice of Issuer's intent to register such copyrights or mask works together with a copy of the application

it intends to file with the United States Copyright Office (excluding exhibits thereto); (y) execute an IP Agreement and such other documents and take such other actions as Required Holders may request in its reasonable judgment to perfect and maintain a perfected security interest (subject to Permitted Liens) in favor of Agent in the copyrights or mask works intended to be registered with the United States Copyright Office; and (z) record such IP Agreement with the United States Copyright Office contemporaneously with filing the copyright or mask work application(s) with the United States Copyright Office. Issuer shall upon Required Holders' request provide to Agent and Holders copies of all applications that have been filed by it or a Subsidiary for patents or for the registration of trademarks, servicemarks, copyrights or mask works, together with evidence of the recording of the IP Agreement necessary to perfect and maintain a perfected the Agent's security interest (subject to Permitted Liens) in such property.

6.7 Minimum Liquidity.

(a) At all times, Issuer shall maintain Liquidity of no less than Three Million Five Hundred Thousand Dollars (\$3,500,000.00); provided that (i) in the event that Issuer shall fail to maintain Liquidity of at least Three Million Five Hundred Thousand Dollars (\$3,500,000.00), Issuer shall promptly (and in any event within one (1) Business Day) provide notice to the Holders of such failure and (ii) Issuer shall have the right to cure such failure within sixty (60) days of the date of such notice (the "Cure Right"). Any cash and Cash Equivalents received by Issuer or any Guarantor during such period in an aggregate amount equal to the amount necessary to cure such failure (the "**Cure Amount**") shall be included in the calculation of Liquidity for purposes of determining compliance with this Section 6.7(a), and upon receipt by Issuer or any Guarantor of such cash proceeds, such covenant shall be recalculated giving effect thereto solely for purpose of determining the existence of an Event of Default under this Section 6.17(a). Notwithstanding anything herein to the contrary, no more than six Cure Rights may be exercised during the term of this Agreement. Notwithstanding anything herein to the contrary, from and after the date on which Issuer provides notice of its intention to use the Cure Right, no Default or Event of Default shall be deemed to have occurred or be continuing with respect to Section 6.7(a) unless the Cure Amount is not received by the date so required (*provided* that, if the Cure Amount is not received on or before the date Issuer's ability to cure has lapsed, such Event of Default or potential Event of Default shall be deemed, to exist from the date of the Issuer's failure to adhere to this Section 6.7(a)).

(b) At all times, Issuer shall maintain Liquidity of no less than Two Million Five Hundred Thousand Dollars (\$2,500,000.00); provided that in the event that Issuer anticipates that it will fail to maintain Liquidity of at least Two Million Five Hundred Thousand Dollars (\$2,500,000.00) at any time, Issuer shall promptly (and in any event within one (1) Business Day) provide notice to the Holders of such anticipated failure.

6.8 Holder Meetings. Issuer will, (i) within ninety (90) days after the close of each fiscal year of Issuer, at the request of any Holder, hold a meeting (at a mutually agreeable location and time or, at the option of any Holder, by conference call), at which meeting shall be reviewed the financial results of the previous fiscal year, the financial condition of Issuer and its Subsidiaries and the projections and business plan for the following fiscal year, as well as the prospects of the business of Issuer and its Subsidiaries and any other matters that any Holder may wish to discuss, and (ii) within forty-five (45) days after the close of the first three fiscal quarters of each fiscal year, at the request of any Holder and upon reasonable prior notice, participate in a conference call to review the financial results of the fiscal quarter then ended, as well as prospects of the business of Issuer and its Subsidiaries and any other matters that any Holder may wish to discuss.

6.9 Formation or Acquisition of Subsidiaries. If Issuer forms any new direct or indirect Domestic Subsidiary or directly or indirectly acquires any new Domestic Subsidiary after the Issue Date, Issuer, at the request of Required Holders, shall (a) cause such new Domestic Subsidiary to provide to Agent a Guaranty of this Agreement, together with such appropriate collateral security documents, all in form and substance reasonably satisfactory to Required Holders, (b) provide to Agent appropriate certificates and powers and financing statements, pledging all of the direct or beneficial ownership interest held in such new Domestic Subsidiary, in form and substance reasonably satisfactory to Required Holders, and (c) provide to Agent all other documentation in form and substance reasonably satisfactory to Required Holders. Any document, agreement, or instrument executed or issued pursuant to this Section 6.9 shall be a Note Document. Notwithstanding anything else set forth in this Section 6.9, the Required Holders shall have the option, in their reasonable discretion, to require that any Foreign Subsidiary (other than an Excluded Foreign Subsidiary) of Issuer or any Guarantor comply with (and be subject to the requirements of) this Section 6.9, and Agent (acting at the direction of the Required Holders) and the Required Holders shall have the right to take such steps in any jurisdiction of organization of any such Foreign Subsidiary to reasonably required to perfect and maintain the perfection of any security interest granted pursuant to this Section 6.9, and compliance with this Section 6.9 with

respect to any such Foreign Subsidiary shall be completed within ninety (90) days unless waived or extended by Required Holders in its reasonable discretion) after request by Agent.

6.10 Accounts. Subject to Section 6.12(b), Issuer shall maintain, and shall cause each of its Domestic Subsidiaries to maintain, all depository, operating, and investment accounts subject to Control Agreements (other than Excluded Accounts). Issuer shall provide Agent five (5) Business Days' prior written notice before establishing (or permitted any of its Domestic Subsidiaries to establish) any banking or investment account at or with any bank or financial institution other than those already subject to Control Agreements. For each banking or investment account that Issuer or any of its Domestic Subsidiaries' at any time maintains (other than Excluded Accounts), Issuer shall cause the applicable bank or financial institution at or with which any such account is maintained to execute and deliver a Control Agreement or other appropriate instrument with respect to such account to perfect Agent's Lien in such account in accordance with the terms hereunder, which Control Agreement may not be terminated without the prior written consent of Agent (acting at the direction of the Required Holders). Notwithstanding anything else set forth herein, all foreign depository, operating, or investment accounts (other than Excluded Accounts) of any Foreign Subsidiary of Issuer or any Foreign Subsidiary of any Guarantor (collectively, the "**Foreign Accounts**"), shall not maintain in excess of Two Hundred Fifty Thousand (\$250,000) in the aggregate across all such accounts at any time.

6.11 Further Assurances. Issuer shall execute any further instruments and take further action as Agent or the Required Holders may reasonably request to perfect or continue Agent's Lien in the Collateral or to effect the purposes of this Agreement.

6.12 Post-Closing Obligations.

(a) Within forty-five (45) days after the Issue Date (unless waived or extended by Required Holders in their reasonable discretion, which waiver or extension may be accomplished via email by Agent), Issuer shall use commercially reasonable efforts to cause the bailee or landlord, as applicable, of each of its business locations, including warehouses, that store any portion of the Collateral valued in excess of Two Hundred Fifty Thousand Dollars (\$250,000) in the aggregate, to execute and deliver a bailee waiver or landlord waiver, as applicable, in form and substance reasonably satisfactory to Required Holders.

(b) Within forty-five (45) days after Issuer completes the transition of its banking services (including the opening of Collateral Accounts) from Wells Fargo Bank to another banking institution (the "**Account Transition**"), but in any event within one hundred twenty (120) days after the Issue Date (unless waived or extended by Required Holders in their reasonable discretion, which waiver or extension may be accomplished via email by Agent), Issuer shall deliver an executed Control Agreement to Agent with respect to any Collateral Accounts listed in the Perfection Certificate to the extent such accounts remain open or any successor accounts opened in connection with the Account Transition, in each case other than with respect to Excluded Accounts, in form and substance reasonably satisfactory to Agent and the Required Holders.

(c) Within forty-five (45) days after the Issue Date (unless waived or extended by Required Holders in their reasonable discretion, which waiver or extension may be accomplished via email by the Required Holders or their counsel), Issuer shall deliver evidence satisfactory to Required Holders that the insurance policies required by Section 6.5 hereof are in full force and effect, together with appropriate evidence showing loss payable and/or additional insured clauses or endorsements in favor of Agent.

6.13 Exchange for DTC-Eligible Securities. In the event the Issuer (i) consummates an IPO or Direct Listing or (ii) becomes subject to the periodic reporting requirements of Section 12(g) or 15(d) of the Exchange Act, the Issuer shall use commercially reasonable efforts to exchange the Notes for securities on substantially the same terms as the Notes eligible for deposit and book-entry delivery through the Depository Trust Company.

7. NEGATIVE COVENANTS

Issuer shall not, and shall not permit any Subsidiary to, do any of the following, without Holders' prior written consent:

7.1 Dispositions. Dispose of all or any part of its business or property, except for Dispositions (a) of Inventory in the ordinary course of business; (b) of worn-out or obsolete Equipment; (c) consisting of Permitted Liens, Permitted Distributions and Permitted Investments; (d) of money or Cash equivalents in a manner that is not prohibited by the terms of this Agreement; (e) non-exclusive licenses for the use of property of Issuer or any Subsidiary in the ordinary course of business and licenses that may be exclusive as to territory but only as to discrete geographical areas

outside of the United States of America, provided that such licenses of Intellectual Property neither result in a legal transfer of title of the licensed Intellectual Property nor have the same effect as a sale of such Intellectual Property; and (f) other Dispositions in an aggregate amount not to exceed Two Hundred Fifty Thousand Dollars (\$250,000.00) in any fiscal year.

7.2 Changes in Business, Management, Ownership, or Business Locations. (a) Engage in any business other than the businesses currently engaged in by Issuer or Subsidiary, or reasonably related thereto; (b) cease doing business, liquidate or dissolve; provided that any Subsidiary that is not a Guarantor may liquidate or dissolve after transferring all of its assets to Issuer or another Subsidiary; or (c) permit or suffer a Change in Control. Issuer shall not, without at least thirty (30) days' prior written notice to Agent: (i) change its jurisdiction of organization, (ii) change its organizational type, (iii) change its legal name, (iv) change any organizational number (if any) assigned by its jurisdiction of organization or (v) change the date on which its fiscal year ends.

7.3 Mergers or Acquisitions. Merge or consolidate with any other Person, or acquire all or substantially all of the capital stock or property of another Person, except that a Subsidiary may merge or consolidate into another Subsidiary or into Issuer, provided that if a Guarantor or Issuer is a party to such transaction, a Person that is a Guarantor or Issuer shall be the surviving entity.

7.4 Indebtedness: Encumbrance; Investments; Distributions. (a) Create, incur, assume, or be liable for any Indebtedness other than Permitted Indebtedness; (b) create, incur, assume or suffer to exist any Lien of any kind upon any of its property, whether now owned or hereafter acquired except Permitted Liens; (c) make any Investment except for Permitted Investments; and (d) pay any dividends or make any distribution or payment or redeem, retire or purchase any capital stock of Issuer except for Permitted Distributions.

7.5 Transactions with Affiliates. Directly or indirectly enter into or permit to exist any material transaction with any Affiliate of Issuer or any of its Subsidiaries, except for (i) transactions with any Affiliate of Issuer or any of its Subsidiaries that are in the ordinary course of Issuer's business, upon fair and reasonable terms that are no less favorable to Issuer than would be obtained in an arm's length transaction with a non-affiliated Person, (ii) transactions between or among Issuer and its Subsidiaries which are expressly permitted by this Agreement or transactions between or among Issuer and any Guarantor in the ordinary course of business, (iii) equity and bridge financings constituting Subordinated Debt and (iv) reasonable and customary director, officer and employee compensation and other customary benefits including retirement, health, stock option and other benefit plans and indemnification arrangements approved by Issuer's board of directors (or a committee thereof) and reimbursement of expenses of officer, employees and directors, in each case, in accordance with Issuer's customary practices as they exist at the Issue Date. The participation of any then-existing investors of Issuer in future bona fide equity financings and subordinated note financings of Issuer and transactions between Issuer and its Subsidiaries that are not otherwise restricted pursuant hereto shall not be deemed to be a violation of this Section (including any equity financings or subordinated note financings led by such investors of Issuer).

7.6 Subordinated Debt. (a) Make or permit any payment on any Subordinated Debt, except as may be permitted by the terms of the subordination, intercreditor, or other similar agreement to which such Subordinated Debt is subject; or (b) amend any provision in any document relating to the Subordinated Debt which would provide for earlier or greater principal, interest, or other payments thereon, or adversely affect the subordination thereof to Obligations owed to Holders, except as may be permitted by the subordination, intercreditor or other similar agreement to which such Subordinated Debt is subject. For the avoidance of doubt, in no event shall Issuer make any (i) payment of cash interest on any Subordinated Debt prior to the PIK Interest Termination Date and (ii) payment under any Subordinated Debt if an Event of Default has occurred and is continuing or would occur as a result of such payment.

7.7 Compliance. Become required to register as an "investment company" or a company controlled by an "investment company" under the Investment Company Act of 1940, as amended, or undertake as one of its important activities extending credit to purchase or carry margin stock, or use the proceeds of the Notes for that purpose; fail to meet the minimum funding requirements of the ERISA, permit a Reportable Event or Prohibited Transaction, as defined in ERISA, to occur; fail to comply in all material respects with the Federal Fair Labor Standards Act or violate any other law or regulation, or permit any of its Subsidiaries to do any of the foregoing, if the violation could reasonably be expected to have a material adverse effect on Issuer's business or operations or could reasonably be expected to cause a Material Adverse Change.

7.8 Compliance with Anti-Terrorism Laws. Agent hereby notifies Issuer and each of its Subsidiaries that pursuant to the requirements of Anti-Corruption Laws and Anti-Money Laundering Laws, and Agent's policies

and practices, Agent is required to obtain, verify and record certain information and documentation that identifies Issuer and each of its Subsidiaries and their principals, which information includes the name and address of Issuer and each of its Subsidiaries and their principals and such other information that will allow Agent to identify such party in accordance with Anti-Corruption Laws and Anti-Money Laundering Laws. Neither Issuer nor any of its Subsidiaries shall, nor shall Issuer or any of its Subsidiaries permit any Affiliate to, directly or indirectly, knowingly enter into any documents, instruments, agreements or contracts with any Person listed on the OFAC Lists. Issuer and each of its Subsidiaries shall immediately notify Agent if Issuer or such Subsidiary has knowledge that Issuer, or any Subsidiary or Affiliate of Issuer, is listed on the OFAC Lists or (a) is convicted on, (b) pleads nolo contendere to, (c) is indicted on, or (d) is arraigned and held over on charges involving money laundering or predicate crimes to money laundering. Neither Issuer nor any of its Subsidiaries shall knowingly, nor shall Issuer or any of its Subsidiaries, permit any Affiliate to, directly or indirectly, (i) conduct any business or engage in any transaction or dealing with any Blocked Person, including, without limitation, the making or receiving of any contribution of funds, goods or services to or for the benefit of any Blocked Person, (ii) deal in, or otherwise engage in any transaction relating to, any property or interests in property blocked pursuant to Executive Order No. 13224 or any similar executive order or other Anti-Terrorism Law, or (iii) engage in or conspire to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in Executive Order No. 13224 or other Anti-Terrorism Law.

7.9 Foreign Subsidiary Assets. The value of all assets and property of any Foreign Subsidiary of Issuer or any Guarantor shall not exceed excess of Five Hundred Thousand Dollars (\$500,000.00) in the aggregate at any time (with respect to all such Foreign Subsidiaries).

8. EVENTS OF DEFAULT

Any one of the following shall constitute an event of default (an “**Event of Default**”) under this Agreement:

8.1 Payment Default. Issuer fails to make any payment of principal or interest due under any Note on its due date, or pay any other Obligations when due and such failure continues for five (5) Business Days.

8.2 Covenant Default.

(a) Issuer fails or neglects to perform any obligation in Sections 6.2, 6.5, 6.6, 6.7, 6.8, 6.9, 6.10 or 6.12 or violates any covenant in Section 7; or

(b) Issuer fails or neglects to perform, keep, or observe any other term, provision, condition, covenant or agreement contained in this Agreement or any other Note Documents, and as to any such default other than those specified in Section 8.1 or 8.2 (a), Issuer has failed to cure such default within thirty (30) days after the earlier of (i) the date a Responsible Officer of the Issuer has obtained knowledge of the occurrence of such default and (ii) the date Issuer has received written notice from Agent or the Required Holders with respect to such default.

8.3 Material Adverse Change. A Material Adverse Change occurs.

8.4 Attachment; Levy; Restraint on Business. (a) (i) The service of process seeking to attach, by trustee or similar process, any funds of Issuer or any Subsidiary, or (ii) a notice of lien, levy, or assessment is filed against any material portion of Issuer’s or a Subsidiary’s assets by any Government Authority, and the same under subclauses (i) and (ii) hereof are not, within thirty (30) days after the occurrence thereof, discharged or stayed (whether through the posting of a bond or otherwise); (b) any material portion of Issuer’s or a Subsidiary’s assets is attached, seized, levied on, or comes into possession of a trustee or receiver, or any court order enjoins, restrains, or prevents Issuer or a Subsidiary from conducting any part of its business; or (c) the delivery of a notice of foreclosure or exclusive control to any entity holding or maintaining Issuer’s or a Subsidiary’s deposit accounts or accounts holding securities by any Person (other than by Agent or any Holder) seeking to foreclose or attach any such accounts or securities.

8.5 Insolvency. (a) Issuer or any Subsidiary admits in writing its inability to pay its debts (including trade debts) as they become due; (b) Issuer or any Subsidiary begins an Insolvency Proceeding; (c) an Insolvency Proceeding is begun against Issuer or any Subsidiary and is not dismissed or stayed within forty-five (45) days, or (d) Issuer or any of its Subsidiaries is or becomes Insolvent.

8.6 Other Agreements. There is a default or other failure to perform in any agreement to which Issuer or any of its Subsidiaries is a party or by which it is bound with a third party or parties which consists of the failure to

pay any Indebtedness at maturity or which results in a right by such third party or parties, whether or not exercised, to accelerate the maturity of Indebtedness in an aggregate amount in excess of Two Hundred Fifty Thousand Dollars (\$250,000).

8.7 Judgments. One or more judgments, orders, or decrees for the payment of money (not covered by independent third-party insurance as to which liability has been accepted by such insurance carrier) in an amount, individually or in the aggregate, of at least Two Hundred Fifty Thousand Dollars (\$250,000) shall be rendered against Issuer and shall remain unsatisfied, unvacated, undischarged or unstayed for a period of thirty (30) days after the entry thereof.

8.8 Misrepresentations. Issuer or any Person acting for Issuer makes any representation, warranty, or other statement now or later in this Agreement, any other Note Document or in any writing delivered to Agent or any Holder or to induce Agent or any Holder to enter this Agreement or any other Note Document, and such representation, warranty, or other statement is incorrect in any material respect when made.

8.9 [Reserved].

8.10 Subordinated Debt. Any document, instrument, or agreement evidencing the subordination of any Subordinated Debt shall for any reason be revoked or invalidated or otherwise cease to be in full force and effect other than in accordance with its terms, any Person shall be in breach thereof or contest in any manner the validity or enforceability thereof or deny that it has any further liability or obligation thereunder, or the Obligations shall for any reason fail to be subordinated or shall not have the priority contemplated by this Agreement or any applicable subordination or intercreditor agreement.

8.11 Guaranty. (a) Any Guaranty terminates or ceases for any reason to be in full force and effect (other than in accordance with its terms); (b) any Guarantor does not perform any obligation or covenant under any Guaranty; (c) except as permitted by this Agreement, the liquidation, winding up, or termination of existence of any Guarantor; (d) there is a material impairment in the perfection or priority of Agent's Lien in the Collateral, taken as a whole, provided by Guarantor or in the value of such collateral; or (e) if any of the circumstances described in Section 8.3 through 8.8 occurs with respect to a Guarantor.

8.12 Governmental Approvals. Any Governmental Approval material to Issuer or any Subsidiary's business shall have been (a) revoked, rescinded, suspended, modified in an adverse manner or not renewed in the ordinary course for a full term, or (b) subject to any decision by a Governmental Authority that designates a hearing with respect to any applications for renewal of any of such Governmental Approval or that could result in the Governmental Authority taking any of the actions described in clause (a) above, and such decision or such revocation, rescission, suspension, modification or non-renewal (i) will cause, or could reasonably be expected to cause, a Material Adverse Change, or (ii) adversely affects the legal qualifications of Issuer or any Subsidiary to hold such Governmental Approval in any applicable jurisdiction and such revocation, rescission, suspension, modification or non-renewal could reasonably be expected to materially and adversely affect the status of or legal qualifications of Issuer or any Subsidiary to hold any Governmental Approval in any other jurisdiction.

9. HOLDER'S AND AGENT'S RIGHTS AND REMEDIES

9.1 Rights and Remedies. While an Event of Default occurs and is continuing, , without notice or demand; (a) Agent, if directed by the Required Holders, may declare all Obligations immediately due and payable (but if an Event of Default described in Sections 8.4 or 8.5 occurs all Obligations are immediately due and payable without any action by Agent or any Holder); (b) the Holders may stop extending credit for Issuer's benefit under this Agreement or under any other agreement between Issuer and any Holder; (c) the Agent may settle or adjust disputes and claims directly with Account Debtors for amounts on terms and in any order that Required Holders consider advisable, notify any Person owing Issuer money of Agent's security interest in such funds, and verify the amount of such account; (d) Agent or any Holder may make any payments and do any acts it considers necessary or reasonable to protect the Collateral and/or its security interest in the Collateral; (e) Agent or any Holder may apply to the Obligations any amount held by Agent or any Holder owing to or for the credit or the account of Issuer; (f) Agent may ship, reclaim, recover, store, furnish, maintain, repair, prepare for sale, advertise for sale, and sell the Collateral; (g) Agent may deliver a notice of exclusive control, any entitlement order, or other directions or instructions pursuant to any Control Agreement or similar agreements providing control of any Collateral; (h) Agent may demand and receive possession of Issuer's Books; and (i) Agent may exercise all rights and remedies available to Agent under the Note Documents or at law or equity, including all remedies provided under the Code (including disposal of the Collateral

pursuant to the terms thereof). Issuer shall assemble the Collateral if Agent requests and make it available as Agent designates. Agent may enter premises where the Collateral is located, take and maintain possession of any part of the Collateral, and pay, purchase, contest, or compromise any Lien which appears to be prior or superior to its security interest and pay all expenses incurred. Issuer grants Agent a license to enter and occupy any of its premises, without charge, to exercise any of Agent's rights or remedies. Agent is hereby granted a non-exclusive, royalty-free license or other right, solely pursuant to the provisions of this Section 9.1, to use, without charge, Issuer's labels, patents, copyrights, mask works, rights of use of any name, trade secrets, trade names, trademarks, service marks, and advertising matter, or any similar property as it pertains to the Collateral, in completing production of, advertising for sale, and selling any Collateral and, in connection with Agent's exercise of its rights under this Section, Issuer's rights under all licenses and all franchise agreements inure to Agent's benefit; provided such license and rights shall only be exercisable in connection with the disposition of Collateral upon Agent's exercise of its remedies hereunder. Issuer hereby irrevocably appoints Agent as its lawful attorney-in-fact, exercisable only upon the occurrence and only during the continuance of an Event of Default, to: (i) endorse Issuer's name on any checks or other forms of payment or security; (ii) sign Issuer's name on any invoice or bill of lading for any Account or drafts against Account Debtors; (iii) settle and adjust disputes and claims about the Accounts directly with Account Debtors, for amounts and on terms Agent (at the direction of the Required Holders) determines reasonable; (iv) make, settle, and adjust all claims under Issuer's insurance policies; (v) pay, contest or settle any Lien, charge, encumbrance, security interest, and adverse claim in or to the Collateral, or any judgment based thereon, or otherwise take any action to terminate or discharge the same; and (vi) transfer the Collateral into the name of Agent or any Holder or a third party as the Code permits. Issuer hereby appoints Agent as its lawful attorney-in-fact to sign Issuer's name on any documents necessary to perfect or continue the perfection of Agent's security interest in the Collateral regardless of whether an Event of Default has occurred until all Obligations (other than inchoate indemnity obligations, and any other obligations which, by their terms, are to survive the termination of this Agreement) have been satisfied in full. Agent's foregoing appointment as Issuer's attorney in fact, and all of Agent's rights and powers, coupled with an interest, are irrevocable until all Obligations (other than inchoate indemnity obligations, and any other obligations which, by their terms, are to survive the termination of this Agreement) have been fully repaid and performed. To the extent permitted by applicable law, Issuer waives demand, notice of default or dishonor, notice of payment and nonpayment, notice of any default, nonpayment at maturity, release, compromise, settlement, extension, or renewal of accounts, documents, instruments, chattel paper, and guarantees held by Agent on which Issuer is liable. If Issuer fails to pay any amounts or furnish any required proof of payment due to third persons or entities, as required under the terms of this Agreement, then Agent (at the direction of the Required Holders) or any Holder may do any or all of the following: (x) make payment of the same or any part thereof; or (y) obtain and maintain insurance policies of the type discussed in Section 6.5, and take any action with respect to such policies as Agent (at the direction of the Required Holders) or such Holder deems prudent. Any amounts so paid or deposited by Agent shall constitute expenses hereunder, shall be immediately due and payable, and shall bear interest at the then applicable rate hereinabove provided, and shall be secured by the Collateral. Any payments made by Agent or any Holder shall not constitute an agreement by Agent or any Holder to make similar payments in the future or a waiver by Agent or any Holder of any Event of Default under this Agreement. At any time after the occurrence and during the continuance of an Event of Default, Agent may notify any Person owing funds to Issuer of Agent's security interest in such funds and verify the amount of such Account. Issuer shall collect all amounts owing to Issuer for Agent, receive in trust all payments as Agent's trustee, and immediately deliver such payments to Agent in their original form as received from the account debtor, with proper endorsements for deposit.

9.2 Application of Payments and Proceeds. All payments received by Agent (or by any Holder, who shall turn over such payments to the Agent for applicable pursuant to this Section 9.2) prior to an Event of Default shall be applied as follows: (1) first, to fees, expenses, reimbursements, indemnifications and any other amounts then due and owing to Agent; and (2) second to all payments on each Note, on a pro rata basis, then due and owing (provided, however, if such payments are not sufficient to pay the whole amount then due, such payments shall be applied first to fees, then unpaid interest, then to the remaining amount then due). After the occurrence and during the continuance of an Event of Default, Agent (and any Holder, who shall turn over such funds in its possession to the Agent for applicable pursuant to this Section 9.2) shall apply any funds in its possession, whether from payments, proceeds realized as the result of any collection of Accounts or other disposition of the Collateral, or otherwise, as follows: (1) first, to fees, expenses, reimbursements, indemnifications and any other amounts then due and owing to Agent; and (2) second to all payments on each Note, on a pro rata basis, then due and owing (provided, however, if such payments are not sufficient to pay the whole amount then due, such payments shall be applied first to fees, then unpaid interest, then to the remaining amount then due). Any surplus shall be paid to Issuer or other Persons legally entitled thereto; Issuer shall remain liable to Agent and Holders for any deficiency. If any Holder, in its reasonable judgment, directly or indirectly enters into a deferred payment or other credit transaction with any purchaser at any

sale of Collateral, such Holder shall have the option, exercisable at any time, of either reducing the Obligations owing to it by the principal amount of the purchase price or deferring the reduction of such Obligations until the actual receipt by it of cash therefor.

9.3 Agent's and Holders' Liability for Collateral. So long as Agent deals with the Collateral in its possession in the same manner as it deals with similar property held by it as a third party agent, Agent shall not be liable or responsible for: (a) the safekeeping of the Collateral; (b) any loss or damage to the Collateral; (c) any diminution in the value of the Collateral; or (d) any act or default of any carrier, warehouseman, bailee, or other Person. Issuer bears all risk of loss, damage or destruction of the Collateral.

9.4 No Waiver; Remedies Cumulative. Agent's and Holders' failure, at any time or times, to require strict performance by Issuer of any provision of this Agreement or any other Note Document shall not waive, affect, or diminish any right of Agent and Holders thereafter to demand strict performance and compliance herewith or therewith. No waiver hereunder shall be effective unless signed by Agent and the Required Holders and then is only effective for the specific instance and purpose for which it is given. Agent's and Holders' rights and remedies under this Agreement and the other Note Documents are cumulative. Agent and Holders have all rights and remedies provided under the Code, by law, or in equity. Agent's or Holders' exercise of one right or remedy is not an election, and Agent's or Holders' waiver of any Event of Default is not a continuing waiver. Agent's or Holders' delay in exercising any remedy is not a waiver, election, or acquiescence.

9.5 Share Collateral. Issuer recognizes that Agent may be unable to effect a public sale of any or all the Collateral comprising shares of Issuer's Subsidiaries, by reason of certain prohibitions contained in federal securities laws and any other applicable securities laws or otherwise, and may be compelled to resort to one or more private sales thereof to a restricted group of purchasers which will be obliged to agree, among other things, to acquire such securities for their own account for investment and not with a view to the distribution or resale thereof or other applicable restrictions. Issuer acknowledges and agrees that any such private sale may result in prices and other terms less favorable than if such sale were a public sale and, notwithstanding such circumstances, agrees that any such private sale shall be deemed to have been made in a commercially reasonable manner. Holder shall be under no obligation to delay a sale of any of the Shares for the period of time necessary to permit the issuer thereof to register such securities for public sale under federal securities laws or under applicable state or foreign securities laws.

9.6 Demand; Protest. Issuer waives demand, protest, notice of protest, notice of default or dishonor, notice of payment and nonpayment, notice of any default, nonpayment at maturity, release, compromise, settlement, extension, or renewal of accounts, documents, instruments, chattel paper, and guarantees at any time held by Agent on which Issuer may in any way be liable.

10. NOTICES.

All notices or other communication by any party to this Agreement or any other Note Document must be in writing and shall be deemed to have been validly served, given, or delivered: (a) upon the earlier of actual receipt and three (3) Business Days after deposit in the U.S. mail, first class, registered or certified mail return receipt requested, with proper postage prepaid; (b) upon transmission, when sent by electronic mail or facsimile transmission; (c) one (1) Business Day after deposit with a reputable overnight courier with all charges prepaid; or (d) when delivered, if hand-delivered by messenger, all of which shall be addressed to the party to be notified and sent to the address, facsimile number, or email address indicated below its signature block on the signature page hereof. Agent or Issuer may change its mailing or electronic mail address or facsimile number by giving the other parties written notice thereof in accordance with the terms of this Section 10.

11. CHOICE OF LAW, VENUE, JURY TRIAL WAIVER

New York law governs the Note Documents without regard to principles of conflicts of law. Issuer, Agent and each Holder each submit to the exclusive jurisdiction of the State and Federal courts in New York County, City of New York, New York; provided, however, that nothing in this Agreement shall be deemed to operate to preclude Agent or any Holder from bringing suit or taking other legal action in any other jurisdiction to realize on the Collateral or any other security for the Obligations, or to enforce a judgment or other court order in favor of Agent or any Holder. Issuer expressly submits and consents in advance to such jurisdiction in any action or suit commenced in any such court, and Issuer hereby waives any objection that it may have based upon lack of personal jurisdiction, improper venue, or forum non conveniens and hereby consents to the granting of such legal or equitable relief as is deemed appropriate by such court.

TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ISSUER, AGENT AND EACH HOLDER EACH WAIVE THEIR RIGHT TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION ARISING OUT OF OR BASED UPON THIS AGREEMENT, THE NOTE DOCUMENTS OR ANY CONTEMPLATED TRANSACTION, INCLUDING CONTRACT, TORT, BREACH OF DUTY AND ALL OTHER CLAIMS. THIS WAIVER IS A MATERIAL INDUCEMENT FOR ALL PARTIES TO ENTER INTO THIS AGREEMENT. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT OR ANYWHERE ELSE, EACH PARTY AGREES THAT IT SHALL NOT SEEK FROM ANY OTHER PARTY UNDER ANY THEORY OF LIABILITY (INCLUDING ANY THEORY IN TORTS), ANY SPECIAL, INDIRECT, CONSEQUENTIAL OR PUNITIVE DAMAGES. EACH PARTY HAS REVIEWED THIS WAIVER WITH ITS COUNSEL.

12. GENERAL PROVISIONS

12.1 Successors and Assigns. This Agreement binds and is for the benefit of the successors and permitted assigns of each party hereto. Issuer may not assign this Agreement or any rights or obligations under it without prior written consent of Agent (acting at the direction of the Required Holders) (which consent may be granted or withheld in their discretion). Each successor and permitted assign shall be subject to the same requirements and limitations of a direct holder thereof, including the requirements under Section 13.9, provided that Issuer shall not be required to pay to any successor or permitted assign more than the amount which it would have been required to pay to the applicable Holder hereunder had such Holder retained such interest in the Notes hereunder or other obligations payable hereunder unless the obligation to make such greater payment results from a Change in Law that occurs after the successor or permitted assign acquired its interest.

12.2 Indemnification.

(a) The Issuer agrees to pay to the Agent, for its own account, fees payable in the amounts and at the times separately agreed upon between the Issuer and the Agent pursuant to the Agent Fee Letter.

(b) The Issuer shall pay (i) all fees, costs and expenses incurred by the Agent or any Holder, including the legal fees, charges and disbursements, incurred in connection with the preparation, execution, delivery or administration of the Note Documents or any amendments, modifications or waivers of the provisions thereof and all fees, costs and expenses incurred by the Agent or any Holder, including the legal fees, charges and disbursements, in connection with the enforcement or protection of its rights in connection with the Note Documents, including its rights under this Section.

(c) Issuer agrees to indemnify, defend and hold Agent and each Holder and their directors, officers, employees, agents, attorneys, or any other Person affiliated with or representing Agent or any Holder (each, an “**Indemnified Person**”) harmless against: (a) all obligations, demands, claims, and liabilities (collectively, “**Claims**”) asserted in connection with, related to, or arising from, out of or under the transactions contemplated by the Note Documents; and (b) all losses incurred, or paid by such Indemnified Person from, following, or arising from transactions between Agent, any Holder and Issuer (including reasonable attorneys’ fees and expenses), except, in the case of clauses (a) and (b), for Claims and/or losses directly caused by such Indemnified Person’s gross negligence or willful misconduct, as determined by a final non-appealable judgement of a court of competent jurisdiction.

(d) This Section 12.2 shall not apply with respect to Taxes, other than Taxes that represent claims, damages, losses or liability arising from any non-Tax claim.

12.3 Amendments in Writing; Integration. All amendments to this Agreement must be in writing and signed by Issuer, Agent and each Holder; provided that no such amendment, waiver or other modification shall without the consent of the Agent, affect the rights, duties, protections, immunities or indemnities of the Agent. This Agreement and the Note Documents represent the entire agreement about this subject matter and supersede prior negotiations or agreements. All prior agreements, understandings, representations, warranties, and negotiations between the parties about the subject matter of this Agreement and the Note Documents merge into this Agreement and the Note Documents. Issuer acknowledges that it is not relying on any representation or agreement made by Agent or any Holder or any employee, attorney or agent thereof, other than the specific agreements set forth in this Agreement and the Note Documents.

12.4 Miscellaneous. Time is of the essence for the performance of all Obligations in this Agreement. Each provision of this Agreement is severable from every other provision in determining the enforceability of any provision. All sums payable by Issuer pursuant to this Agreement or any of the other Note Documents shall be payable

without notice or demand and shall be payable in United States Dollars without set-off or reduction of any manner whatsoever; provided that neither Agent or any of its Affiliates shall be entitled to exercise any such set-off or reduction with respect to any Tax reserve account. This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which, when executed and delivered, are an original, and all taken together, constitute one Agreement. This Agreement and all covenants, representations and warranties made in this Agreement continue in full force until all Obligations (other than inchoate indemnity obligations and any other obligations which, by their terms, are to survive the termination of this Agreement) have been satisfied. The obligations in Section 12.2, Section 13.5 and Section 13.9(d) to indemnify Agent and each Holder shall survive until the statute of limitations with respect to such claim or cause of action shall have run and shall survive the termination of this Agreement or the earlier resignation or removal of the Agent.

12.5 Severability of Provisions. Each provision of this Agreement is severable from every other provision in determining the enforceability of any provision.

12.6 Correction of Note Documents. Agent (acting at the direction of the Required Holders) may correct patent errors and fill in any blanks in the Note Documents consistent with the agreement of the parties hereto so long as Agent provides Issuer with prior written notice of such correction and allows Issuer at least ten (10) days to object to such correction. In the event of such objection, such correction shall not be made except by pursuant to Section 12.3 of this Agreement.

12.7 Confidentiality. In handling any confidential information, Agent and each Holder shall exercise the same degree of care that it exercises for its own proprietary information, but disclosure of information may be made: (a) on a need to know basis to its Subsidiaries or Affiliates so long as such Subsidiaries or Affiliates are subject to this Section 12.7; (b) to prospective transferees or purchasers of any interest in this Agreement (provided, however, that prior to such disclosure any prospective transferee or purchaser shall have entered into an agreement containing provisions substantially the same as this Section 12.7); (c) as required by law, regulation, subpoena, or other order; (d) to its regulators or as otherwise required in connection with its examination or audit; (e) as it consider appropriate in exercising remedies under the Note Documents; (f) to any independent or internal auditor, agent, employee or attorney of the Agent or such Holder so long as such Person is subject to the same or similar confidentiality requirements as set forth in this Section 12.7; and (g) to its third-party service providers so long as such service providers are subject to the same or similar confidentiality requirements as set forth in this Section 12.7. Confidential information does not include information that either: (i) is in the public domain or in Agent's or any Holder's possession when disclosed to it, or becomes part of the public domain after disclosure to Agent or any Holder; or (ii) is disclosed to Agent or any Holder by a third party, if Agent or a Holder does not know that the third party is prohibited from disclosing the information.

12.8 General Limitations on Transfer. All transfers of Notes shall be subject to the following limitations:

- (a) no transfer shall be effective until it is registered in the Register described in Section 1.3(c);
- (b) prior to the registration of any transfer, Issuer, the Registrar (if not Issuer) and their agents shall treat the Person in whose name the Note is registered as the owner and Holder thereof for all purposes (whether or not the Note is overdue);
- (c) no transfer or exchange will be registered no later than three (3) Business Days prior to any day on which any payment is due with respect to the Obligations;
- (d) no service charge shall be imposed in connection with any transfer or exchange of any Note; and
- (e) Issuer shall promptly notify Issuer and Registrar in writing of any transfer or exchange of Notes pursuant to Section 12.9 hereof, and in any event no later than three (3) Business Days prior to any day on which any other payment is due with respect to the Obligations so long as written notice of transfer was received by Issuer at least five (5) Business Days prior to the applicable payment date; it being understood that no transfers will be effected from such applicable date to the date the applicable payments are made. Any such notice shall include the relevant name, address and other information for notices of each transferee of any such Note together with the wire instructions or such other instructions for payment and applicable tax forms and any other information reasonably requested by the Registrar. The Registrar shall be entitled to conclusively rely on, and shall be fully protected in acting upon, any such notice provided to it by Issuer.

12.9 Transfer Restrictions.

(a) A Holder may transfer a Note (or a beneficial interest therein) or exchange a Note (or a beneficial interest therein) for another Note or Notes of any authorized denomination so long as such transfer or exchange is being made in compliance with the Securities Act and any applicable securities laws of any state of the United States. Such Holder may complete such transfer or exchange, as applicable, by presenting to Issuer a written instruction therefor stating the name of the proposed transferee or requesting such an exchange, accompanied by any certification, opinion or other document required by Section 12.10. If any transfer or exchange meets the requirements of this Section 12.9 and Section 12.10, Issuer shall promptly provide written notice substantially in the form of Exhibit E to the Registrar (if not Issuer) and the Registrar shall register such transfer or exchange in accordance with Section 12.8.

(b) If a Note is transferred or exchanged for another Note, Issuer shall (x) cancel the Note being transferred or exchanged, (y) deliver one or more new Notes in authorized denominations having an aggregate principal amount equal to the principal amount of such transfer or exchange to the transferee (in the case of a transfer) or the Holder of the canceled Note (in the case of an exchange), registered in the name of such transferee or Holder of new Notes, as applicable, and (z) if such transfer or exchange involves less than the entire principal amount of the canceled Note, deliver to the Holder of such canceled Note one or more Notes in authorized denominations having an aggregate principal amount equal to the untransferred or unexchanged portion of the canceled Note, registered in the name of the Holder thereof.

12.10 Transfers and Exchanges.

(a) The transfer or exchange of any Note (or a beneficial interest therein) may only be made in accordance with Sections 12.8 and 12.9. The Registrar may refuse to register any requested transfer or exchange that does not comply with the preceding sentence. For the avoidance of doubt, Agent (in any capacity, including as Registrar) shall have no obligation to ascertain or confirm whether any requirements (including any requirements of securities or any other laws, rules or regulations) for the transfer or exchange of Notes have been complied with and shall conclusively rely upon and be fully protected in acting upon any notification from Issuer pursuant to Section 12.8(e) regarding any transfer or exchange. The Registrar shall be fully justified in refraining from taking any action until it has received such notice from Issuer and shall not be liable in so refraining from taking any action.

(b) The Person requesting the transfer or exchange must deliver or cause to be delivered to Issuer such certification, opinions and evidence as Issuer may reasonably require in order to determine that the proposed transfer or exchange is being made in compliance with the Securities Act and any applicable securities laws of any state of the United States.

(c) Issuer shall retain copies of all letters, notices and other written communications received pursuant to Sections 12.9 and 12.10.

13. AGENT

13.1 Appointment, Powers and Immunities. Each Holder hereby irrevocably appoints and authorizes Agent to act as its agent hereunder and under the other Note Documents with such powers as are specifically delegated to Agent by the terms of this Agreement and the other Note Documents, together with such other powers as are reasonably incidental thereto. Agent shall have no duties or responsibilities except those expressly set forth in this Agreement and the other Note Documents and shall not be a trustee for any Holder. Agent shall not be responsible to the Holders for any recitals, statements, representations or warranties contained in this Agreement or the other Note Documents, or in any certificate or other document referred to or provided for in, or received by any of them under, this Agreement or the other Note Documents, or for the value, validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement, the other Note Documents, or any other document referred to or provided for herein or therein, or for the collectability of the Obligations or for the validity, effectiveness or value of any interest or security granted herein or for the value of any Collateral or for the validity or effectiveness of any assignment, mortgage, pledge, security agreement, financing statement, document or instrument, or for any failure by any Issuer or any other Person to perform any of its obligations hereunder or under the other Note Documents. Agent may employ agents and attorneys-in-fact and shall not be answerable, for the negligence or misconduct of any such agents or attorneys-in-fact selected by it except to the extent that a court of competent jurisdiction determines in a final and nonappealable judgment that Agent acted with gross negligence or willful misconduct in the selection of such sub-agent or attorney-in-fact. The exculpatory provisions of this Article shall apply to any such sub-agent and attorney-in-fact of the Agent.

Neither Agent nor any of its directors, officers, members, managers, employees or agents shall be liable or responsible for any action taken or omitted to be taken by it or them hereunder or under the other Note Documents or in connection herewith or therewith, except for its or their own gross negligence or willful misconduct, as determined by a court of competent jurisdiction in a final and nonappealable judgment. Without limiting the generality of the foregoing, (a) Agent shall not be subject to any fiduciary or other implied duties, regardless of whether a Potential Default or Event of Default has occurred and is continuing, and (b) Agent shall not have any duty to take any discretionary action or to exercise any discretionary power. Agent shall not be required to take any action that, in its opinion, may expose Agent to liability or that is contrary to any Note Document or applicable law, or for which the Agent is not indemnified to its satisfaction. Agent shall have no duty to disclose, and shall not be liable for the failure to disclose, any information relating to Issuer or any Affiliate of Issuer that is communicated to or obtained by the Person serving as Agent or any of its Affiliates in any capacity. Agent shall not be responsible for or have any duty to ascertain or inquire into (i) the performance or observance of any of the covenants, agreements or other terms or conditions set forth in any Note Document or the occurrence of any Potential Default or Event of Default, (ii) the existence, value, sufficiency or collectability of any Collateral or creation, perfection or priority of any Lien purported to be created by this Agreement or any other Note Document, (vi) the satisfaction of any condition set forth in any Note Document or (vii) whether Issuer or any other Person has complied with its obligations under the Note Documents, including in respect of documents, notices and certificates that are required to be delivered to the Agent or as to the matters described therein being acceptable or satisfactory to the Agent. Agent shall not be responsible or liable for any failure to monitor or maintain any portion of the Collateral or for the perfection of any Lien on the Collateral. Each party to this Agreement acknowledges and agrees that Agent shall not have any obligation to file financing statements, amendments to financing statements, or continuation statements, or to perfect or maintain the perfection of any Agent's Lien on the Collateral. Agent shall not be responsible for, nor chargeable with, knowledge of the terms and conditions of any agreement, instrument, or other than such Note Documents to which it is directly a party, whether or not an original or a copy of such agreement has been provided to Agent. No provision of this Agreement or any other Note Document shall require Agent to expend or risk its own funds or otherwise incur any liability, financial or otherwise, in the performance of any of its duties hereunder or thereunder or in the exercise of any of its rights or powers, if it shall have grounds to believe that repayment of such funds or indemnity satisfactory to it against such risk or liability is not assured to it. In determining compliance with any condition hereunder to the issuance of any Notes that by its terms must be fulfilled to the satisfaction of a Holder, Agent may presume that such condition is satisfactory to such Holder unless Agent shall have received notice to the contrary from such Holder prior to the Issue Date. In no event shall Agent be responsible or liable for any failure or delay in the performance of their obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, but not limited to, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or acts of God, future changes in applicable law or regulation, and interruptions, loss or malfunctions of utilities, communications or computer (software and hardware) services; it being understood that Agent shall use commercially reasonable efforts consistent with accepted practices in the banking industry to resume performance as soon as practicable under the circumstances. The rights, privileges, protections, immunities and benefits given to Agent, including, without limitation, its right to be indemnified, are extended to, and shall be enforceable: (i) by such Agent in each Note Document and any other document related hereto or thereto to which it is a party and (ii) the entity serving as Agent in each of its capacities hereunder and in each of its capacities under any Note Document whether or not specifically set forth therein and each agent, custodian and other Person employed to act hereunder and under any Loan Document or related document, as the case may be.

13.2 Reliance by Agent. Agent shall be entitled to rely upon any certification, notice or other communication (including any thereof by telephone, facsimile transmission, or email) believed by it to be genuine and correct and to have been signed or sent by or on behalf of the proper person or persons, and upon advice and statements of legal counsel, independent accountants and other experts selected by Agent. Agent shall not be liable for any action taken or not taken by it with the consent or at the request of the Required Holders. Agent shall be fully justified in failing or refusing to take any action under this Agreement or any other Note Document unless it shall first receive such advice, concurrence, instruction or direction of the Required Holders or all Holders, as it deems appropriate. Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement and the other Notes Documents in accordance with a request or instruction of the Required Holders, and such request and any action taken or failure to act pursuant thereto shall be binding upon all the Holders and all future holders of the Notes. Notwithstanding anything contained in this Agreement or the other Note Documents to the contrary, without limiting any rights, protections, immunities or indemnities afforded to the Agents hereunder (including without limitation this Section 13), phrases such as "satisfactory to the Agent," "approved by the Agent," "acceptable to the Agent," "as determined by the Agent," "designated by the Agent", "specified by the Agent", "in the Agent's discretion," "selected by the Agent," "elected by the Agent," "requested by the Agent," "in the opinion of the Agent," and phrases of similar

import that authorize or permit an Agent to approve, disapprove, determine, act, evaluate or decline to act in its discretion shall be subject to such Agent receiving a direction from the Required Holders.

13.3 Knowledge of Default; Cross Defaults. Agent shall not be deemed to have knowledge of the occurrence of an Event of Default, or the occurrence of any event which could, with the passage of time or the giving of notice or both, constitute an Event of Default (each, a “**Potential Default**”) or any other matter unless Agent has received notice from a Holder or Issuer specifying such Potential Default or Event of Default or other matter and stating, if applicable, that such notice is a “Notice of Default.” If Agent receives such a notice of the occurrence of a Potential Default or Event of Default, Agent shall give notice thereof to the Holders. Upon becoming aware of the occurrence of a Potential Default or Event of Default, a Holder shall give notice thereof to Agent.

13.4 Compliance with Plan. Notwithstanding anything to the contrary, nothing in the Transaction Documents shall prohibit any action required under the Plan.

13.5 Indemnification. The Holders shall indemnify Agent ratably in accordance with the aggregate principal amount of the Notes made by the Holders, for all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind and nature whatsoever that may be imposed on, incurred by or asserted against Agent in any way relating to or arising out of this Agreement or any of the other Note Documents or any other documents contemplated by or referred to herein or therein or the transactions contemplated by or referred to herein or therein or the transactions contemplated hereby and thereby (but excluding, unless a default or event of default has occurred and is continuing, normal administrative costs and expenses incident to the performance of its agency duties hereunder) or the enforcement of any of the terms hereof or of any such other documents, provided that no Holder shall be liable for any of the foregoing to the extent they arise from the gross negligence or willful misconduct, as determined by a court of competent jurisdiction in a final and nonappealable judgment, of the party to be indemnified.

13.6 Failure to Act. Agent shall in all cases be fully justified in failing or refusing to act hereunder or under any other Note Document unless it shall be indemnified to its satisfaction by the Holders against any and all liability, cost and expense that may be incurred by it by reason of taking or continuing to take any such action.

13.7 Resignation or Removal of Agent. If at any time Agent deems it advisable, in its sole discretion, it may submit to each of the Holders and Issuer a written notification of its resignation as Agent under this Agreement, such resignation to be effective on the thirtieth (30th) day after the date of such notice. Agent may be removed at any time, with or without cause, by vote of the Required Holders upon 30 day’ prior notice. Upon any such resignation or removal, the Required Holders shall have the right to appoint a successor Agent from among the Holders, such successor Agent to be reasonably acceptable to Issuer. If no successor Agent shall have been so appointed by the Required Holders and accepted such appointment within thirty (30) days after the retiring Agent’s giving of notice of resignation, then the retiring Agent may, on behalf of Holders, appoint, or petition a court of competent jurisdiction to appoint, a successor Agent, which successor Agent shall be either an existing Holder or a commercial bank organized under the laws of the United States of America or of any State thereof and having a combined capital and surplus of at least \$100,000,000. Upon the acceptance of any appointment as Agent hereunder by a successor Agent, such successor Agent shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring Agent, and the retiring Agent shall be discharged from its duties and obligations under this Agreement. Issuer and the Holders shall execute such documents as shall be necessary to effect such appointment. After any retiring Agent’s resignation hereunder as Agent, the provisions of this Section 13 shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Agent under this Agreement. Notwithstanding anything to the contrary contained herein or in any Note Document, any entity into which Agent may be merged or converted or with which it may be consolidated, or any entity resulting from any merger, conversion or consolidation to which Agent shall be a party, or any entity succeeding to the business of Agent shall be the successor of such Agent hereunder and under the Note Documents without the execution or filing of any paper with any Person or any further act on the part of any Person.

13.8 Purchase Decision. Each Holder acknowledges that none of Agent or the other Holders has made any representation or warranty to it, and that no act by Agent or a Holder hereinafter taken, including any review of the affairs of any Issuer, shall be deemed to constitute any representation or warranty by Agent or such Holder to any other Holder. Each Holder represents to the other Holders that it has, independently and without reliance upon any other Holder and based on such documents and information as it has deemed appropriate, made its own appraisal of, and investigation into, the business, prospects, operations, property, financial and other condition and creditworthiness of Issuer, and all applicable bank, lending, interest rate and securities regulatory laws relating to the transactions

contemplated hereby, and made its own decision to enter into this Agreement and to purchase Notes hereunder. Each Holder also represents that it will, independently and without reliance upon any other Holder and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under this Agreement and the other Note Documents, and to make such investigations as it deems necessary to inform itself as to the business, prospects, operations, property, financial and other condition and creditworthiness of Issuer. Except for any notices, reports and other documents expressly herein required to be furnished to other Holders by a Holder, such Holder shall not have any duty or responsibility to provide such other Holders with any credit or other information concerning the business, prospects, operations, property, financial and other condition or creditworthiness of any Issuer which may come into the possession of any of such Holder.

13.9 Holders' Representations Regarding IRS Withholding; Delivery of Tax Forms. Each Holder represents and agrees as follows:

(a) Such Holder will furnish to Agent and Issuer, upon request, such forms, certifications, statements and other documents as Agent and Issuer may reasonably request from time to time to evidence such Holder's exemption from the withholding of any Tax imposed by any jurisdiction or to enable Agent and Issuer to comply with any applicable laws or regulations relating thereto;

(b) Without limiting the effect of the foregoing, if such Holder is not created or organized under the laws of the United States or any state thereof, such Holder further represents and warrants (i) that it is engaged in the conduct of a business within the United States and that the payments made hereunder are or are reasonably expected to be effectively connected with the conduct of that trade or business and are or will be includible in its gross income; or (ii) if such Holder is not engaged in a U.S. trade or business with which such payments are effectively connected, that such Holder is entitled to the benefits of a Tax convention which exempts the income from U.S. federal withholding Tax and that it has satisfied all requirements to qualify for the exemption from such Tax; and

(c) Without limiting the effect of the foregoing, any Holder that is not a "United States person" within the meaning of Section 7701(a)(30) of the IRC shall at closing deliver to the Agent and the Issuer copies of whichever series of IRS Form W-8 is applicable, or such other forms, certifications, statements or documents, duly executed and completed by Holder as evidence of such Holder's exemption from the withholding of U.S. federal withholding Tax with respect thereto. Any Holder that is a "United States person" within the meaning of Section 7701(a)(30) of the IRC shall deliver to the Issuer or Agent copies of a duly completed and executed IRS Form W-9 certifying that such Holder is exempt from U.S. federal backup withholding Tax. Each Holder agrees that if any form or certification it previously delivered expires or becomes obsolete or inaccurate in any respect, it shall update such form or certification or promptly notify Issuer and Agent in writing of its legal inability to do so.

13.10 Expenses of Agent; Annual Agent Fee.

(a) Except as otherwise expressly provided in this Agreement, Agent shall not be entitled to compensation or reimbursement of expenses from the Holders, unless such expenses are approved by the Required Holders, but may receive compensation or reimbursement of expenses from Issuer under a separate agreement with Issuer. The foregoing shall in no way be construed to limit the rights, protections or immunities of the Agent under this Agreement or any other Note Document.

14. DEFINITIONS

14.1 Definitions. Accounting terms not defined in this Agreement shall be construed following GAAP. Calculations and determinations must be made following GAAP (except for (i) non-compliance with FAS 123R in monthly reporting and (ii) with respect to unaudited financial statements, for the absence of footnotes and subject to year-end audit adjustments), provided that if at any time any change in GAAP would affect the computation of any financial ratio or covenant requirement set forth in any Note Documents, and any of Issuer, Agent or any Holder shall so request, Issuer and the Holders shall negotiate in good faith to amend such ratio or covenant requirement to preserve the original intent thereof in light of such change in GAAP; provided, further, that until so amended, (a) such ratio or covenant requirement shall continue to be computed in accordance with GAAP prior to such change therein and (b) Issuer shall provide Agent and the Holders financial statements and other documents required under this Agreement or as reasonably requested hereunder setting forth a reconciliation between calculations of such ratio or requirement made before and after giving effect to such change in GAAP), provided, further, that for purposes of compliance with the covenants in the Note Documents (other than the delivery of financial statements in accordance with GAAP) (x)

any obligations of a Person under a lease (whether existing now or entered into in the future) that is not (or would not be) a capital lease obligation under GAAP prior to the issuance of Accounting Standards Codification 842 shall not be treated as a capital lease obligation solely as a result of the adoption of changes in GAAP. As used in this Agreement, the following terms have the meanings set forth below. All other terms contained in this Agreement, unless otherwise indicated, shall have the meaning provided by the Code to the extent such terms are defined therein.

“Account” is any “account” as defined in the Code with such additions to such term as may hereafter be made, and includes, without limitation, all accounts receivable and other sums owing to a Person.

“Account Debtor” is any “account debtor” as defined in the Code with such additions to such term as may hereafter be made.

“Affiliate” of any Person is a Person that owns or controls directly or indirectly the Person, any Person that controls or is controlled by or is under common control with the Person, and each of that Person’s senior executive officers, directors, partners and, for any Person that is a limited liability company, that Person’s managers and members.

“Agent” is defined in the preamble.

“Agent Fee Letter” means that certain letter, dated on or about the Issue Date, between the Issuer and the Agent.

“Allocation” means, with respect to a Holder, the allocation of such Holder to receive Notes from Issuer for the cancellation of the aggregate principal amount of Existing Notes set forth opposite such Holder’s name on Schedule 1.1 hereto, as the same may be amended from time to time.

“Anti-Corruption Laws” has the meaning set forth in Section 4(i).

“Anti-Money Laundering Laws” has the meaning set forth in Section 4(i).

“Books” are all books and records including ledgers, federal and state Tax returns, records regarding a Person’s assets or liabilities, the Collateral, business operations or financial condition, and all computer programs or storage or any equipment containing such information.

“Business Day” is any day that is not a Saturday, Sunday or a day on which banks in New York City or Wilmington, Delaware are closed.

“Cash Equivalents” means (a) marketable direct obligations issued or unconditionally guaranteed by the United States or any agency or any State thereof having maturities of not more than one (1) year from the date of acquisition; (b) commercial paper maturing no more than one (1) year after its creation and having the highest rating from either Standard & Poor’s Corporation or Moody’s Investors Service; (c) certificates of deposit issued maturing no more than one (1) year after issue; and (d) money market funds at least ninety-five percent (95%) of the assets of which constitute Cash Equivalents of the kinds described in clauses (a) through (c) of this definition.

“CFC” means a Person that is a controlled foreign corporation under Section 957(a) of the IRC.

“Change in Control” means any event, transaction, or occurrence as a result of which (i) with respect to Issuer, any “person” (as such term is defined in Section 13(d)(3) of the Exchange Act) is or becomes a beneficial owner (within the meaning Rule 13d-3 promulgated under the Exchange Act), directly or indirectly, of securities of Issuer, representing more than fifty percent (50.00%) of the combined voting power of Issuer’s then outstanding securities; or (ii) during any period of twelve consecutive calendar months, individuals who at the beginning of such period constituted the board of directors of Issuer (together with any new directors whose election by the board of directors of Issuer was approved by a vote of not less than a majority of the directors then still in office who either were directors at the beginning of such period or whose election or nomination for election was previously so approved) cease for any reason other than death or disability to constitute a majority of the directors then in office.

“Change in Law” shall mean the occurrence, after the date hereof, of (a) the adoption, taking effect or phasing in of any law, rule, regulation or treaty; (b) any change in any law, rule, regulation or treaty or in the administration, interpretation or application thereof; (c) any new, or adjustment to, requirements prescribed by any domestic or foreign governmental authority or resulting from compliance by Agent or any Holder with any request or

directive (whether or not having the force of law) from any Governmental Authority, or (d) the making, issuance or application of any request, guideline, requirement or directive (whether or not having the force of law) by any Governmental Authority.

“Code” is the Uniform Commercial Code, as the same may, from time to time, be enacted and in effect in the State of New York; provided, that, to the extent that the Code is used to define any term herein or in any Note Document and such term is defined differently in different Articles or Divisions of the Code, the definition of such term contained in Article or Division 9 shall govern; provided further, that in the event that, by reason of mandatory provisions of law, any or all of the attachment, perfection, or priority of, or remedies with respect to, Agent’s Lien on any Collateral is governed by the Uniform Commercial Code in effect in a jurisdiction other than the State of New York, the term **“Code”** shall mean the Uniform Commercial Code as enacted and in effect in such other jurisdiction solely for purposes on the provisions thereof relating to such attachment, perfection, priority, or remedies and for purposes of definitions relating to such provisions.

“Collateral” is any and all properties, rights and assets of Issuer described on Exhibit A.

“Collateral Account” is any Deposit Account, Securities Account, or Commodity Account of Issuer or any Guarantor.

“Commodity Account” is any “commodity account” as defined in the Code with such additions to such term as may hereafter be made.

“Compliance Certificate” is that certain certificate in the form attached hereto as Exhibit C.

“Contingent Obligation” is, for any Person, any direct or indirect liability, contingent or not, of that Person for (a) any indebtedness, lease, dividend, letter of credit or other obligation of another such as an obligation directly or indirectly guaranteed, endorsed, co-made, discounted or sold with recourse by that Person, or for which that Person is directly or indirectly liable; (b) any obligations for undrawn letters of credit for the account of that Person; and (c) all obligations from any interest rate, currency or commodity swap agreement, interest rate cap or collar agreement, or other agreement or arrangement designated to protect a Person against fluctuation in interest rates, currency exchange rates or commodity prices; but “Contingent Obligation” does not include endorsements in the ordinary course of business or customary indemnification obligations. The amount of a Contingent Obligation is the stated or determined amount of the primary obligation for which the Contingent Obligation is made or, if not determinable, the maximum reasonably anticipated liability for it determined by the Person in good faith; but the amount may not exceed the maximum of the obligations under any guarantee or other support arrangement.

“Control Agreement” is any control agreement entered into among the depository institution at which Issuer or a Guarantor maintains a Deposit Account or the securities intermediary or commodity intermediary at which Issuer or such Guarantor maintains a Securities Account or a Commodity Account, Issuer or such Guarantor, and Agent pursuant to which Agent obtains control (within the meaning of the Code) over such Deposit Account, Securities Account, or Commodity Account.

“Copyrights” are any and all copyright rights, copyright applications, copyright registrations and like protections in each work of authorship and derivative work thereof, whether published or unpublished and whether or not the same also constitutes a trade secret.

“Deposit Account” is any “deposit account” as defined in the Code with such additions to such term as may hereafter be made.

“Direct Listing” means the initial listing of the common stock of the Issuer (or other equity securities of the Issuer) on the Nasdaq Stock Market, the New York Stock Exchange or another exchange or marketplace approved by the Issuer’s board of directors by means of an effective registration statement filed by the Issuer with the Securities and Exchange Commission, without a related underwritten offering of such common stock (or other equity securities).

“Disposition” or **“Dispose”** means the sale, transfer, license, lease or other disposition of any property by any Person, including any sale, assignment, transfer or other disposal, with or without recourse, of any notes or accounts receivable or any rights and claims associated therewith.

“Dollars,” “dollars” and **“\$”** each mean lawful money of the United States.

“Domestic Subsidiary” is any Subsidiary which is not a Foreign Subsidiary.

“Equipment” is all “equipment” as defined in the Code with such additions to such term as may hereafter be made, and includes without limitation all machinery, fixtures, goods, vehicles (including motor vehicles and trailers), and any interest in any of the foregoing.

“ERISA” is the Employee Retirement Income Security Act of 1974, and its regulations.

“Event of Default” is defined in Section 8.

“Exchange Act” means the Securities Exchange Act of 1934, as amended.

“Excluded Accounts” means (i) deposit accounts used exclusively for payroll, payroll taxes and other employee wage and benefit payments to or for the benefit of Issuer’s employees and (ii) deposit accounts subject to Liens permitted by clause (i) or clause (k) of the defined term “Permitted Liens”.

“Excluded Foreign Subsidiary” means any Subsidiary of Issuer that is (a) a CFC, (b) a Subsidiary of a CFC or (c) a Domestic Subsidiary substantially all of the assets of which consist of equity interests in (or debt obligations treated as equity as equity interests in) one or more entities described in this definition, if the provision of a guarantee and security interest hereunder by such Subsidiary or the pledge of more than sixty-five percent (65%) of the voting stock of such Subsidiary would create adverse tax consequences to Issuer and its Subsidiaries under the IRC.

“Excluded Taxes” shall mean any of the following Taxes imposed on or with respect to Agent, any Holder (or any successor or assign of Agent or any Holder) or any other recipient of payment (together with each of Agent and Holder, a **“Recipient”**) or required to be withheld or deducted from a payment to the Recipient (a) any Taxes imposed on or measured by net income (however denominated), franchise Taxes, and branch profits Taxes, in each case, (ii) imposed as a result of such Recipient being organized under the laws of, or having its principal office or its applicable lending office located in, the jurisdiction imposing such Tax (or any political subdivision thereof) or (ii) imposed as a result of a present or former connection between such Recipient and the jurisdiction imposing such Tax (other than connections arising from such Recipient having executed, delivered, become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced any Note Document, or sold or assigned an interest in the Note or any Note Document), (b) any U.S. federal withholding Taxes imposed with respect to an applicable interest in any Obligation pursuant to a law in effect on the date on which (i) the Recipient acquires such interest in such Obligation or (ii) such Recipient changes its lending office, except in each case to the extent that, pursuant to Section 1.2(d), amounts with respect to such Taxes were payable either to such successor’s or assign’s applicable predecessor or assignor immediately before such successor or assign became a party hereto or to the Recipient immediately before it changed its lending office, (c) any U.S. federal withholding Taxes that would not have been imposed but for such Recipient’s failure to comply with Section 13.9(c), and (d) any U.S. federal withholding Taxes imposed under FATCA.

“Existing Notes” means (i) the Senior Secured Convertible Notes due December 6, 2025 issued by ProSomnus, Inc. pursuant to that certain Indenture, dated as of December 6, 2022, by and among ProSomnus, Inc., the Issuer and ProSomnus Holdings, Inc., as guarantors, and Wilmington Trust, National Association, as trustee and collateral agent, as supplemented by the First Senior Supplemental Indenture entered into on June 29, 2023 and the Second Supplemental Indenture entered into on September 20, 2023, and (ii) the Senior Secured Convertible Exchange Notes due December 6, 2025 issued by ProSomnus, Inc. pursuant to that certain Indenture, dated as of October 11, 2023, by and among ProSomnus, Inc., the Issuer and ProSomnus Holdings, Inc., as guarantors, and Wilmington Trust, National Association, as trustee and collateral agent.

“FATCA” means Sections 1471 through 1474 of the IRC, as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with), any current or future regulations or official interpretations thereof, any agreements entered into pursuant to Section 1471(b)(1) of the IRC and any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement, treaty or convention among Governmental Authorities and implementing such Sections of the IRC.

“Foreign Subsidiary” is a Subsidiary that is not an entity organized under the laws of the United States or any state thereof or the District of Columbia.

“GAAP” is generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and

pronouncements of the Financial Accounting Standards Board or in such other statements by such other Person as may be approved by a significant segment of the accounting profession, which are applicable to the circumstances as of the date of determination, subject to Section 14.1.

“General Intangibles” is all “general intangibles” as defined in the Code in effect on the date hereof with such additions to such term as may hereafter be made, and includes without limitation, all Intellectual Property, payment intangibles, royalties, contract rights, goodwill, franchise agreements, purchase orders, customer lists, route lists, telephone numbers, domain names, claims, income and other Tax refunds, security and other deposits, options to purchase or sell real or personal property, rights in all litigation presently or hereafter pending (whether in contract, tort or otherwise), insurance policies (including without limitation key man, property damage, and business interruption insurance), payments of insurance and rights to payment of any kind.

“Governmental Approval” is any consent, authorization, approval, order, license, franchise, permit, certificate, accreditation, registration, filing or notice, of, issued by, from or to, or other act by or in respect of, any Governmental Authority.

“Governmental Authority” is any nation or government, any state or other political subdivision thereof, any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative functions of or pertaining to government, any securities exchange and any self-regulatory organization.

“Guarantor” is any Person providing a Guaranty in favor of Agent in respect of the Obligations.

“Guaranty” is any guaranty of all or any part of the Obligations, as the same may from time to time be amended, restated, modified or otherwise supplemented.

“Holder” or **“Holders”** is defined in the preamble hereof.

“Indebtedness” is, with respect to Issuer or any Subsidiary, (a) indebtedness for borrowed money or the deferred price of property or services, such as reimbursement and other obligations for surety bonds and letters of credit, (b) obligations evidenced by notes, bonds, debentures or similar instruments, (c) capital lease obligations, and (d) Contingent Obligations with respect to Indebtedness described in clauses (a) through (c) of this definition.

“Indemnified Person” is defined in Section 12.2.

“Indemnified Taxes” means (a) Taxes, other than Excluded Taxes, imposed on or with respect to any payment made by or on account of any obligation of the Issuer under any Note Document, and (b) to the extent not otherwise described in clause (a) of this definition, Other Taxes.

“Insolvency Proceeding” is any proceeding by or against any Person under the United States Bankruptcy Code, or any other bankruptcy or insolvency law, including assignments for the benefit of creditors, or proceedings seeking reorganization, arrangement, or other relief.

“Insolvent” means not Solvent.

“Inventory” is all “inventory” as defined in the Code in effect on the date hereof with such additions to such term as may hereafter be made, and includes without limitation all merchandise, raw materials, parts, supplies, packing and shipping materials, work in process and finished products, including without limitation such inventory as is temporarily out of Issuer’s custody or possession or in transit and including any returned goods and any documents of title representing any of the above.

“Investment” by any Person is any beneficial ownership interest in any other Person (including stock, partnership interest or other securities), and any loan, advance or capital contribution to any other Person.

“Intellectual Property” means, with respect to any Person, all of such Person’s right, title, and interest in and to the following:

- (a) its Copyrights, Trademarks and Patents;

(b) any and all trade secrets and trade secret rights, including, without limitation, any rights to unpatented inventions, know-how, operating manuals;

(c) any and all source code;

(d) any and all design rights which may be available to such Person;

(e) all licenses or other rights to use any of the Copyrights, Patents or Trademarks, and all license fees and royalties arising from such use to the extent permitted by such license or rights;

(f) any and all claims for damages by way of past, present and future infringement of any of the foregoing, with the right, but not the obligation, to sue for and collect such damages for said use or infringement of the Intellectual Property rights identified above; and

(g) all amendments, renewals and extensions of any of the Copyrights, Trademarks or Patents.

“IP Agreement” is that certain Intellectual Property Security Agreement executed and delivered by Issuer to Agent dated as of the Issue Date, or any subsequently delivered similar agreement.

“IPO” means the Issuer’s first underwritten public offering of its common stock under the Securities Act.

“IRC” means the U.S. Internal Revenue Code of 1986, as amended.

“Issue Date” is the date of this Agreement, as indicated on the cover page hereof.

“Issuer” is defined in the preamble hereof.

“Lien” is a claim, mortgage, deed of trust, levy, charge, pledge, security interest or other encumbrance of any kind, whether voluntarily incurred or arising by operation of law or otherwise against any property.

“Liquidity” is, at any time, the sum of the aggregate amount of unrestricted cash and Cash Equivalents held at such time by Issuer and any Guarantor.

“Material Adverse Change” is (a) a material impairment in the perfection or applicable priority of Agent’s Lien in the Collateral, taken as a whole; (b) a material adverse change in the business, operations, assets, or financial condition of Issuer and its Subsidiaries taken as a whole; or (c) a material impairment of the prospect of repayment of any portion of the Obligations or otherwise perform its obligations under the Note Documents.

“Maturity Date” is December 31, 2026.

“Note” is defined in the preamble hereof.

“Note Approval Resolutions” are those resolutions substantially in the form attached hereto as Exhibit B.

“Note Documents” are, collectively, this Agreement, the Notes, the IP Agreement, the Perfection Certificate, any Guaranty, any Control Agreement, any subordination/intercreditor agreements, any landlord waivers, any bailee agreements, and any other present or future agreement between Issuer, any Guarantor and/or for the benefit of Agent or any Holder in connection with this Agreement, all as amended, restated, amended and restated, supplemented or otherwise modified from time to time.

“Note Parties” means, collectively, Issuer and all Guarantors.

“Obligations” are the Note Parties’ obligation to pay when due any debts, principal, interest, other amounts any Note Party owes Agent or any Holder now or later under this Agreement or the other Note Documents, including, without limitation, interest accruing after Insolvency Proceedings begin, and the performance of the Note Parties’ duties under the Note Documents, and including interest accruing after Insolvency Proceedings begin and debts, liabilities, or obligations of any Note Party assigned to Agent or any Holder.

“OFAC” means the U.S. Department of Treasury Office of Foreign Assets Control.

“OFAC Lists” are, collectively, the Specially Designated Nationals and Blocked Persons List maintained by OFAC pursuant to Executive Order No. 13224, 66 Fed. Reg. 49079 (Sept. 25, 2001) and/or any other list of terrorists or other restricted Persons maintained pursuant to any of the rules and regulations of OFAC or pursuant to any other applicable Executive Orders.

“Other Taxes” means all present or future stamp, court or documentary, intangible, recording, filing or similar Taxes that arise from any payment made under, from the execution, delivery, performance, enforcement or registration of, from the receipt or perfection of a security interest under, or otherwise with respect to, any Note Document, except any such Taxes that are imposed as a result of a present or former connection between such Recipient and the jurisdiction imposing such Tax (other than connections arising from such Recipient having executed, delivered, become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced any Note Document, or sold or assigned an interest in the Note or any Note Document) with respect to an assignment.

“Outstanding Principal Balance” means, for any Note from time to time, the original principal amount of such Note, as may be (i) increased pursuant to the payment in kind of any interest as provided in Section 1.2 or (ii) reduced pursuant to any prepayment or repayment effected in accordance with the terms hereof.

“Patents” means all patents, patent applications and like protections including without limitation improvements, divisions, continuations, renewals, reissues, extensions and continuations-in-part of the same.

“Payment Date” has the meaning set forth in Section 1.2(a).

“Perfection Certificate” is the completed certificate signed by Issuer, entitled “Perfection Certificate” delivered by Issuer to Holders in connection with this Agreement, as updated by Issuer from time to time in accordance with Section 4(g).

“Permitted Distributions” are

(a) any conversion of Issuer’s convertible securities into other securities pursuant to the terms of such convertible securities or otherwise in exchange thereof,

(b) the payment of dividends solely in common stock by Issuer;

(c) the payment of cash in lieu of the issuance of fractional shares;

(d) the repurchase by Issuer of its stock from former employees, directors or consultants pursuant to stock repurchase agreements so long as an Event of Default does not exist at the time of such repurchase and would not exist immediately after giving effect to such repurchase, provided such repurchase does not exceed in the aggregate of Two Hundred Fifty Thousand Dollars (\$250,000.00) per fiscal year;

(e) any dividends or distributions by a Subsidiary to Issuer or any other Subsidiary.

“Permitted Indebtedness” is:

(a) Issuer’s Indebtedness to Holders under this Agreement and the other Note Documents;

(b) Indebtedness incurred under corporate credit cards or letters of credit, not to exceed Two Hundred Fifty Thousand Dollars (\$250,000.00) in the aggregate at any time;

(c) Indebtedness existing on the Issue Date and shown on the Perfection Certificate;

(d) Indebtedness with respect to surety bonds and similar obligations, in each case incurred in the ordinary course of business;

(e) Indebtedness incurred as a result of endorsing negotiable instruments received in the ordinary course of business and Indebtedness to trade creditors;

(f) Subordinated Debt;

(g) Indebtedness in an aggregate principal amount not to exceed Three Million Five Hundred Dollars (\$3,500,000.00) secured by a Permitted Lien described in clause (c) of the defined term “Permitted Liens”; provided that (i) such Indebtedness at the time incurred does not exceed the lesser of the cost or fair market value of the equipment financed with such Indebtedness and (ii) the interest rate on any such Indebtedness (implied or by purchase money) does not exceed 12.0% per annum;

(h) Indebtedness that constitutes a Permitted Investment under clause (g) of the defined term “Permitted Investments”;

(i) other unsecured Indebtedness in an aggregate principal amount not to exceed Two Hundred Fifty Thousand Dollars (\$250,000.00) at any time;

(j) joint ventures or strategic alliances in the ordinary course of Issuer’s business consisting of non-exclusive licensing of technology, the development of technology or the providing of technical support;

(k) cost plus and transfer pricing arrangements between or among Issuer or any Subsidiaries in the ordinary course of business; and

(l) extensions, refinancings, modifications, amendments and restatements of any items of Permitted Indebtedness, provided that the principal amount thereof is not increased other than the amount of any reasonably premiums or the terms thereof, taken as a whole, are not modified to impose materially more burdensome terms upon Issuer or its Subsidiary, as the case may be.

“Permitted Investments” are:

- (a) accounts receivable in the ordinary course of Issuer’s business;
- (b) Investments shown on the Perfection Certificate and existing on the Issue Date;
- (c) Cash Equivalents;
- (d) Investments consisting of the endorsement of negotiable instruments for deposit or collection or similar transactions in the ordinary course of Issuer;
- (e) subject to Section 6.10 and 6.12, Investments consisting of Deposit Accounts;
- (f) Investments accepted in connection with Dispositions permitted by Section 7.1;
- (g) Investments (i) in any Subsidiary that is a Guarantor or in Issuer, (ii) between Subsidiaries that are not Guarantors, and (iii) by Issuer or a Subsidiary which is a Guarantor in a Subsidiary which is not a Guarantor in an amount not to exceed Two Hundred Fifty Thousand Dollars (\$250,000.00) in the aggregate in any fiscal year;
- (h) Investments consisting of (i) travel advances and employee relocation loans and other employee loans and advances in the ordinary course of business, and (ii) loans to employees, officers or directors relating to the purchase of equity securities of Issuer pursuant to employee stock purchase plans or agreements approved by Issuer’s board of directors; provided, however, such Investments under the foregoing clauses (i) and (ii) do not exceed Two Hundred Fifty Thousand Dollars (\$250,000.00) in the aggregate;
- (i) Investments (including debt obligations) received in connection with the bankruptcy or reorganization of customers or suppliers and in settlement of delinquent obligations of, and other disputes with, customers or suppliers arising in the ordinary course of business;
- (j) Investments consisting of notes receivable of, or prepaid royalties and other credit extensions, to customers and suppliers who are not Affiliates, in the ordinary course of business; provided that this paragraph (i) shall not apply to Investments of Issuer in any Subsidiary; and
- (k) other Investments in an amount not to exceed Two Hundred Fifty Thousand Dollars (\$250,000.00) in the aggregate outstanding at any time.

“Permitted Liens” are:

(a) Liens existing on the Issue Date and shown on the Perfection Certificate or arising under this Agreement and the other Note Documents, including any Liens incurred in connection with the extension, renewal or refinancing of any Indebtedness secured by such Liens;

(b) Liens for Taxes, fees, assessments or other government charges or levies, either not delinquent or being contested in good faith and for which Issuer maintains adequate reserves on its Books;

(c) Liens securing Indebtedness not to exceed Three Million Five Hundred Dollars (\$3,500,000.00) in the aggregate at any time outstanding (i) upon or in any equipment held by Issuer or any of its Subsidiaries to secure the purchase price of such equipment or Indebtedness incurred solely for the purpose of financing the acquisition of such equipment, or (ii) existing on such equipment at the time of its acquisition, provided that in each case the Lien is confined solely to the property so acquired and improvements, additions and accessions thereto, and the proceeds of such equipment.

(d) Liens of carriers, warehousemen, suppliers, or other Persons that are possessory in nature arising in the ordinary course of business so long as such Liens attach only to Inventory with an aggregate value not to exceed Two Hundred Fifty Thousand Dollars (\$250,000), and which are not delinquent or remain payable without penalty or which are being contested in good faith and by appropriate proceedings;

(e) Liens to secure payment of workers' compensation, employment insurance, old-age pensions, social security and other like obligations incurred in the ordinary course of business (other than Liens imposed by ERISA);

(f) Liens incurred in the extension, renewal or refinancing of the indebtedness secured by Liens described in clauses (a) through (c) above, but any extension, renewal or replacement Lien must be limited to the property encumbered by the existing Lien and the principal amount of the indebtedness may not increase;

(g) leases or subleases of real property granted in the ordinary course of business, and leases, subleases, non-exclusive licenses or sublicenses of property (other than real property or Intellectual Property) granted in the ordinary course of Issuer's business (or, if referring to another Person, in the ordinary course of such Person's business), if the leases, subleases, licenses and sublicenses do not prohibit granting Agent or any Holder a security interest;

(h) Liens securing Subordinated Debt;

(i) deposits to secure the performance of leases, statutory obligations, stay, and appeal bonds, and other obligations of a like nature incurred in the ordinary course of business not representing an obligation for borrowed money;

(j) non-exclusive licenses of Intellectual Property granted to third parties in the ordinary course of business and licenses of Intellectual Property that could not result in a legal transfer of title of the licensed property that may be exclusive in respects other than territory and that may be exclusive as to territory only as to discrete geographical areas outside of the United States;

(k) Liens securing corporate credit card and letter of credit arrangements not exceeding Two Hundred Fifty Thousand Dollars (\$250,000.00) at any time; and

(l) Liens arising from attachments or judgments, orders, or decrees in circumstances not constituting an Event of Default under Sections 8.4 and 8.7.

"Person" is any individual, sole proprietorship, partnership, limited liability company, joint venture, company, trust, unincorporated organization, association, corporation, institution, public benefit corporation, firm, joint stock company, estate, entity or government agency.

"PIK Interest Termination Date" has the meaning set forth in Section 1.2(b).

"Plan" is defined in the preamble.

"Recipient" is defined in the definition of "Excluded Taxes".

“Required Holders” means the Holders holding a majority of the aggregate Outstanding Principal Balance of all Notes.

“Requirement of Law” is as to any Person, the organizational or governing documents of such Person, and any law (statutory or common), treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

“Responsible Officer” is any of the Chief Executive Officer, President, Chief Financial Officer and Secretary of Issuer.

“Sanctions” has the meaning set forth in Section 4(i).

“Secured Parties” has the meaning set forth in Section 3(a).

“Securities Account” is any “securities account” as defined in the Code with such additions to such term as may hereafter be made.

“Shares” is (x) one hundred percent (100%) of the issued and outstanding capital stock, membership units or other securities owned or held of record by Issuer or any Guarantor, in any Domestic Subsidiary and (y) 65% of the issued and outstanding voting capital stock and 100% of the issued and outstanding non-voting capital stock of each Excluded Foreign Subsidiary.

“Solvent” means, with respect to any Person: the fair salable value of such Person’s consolidated assets (including goodwill minus disposition costs) exceeds the fair value of such Person’s liabilities; such Person is not left with unreasonably small capital after the transactions in this Agreement; and such Person is able to pay its debts (including trade debts) as they mature.

“Subordinated Debt” is indebtedness incurred by Issuer subordinated to all of Issuer’s now or hereafter indebtedness to Holders under the Note Documents (pursuant to a subordination, intercreditor, or other similar agreement in form and substance reasonably satisfactory to the Agent and the Holders entered into among Agent, the Holders and the other creditor), on terms reasonably acceptable to the Holders and that matures at a date later than the 91st day following the Maturity Date.

“Subsidiary” means, with respect to any Person, a corporation, partnership, limited liability company or other entity of which shares of stock or other ownership interests having ordinary voting power (other than stock or such other ownership interests having such power only by reason of the happening of a contingency) to elect a majority of the board of directors or other managers of such corporation, partnership or other entity are at the time owned, directly or indirectly through one or more intermediaries, or both, by such Person. Unless the context otherwise requires, each reference to a Subsidiary herein shall be a reference to a Subsidiary of Issuer.

“Taxes” is defined in Section 1.3(b)(i).

“Trademarks” means any trademark and servicemark rights, whether registered or not, applications to register and registrations of the same and like protections, and the entire goodwill of the business of Issuer connected with and symbolized by such trademarks.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first written above.

ISSUER:

PROSOMNUS SLEEP TECHNOLOGIES, INC.

By _____

Name:

Title:

Address for Notice:

5675 Gibraltar Drive

Pleasanton, CA 94588

Attn: Chief Financial Officer

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first written above.

AGENT:

WILMINGTON SAVINGS FUND SOCIETY, FSB

By _____

Name:

Title:

Address for Notice:

[]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first written above.

[HOLDER]:

[]

By _____

Name:

Title:

Address for Notice:

[]

SCHEDULE 1

Conditions to Note Issuance

Issuer shall have delivered to Agent and Holders or Agent and Holders shall have received the following, in form and substance satisfactory to Required Holders, duly executed by all parties thereto (other than Agent or any Holder); provided that item 9 below shall only be delivered to the Holders and item 8 shall be satisfactory to the Agent with respect to fees and expenses owing to it or its counsel:

1. this Agreement and each other Note Document;
2. the Notes;
3. the IP Agreement;
4. certificate of the Secretary of Issuer attaching (i) Issuer's certificate of incorporation, as amended to date; (ii) a copy of its signed bylaws, as amended to date, (iii) good standing certificates of Issuer certified by the Secretary of State (or equivalent agency) of Delaware and California, each as of a date no earlier than thirty (30) days prior to the Issue Date, (iv) duly executed resolutions of Issuer's board of directors authorizing its execution, delivery, and performance of this Agreement and the other Note Documents to which it is a party, and (v) an incumbency certificate;
5. the Perfection Certificate;
6. a signed copy of any stockholder consent required in connection with the Note Documents;
7. UCC National Form Financing Statement (UCC-1) in favor of Agent for Issuer;
8. payment of the fees and expenses (including those of the Agent, including fees and disbursements of Seward & Kissel LLP, as counsel to the Agent) then due as specified herein;
9. current financial statements of Issuer; and
10. certified copies, dated as of a recent date, of financing statement searches, as Required Holders may request, accompanied by written evidence (including any UCC termination statements) that the Liens indicated in any such financing statements either constitute Permitted Liens or have been or will be terminated or released on the Issue Date.

SCHEDULE 1.1**Holders and Allocations**

Lender	Allocation Amount	Existing Notes Cancellation¹	Allocation Percentage
CrossingBridge Low Duration High Yield Fund			
Destinations Low Duration Fixed Income Fund			
Intrepid Income Fund			
TOTAL			

¹ Reflects the aggregate principal amount and accrued and unpaid interest on each Holder's Existing Notes to be cancelled as consideration for the issuance of the Notes.

EXHIBIT A

The Collateral consists of all of Issuer's right, title and interest in and to all of its personal property wherever located, whether now owned or hereafter acquired or arising, including, but not limited to:

All goods, Accounts (including but not limited to health-care receivables), Equipment, Inventory, contract rights or rights to payment of money, leases, license agreements, franchise agreements, General Intangibles, commercial tort claims, documents, instruments (including any promissory notes), chattel paper (whether tangible or electronic), cash, deposit accounts, fixtures, letters of credit rights (whether or not the letter of credit is evidenced by a writing), securities, and all other investment property, supporting obligations, and financial assets, whether now owned or hereafter acquired, wherever located, equity interests of any Subsidiary, and all Issuer's Books relating to the foregoing, and any and all claims, rights and interests in any of the above and all substitutions for, additions, attachments, accessories, accessions and improvements to and replacements, products, proceeds and insurance proceeds of any or all of the foregoing.

Notwithstanding the foregoing, "Collateral" shall not include (a) any intent-to-use trademarks at all times prior to the first use thereof, whether by the actual use thereof in commerce, the recording of a statement of use with the United States Patent and Trademark Office or otherwise; (b) rights held under a license or lease that are not assignable by their terms without the consent of the licensor or lessor thereof (but only to the extent such restriction on assignment is enforceable under applicable law); (c) any interest of Issuer as a lessee under an Equipment lease if Issuer is prohibited by the terms of such lease from granting a security interest in such lease or under which such an assignment or Lien would cause a default to occur under such lease; provided, however, that upon termination of such prohibition, such interest shall immediately become Collateral without any action by Issuer or Holder; (d) any of the outstanding voting capital stock of an Excluded Foreign Subsidiary in excess of 65% of the voting power of all classes of capital stock of such Excluded Foreign Subsidiary entitled to vote; (e) any property (including any accessions, additions, replacements or substitutions) subject to a Lien that constitutes a Permitted Lien under clause (c) of the definition of Permitted Liens solely for as long as Issuer is prohibited from granting a security interest in such property provided, that immediately upon the lapse or termination of any such provision, the term "Collateral" shall include, and Issuer shall be deemed to have granted a security interest in, all its rights, title and interests in and to such property; (f) any contract, instrument or chattel paper in which Issuer has any right, title or interest if and to the extent such contract, instrument or chattel paper includes a provision containing a restriction on assignment such that the creation of a security interest in the right, title or interest of Issuer therein would be prohibited and would, in and of itself, cause or result in a default thereunder enabling another person party to such contract, instrument or chattel paper to enforce any remedy with respect thereto; (g) deposit accounts used exclusively for payroll, payroll taxes and other employee wage and benefit payments to or for the benefit of Issuer's employees for which a security interest is not permitted pursuant to applicable law; or (h) deposit accounts subject to Liens permitted by clause (i) or clause (k) of the defined term "Permitted Liens".

EXHIBIT B

NOTE APPROVAL RESOLUTIONS

EXHIBIT C**COMPLIANCE CERTIFICATE**

TO: WILMINGTON SAVINGS FUND SOCIETY, FSB, AS AGENT

Date: _____

FROM: PROSOMNUS SLEEP TECHNOLOGIES, INC.

I, an authorized officer of ProSomnus Sleep Technologies, Inc. (“**Issuer**”) certify pursuant to the Note Purchase and Security Agreement (as amended, the “**Agreement**”) issued by Issuer to Agent and the Holders (as defined therein) as follows for the period ending _____ (all capitalized terms used herein shall have the meaning set forth in the Note):

(a) all representations and warranties set forth in the Agreement and the Note Documents are true and correct, in all material respects as of the date hereof, provided that the materiality qualifier is not applicable to any representation or warranty that is already qualified or modified by materiality in the text thereof;

(b) Issuer is in compliance with the terms of the Note Documents to which it is a party; and

(c) no Event of Default exists under the Agreement.

Attached are the required documents supporting the certification.

Please indicate compliance status by circling Yes/No under “Complies” column.

<u>Reporting Covenant</u>	<u>Required</u>	<u>Complies</u>
Compliance Certificate	Monthly within 30 days	Yes No
Quarterly financial statements	Quarterly within 30 days	Yes No
Annual financial statement (CPA Audited) + CC	FYE within 120 days	Yes No
Annual operating budget (monthly) and projections (quarterly)	Within 45 days of FYE and 10 days after any update	Yes No
409A valuation	Within 30 days of receipt by Issuer	Yes No
10-Q, 10-K and 8-K	Within 5 days after filing with SEC	Yes No N/A
<u>Financial Covenant(s)</u>	<u>Required</u>	<u>Complies</u>
Minimum Liquidity	\$2,500,000	Yes No
	\$3,500,000	Yes No

[Balance of Page Intentionally Left Blank]

Other Matters

1. Are any legal actions pending or threatened in writing against Issuer or Subsidiary which could reasonably be expected to result in damages of \$250,000 or more?

☐ Yes ☐ No [If Yes, please provide a brief summary.]

2. Have there been any material returns, recoveries, disputes and claims with Account Debtors of Issuer or any Subsidiary

☐ Yes ☐ No [If Yes, please provide a brief summary.]

3. Has there been any event that materially and adversely affects value of IP (owned by Issuer or Subsidiary)

☐ Yes ☐ No [If Yes, please provide a brief summary.]

4. Since the last Compliance Certificate Issuer has delivered, has Issuer changed: (i) the address of its chief executive office, (ii) its legal name, or (iii) its state of incorporation? If so, please give details is:

5. Have there been any amendments of or other changes to the Operating Documents of Issuer?

☐ Yes ☐ No [If Yes, please provide copies of any such amendments with this Compliance Certificate.]

6. Have there been any amendments to or notices provided with respect to Subordinated Debt?

☐ Yes ☐ No [If Yes, please provide copies thereof with this Compliance Certificate.]

7. Has Issuer sent or received any material correspondence, reports, documents or made other filings with any Governmental Authority that could reasonably be expected to have a material adverse effect on any of the Governmental Approvals material to Issuer's or any Subsidiary's business or that could otherwise reasonably be expected to have a Material Adverse Change.

☐ Yes ☐ No [If Yes, please provide a brief summary.]

8. Set forth below are any new Collateral Accounts of Issuer and any Guarantor not previously disclosed to Agent and the Holders on a Perfection Certificate or a previously delivered Compliance Certificate:

Issuer / Guarantor	Institution Name and Address	Account Number	Balance

[Signature Page Follows]

The following are the exceptions with respect to the certification above: (If no exceptions exist, state “**No exceptions to note.**”)

PROSOMNUS SLEEP TECHNOLOGIES, INC.

By: _____
Name: _____
Title: _____

[Signature Page to Compliance Certificate]

EXHIBIT D

FORM OF SECURED PROMISSORY NOTE

THIS NOTE HAS BEEN ISSUED WITH ORIGINAL ISSUE DISCOUNT (AS DEFINED IN SECTION 1273(a) OF THE INTERNAL REVENUE CODE OF 1986, AS AMENDED, AND U.S. TREASURY REGULATIONS SECTION 1.1273-1 PROMULGATED THEREUNDER). THE HOLDER CAN OBTAIN THE INFORMATION DESCRIBED IN U.S. TREASURY REGULATIONS SECTION 1.1275-3 BY WRITING TO: [NAME AND ADDRESS OF ISSUER], ATTENTION: [CHIEF FINANCIAL OFFICER].

SECURED PROMISSORY NOTE

\$[]

July [], 2024

FOR VALUE RECEIVED, PROSOMNUS SLEEP TECHNOLOGIES, INC., a Delaware corporation (“Issuer”) hereby unconditionally promise to pay to [], a [] (together with its registered successors and assigns, “Holder”), at the Holder’s lending office, or at such other place as Holder may from time to time designate in writing, in lawful money of the United States of America and in immediately available funds, the principal sum of [] Dollars (\$[]), pursuant to the terms of the Note Purchase and Security Agreement, dated as of the date hereof, by and among Issuer, Wilmington Savings Fund Society, FSB, as Agent, and each Holder from time to time party thereto (including, without limitation, Holder) (as amended, restated, supplemented or otherwise modified from time to time, the “Note Purchase Agreement”). All capitalized terms used herein (which are not otherwise specifically defined herein) shall be used in this Secured Promissory Note (this “Note”) as defined in the Note Purchase Agreement.

The Outstanding Principal Balance evidenced by this Note shall be payable in full on the Maturity Date, or on such earlier date as provided for in the Note Purchase Agreement.

This Note is issued in accordance with the provisions of the Note Purchase Agreement and is entitled to the benefits of the Note Purchase Agreement and the other Note Documents, and reference is hereby made to the Note Purchase Agreement for a statement of the terms and conditions under which this Note was made and is required to be repaid.

Issuer promises to pay interest from the date hereof until payment in full hereof on the unpaid principal balance of this Note at the per annum rate or rates set forth in the Note Purchase Agreement. Interest on the unpaid principal balance of this Note shall be payable on the dates and in the manner set forth in the Note Purchase Agreement. Interest as aforesaid shall be calculated in accordance with the terms of the Note Purchase Agreement.

Upon and after the occurrence and during the continuance of an Event of Default, and as provided in the Note Purchase Agreement, the principal outstanding under this Note may be declared, and immediately upon such declaration shall become, due and payable without demand, notice or legal process of any kind; provided, however, that upon the occurrence of an Event of Default pursuant to the provisions of Section 8.5(b) or Section 8.5(c) of the Note Purchase Agreement, the principal outstanding under this Note shall automatically be due and payable, without demand, notice or acceleration of any kind whatsoever.

Payments received in respect of this Note shall be applied as provided in the Note Purchase Agreement.

Issuer hereby waives presentment, demand, protest and notice of presentment, demand, nonpayment and protest.

No waiver by any Holder of any one or more defaults by Issuer in the performance of any of its obligations under this Note shall operate or be construed as a waiver of any future default or defaults, whether of a like or different nature, or as a waiver of any obligation of Issues to any other Holder under the Note Purchase Agreement.

No provision of this Note may be amended, waived or otherwise modified unless such amendment, waiver or other modification is in writing and is signed or otherwise approved by Issuer and Holder.

THIS NOTE SHALL BE GOVERNED BY, AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO CONFLICTS OF LAW PRINCIPLES.

Whenever possible each provision of this Note shall be interpreted in such manner as to be effective and valid under applicable law, but in case any provision of or obligation under this Note shall be invalid, illegal or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

Whenever in this Note reference is made to Holder or Issues, such reference shall be deemed to include, as applicable, a reference to their respective successors and assigns. The provisions of this Note shall be binding upon Issuer and its successors and assigns, and shall inure to the benefit of Holder and its successors and assigns.

In addition to, and without limitation, of any of the foregoing, this Note shall be deemed to be a Note Document and shall otherwise be subject to all of the general terms and conditions contained in the Note Purchase Agreement.

[Signature Page Follows]

IN WITNESS WHEREOF, Issuer has caused this Secured Promissory Note to be executed as of the date first written above.

ISSUER:

PROSOMNUS SLEEP TECHNOLOGIES, INC.

By _____

Name:

Title:

Address for Notice:

5675 Gibraltar Drive

Pleasanton, CA 94588

Attn: Chief Financial Officer

[Signature Page to Secured Promissory Note]

EXHIBIT E

FORM OF TRANSFER OR EXCHANGE NOTICE TO REGISTRAR

Date: [], 20[]

To: Wilmington Savings Fund Society, FSB, as Registrar

Ladies and Gentlemen:

Reference is made to that certain Note Purchase and Security Agreement, dated as of [], 2024 (as amended, restated, amended and restated, extended, supplemented or otherwise modified from time to time, the “Note Purchase Agreement”; the terms defined therein being used herein as therein defined), among Prosomnus Sleep Technologies, Inc. (the “Issuer”), Wilmington Savings Fund Society, as Registrar and as collateral agent (in such capacity, together with its successors or permitted assigns, “Agent”) and the Holders from time to time party thereto.

Pursuant to Section 12.8(e) and Section 12.9(a) of the Note Purchase Agreement, the Issuer hereby notifies you of a transfer or exchange of Notes on [date] and hereby directs you to register the following transfer or exchange in the Register in accordance with the Note Purchase Agreement:

Name of Transferor (as it appears on the Register):

Name of Transferee (as it shall appear on the Register):

Amount of Note Transferred: \$[]

Effective Date of Transfer: [], 20[]

PROSOMNUS SLEEP TECHNOLOGIES, INC.

By: _____

Name:

Title:

Exhibit 7

New Board

The New Board of Directors of ProSomnus Sleep Technologies, Inc. shall consist of five members:

1. Len Liptak
2. Anthony Raab
3. Jason Orchard
4. Benjamin R. Gurvitz
5. Bruce Falbaum