United States
Securities and Exchange Commission
Washington, D.C. 20549

Form 8-K

Current Report
Pursuant to Section 13 or 15(d)
of The Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): November 18, 2020

FireEye, Inc.
(Exact name of registrant as specified in its charter)

Delaware
(State or Other Jurisdiction
of Incorporation)

001-36067
(Commission
File Number)

20-1548921
(IRS Employer
Identification No.)

601 McCarthy Blvd.
Milpitas, CA 95035
(Address of Principal Executive Offices) (Zip Code)

(408) 321-6300
(Registrant’s Telephone Number, Including Area Code)

Not Applicable
(Former Name or Former Address, If Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Securities registered pursuant to Section 12(b) of the Act:

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<th>Title of each class</th>
<th>Trading Symbol(s)</th>
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<tr>
<td>Common Stock, par value $0.0001 per share</td>
<td>FEYE</td>
<td>The NASDAQ Global Select Market</td>
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Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐
Entry into a Material Definitive Agreement.

Issuance and Sale of 4.5% Series A Convertible Preferred Stock

On November 18, 2020, FireEye, Inc., a Delaware corporation (the “Company”) entered into: (i) a Securities Purchase Agreement with BTO Delta Holdings DE L.P., an investment vehicle of funds affiliated with The Blackstone Group Inc. (“Blackstone”), and (ii) a Securities Purchase Agreement with ClearSky Security Fund I LLC and ClearSky Power & Technology Fund II LLC (collectively, “ClearSky” and together with Blackstone, the “Purchasers”), pursuant to which the Company will issue and sell at closing (the “Private Placement”) for an aggregate purchase price of $400,000,000 consisting of 400,000 shares of a newly designated 4.5% Series A Convertible Preferred Stock, par value $0.0001 per share (the “Series A Preferred Stock”), at a price of $1,000 per share (each a “Financing Agreement” and together the “Financing Agreements”). The Company intends to use the net proceeds from the Private Placement to fund acquisitions, buybacks of the Company’s common stock, par value $0.0001 per share (“Common Stock”), and for working capital purposes.

The Financing Agreement contains customary representations, warranties and covenants of the Company and the Purchaser. The Private Placement is expected to close (the “Private Placement Closing”) on or around December 8, 2020, subject to customary closing conditions, including, among others: (i) the continued accuracy of the representations and warranties contained in the Financing Agreements and (ii) the performance in all material respects by each party of its respective covenants and agreements under the Financing Agreements.

After the Private Placement Closing, subject to certain customary exceptions including transfers to permitted transferees, the Purchaser, and its affiliates, will be restricted from transferring the Series A Preferred Stock until the one-year anniversary of the Private Placement Closing.

Designation of Series A Preferred Stock

The Series A Preferred Stock to be issued at the Private Placement Closing will have the powers, designations, preferences, and other rights set forth in the form of Certificate of Designations of the Series A Preferred Stock filed herewith as Exhibit B to the Financing Agreements (the “Certificate of Designations”). The Holders (as defined below) will be entitled to dividends on the original purchase price paid by the Purchaser at the rate of 4.5% per annum that (i) for the first three years after the Private Placement Closing will be paid in-kind, and (ii) after the third anniversary of the Private Placement Closing, will, at the Company’s election either be paid in cash, or, if not, will accrue and accumulate, in each case, accruing daily and paid quarterly in arrears. The Holders (as defined below) are also entitled to participate in dividends declared or paid on the Common Stock on an as-converted basis. The Series A Preferred Stock will rank senior to the Common Stock with respect to dividend rights and rights upon the voluntary or involuntary liquidation, dissolution, or winding up of the affairs of the Company (a “Liquidation”). Upon a Liquidation, each share of Series A Preferred Stock would be entitled to receive an amount per share equal to the greater of (i) the purchase price paid by the Purchaser, plus all accrued and unpaid dividends and (ii) the amount that the holder of Series A Preferred Stock (each, a “Holder” and collectively, the “Holders”) would have been entitled to receive at such time if the Series A Preferred Stock were converted into Common Stock (the “Liquidation Preference”).

Conversion Rights

The Holder will have the right, at its option, to convert its Series A Preferred Stock, in whole or in part, into fully paid and non-assessable shares of Common Stock at a conversion price equal to $18.00 per share subject to certain customary adjustments in the event of certain adjustments to the Common Stock.

After the third anniversary of the Private Placement Closing, subject to certain conditions, the Company may, at its option, require conversion of all of the outstanding shares of Series A Preferred Stock to Common Stock if, for at least 20 trading days during the 30 consecutive trading days immediately preceding the date the Company notifies the Holders of the election to convert, the closing price of the Common Stock is at least 175% of the conversion price.

Redemption Rights

After the seventh anniversary of the Private Placement Closing, each Holder shall have the right to require the Company to redeem all or any part of the Holder’s Series A Preferred Stock for cash at a price equal to the original purchase price paid by the Purchaser plus any accrued and unpaid dividends. Upon a “Fundamental Change” (involving a change of control, bankruptcy, insolvency, liquidation or de-listing of the Company as further described in the Certificate of Designations), each Holder shall have the right to require the Company to redeem all or any part of the Holder’s Series A Preferred Stock for an amount equal to the Liquidation Preference at a repurchase price calculated in accordance with the Certificate of Designations plus any accrued and unpaid dividends.
Voting & Consent Rights
The Holders generally will be entitled to vote with the holders of the shares of Common Stock on all matters submitted for a vote of holders of shares of Common Stock (voting together with the holders of shares of Common Stock as one class) on an as-converted basis, subject to certain Nasdaq voting limitations, if applicable.

Additionally, the consent of the Holders of a majority of the outstanding shares of Series A Preferred Stock will be required for so long as any shares of the Series A Preferred Stock remain outstanding for (i) amendments to the Company’s organizational documents that have an adverse effect on the holders of Series A Preferred Stock and (ii) issuances by the Company of securities that are senior to, or equal in priority with, the Series A Preferred Stock. In addition, for so long as 25% of the Series A Preferred Stock issued in connection with the Financing Agreements remains outstanding, consent of the Holders of a majority of the outstanding shares of Series A Preferred Stock will be required for (i) any change to the size of the Board of Directors of the Company (the “Board”), (ii) any voluntary dissolution, liquidation, bankruptcy, winding up or deregistration or delisting and (iii) incurrence by the Company of net debt in excess of $350,000,000.

Purchaser Governance Rights
For so long as Blackstone holds 65% of the Series A Preferred Stock issued to it under the Financing Agreement, Blackstone will have the right to nominate for election one member to the Board (the “Series A Director”), provided that the Purchaser’s initial nominee will be appointed to the Board at the Private Placement Closing as a Class I director and will not be entitled to any compensation from the Company for his service.

Under the Financing Agreements, for so long as Blackstone has the right to nominate a director for election to the Board, the Purchasers have agreed to vote all of their shares of Series A Preferred Stock and shares of Common Stock issuable upon conversion of the Series A Preferred Stock purchased pursuant to the Private Placement or any other shares of Common Stock owned by the Purchasers (i) in favor of the Company’s “say-on-pay” proposal and any proposal by the Company relating to equity compensation that has been approved by the Board or the Compensation Committee of the Board (or any successor committee, however denominated), (ii) in favor of the Company’s proposal for ratification of the appointment of the Company’s independent registered public accounting firm and (iii) amendments to organizational documents in a manner that does not have an adverse effect on the holders of Series A Preferred Stock to increase the authorized shares of capital stock.

For so long as ClearSky holds 65% of the Series A Preferred Stock issued to it under the Financing Agreement, ClearSky shall be entitled to designate one non-voting observer to the Board.

Purchaser Standstill
Additionally, until the latter of (i) the date Blackstone no longer has the right to designate or nominate a director to the Board or (ii) the first anniversary of the Private Placement Closing, the Purchaser will be subject to certain standstill restrictions pursuant to which the Purchaser will be restricted, among other things and subject to certain customary exceptions, from (i) acquiring more than 5% of the Company’s outstanding Common Stock or securities exchangeable for or convertible into the Common Stock (excluding for these purposes, shares of Common Stock issued or issuable upon conversion of the Series A Preferred Stock); (ii) making, participating in or encouraging any proxy solicitation; (iii) seeking representation on the Board (beyond the representation provided for above); (iv) seeking to publicly change or influence the policies or management of the Company (beyond their right to do so based on their representation on the Board); (v) submitting any shareholder proposal to the Company; and (vi) publicly proposing any change of control or other material transaction involving the Company; or supporting or encouraging any person in doing any of the foregoing.

Registration Rights Agreement
Holders of Series A Preferred Stock and Common Stock issuable upon conversion of Series A Preferred Stock issued to Purchaser pursuant to the Financing Agreements will have certain customary registration rights with respect to such shares of Series A Preferred Stock and Common Stock issuable upon conversion of Series A Preferred Stock pursuant to the terms of the Registration Rights Agreement, a form of which is attached as Exhibit C to the Financing Agreements (the “Registration Rights Agreement”).

The foregoing description of the terms of the Series A Preferred Stock, the Financing Agreements, the Certificate of Designation, the Registration Rights Agreement and the transactions contemplated thereby does not purport to be complete and is subject to, and qualified in its entirety by, the full text of the Financing Agreements and the exhibits thereto, which are attached hereto as Exhibits 10.1 and 10.2, and are incorporated herein by reference.
The Financing Agreements have been filed to provide investors and securityholders with information regarding its terms and conditions. It is not intended to provide any other information about the Purchasers or the Company. The Financing Agreements contain representations, warranties, and covenants of the parties thereto made to and solely for the benefit of each other, and such representations, warranties, and covenants may be subject to materiality and other qualifiers applicable to the contracting parties that differ from those that may be viewed as material to investors. The assertions embodied in those representations, warranties, and covenants are qualified by information in a confidential disclosure letter that the Company delivered in connection with the execution of the Financing Agreements and were made as of the date of the Financing Agreements and as of the Private Placement Closing, except those made as of a specified date. Accordingly, investors and securityholders should not rely on the representations, warranties, and covenants as characterizations of the actual state of facts. Moreover, information concerning the subject matter of the representations, warranties, and covenants may change after the date of the Financing Agreements, which subsequent information may or may not be fully reflected in the Company’s public disclosures.

This Current Report on Form 8-K does not constitute an offer to sell, or a solicitation of an offer to buy, any security and shall not constitute an offer, solicitation or sale in any jurisdiction in which such offer, solicitation or sale would be unlawful.

**Respond Software Merger**

On November 18, 2020, the Company, Bravo Merger Acquisition Corporation, a Delaware corporation and a wholly owned subsidiary of the Company ("Merger Sub I"), and Bravo Merger Acquisition LLC, a Delaware limited liability company and a wholly owned subsidiary of the Company ("Merger Sub II"), entered into an Agreement and Plan of Reorganization (the "Definitive Agreement") with Respond Software, Inc., a Delaware corporation ("Respond Software"), and Fortis Advisors LLC as stockholder representative thereunder, pursuant to which Merger Sub I merged with and into Respond Software (the "Merger"). Within forty-five days after the closing of the Merger (the "Closing"), as part of the same overall transaction, the surviving corporation from the Merger will be merged with and into Merger Sub II (which will be renamed Respond Software, LLC pursuant to such merger).

Under the terms of the Definitive Agreement, the Company agreed to (i) pay the former security holders of Respond Software merger consideration (the "Merger Consideration") with an aggregate value equal to (A) approximately $186.1 million, consisting of approximately $116.9 million in net cash less approximately $0.8 million in applicable exercise prices of vested Respond Software stock options, and an aggregate of approximately 4.9 million shares of Common Stock, valued at the volume weighted average closing price of the Common Stock for the 30 trading days ending on and including the last trading day prior to the date of the Definitive Agreement, and (ii) assume unvested Respond Software stock options exercisable for an aggregate of approximately 0.8 million shares of Common Stock. The Company funded the cash portion of the Merger Consideration with the Company’s cash and cash equivalents.

Under the terms of the Definitive Agreement, at the Closing and as a result thereof:

- each share of capital stock of Respond Software was cancelled and converted into the right to receive its pro rata portion of the cash and stock portions of the Merger Consideration, with the mixture of consideration consisting of approximately 58.5% cash and 41.5% stock in respect of each share of Respond Software capital stock;
- each vested Respond Software stock option was cancelled and converted into the right to receive cash in an amount equal to the pro rata portion of the Merger Consideration net of the applicable exercise prices and tax withholdings; and
- each unvested Respond Software stock option was assumed by the Company, other than each unvested Respond Software stock option held by a non-continuing employee, which was cancelled for no consideration.
The Definitive Agreement contains customary representations, warranties and covenants of Respond Software. The Definitive Agreement also contains customary indemnification provisions whereby the former stockholders of Respond Software and the former holders of vested Respond Software stock options (collectively, the "Indemnifying Parties") have agreed to indemnify, subject to certain caps and thresholds, the Company and affiliated parties for any liabilities and losses arising out of any inaccuracy in, or breaches of, the representations, warranties and covenants of Respond Software in the Definitive Agreement, pre-closing taxes of Respond Software, appraisal claims of former Respond Software stockholders (if any) and certain other matters. Fifteen percent of the value of the Merger Consideration otherwise payable to the Indemnifying Parties pursuant to the Definitive Agreement, funded solely from the cash portion of the Merger Consideration, was placed in a third party escrow fund for eighteen months as security for the indemnification obligations of the Indemnifying Parties under the Definitive Agreement; provided, however, on the terms and subject to the conditions set forth in the Definitive Agreement, a portion of the escrow fund will be released to the Indemnifying Parties after the first anniversary of the Closing.

A copy of the Definitive Agreement is filed herewith as Exhibit 2.1. The foregoing description of the Definitive Agreement does not purport to be complete and is qualified in its entirety by reference to the full text of the Definitive Agreement, which is incorporated herein by reference. The Definitive Agreement has been attached to provide investors with information regarding its terms. It is not intended to provide any other factual information about the Company or Respond Software. In particular, the representations and warranties contained in the Definitive Agreement were made only for the purposes of the Definitive Agreement as of specific dates and were qualified by disclosures between the parties and a contractual standard of materiality that is different from those generally applicable to stockholders, among other limitations. The representations and warranties were made for the purposes of allocating contractual risk between the parties to the Definitive Agreement and should not be relied upon as a disclosure of factual information relating to the Company or Respond Software.

**Item 2.03. Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of the Registrant**

The information related to the issuance and sale of 4.5% Series A Convertible Preferred Stock contained in Item 1.01 of this Current Report on Form 8-K is incorporated herein by reference.

**Item 3.02 Unregistered Sales of Equity Securities.**

*Issuance and Sale of 4.5% Series A Convertible Preferred Stock*

On November 18, 2020, the Company entered into the Financing Agreements, pursuant to which it agreed to sell 400,000 shares of Series A Preferred Stock for $400,000,000 in the aggregate to the Purchasers in a private placement pursuant to an exemption from the registration requirements of the Securities Act of 1933, as amended (the “Securities Act”). The Company will offer and sell the shares of Series A Preferred Stock to the Purchasers in reliance on the exemption from registration provided by Section 4(a)(2) of the Securities Act. The Company will rely on this exemption from registration based in part on representations made by Purchasers in the applicable Financing Agreements.

The Series A Preferred Stock to be issued at the Private Placement Closing will have the powers, designations, preferences, and other rights set forth in the form of Certificate of Designations. The Holders will be entitled to dividends on the original purchase price paid by the Purchaser at the rate of 4.5% per annum that (i) for the first three years after the Private Placement Closing will be paid in-kind, and (ii) after the third anniversary of the Private Placement Closing, will, at the Company’s election either be paid in cash, or if not, will accrue and accumulate, in each case, accruing daily and paid quarterly in arrears. The Holders are also entitled to participate in dividends declared or paid on the Common Stock on an as-converted basis. The Series A Preferred Stock will rank senior to the Common Stock with respect to dividend rights and rights upon a Liquidation of the Company. Upon a Liquidation, each share of Series A Preferred Stock would be entitled to receive an amount per share equal to the greater of (i) the purchase price paid by the Purchaser, plus all accrued and unpaid dividends and (ii) the amount of the Liquidation Preference.

*Issuance of Common Stock in Connection with Respond Software Merger*

At the Closing as a result of the Merger, the Company issued to certain former security holders of Respond Software a total of approximately 4.9 million shares of the Common Stock. These shares of the Common Stock were issued pursuant to exemptions from registration provided by Section 4(a)(2) and/or Regulation D of the Securities Act of 1933. At the Closing, the Company also assumed unvested stock options to purchase approximately 0.8 million shares of the Common Stock, with a weighted average exercise price of approximately $1.39.

**Item 5.02 Departure of Directors or Certain Officers; Election of Directors**

*Election of New Director*

As described in Item 1.01 of this Current Report on Form 8-K, under the terms of the Financing Agreement, Blackstone will have the right to designate one member of the Board at the Private Placement Closing. Viral Patel has been designated by Blackstone as the Series A Director and, accordingly, the Board intends to appoint Mr. Patel to serve as a member of the Board effective as of the Private Placement Closing.
Departure of Director

On November 18, 2020, Stephen Pusey notified the Company of his decision to step down from the Board, effective as of the Private Placement Closing. Mr. Pusey’s decision to step down was due to increased time commitments related to other endeavors and did not involve any disagreement with the Company. Mr. Pusey had served as a director since June 2015. The Company extends its deepest appreciation to Mr. Pusey for his many years of valued service to the Board.

Item 7.01 Regulation FD Disclosures.

The Company issued a press release, dated November 19, 2020, relating to the Private Placement. A copy of the press release is furnished herewith as Exhibit 99.1 and is hereby incorporated by reference into this Item 7.01.

The Company issued a press release, dated November 19, 2020, regarding the Merger. A copy of the press release is furnished herewith as Exhibit 99.2 and is hereby incorporated by reference into this Item 7.01.

In addition, a conference call to discuss the Private Placement and the Merger will be hosted by the Company on November 19, 2020, at 2:00 p.m. Pacific time (5:00 p.m. Eastern time). Media representatives, analysts and the public are invited to listen to this discussion by calling (877) 312-5521 or (678) 894-3048, or via on-demand webcast at investors.fireeye.com. The slides to be used in connection with the conference call are furnished herewith as Exhibit 99.3 and are incorporated herein by reference.

The information contained in this Item 7.01 and in Exhibits 99.1, 99.2 and 99.3 attached hereto are being furnished to the Securities and Exchange Commission pursuant to Item 7.01 of Form 8-K and shall not be deemed “filed” for purposes of Section 18 of the Securities Exchange Act of 1934 (the “Exchange Act”), or otherwise subject to the liabilities of that Section, nor shall any such information or exhibits be deemed incorporated by reference in any filing under the Exchange Act or the Securities Act.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

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<th>Description</th>
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<td>10.1</td>
<td>Securities Purchase Agreement, dated as of November 18, 2020, by and between FireEye, Inc. and BTO Delta Holdings DE L.P.**</td>
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<td>10.2</td>
<td>Securities Purchase Agreement, dated as of November 18, 2020, by and among FireEye, Inc., ClearSky Security Fund I LLC and ClearSky Power &amp; Technology Fund II LLC**</td>
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<td>104</td>
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* The schedules and other attachments to this exhibit have been omitted. The Company agrees to furnish a copy of any omitted schedules or attachments to the SEC upon request.

** Certain schedules and exhibits have been omitted. The Company agrees to furnish a copy of any omitted schedules or attachments to the SEC upon request.
Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

FIREEYE, INC.

Date: November 19, 2020

By: /s/ Alexa King
Alexa King
Executive Vice President, General Counsel and Secretary
AGREEMENT AND PLAN OF REORGANIZATION

BY AND AMONG

FIREEYE, INC.,

BRAVO MERGER ACQUISITION CORPORATION,

BRAVO MERGER ACQUISITION LLC,

RESPOND SOFTWARE, INC.,

AND

FORTIS ADVISORS LLC,

AS STOCKHOLDER REPRESENTATIVE
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THIS AGREEMENT AND PLAN OF REORGANIZATION (the “Agreement”) is made and entered into as of November 18, 2020 by and among FireEye, Inc., a Delaware corporation (“Parent”), Bravo Merger Acquisition Corporation, a Delaware corporation and a wholly owned subsidiary of Parent (“Merger Sub I”), Bravo Merger Acquisition LLC, a Delaware limited liability company and wholly owned subsidiary of Parent (“Merger Sub II” and, together with Merger Sub I, the “Merger Subs”), Respond Software, Inc., a Delaware corporation (the “Company”), and Fortis Advisors LLC, a Delaware limited liability company, solely in its capacity as representative, agent and attorney-in-fact of the Indemnifying Parties (the “Stockholder Representative”). All capitalized terms that are used but not defined herein shall have the respective meanings ascribed thereto in Annex A.

W I T N E S S E T H:

WHEREAS, the boards of directors or members, as applicable, of each of Parent, the Merger Subs and the Company have determined that it is advisable and in the best interests of each corporation or limited liability company and their respective stockholders or members, as applicable, that Parent acquire the Company through the statutory merger of Merger Sub I with and into the Company, pursuant to which the Company will become a wholly owned subsidiary of Parent (the “First Merger”) and as part of the same overall transaction, the surviving entity of the First Merger will merge with and into Merger Sub II (the “Second Merger” and together with the First Merger, the “Mergers”) upon the terms and subject to the conditions set forth in this Agreement and in accordance with the provisions of Delaware Law, and in furtherance thereof, have approved this Agreement, the Mergers and the other transactions contemplated by this Agreement and the Related Agreements (the “Transactions”).

WHEREAS, Parent and the Company intend, by executing this Agreement, that the Mergers be treated as integrated steps in a single transaction contemplated by this Agreement and will together qualify as a tax-free reorganization within the meaning of Section 368(a)(1)(A) of the Code and that this Agreement will be, and is, adopted as a plan of reorganization within the meaning of Treasury Regulations Section 1.368-2(g).

WHEREAS, concurrent with the execution and delivery of this Agreement, as a material inducement to Parent’s willingness to enter into this Agreement, (i) each Key Employee listed on Schedule A is accepting an offer letter from Parent (collectively, the “Key Employee Offer Letter”) and (ii) each Key Employee has executed a Non-Competition Agreement in substantially the form set forth as Exhibit A (the “Non-Competition Agreement”).

WHEREAS, concurrent with the execution and delivery of this Agreement, as a material inducement to Parent’s willingness to enter into this Agreement, each Stockholder listed on Schedule B (each, a “Major Stockholder”) has executed and delivered to Parent a Joinder Agreement in the form set forth in Exhibit B (a “Joinder Agreement”), and an accredited investor questionnaire in form and substance reasonably satisfactory to Parent (an “Accredited Investor Questionnaire”).

WHEREAS, concurrent with the execution and delivery of this Agreement, as a material inducement to Parent’s willingness to enter into this Agreement, each of the Persons listed on Schedule C (each, a “Consideration Holdback Employee”) has executed and delivered to Parent a Consideration Holdback Agreement and/or an Option Vesting Amendment as set forth on Schedule C.

WHEREAS, based on the Accredited Investor Questionnaires delivered prior to the execution of this Agreement and other information made available to Parent by the Company, Parent reasonably believes
that no more than thirty-five (35) of the recipients of Parent Common Stock in the Transactions are not accredited investors (as such term is used in Regulation D promulgated under the Securities Act) and that the issuance of all shares of Parent Common Stock in the Transactions will validly qualify for an exemption from the registration and prospectus delivery requirements of the Securities Act and the equivalent state “blue-sky” Legal Requirements (the “Share Registration Exemption”).

WHEREAS, Parent, the Merger Subs and the Company desire to make certain representations, warranties, covenants and agreements, as more fully set forth herein, in connection with the Transactions.

NOW, THEREFORE, in consideration of the mutual agreements, covenants and other premises set forth herein, the mutual benefits to be gained by the performance thereof, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted, the parties hereto hereby agree as follows:

ARTICLE I
THE MERGERS

1.1 The Mergers.

(a) First Merger. On the terms and subject to the conditions set forth in this Agreement and applicable provisions of Delaware Law, on the Closing Date Parent shall effect the First Merger, whereupon the separate corporate existence of Merger Sub I shall cease and the Company shall continue as the surviving corporation and a wholly owned subsidiary of Parent. The Company, as the surviving corporation after the First Merger, is sometimes referred to herein as the “First Merger Surviving Corporation.” The Merger shall become effective at the latest time of the filing and acceptance by the Secretary of State of the State of Delaware of the First Merger Certificate of Merger or such other later time as may be agreed by Parent and the Company and specified in the First Merger Certificate of Merger (such time the “First Merger Effective Time”).

(b) Second Merger. On the terms and subject to the conditions set forth in this Agreement and applicable provisions of Delaware Law, within forty-five (45) days from the Closing Date, Parent shall effect the Second Merger, whereupon the separate corporate existence of the First Merger Surviving Corporation shall cease and Merger Sub II shall continue as the surviving entity and a wholly owned subsidiary of Parent. Merger Sub II, as the surviving entity after the Second Merger, is sometimes referred to herein as the “Second Merger Surviving Entity.” The Second Merger shall become effective at the latest time of the filing and acceptance by the Secretary of State of the State of Delaware of the Second Merger Certificate of Merger or such other later time as may be specified in the Second Merger Certificate of Merger (such time the “Second Merger Effective Time”). For the sake of clarity, it is intended that the First Merger and the Second Merger are integrated and to be considered as being performed and occurring as an integrated transaction and reorganization for U.S. federal and state income tax purposes with the result being a reorganization as defined in Section 368(a)(1)(A) of the Code.

1.2 The Closing.

(a) Closing Time and Location. Unless this Agreement is validly terminated pursuant to Section 6.1, the First Merger shall be consummated at a closing (the “Closing”) on the date of this Agreement or, if the conditions set forth in Section 1.2(b) are not satisfied on such day, a date within one (1) Business Day following the satisfaction or waiver (if permissible hereunder) of the conditions set forth in Section 1.2(b) (other than those conditions that by their nature are to be satisfied at the Closing, but subject to satisfaction or waiver (if permissible hereunder) of those conditions), at the offices of Wilson Sonsini Goodrich & Rosati, Professional Corporation, 650 Page Mill Road, Palo Alto, California, unless another time or place is mutually agreed upon in writing by Parent and the Company. The date upon which the Closing actually occurs shall be referred to herein as the “Closing Date.”

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(i) **Conditions to Obligations of Each Party.** The respective obligations of Parent, the Merger Subs and the Company to effect the Mergers shall be subject to the satisfaction, at or prior to the First Merger Effective Time, of the following conditions (any of which may be waived only with the written mutual consent of Parent, the Merger Subs and the Company (it being understood that each such condition is solely for the benefit of Parent, the Merger Subs and the Company and may be waived in writing by their written mutual consent without notice, liability or obligation to any other Person)):

(A) **Stockholder Approval.** The Requisite Stockholder Approval shall have been obtained.

(B) **Regulatory Approvals.** All approvals of Governmental Entities required to be obtained prior to the First Merger Effective Time in connection with the Transactions shall have been obtained.

(C) **No Legal Impediments.** No Legal Requirement (whether temporary, preliminary or permanent) shall be in effect which has the effect of making the Transactions illegal or otherwise prohibiting or preventing consummation of the Transactions.

(ii) **Additional Conditions to the Obligations of Parent and the Merger Subs.** The obligations of Parent and the Merger Subs to effect the Mergers shall be subject to the satisfaction at or prior to the First Merger Effective Time of each of the following additional conditions (any of which may be waived, in writing, exclusively by Parent and the Merger Subs (it being understood that each such condition is solely for the benefit of Parent and the Merger Subs and may be waived in writing without notice, liability or obligation to any other Person)):

(A) **Representations and Warranties.** The representations and warranties of the Company set forth in this Agreement that are qualified by “materiality” or “Company Material Adverse Effect” qualifications set forth in such representations or warranties shall have been true and correct on the date of this Agreement and shall be true and correct on the Closing Date as if such representations and warranties were made on and as of the Closing Date (other than the representations and warranties of the Company made only as of a specified date, which shall have been true and correct as of such date) and all other representations and warranties of the Company set forth in this Agreement shall have been true and correct in all material respects on the date of this Agreement and shall be true and correct in all material respects on the Closing Date as if such representations and warranties were made on and as of the Closing Date (other than the representations and warranties of the Company made only as of a specified date, which shall have been true and correct in all material respects as of such date).

(B) **Covenants.** The Company shall have performed and complied in all material respects with all covenants and obligations under this Agreement required to be performed and complied with by the Company prior to the Closing.

(C) **No Material Adverse Effect.** There shall not have occurred and be continuing a Company Material Adverse Effect.
(D) **Joinder Agreements.** All Major Stockholders shall have executed and delivered to Parent a Joinder Agreement and all such Joinder Agreements shall be in full force and effect.

(E) **Stockholder Written Consent.** Stockholders holding shares of Company Capital Stock representing at least eighty percent (80%) of the shares of Company Capital Stock entitled to vote on the Transactions shall have executed and delivered to Parent the Stockholder Written Consent with respect to such shares and such Stockholder Written Consent shall be in full force and effect.

(F) **FIRPTA Certificate.** Parent shall have received (i) a notice to the IRS, in accordance with the requirements of Treasury Regulations Section 1.897-2(h)(2), dated as of the Closing Date and executed by the Company, together with written authorization for Parent to deliver such notice to the IRS on behalf of the Company after the Closing, and (ii) a certification that the shares of Company Capital Stock are not United States real property interests as defined in Section 897(c) of the Code prepared in accordance with the Treasury Regulations under Sections 897 and 1445 of the Code in a form reasonably acceptable to Parent for purposes of satisfying Parent’s obligations under Treasury Regulation Section 1.1445-2(c)(3), in each case, validly executed by a duly authorized officer of the Company.

(G) **Key Employees.** The Non-Competition Agreements and each of the Key Employee Offer Letters executed concurrently with this Agreement shall be in full force and effect and shall not have been revoked, rescinded or otherwise repudiated by the respective signatories thereto, and no Key Employee shall have terminated his or her employment with the Company or, to the Knowledge of the Company, expressed an intention or interest in terminating his or her employment with the Company at or prior to the Closing, or with the Second Merger Surviving Entity or Parent (or one of the Subsidiaries, as applicable) following the Closing. All of the Key Employees shall have executed and delivered to Parent Parent’s Proprietary Information and Inventions Agreement and shall be eligible to work in the United States.

(H) **Share Registration Exemption.** Parent shall be reasonably satisfied that no more than thirty-five (35) of the potential recipients of Parent Common Stock or rights to acquire Parent Common Stock (other than pursuant to any Assumed Options) in connection with the First Merger will fail to be, at the Closing, “accredited” as defined in Rule 501 promulgated under Regulation D of the Securities Act and the issuance of all shares of Parent Common Stock in the First Merger shall validly qualify for an exemption from the registration and prospectus delivery requirements of the Securities Act and the equivalent state “blue-sky” Legal Requirements.

(I) **Escrow Agreement.** The Company shall have caused to be delivered to Parent the Escrow Agreement duly executed by the Stockholder Representative.

(J) **Termination of 401(k) Plans.** The Company shall have terminated, effective as of no later than the day immediately preceding the Closing Date, all Company Employee Plans intended to include group severance pay or benefits and any Company 401(k) Plan.

(K) **280G Waivers.** Each Person who may receive any payments and/or benefits that would be characterized as a “parachute payment” within the meaning of Section 280G(b)(1) of the Code has executed and delivered to Parent a waiver document that is mutually agreed upon by the Company and Parent.
(L) **Third Party Consents.** The Company shall have delivered to Parent all necessary consents, waivers and approvals of parties to any Contract set forth on Schedule 1.2(b)(ii)(L) hereto.

(M) **Terminated Agreements.** The Company shall have terminated each of the agreements listed on Schedule 1.2(b)(ii)(M) hereto effective no later than the Closing and, from and after the Closing, each such agreement shall be of no further force or effect.

(N) **Amended Agreements.** The Company shall have amended each of the agreements listed on Schedule 1.2(b)(ii)(N) hereto effective no later than the Closing in the manner set forth on such Schedule.

(O) **Statement of Expenses.** The Company shall have delivered to Parent the Statement of Expenses pursuant to Section 1.8(k).

(P) **Payment Spreadsheet.** The Company shall have delivered to Parent the Payment Spreadsheet pursuant to Section 1.8(c).

(Q) **Company Pre-Closing Certificate.** The Company shall have delivered to Parent the Company Pre-Closing Certificate pursuant to Section 1.11(b).

(R) **Certificate of the Company.** Parent shall have received a certificate from the Company, validly executed by the Chief Executive Officer of the Company (the “Company Officer’s Certificate”) for and on the Company’s behalf, to the effect that, as of the Closing:

a) the condition to the obligations of Parent and the Merger Subs set forth in Section 1.2(b)(ii)(A) has been satisfied (unless otherwise waived in accordance with the terms hereof);

b) the Company has performed and complied in all material respects with all covenants and obligations under this Agreement required to be performed and complied with by such party as of the Closing; and

c) the condition to the obligations of Parent and the Merger Subs set forth in Section 1.2(b)(ii)(C) has been satisfied (unless otherwise waived in accordance with the terms hereof).

(S) **Certificate of Secretary of Company.** Parent shall have received a certificate, validly executed by the Secretary of the Company, certifying (1) as to the terms and effectiveness of the Charter Documents, (2) as to the valid adoption of resolutions of the Company Board (whereby the Mergers and the other Transactions were unanimously approved by the Company Board) and (3) that the Stockholders constituting the Requisite Stockholder Approval have adopted and approved the Mergers, this Agreement and the consummation of the Transactions contemplated hereby.

(T) **Certificates of Good Standing.** Parent shall have received a long-form certificate of good standing, dated within three (3) Business Days prior to the Closing, with respect to the Company from the Secretary of State of the State of Delaware (in the case of the Company) or from the applicable Governmental Entity in the jurisdiction of its incorporation or organization.

(iii) **Additional Conditions to Obligations of the Company.** The obligations of the Company to effect the Mergers shall be subject to the satisfaction at or prior to the First Merger
Effective Time of the following additional conditions (any of which may be waived, in writing, exclusively by the Company (it being understood that each such condition is solely for the benefit of the Company and may be waived in writing without notice, liability or obligation to any other Person)):

(A) **Representations and Warranties.** The representations and warranties of Parent and the Merger Subs set forth in this Agreement that are qualified by “materiality” or “material adverse effect” qualifications set forth in such representations or warranties shall have been true and correct as of the date of this Agreement and shall be true and correct as of the Closing Date as though such representations and warranties were made on and as of the Closing Date (other than the representations and warranties of Parent and the Merger Subs made only as of a specified date, which shall be true and correct in all material respects as of such date) and all other representations and warranties of Parent and the Merger Subs set forth in this Agreement shall have been true and correct in all material respects on the date of this Agreement and shall be true and correct in all material respects on the Closing Date as if such representations and warranties were made on and as of the Closing Date (other than the representations and warranties of Parent and the Merger Subs made only as of a specified date, which shall have been true and correct in all material respects as of such date).

(B) **Covenants.** Parent and the Merger Subs shall have performed and complied in all material respects with all covenants and obligations under this Agreement required to be performed and complied with by them prior to the Closing.

(C) **Escrow Agreement.** Parent shall have delivered or caused to be delivered to the Company and the Stockholder Representative the Escrow Agreement duly executed by Parent and the Escrow Agent.

(D) **Certificate of the Parent.** The Company shall have received a certificate from Parent, validly executed by a duly authorized officer of Parent (the “Parent Officer’s Certificate”) for and on Parent’s behalf, to the effect that, as of the Closing:

   a) the condition to the obligations of the Company set forth in Section 1.2(b)(iii)(A) has been satisfied (unless otherwise waived in accordance with the terms hereof); and

   b) Parent and the Merger Subs have each performed and complied in all material respects with all covenants and obligations under this Agreement required to be performed and complied with by such parties as of the Closing.

1.3 **Organizational Documents of the Surviving Entities.**

   (a) **First Merger Surviving Corporation.**

      (i) Unless otherwise determined by Parent prior to the First Merger Effective Time, the certificate of incorporation of the First Merger Surviving Corporation shall be amended and restated as of the First Merger Effective Time to be identical to the certificate of incorporation of Merger Sub I as in effect immediately prior to the First Merger Effective Time, until thereafter amended in accordance with Delaware Law and as provided in such certificate of incorporation; provided, however, that at the First Merger Effective Time, the certificate of incorporation of the First Merger Surviving Corporation shall be amended to change the name of the First Merger Surviving Corporation to “Respond Software, Inc.”
Unless otherwise determined by Parent prior to the First Merger Effective Time, the bylaws of Merger Sub I as in effect immediately prior to the First Merger Effective Time shall be the bylaws of the First Merger Surviving Corporation as of the First Merger Effective Time until thereafter amended in accordance with Delaware Law and as provided in the certificate of incorporation of the First Merger Surviving Corporation and such bylaws.

(b) **Second Merger Surviving Entity.**

(i) The certificate of formation of Merger Sub II, as in effect immediately prior to the Second Merger Effective Time, shall be the certificate of formation of the Second Merger Surviving Entity at the Second Merger Effective Time, until thereafter amended in accordance with Delaware Law and as provided in such certificate of formation; provided, however, that at the Second Merger Effective Time, the certificate of formation of the Second Merger Surviving Entity shall be amended to change the name of the Second Merger Surviving Entity to “Respond Software, LLC”.

(ii) The limited liability company agreement of Merger Sub II, as in effect immediately prior to the Second Merger Effective Time, shall be the limited liability company agreement of the Second Merger Surviving Entity at the Second Merger Effective Time, until thereafter amended in accordance with Delaware Law and as provided in such limited liability company agreement.

1.4 Directors and Officers of the Surviving Entities.

(a) **First Merger Surviving Corporation.**

(i) Unless otherwise determined by Parent prior to the First Merger Effective Time, the directors of Merger Sub I immediately prior to the First Merger Effective Time shall be the directors of the First Merger Surviving Corporation immediately after the First Merger Effective Time, each to hold the office of a director of the First Merger Surviving Corporation in accordance with the provisions of Delaware Law and the certificate of incorporation and bylaws of the First Merger Surviving Corporation until his or her successor is duly elected and qualified.

(ii) Unless otherwise determined by Parent prior to the First Merger Effective Time, the officers of Merger Sub I immediately prior to the First Merger Effective Time shall be the officers of the First Merger Surviving Corporation immediately after the First Merger Effective Time, each to hold office in accordance with the provisions of the bylaws of the First Merger Surviving Corporation.

(b) **Second Merger Surviving Entity.**

(i) Parent shall be the sole member (as defined in the limited liability company agreement of the Second Merger Surviving Entity) of the Second Merger Surviving Entity.

(ii) The officers of Merger Sub II immediately prior to the Second Merger Effective Time shall be the officers of the Second Merger Surviving Entity immediately after the Second Merger Effective Time, each to hold office in accordance with the provisions of the limited liability company agreement of the Second Merger Surviving Entity.

1.5 General Effects of the Mergers.

(a) **First Merger.** At the First Merger Effective Time, the effects of the First Merger shall be as provided in the applicable provisions of Delaware Law. Without limiting the generality of the foregoing, and subject thereto, at the First Merger Effective Time, except as otherwise agreed to pursuant
to the terms of this Agreement, all of the property, rights, privileges, powers and franchises of the Company and Merger Sub I shall vest in the First Merger Surviving Corporation, and all debts, liabilities and duties of the Company and Merger Sub I shall become the debts, liabilities and duties of the First Merger Surviving Corporation.

(b) **Second Merger.** At the Second Merger Effective Time, the effects of the Second Merger shall be as provided in the applicable provisions of Delaware Law. Without limiting the generality of the foregoing, and subject thereto, at the Second Merger Effective Time, except as otherwise agreed to pursuant to the terms of this Agreement, all of the property, rights, privileges, powers and franchises of Merger Sub II and the First Merger Surviving Corporation shall vest in the Second Merger Surviving Entity, and all debts, liabilities and duties of Merger Sub II and the First Merger Surviving Corporation shall become the debts, liabilities and duties of the Second Merger Surviving Entity.

1.6 **Effect of First Merger on Capital Stock of Constituent Corporations.**

(a) **Merger Sub I Capital Stock.** At the First Merger Effective Time, by virtue of the First Merger and without any action on the part of Parent, the Merger Subs, the Company or the respective stockholders or members thereof, each share of capital stock of Merger Sub I that is issued and outstanding immediately prior to the First Merger Effective Time shall be converted into and become one validly issued, fully paid and non-assessable share of Company Common Stock (and the shares of the Company into which the shares of Merger Sub I capital stock are so converted shall be the only shares of the Company’s capital stock that are issued and outstanding immediately after the First Merger Effective Time). Each certificate evidencing ownership of shares of Merger Sub I capital stock will evidence ownership of such shares of Company Common Stock.

(b) **Company Capital Stock; Company Options; Company Warrants.**

(i) **Generally.** At the First Merger Effective Time, by virtue of the First Merger and without any action on the part of Parent, the Merger Subs, the Company or the respective stockholders or members thereof, each share of Company Capital Stock (excluding (A) Cancelled Shares, which shall be treated in the manner set forth in Section 1.6(b)(ii) and (B) Dissenting Shares, which shall be treated in the manner set forth in Section 1.6(b)(iii)) issued and outstanding as of immediately prior to the First Merger Effective Time shall be cancelled and extinguished and shall be converted automatically into the right to receive, upon the terms set forth in this Section 1.6 and throughout this Agreement (subject to the indemnification and escrow provisions set forth in Article VII and, with respect to Company Capital Stock and Company Options held by the Consideration Holdback Employees, the Consideration Holdback Agreement and/or Option Vesting Amendment), and subject to surrender of the certificate representing such shares of Company Capital Stock and the execution and delivery of a Letter of Transmittal and a Joinder Agreement in the manner provided in Section 1.8:

(A) with respect to each outstanding share of Company Common Stock: (1) the Per Share Stockholder Closing Cash Consideration, (2) the Per Share Stockholder Closing Stock Consideration, (3) the Per Share Escrow Consideration, and (4) the Per Share Representative Fund Consideration; provided, however, that with respect to each outstanding share of Company Restricted Stock, the amounts in the foregoing clauses (1), (2), (3) and (4) shall continue after the First Merger Effective Time to be subject to the same vesting or repurchase option, risk of forfeiture or other conditions under any applicable stock restriction agreement or other agreement with the Company to which such Company Restricted Stock was subject prior to the First Merger Effective Time, shall not automatically be payable when otherwise due if such Company Restricted Stock had been Company Common Stock and shall instead become immediately payable subject to the terms and conditions of this Agreement and on such date as such Company Restricted Stock would have ceased to become subject to any vesting or repurchase option,
risk of forfeiture or other condition under any applicable stock restriction agreement or other agreement with the Company to which such Company Restricted Stock was subject prior to the First Merger Effective Time;

(B) with respect to each outstanding share of Series Seed Preferred Stock: (1) the Per Share Stockholder Closing Cash Consideration, (2) the Per Share Stockholder Closing Stock Consideration, (3) the Per Share Escrow Consideration, and (4) the Per Share Representative Fund Consideration;

(C) with respect to each outstanding share of Series A Preferred Stock: (1) the Per Share Stockholder Closing Cash Consideration, (2) the Per Share Stockholder Closing Stock Consideration, (3) the Per Share Escrow Consideration, and (4) the Per Share Representative Fund Consideration; and

(D) with respect to each outstanding share of Series B Preferred Stock: (1) the Per Share Stockholder Closing Cash Consideration, (2) the Per Share Stockholder Closing Stock Consideration, (3) the Per Share Escrow Consideration, and (4) the Per Share Representative Fund Consideration.

"Merger Consideration" shall mean all of the amounts payable pursuant to the preceding sentence and Section 1.6(b)(iv). Notwithstanding anything to the contrary herein, (A) a portion of the consideration that otherwise would be payable at the Closing to each Stockholder and Vested Company Optionholder pursuant to this Section 1.6(b) and Section 1.6(b)(iv)(A) shall be withheld at the Closing and (1) deposited into the Escrow Fund pursuant to Section 1.8(b)(iii) and (2) deposited into the Representative Fund pursuant to Section 1.8(b)(iv), which will be distributed to the Stockholders and Vested Company Optionholders in accordance with, and subject to, the terms and conditions of this Agreement and, as applicable, the Escrow Agreement, (B) with respect to each Consideration Holdback Employee, an additional portion of the stock consideration equal to the Consideration Holdback Amount that otherwise would be payable to such Consideration Holdback Employee at the Closing pursuant to this Section 1.6(b) shall be withheld at the Closing and deposited with the Escrow Agent pursuant to the Consideration Holdback Agreement, which consideration will be distributed to such Consideration Holdback Employee in accordance with, and subject to, the terms and conditions of this Agreement and the Consideration Holdback Agreement, (C) Parent shall have the right, but not the obligation, to pay in cash in lieu of shares of Parent Common Stock any amounts payable from time to time hereunder that would otherwise be paid in shares of Parent Common Stock to any Stockholder that Parent is not certain is an accredited investor (as determined by Parent in its sole discretion after taking into account any Accredited Investor Questionnaire theretofore delivered to Parent by such Stockholder) and that is not a Major Stockholder and (D) any such amounts paid in cash that would otherwise have been paid in shares of Parent Common Stock if not for the foregoing clause (C) shall be deducted on a pro rata basis from the amount of cash consideration payable from time to time to the Major Stockholders and paid instead in a number of shares of Parent Common Stock of equivalent value to such deducted amounts with each share valued at the Parent Trading Price. For purposes of calculating all amounts issuable to each Stockholder pursuant to this Section 1.6, all shares of Company Capital Stock held by each Stockholder shall be aggregated on a certificate-by-certificate basis, the amount of cash consideration due in respect of each such certificate shall be rounded down to the nearest whole cent and the number of shares of Parent Common Stock due in respect of each such certificate shall be rounded down to the nearest whole share. No fraction of a share of Parent Common Stock will be issued by virtue of the Mergers, provided, that any Stockholder who otherwise would be entitled to receive a fraction of a share of Parent Common Stock shall receive, in lieu thereof, an amount of cash equal to the product obtained by multiplying (A) such fraction by (B) the Parent Trading Price, rounded down to the nearest whole cent.
(ii) **Cancelled Shares.** At the First Merger Effective Time, by virtue of the First Merger and without any action on the part of Parent, the Merger Subs, the Company or the respective stockholders or members thereof, each share of Company Capital Stock that is issued and outstanding and held by the Company as of immediately prior to the First Merger Effective Time ("Cancelled Shares") shall be cancelled without any consideration paid therefor.

(iii) **Dissenting Shares.** Notwithstanding any other provisions of this Agreement to the contrary, any shares of Company Capital Stock outstanding immediately prior to the First Merger Effective Time and with respect to which the holder thereof has properly demanded appraisal rights in accordance with Section 262 of Delaware Law, and who has not effectively withdrawn or lost such holder’s appraisal rights under Delaware Law (collectively, the "Dissenting Shares"), shall not be converted into or represent a right to receive the applicable consideration for Company Capital Stock set forth in Section 1.6(b)(i) but the holder thereof shall only be entitled to such rights as are provided by Delaware Law. Notwithstanding the provisions of this Section 1.6(b)(iii), if any holder of Dissenting Shares shall effectively withdraw or lose (through failure to perfect or otherwise) such holder’s appraisal rights under Delaware Law, then, as of the later of the First Merger Effective Time and the occurrence of such event, such holder’s shares shall automatically be converted into and represent only the right to receive, upon surrender of the certificate representing such shares, upon the terms set forth in this Section 1.6 and throughout this Agreement (including the indemnification and escrow provisions set forth in Article VII), the consideration for Company Capital Stock set forth in Section 1.6(b)(i) without interest thereon. After the Closing, Parent shall give the Stockholder Representative (A) prompt notice of any written demand for appraisal received by Parent and/or any of its Affiliates (including the Second Merger Surviving Entity) pursuant to the applicable provisions of Delaware Law and (B) the opportunity to control all negotiations and proceedings with respect to such demands. Neither Parent nor any of its Affiliates (including the Second Merger Surviving Entity), on the one hand, nor the Stockholder Representative, on the other hand, shall make or authorize any payment with respect to any such demands or offer to settle or settle any such demands without the prior written consent of the other party, such consent not to be unreasonably withheld. After the Closing, any communication to be made by Parent and/or any of its Affiliates (including the First Merger Surviving Corporation), on the one hand, and the Stockholder Representative, on the other hand, to any such demanding Stockholder with respect to such demands shall be submitted to the other party in advance and shall not be presented to any such demanding Stockholder prior to such Person receiving the other party’s written consent, such consent not to be unreasonably withheld.

(iv) **Treatment of Company Options.**

(A) **Effect on Vested Company Options.** Parent shall not assume any Vested Company Options, and at the First Merger Effective Time each Vested Company Option outstanding immediately prior to the First Merger Effective Time shall, without any action on the part of Parent, the Merger Subs, the Company or the holder thereof, be cancelled and converted into and, subject to the following sentence and the other terms and conditions set forth throughout this Agreement (including the indemnification and escrow provisions set forth in Article VII), and the applicable delivery requirements in Section 1.8, shall become a right to receive an amount in cash (rounded to the nearest cent), without interest, with respect to each share of Company Common Stock subject to such Vested Company Option, equal to: (1) the Per Vested Option Closing Cash Consideration with respect to such share, (2) the Per Share Escrow Consideration, and (3) Per Share Representative Fund Consideration, in each case less applicable Tax withholding. The parties acknowledge and agree that any Tax deduction or expense arising or resulting from the cancellation of any Vested Company Option or the payment of any amount which is treated as compensation for Tax purposes, in each case pursuant to this Section 1.6(b)(iv)(A), shall be allocated to the Pre-Closing Tax Period for all Tax purposes to the extent permitted by applicable Legal Requirements. Notwithstanding the foregoing, in the case of a Consideration Holdback Employee required to enter into an Option Vesting Amendment as set forth on Schedule C, a portion of each Company Option
that would otherwise be a Vested Company Option held by such Consideration Holdback Employee will be amended to be revested as set forth in such Option Vesting Amendment and treated as an Unvested Company Option in accordance with Section 1.6(b)(iv)(B) below.

(B) **Effect on Unvested Company Options held by Continuing Employees.** At the First Merger Effective Time, each Unvested Company Option held by a Continuing Employee shall be assumed by Parent as a Parent Option. Except as otherwise set forth in this Agreement, each Unvested Company Option so assumed by Parent pursuant to this Section 1.6(b)(iv)(B) (an “Assumed Option”) shall continue to have, and be subject to, the same terms and conditions (including the applicable vesting terms) set forth in the Plan and the option agreements relating thereto as in effect immediately prior to the First Merger Effective Time, except that (A) such Assumed Option will be exercisable for that number of whole shares of Parent Common Stock equal to the product of the aggregate number of shares of Company Common Stock that were issuable upon exercise in full of such Unvested Company Option immediately prior to the First Merger Effective Time multiplied by the Option Exchange Ratio, rounded down to the nearest whole number of shares of Parent Common Stock, and (B) the per share exercise price for the shares of Parent Common Stock issuable upon exercise of such Assumed Option shall be equal to the quotient obtained by dividing the exercise price per share of Company Common Stock at which such applicable Company Option was exercisable immediately prior to the Closing Date by the Option Exchange Ratio, rounded up to the nearest whole cent. It is the intention of the parties that, to the extent possible, each Assumed Option qualify following the First Merger Effective Time as an “incentive stock option” (within the meaning of Section 422 of the Code) to the extent that the corresponding Company Option qualified as an incentive stock option immediately prior to the First Merger Effective Time. The assumption of Unvested Company Options under this Section 1.6(b)(iv)(B) is intended to comply with Section(s) 409A and 424 of the Code.

(C) **Effect on Unvested Company Options held by non-Continuing Employees.** Effective as of the First Merger Effective Time, each Unvested Company Option that is outstanding as of immediately prior to the First Merger Effective Time and held by a non-Continuing Employee shall be cancelled without payment of any consideration in respect of such cancelled Unvested Company Option.

(D) **Necessary Actions for Company Options and Company Restricted Stock.** Prior to the First Merger Effective Time, and subject to the review and approval of Parent, the Company shall take all actions necessary to effect the transactions anticipated by this Section 1.6 under all Company Option agreements, all agreements related to Company Restricted Stock and any other plan or arrangement of the Company (whether written or oral, formal or informal), including adopting all resolutions, delivering all required notices, obtaining consents from each holder of a Company Option or Company Restricted Stock and taking any other actions that are necessary or appropriate to effectuate Section 1.6(b)(iv)(A) and this Section 1.6(b)(iv)(D).

(v) **Treatment of Company Warrants.** At the First Merger Effective Time, each Company Warrant that is unexpired, unexercised and outstanding immediately prior to the First Merger Effective Time shall terminate in its entirety.

1.7 **Effect of Second Merger on Capital Stock of Constituent Companies.**

(a) **Company Capital Stock.** Effective as of the Second Merger Effective Time, by virtue of the Second Merger and without any action on the part of Parent, Merger Sub II, the Company or the respective stockholders thereof, each share of capital stock of the Company that is issued and outstanding immediately prior to the Second Merger Effective Time shall be cancelled without any consideration paid therefor.
Merger Sub II Membership Interests. Effective as of the Second Merger Effective Time, by virtue of the Second Merger and without any action on the part of Parent, Merger Sub II, the Company or the respective stockholders or members thereof, each membership interest of Merger Sub II that is issued and outstanding immediately prior to the Second Merger Effective Time shall remain issued and outstanding.

1.8 Payment of Merger Consideration for Company Capital Stock and Company Options.

(a) Exchange Agent. American Stock Transfer & Trust Company, LLC shall serve as the exchange agent (the “Exchange Agent”) for the Mergers.

(b) Parent Closing Payments.

(i) On the Closing Date (or as soon as practicable thereafter (but in no event later than two (2) Business Days following the Closing Date)), Parent shall transfer, or cause to be transferred, (i) to the Exchange Agent the amount of cash and the number of shares of Parent Common Stock (less the number of shares of Parent Common Stock subject to the Consideration Holdback Agreement) payable to the Stockholders at the Closing pursuant to Section 1.6(b)(i) in exchange for all shares of Company Capital Stock outstanding as of immediately prior to the First Merger Effective Time and (ii) to the Escrow Agent the number of shares of Parent Common Stock to be held and distributed in accordance with the terms of the Consideration Holdback Agreement.

(ii) On the Closing Date (or as soon as practicable thereafter (but in no event later than two (2) Business Days following the Closing Date)), Parent shall transfer, or cause to be transferred, to the Company a cash amount, by wire transfer of immediately available United States funds to an account designated by the Company prior to the Closing, equal to the aggregate amount payable in respect of all Company Options pursuant to Section 1.6(b)(iv)(A), for distribution to the holders of the Vested Company Options through the Company’s payroll system.

(iii) On the Closing Date (or as soon as practicable thereafter (but in no event later than two (2) Business Days following the Closing Date)), Parent shall transfer, or cause to be transferred, the Escrow Amount to the Escrow Agent to hold in trust as an escrow fund (the “Escrow Fund”) under the terms of this Agreement and the Escrow Agreement. Upon deposit of the Escrow Amount with the Escrow Agent in accordance with the preceding sentence, Parent shall be deemed to have contributed each relevant Stockholder’s and Vested Company Optionholder’s Pro Rata Portion of the Escrow Amount to the Escrow Fund.

(iv) At the First Merger Effective Time, Parent shall transfer the Representative Expense Amount to the Stockholder Representative to hold (the “Representative Fund”) under the terms of this Agreement. The Representative Fund will be used for the purposes of paying directly, or reimbursing the Stockholder Representative for, any third party expenses pursuant to this Agreement and the ancillary agreements. The Stockholders and Vested Company Optionholders will not receive any interest or earnings on the Representative Fund and irrevocably transfer and assign to the Stockholder Representative any ownership right that they may otherwise have had in any such interest or earnings. The Stockholder Representative will not be liable for any loss of principal of the Representative Fund other than as a result of its gross negligence or willful misconduct. The Stockholder Representative will hold these funds separate from its corporate funds, will not use these funds for its operating expenses or any other corporate purposes and will not voluntarily make these funds available to its creditors in the event of bankruptcy. Upon deposit of the Representative Expense Amount with the Stockholder Representative in accordance with this Section 1.8(b)(iv), for Tax purposes Parent shall be deemed to have
paid each relevant Stockholder and Vested Company Optionholder its, his or her Pro Rata Portion of the Representative Expense Amount and then each such Stockholder and Vested Company Optionholder shall be deemed to have voluntarily contributed such amount to the Representative Fund, any withholding in respect thereof shall be satisfied from the Total Stockholder Closing Cash Consideration owing to the Stockholder or Total Vested Optionholder Closing Cash Consideration owing to the Vested Company Optionholder, as applicable, on the Closing Date and, for the avoidance of doubt, the amount of the Representative Fund that is returned to the Stockholders or Vested Company Optionholders shall not again be subject to information reporting or withholding. As soon as reasonably determined by the Stockholder Representative that the Representative Fund is no longer required to be withheld, the Stockholder Representative shall distribute or cause the distribution of the remaining portion of the Representative Fund (if any) to the Stockholders and Vested Company Optionholders; provided, however, that while any amounts remain in the Escrow Fund, the Stockholder Representative may deliver such portion of the Representative Fund to the Escrow Agent for further distribution to the Stockholders and Vested Company Optionholders in accordance with their respective Pro Rata Portions; provided, further, that any such amounts delivered to the Escrow Agent for distribution to the Stockholders and Vested Company Optionholders shall be promptly distributed to the Stockholders and Vested Company Optionholders and not serve as a source of recovery for indemnification claims pursuant to this Agreement that are recoverable solely against the Escrow Fund pursuant to Section 7.2(a)(i).

(c) Payment Spreadsheet. Prior to the Closing, the Company shall deliver to Parent a payment spreadsheet or spreadsheets (the “Payment Spreadsheet”) setting forth:

(i) the amount of the Total Consideration, the Total Cash Consideration, and the Total Stock Consideration;

(ii) the amount of the Per Share Total Consideration Value, the Per Share Escrow Consideration, the Per Share Stockholder Closing Cash Consideration, the Per Share Stockholder Closing Stock Consideration, the Per Share Representative Fund Consideration and the Option Exchange Ratio;

(iii) the number of Total Outstanding Shares;

(iv) with respect to each Stockholder: (A) the name and address of such holder, (B) whether such holder is a current or former employee of the Company, (C) the number, class and series of shares of Company Capital Stock held by such holder and the respective certificate number, (D) the date of acquisition of such shares and, with respect to any share or security that, in each case, would be deemed a “covered security” under Treasury Regulations Section 1.6045-1(a)(15), the adjusted tax basis of such shares, (E) the cash consideration that such holder is entitled to receive pursuant to Section 1.6(b) (on a certificate-by-certificate basis and in the aggregate (as applicable)), (F) the stock consideration that such holder may be entitled to receive pursuant to Section 1.6(b) (on a certificate-by-certificate basis and in the aggregate), (G) the Pro Rata Portion of such holder, (H) the amount of cash to be deposited into the Escrow Fund and the amount of cash to be deposited into the Representative Fund, in each case, on behalf of such holder pursuant to this Agreement, (I) the Consideration Holdback Amount of such holder and the number of shares of Parent Common Stock to be withheld and deposited with the Escrow Agent pursuant to the Consideration Holdback Agreement, on behalf of such holder, (J) the net cash and stock amounts to be paid to such holder at Closing after giving effect to the foregoing clauses (H) and (I) (on a certificate-by-certificate basis and in the aggregate), (K) the amount of any withholding due on any payment (assuming, solely for purposes of preparing the Payment Spreadsheet, that such Stockholder has delivered to the Exchange Agent the appropriate IRS Form W-8 or IRS Form W-9, as applicable, indicating that no withholding is required), and (L) such other information as required by the Exchange Agent in the form of spreadsheet provided to the Company prior to the date hereof; and
(v) with respect to each holder of Company Options, (A) such holder’s name and address; (B) the number of shares of Company Capital Stock underlying each Company Option held by such holder; (C) the respective exercise price per share of such Company Option; (D) the respective grant date(s) of such Company Option; (E) whether the holder of such Company Option is a Continuing Employee; (F) whether such Company Option is an incentive stock option or a non-qualified stock option; (G) the total number of such holder’s Company Options that will be Unvested Company Options as of immediately prior to the First Merger Effective Time (including, if applicable, Company Options that will be revested at the Closing pursuant to an Option Vesting Amendment); (H) the total number of such holder’s Company Options that will be Vested Company Options as of immediately prior to the First Merger Effective Time; (I) in the case of Unvested Company Options, the respective vesting arrangement(s) (including vesting start date(s)) with respect to such Unvested Company Options, the per share exercise price applicable to such Company Options after being assumed by Parent and the number of shares of Parent Common Stock applicable to such Company Options after being assumed by Parent; (J) the amount of cash, if any, to be paid to such holder pursuant to Section 1.6(b) in respect of such Company Options, (K) with respect to the Vested Company Options, the amount of cash to be deposited into the Escrow Fund and the amount of cash to be deposited into the Representative Fund, in each case, on behalf of such holder pursuant to this Agreement, (L) the amount of any cash required to be paid by or on behalf of the Company Optionholder in settlement of any Tax withholding obligations and outstanding loans between the Company and such Company Optionholder, and (M) such other information as the Exchange Agent or Parent may reasonably request in order to facilitate the payments to be made pursuant to this Section 1.8.

(d) Payment Procedures.

(i) As soon as reasonably practicable after the Closing Date, Parent or the Exchange Agent shall mail a letter of transmittal in the form set forth in Exhibit D (a “Letter of Transmittal”) and a Joinder Agreement to the address set forth opposite each such Stockholder’s name on the Payment Spreadsheet (except to the extent any of such documents have previously been received by Parent prior to the Closing from such Stockholder). Promptly (but in no event more than five (5) Business Days) following receipt by the Exchange Agent of a Letter of Transmittal, a Joinder Agreement and any applicable tax forms that the Exchange Agent may reasonably require in connection therewith (except to the extent any of such documents have previously been received by Parent prior to the Closing from such Stockholder) (the “Exchange Documents”), duly completed and validly executed in accordance with the instructions thereto, and a certificate representing the relevant shares of Company Capital Stock (the “Company Stock Certificates”), Parent shall cause the Exchange Agent to pay and/or issue to the holder of such Company Stock Certificate in exchange therefor the cash and/or stock portion of the Merger Consideration payable in respect thereof at Closing pursuant to Section 1.6(b)(i) (less the amount of cash withheld and deposited into the Escrow Fund pursuant to Section 1.8(b)(iii) and less the amount of cash withheld and deposited into the Representative Fund pursuant to Section 1.8(b)(iv)) and the Company Stock Certificate so surrendered shall be cancelled. Until so surrendered, each Company Stock Certificate outstanding after the First Merger Effective Time will be deemed, for all purposes thereafter, to evidence only the right to receive the cash and stock amounts payable hereunder in exchange for shares of Company Capital Stock (without interest). Subject to Section 1.8(e), no portion of the Merger Consideration will be paid to the holder of any unsurrendered Company Stock Certificate with respect to shares of Company Capital Stock formerly represented thereby until the holder of record of such Company Stock Certificate shall surrender such Company Stock Certificate and validly executed Exchange Documents pursuant hereto. For all purposes under this Agreement the value attributable to a share of Parent Common Stock shall be the Parent Trading Price.

(ii) As soon as reasonably practicable after the Closing Date, Parent shall mail an Option Equity Award Consent to the address set forth opposite each Vested Company Optionholder’s name on the Payment Spreadsheet (except to the extent such document has previously been received by
Parent prior to the Closing from such Vested Company Optionholder). Promptly (but in no event more than five (5) Business Days) following receipt by Parent of an Option Equity Award Consent and any applicable tax forms that Parent may reasonably require in connection therewith (except to the extent any of such documents have previously been received by Parent prior to the Closing from such Vested Company Optionholder), duly completed and validly executed in accordance with the instructions thereeto, Parent shall cause the payment, to such Vested Company Optionholder, of the cash payable in respect thereof at Closing pursuant to Section 1.6(b)(iv)(A) (less the amount of cash withheld and deposited into the Escrow Fund pursuant to Section 1.8(b)(iii) and less the amount of cash withheld and deposited into the Representative Fund pursuant to Section 1.8(b)(iv)), in each case less any applicable Tax withholding.

(e) **Lost, Stolen or Destroyed Certificates.** In the event any Company Stock Certificate not otherwise held in electronic form immediately prior to the First Merger Effective Time shall have been lost, stolen or destroyed, the Exchange Agent or Parent shall pay and/or issue, in exchange for such lost, stolen or destroyed certificate, the Merger Consideration, if any, payable and/or issuable in respect thereto pursuant to Section 1.6(b) upon the making of an affidavit of that fact by the holder thereof; provided, however, that, as conditions precedent to the issuance thereof, the Stockholder who is the owner of such lost, stolen or destroyed certificate shall have provided an indemnification agreement in a form and substance reasonably acceptable to Parent against any claim that may be made against Parent, the Second Merger Surviving Entity or the Exchange Agent with respect to the certificates alleged to have been lost, stolen or destroyed and to the extent required by the Exchange Agent, the Stockholder who is the owner of such lost, stolen or destroyed certificates shall have delivered a bond in such amount as the Exchange Agent may reasonably direct.

(f) **Transfers of Ownership.** If any cash amounts or stock are to be disbursed pursuant to Section 1.6 and this Section 1.8 to a Person other than the Person whose name is reflected on the Company Stock Certificate surrendered in exchange therefor, it will be a condition of the issuance or delivery thereof that the certificate so surrendered will be properly endorsed and otherwise in proper form for transfer and that the person requesting such exchange will have paid to Parent or any agent designated by it any transfer or other taxes required by reason of the payment of any portion of the Merger Consideration in any name other than that of the registered holder of the certificate surrendered, or established to the satisfaction of Parent or any agent designated by it that such tax has been paid or is not payable.

(g) **Shares of Parent Common Stock.** The shares of Parent Common Stock issued by Parent to the Stockholders pursuant to Section 1.6(b), and this Section 1.8 shall be placed in a restrictive class bearing the following restrictive legend:

THE SHARES HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT, OR ANY STATE SECURITIES LAWS. THEY MAY NOT BE SOLD OR OFFERED FOR SALE IN THE ABSENCE OF AN EFFECTIVE REGISTRATION STATEMENT AS TO THE SECURITIES UNDER SAID ACT AND ANY APPLICABLE STATE SECURITIES LAW OR AN EXEMPTION FROM SUCH REGISTRATION UNDER SAID ACT. THE ISSUER OF THESE SHARES MAY REQUIRE AN OPINION OF COUNSEL REASONABLY SATISFACTORY TO THE ISSUER THAT SUCH OFFER, SALE OR OTHER TRANSFER OTHERWISE COMPLIES WITH THE SECURITIES ACT AND ANY APPLICABLE STATE SECURITIES LAWS.

(h) **Exchange Agent to Return Merger Consideration.** At any time following the last day of the sixth (6th) month following the First Merger Effective Time, Parent shall be entitled to require the Exchange Agent to deliver to Parent or its designated successor or assign all cash amounts that have been deposited with the Exchange Agent pursuant to Section 1.8(b)(i), and any and all interest thereon or

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other income or proceeds thereof, not disbursed to the holders of Company Stock Certificates pursuant to Section 1.8(d), and thereafter the holders of Company Stock Certificates shall be entitled to look only to Parent, the First Merger Surviving Corporation and/or the Second Merger Surviving Entity (subject to the terms of Section 1.8(j)) only as general creditors thereof with respect to any and all cash amounts and stock that may be payable to such holders of Company Stock Certificates pursuant to Section 1.8(d) upon the due surrender of such Company Stock Certificates and duly executed Exchange Documents in the manner set forth in Section 1.8(d). No interest shall be payable for the cash amounts delivered to Parent pursuant to the provisions of this Section 1.8(h) and which are subsequently delivered to the holders of Company Stock Certificates.

(i) **No Further Ownership Rights in Company Capital Stock.** Following the consummation of the Mergers, the cash amounts and stock paid in respect of the surrender for exchange of shares of Company Capital Stock in accordance with the terms hereof shall be deemed to be full satisfaction of all rights pertaining to such shares of Company Capital Stock, and there shall be no further registration of transfers on the records of the First Merger Surviving Corporation or the Second Merger Surviving Entity of shares of Company Capital Stock which were outstanding immediately prior to the First Merger Effective Time. If, after the First Merger Effective Time, Company Stock Certificates are presented to the First Merger Surviving Corporation or the Second Merger Surviving Entity for any reason, they shall be cancelled and exchanged as provided in this Article I.

(j) **No Liability.** Notwithstanding anything to the contrary in this Agreement, none of Parent, the First Merger Surviving Corporation, the Second Merger Surviving Entity, the Exchange Agent or any party hereto shall be liable to a Stockholder for any amount paid to a public official pursuant to any applicable abandoned property, escheat or similar law.

(k) **Statement of Expenses.** Prior to the Closing, the Company shall deliver to Parent a statement that sets forth all Third Party Expenses that are unpaid as of the Closing, or anticipated to be incurred or payable by or on behalf of the Company after the Closing and wire instructions for each payment to be made at or after the Closing (the “Statement of Expenses”). Without limitation to any other provision of this Agreement, in making any payment in respect of any unpaid Third Party Expenses at the Closing and in calculating the Closing Net Working Capital, Parent shall be entitled to rely on the Statement of Expenses.

### 1.9 Withholding Taxes.

The Company, the Exchange Agent, the Escrow Agent, Parent, the First Merger Surviving Corporation and the Second Merger Surviving Entity shall be entitled to deduct and withhold from any consideration payable or otherwise deliverable pursuant to this Agreement such amounts as may be required to be deducted or withheld therefrom under any provision of U.S. federal, state, local or non-U.S. Tax Legal Requirements or under any Legal Requirements or applicable Orders and shall be permitted to pay or cause to be paid any amounts due under this Agreement through an appropriate payroll service provider of Parent, the Company, the First Merger Surviving Corporation or the Second Merger Surviving Entity or any of their subsidiaries or affiliates in order to facilitate any such deducting or withholding. To the extent such amounts are so deducted or withheld and paid over to the appropriate Governmental Entity or other Person, such amounts shall be treated for all purposes under this Agreement as having been paid to the Person to whom such amounts would otherwise have been paid.

### 1.10 Tax Consequences.

The Mergers are intended to be treated as integrated steps in a single transaction and together to qualify as a “reorganization” within the meaning of Section 368(a)(1)(A) of the Code, and this Agreement is intended to constitute a “plan of reorganization” within the meaning of Treasury Regulations Sections 1.368-2(g) and 1.368-3. Each party hereto shall cause all Tax Returns relating to the Mergers filed by such party to be filed on the basis of treating the Mergers as a “reorganization” within the meaning of Section 368(a)(1)(A) of the Code unless otherwise required by a change in Legal Requirements after the Closing or pursuant to a Tax proceeding, provided that such party shall have first defended the foregoing intended reporting position in good faith in such Tax proceeding.
1.11 Adjustment for Closing Net Working Capital.

(a) Schedule 1.11(a) sets forth (i) an estimated consolidated balance sheet of the Company as of the date of this Agreement prepared by the Company and (ii) the Company’s good faith estimate of the amount of Net Working Capital and all components thereof as if the Closing occurred upon the execution of this Agreement.

(b) Prior to the Closing Date, the Company shall deliver to Parent a certificate of the Company (the “Company Pre-Closing Certificate”), validly executed on its behalf by the Chief Executive Officer or Chief Financial Officer of the Company, setting forth (i) an estimated consolidated balance sheet of the Company as of the Closing prepared by the Company and (ii) the Company’s good faith estimate of the amount of Closing Net Working Capital (the “Estimated Closing Net Working Capital Amount”) and all components thereof. The Company Pre-Closing Certificate shall be prepared in accordance with the Applicable Accounting Principles. After delivery of the Company Pre-Closing Certificate and the Payment Spreadsheet, Parent and its accountants and other representatives shall be permitted reasonable access to the Company’s Books and Records and any available work papers related to the preparation of the Company Pre-Closing Certificate and Payment Spreadsheet, and the Company shall, and shall cause its accountants and employees to, reasonably cooperate with and respond to questions and comments of Parent related to the Company Pre-Closing Certificate or the Payment Spreadsheet. The process described in this Section 1.11(b) is not intended to permit the introduction of different accounting methodologies, practices, estimation techniques, assumptions and principles to the preparation of the Company Pre-Closing Certificate from the accounting methodologies, practices, estimation techniques, assumptions and principles used in the Applicable Accounting Principles.

(c) No later than ninety (90) calendar days after the Closing Date, Parent shall deliver to the Stockholder Representative a statement (the “Post-Closing Statement”) setting forth (i) a consolidated balance sheet of the Company as of the Closing and (ii) Parent’s good faith calculation of Closing Net Working Capital, and the components thereof, together with reasonably detailed supporting documentation for such calculations. The Post-Closing Statement shall be prepared in accordance with the Applicable Accounting Principles. If Parent does not deliver a Post-Closing Statement on or before the ninetieth (90th) day after the Closing Date, then the amount of Closing Net Working Capital estimated in the Company Pre-Closing Certificate and all amounts therein shall be final and binding and not subject to appeal.

(d) If Parent delivers a Post-Closing Statement to the Stockholder Representative in accordance with Section 1.11(c) on or before the ninetieth (90th) day after the Closing Date, then the Stockholder Representative shall have sixty (60) calendar days following its receipt of the Post-Closing Statement (the “Review Period”) to review the same together with all documentation and information related to the Stockholder Representative’s review of the Post-Closing Statement as reasonably requested in accordance with this Section 1.11(d). During the Review Period, Parent shall cooperate with the Stockholder Representative and provide the Stockholder Representative with reasonable access, during normal business hours, to the work papers of Parent and its accountants related to the preparation of the Post-Closing Statement, and Parent shall make reasonably available its employees and accountants involved in the preparation of the Post-Closing Statement. On or before the expiration of the Review Period, the Stockholder Representative may deliver to Parent a written statement accepting or disputing the Post-Closing Statement. In the event that the Stockholder Representative shall dispute the Post-Closing Statement, such written statement shall include an itemization of the Stockholder Representative’s objections and the reasons therefor (such statement, a “Dispute Statement”). Any component of the
Closing Net Working Capital set forth in the Post-Closing Statement that is not disputed in a Dispute Statement shall be final and binding and not subject to appeal. If the Stockholder Representative does not deliver a Dispute Statement to Parent within the Review Period or delivers a statement accepting the Post-Closing Statement, the Post-Closing Statement and all amounts therein shall be final and binding and not subject to appeal.

(e) If the Stockholder Representative delivers a Dispute Statement during the Review Period, Parent and the Stockholder Representative may meet and attempt in good faith to resolve their differences with respect to the disputed items set forth in the Dispute Statement during the forty-five (45) calendar days immediately following Parent’s receipt of the Dispute Statement, or such longer period as Parent and the Stockholder Representative may mutually agree in writing (the “Resolution Period”). Any such disputed items that are resolved by Parent and the Stockholder Representative during the Resolution Period shall be final and binding and not subject to appeal. If Parent and the Stockholder Representative do not resolve all such disputed items by the end of the Resolution Period, either Parent or the Stockholder Representative may submit all items then remaining in dispute with respect to the Dispute Statement to PricewaterhouseCoopers, or if such accounting firm will not so act, a nationally recognized independent accounting firm upon which Parent and the Stockholder Representative shall reasonably agree (the “Accounting Firm”) for review and resolution (provided that the Accounting Firm shall not have provided services to either Parent or the Company previously unless otherwise agreed in writing by Parent and the Stockholder Representative). The Accounting Firm shall act as an expert and not an arbitrator. The Accounting Firm shall (i) make any calculations in accordance with the Applicable Accounting Principles, (ii) shall review and determine only those items remaining in dispute between Parent and the Stockholder Representative, and (iii) shall only be permitted or authorized to determine an amount with respect to any such disputed item that is either, or within the numerical range between, the amount of such disputed item as proposed by Parent in the Post-Closing Statement or the amount of such disputed item as proposed by the Stockholder Representative in the Post-Closing Statement. Each of Parent and the Stockholder Representative shall (A) enter into a customary engagement letter with the Accounting Firm at the time such dispute is submitted to the Accounting Firm and otherwise cooperate with the Accounting Firm and (B) have the opportunity to submit a written statement in support of their respective positions with respect to such disputed items, to provide supporting material to the Accounting Firm in defense of their respective positions with respect to such disputed items and to submit a written statement responding to the other party’s position regarding the disputed items. Neither Parent nor the Stockholder Representative shall engage in any communication of any kind, whether oral or written, with the Accounting Firm regarding the items included in the Dispute Statement except in the presence (in person or telephonically) of the other such party, or, in the case of written communications (including electronic mail), without such other party simultaneously receiving a copy of any such communications. The Accounting Firm’s sole function shall be to arbitrate each disputed item in accordance with the Applicable Accounting Principles and not to conduct its own investigation or analysis. The Accounting Firm shall allow Parent and the Stockholder Representative to present their respective positions regarding the disputed items and shall thereafter as promptly as possible provide the parties hereto a written determination of each disputed item, and such written determination shall be final and binding upon the parties hereto, and judgment may be entered on the award. The Accounting Firm may, at its discretion, conduct a conference concerning the disputed items, at which conference each party shall have the right to present additional documents, materials and other information and to have present its advisors, counsel and accountants. In connection with such process, there shall be no other hearings or any oral examinations, testimonies, depositions, discovery or other similar proceedings. The Accounting Firm shall address only the issues in dispute, shall make its decision solely on the basis of the evidence and position papers presented to it and in a manner consistent with the Applicable Accounting Principles. The Accounting Firm shall be instructed to deliver to Parent and the Stockholder Representative a written determination (such determination to include a worksheet setting forth all calculations used in arriving at such determination and to be based solely on information provided to the Accounting Firm by Parent and the Stockholder Representative) of the disputed
items within thirty (30) calendar days of receipt of the disputed items, which determination shall be final and binding and not subject to appeal, absent manifest error or fraud. All fees and expenses relating to the work, if any, to be performed by the Accounting Firm will be allocated between Parent, on the one hand, and the Stockholder Representative (on behalf of the Indemnifying Parties), on the other hand, in the same proportion as the differences between the aggregate amount of the disputed items so submitted to the Accounting Firm that is unsuccessfully disputed by each such party (as finally determined by the Accounting Firm) and the final total determined amount of such items so submitted.

(f) The “Final Closing Net Working Capital Amount” shall be the final, binding and nonappealable amount of Closing Net Working Capital pursuant to the terms of this Section 1.11. If the Estimated Net Working Capital Surplus, if any, is greater than the Final Net Working Capital Surplus, if any, or if the Final Net Working Capital Deficit, if any, is greater than the Estimated Net Working Capital Deficit, if any, then within five (5) Business Days after such final determination, Parent and the Stockholder Representative shall direct the Escrow Agent to deliver to Parent from the Escrow Fund an aggregate amount of cash equal to the amount of such excess (the “Post-Closing Net Working Capital Deficit Amount”). If the Estimated Net Working Capital Surplus, if any, is less than the Final Net Working Capital Surplus, if any, or if the Final Net Working Capital Deficit, if any, is less than the Estimated Net Working Capital Deficit, if any, then within five (5) Business Days after such final determination, Parent shall deliver to the Escrow Agent an aggregate amount of cash equal to the amount of such excess (the “Post-Closing Net Working Capital Surplus Amount”) for deposit into the Escrow Fund with such excess amount to be released in accordance with the terms of the Escrow Agreement.

1.12 Taking of Further Action. If at any time after the First Merger Effective Time, any further action is necessary or desirable to carry out the purposes of this Agreement and to vest the Second Merger Surviving Entity with full right, title and possession to all assets, property, rights, privileges, powers and franchises of the Company, or to vest Parent with full right, title and possession to all of the Company Capital Stock, then each of the Second Merger Surviving Entity, Parent and the officers and directors of each of the Second Merger Surviving Entity and Parent are fully authorized in the name of their respective corporations or otherwise to take, and will take, all such lawful and necessary action.

ARTICLE II
REPRESENTATIONS AND WARRANTIES
OF THE COMPANY

Subject to such exceptions as are disclosed in the specific section, subsection or sub-clause of the disclosure schedule delivered by the Company to Parent on the date hereof prior to the execution and delivery hereof (the “Disclosure Schedule”) that corresponds to the specific section, subsection or sub-clause of each representation and warranty set forth in this Article II (provided, however, that any information set forth in a section, subsection or sub-clause of the Disclosure Schedule shall be deemed to be disclosed for purposes of, and shall qualify, the corresponding section, subsection or sub-clause of this Agreement and any other section, subsection or sub-clause of this Agreement, where it is reasonably apparent on the face of such disclosure that such information applies to such other section, subsection or sub-clause), the Company hereby represents and warrants to Parent and the Merger Subs as follows:

2.1 Organization and Good Standing. The Company is a corporation duly incorporated, validly existing and in good standing under the laws of the State of Delaware. The Company has the requisite corporate power to own, lease and operate its assets and properties and to carry on its business as currently conducted. The Company is duly qualified or licensed to do business and in good standing as a foreign corporation in each jurisdiction in which the character or location of its assets or properties (whether owned, leased or licensed) or the nature of its business make such qualification or license necessary to the Company’s business as currently conducted, except where the failure to be so qualified or licensed would

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not reasonably be expected to be material to the Company, taken as a whole. The Company has Made Available true, correct and complete copies of its certificate of incorporation, as amended to date, and bylaws, as amended to date, each in full force and effect on the date hereof (collectively, the “Charter Documents”). When made, all the payments made in accordance with Section 1.6(b) and as reflected in the Payment Spreadsheet shall comply with the Charter Documents. Since the date the Charter Documents were Made Available, the Company Board has not approved or proposed any amendment to any of the Charter Documents. Section 2.1 of the Disclosure Schedule lists the directors and board appointed officers of the Company.

2.2 Authority and Enforceability.

(a) The Company has all requisite corporate power and authority to enter into this Agreement and any Related Agreements to which it is a party and, subject to receipt of the Requisite Stockholder Approval, to consummate the Transactions. The execution and delivery of this Agreement and any Related Agreements to which the Company is a party and the consummation of the Transactions have been duly authorized by all necessary corporate action on the part of the Company (including the unanimous approval of the Company Board) and no further corporate or other action is required on the part of the Company to authorize this Agreement and any Related Agreements to which the Company is a party or to consummate the Transactions, other than the adoption of this Agreement and approval of the Transactions by the Stockholders of the Company who hold (i) a majority of the outstanding shares of Company Common Stock and Company Preferred Stock, voting together as a single class on an as-converted to Company Common Stock basis, and (ii) a majority of the outstanding shares of Company Preferred Stock, voting together as a single class on an as-converted to Company Common Stock basis (the foregoing clauses (i) and (ii) collectively, the “Requisite Stockholder Approval”). The Requisite Stockholder Approval is the only vote of the Stockholders required under applicable Legal Requirements, the Charter Documents and all Contracts to which the Company is a party to legally adopt this Agreement and approve the Transactions.

(b) The Company Board has unanimously determined that this Agreement and the Transactions are advisable, fair to, and in the best interests of, the Company and its Stockholders, approved this Agreement and the Transactions, and recommended to the Stockholders to vote in favor of adoption of this Agreement and approval of the Transactions. The Company Board has taken all necessary actions so that any restrictions on business combinations set forth in Section 203 of Delaware Law are not applicable to this Agreement and the Transactions and no “control share acquisition,” “fair price,” “moratorium” or other antitakeover Legal Requirement (such Legal Requirement, including Section 203 of Delaware Law, “Takeover Law”) applies to this Agreement or the Transactions.

(c) This Agreement and each of the Related Agreements to which the Company is a party have been duly executed and delivered by the Company and assuming the due authorization, execution and delivery by the other parties hereto and thereto, constitute the valid and binding obligations of the Company enforceable against it in accordance with their respective terms, subject to (x) Legal Requirements of general application relating to bankruptcy, insolvency, moratorium, the relief of debtors and enforcement of creditors’ rights in general, and (y) rules of law governing specific performance, injunctive relief, other equitable remedies and other general principles of equity (clauses (x) and (y) collectively, the “Enforceability Limitations”).

(d) The Company and the Company Board have taken all actions necessary to effect the transactions anticipated by Section 1.6(b)(iv) under the Plan, all Company Options, and any other plan or arrangement of the Company (whether written or oral, formal or informal) governing the terms of any Company Options, including (i) the determination by the administrators of the Plan that the treatment of Company Options contemplated by Section 1.6(b)(iv) is permissible under the terms of the Plan and the applicable equity award agreements, and (ii) the delivery of all required notices and the procurement of all necessary approvals and consents from third parties necessary to effectuate the foregoing.

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The Company has complied with the provisions of, and no breach, violation or default exists under, any Contract to which the Company is a party that provides for any notice or negotiation rights with respect to an acquisition of the Company.

2.3 Governmental Approvals and Consents. No consent, notice, waiver, approval, Order or authorization of, or registration, declaration or filing with any Governmental Entity, is required by, or with respect to, the Company in connection with the execution and delivery of this Agreement and any Related Agreement to which the Company is a party or the consummation of the Transactions, except for (a) such consents, notices, waivers, approvals, orders, authorizations, registrations, declarations and filings as may be required under applicable securities laws and state “blue sky” laws, and (b) the filing of the First Merger Certificate of Merger and the Second Merger Certificate of Merger with the Secretary of State of the State of Delaware.

2.4 No Conflicts. The execution and delivery by the Company of this Agreement and any Related Agreement to which the Company is a party, and the consummation of the Transactions, will not conflict with or result in any violation of or default under (with or without notice or lapse of time, or both) or give rise to a right of termination, cancellation, modification or acceleration of any material obligation or loss of any material benefit under, or result in the imposition of any Lien (other than a Permitted Lien) upon any material assets of the Company or any of the equity securities of the Company under, (any such event, a “Conflict”) (a) any provision of the Charter Documents, (b) any Material Contract to which the Company is a party or by which any of its properties or assets (whether tangible or intangible) are bound, or (c) any Legal Requirement or Order applicable to the Company.

2.5 Company Capital Structure.

(a) As of the date hereof, the authorized capital stock of the Company consists of (i) 37,000,000 shares of Company Common Stock, $0.001 par value per share (the “Company Common Stock”) and (ii) 19,959,218 shares of Company Preferred Stock, $0.001 par value per share, of which (A) 4,347,825 shares have been designated as Series Seed Preferred Stock (the “Series Seed Preferred Stock”), (B) 6,123,727 shares have been designated as Series A Preferred Stock (the “Series A Preferred Stock”), and (C) 9,487,666 shares have been designated as Series B Preferred Stock (the “Series B Preferred Stock”). As of the date hereof, 8,338,237 shares of Company Common Stock are issued and outstanding, 4,347,825 shares of Series Seed Preferred Stock are issued and outstanding, 6,123,727 shares of Series A Preferred Stock are issued and outstanding; and 9,487,666 shares of Series B Preferred Stock are issued and outstanding. Each share of Company Preferred Stock is convertible on a one-share-for-one-share basis into Company Common Stock. As of the date hereof, the Company Capital Stock is held by the Persons and in the amounts set forth in Section 2.5(a) of the Disclosure Schedule which further sets forth for each such Person the number of shares held of each series of Company Capital Stock, class and/or series of such shares and the number of the applicable stock certificate representing such shares. All outstanding shares of Company Capital Stock are duly authorized, validly issued, fully paid and non-assessable and are not subject to preemptive rights created by statute, the Charter Documents, or any agreement to which the Company is a party or by which it is bound.

(b) All outstanding shares of Company Capital Stock (including Company Restricted Stock) and Company Options have been issued or repurchased (in the case of shares that were outstanding and repurchased by the Company or any Stockholder) in compliance with all applicable Legal Requirements, and were issued, transferred and repurchased (in the case of shares that were outstanding and repurchased by the Company or any Stockholder) in accordance with any right of first refusal or similar
right or limitation Known to the Company. No Stockholder has exercised any right of redemption, if any, provided in the Charter Documents with respect to shares of the Company Preferred Stock, and the Company has not received notice that any Stockholder intends to exercise such rights. The Company does not have any liability (contingent or otherwise) or claim, loss, liability, damage, deficiency, cost or expense relating to or arising out of the issuance or repurchase of any Company Capital Stock, or out of any agreements or arrangement relating thereto (including any amendment of the terms of any such agreement or arrangement). There are no declared or accrued but unpaid dividends with respect to any shares of Company Capital Stock. Other than the Company Capital Stock set forth in Section 2.5(a) of the Disclosure Schedule, the Company has no other capital stock authorized, issued or outstanding.

(c) Section 2.5(c) of the Disclosure Schedule sets forth for all holders of Company Restricted Stock as of the date hereof, the name of the holder of such Company Restricted Stock, the date of grant and/or purchase of such Company Restricted Stock, as applicable, the purchase price of such Company Restricted Stock, if any, the repurchase price of such Company Restricted Stock, if any, whether such Company Restricted Stock was acquired pursuant the exercise of an incentive stock option (as defined in Section 422 of the Code) and the vesting schedule for such Company Restricted Stock, the extent vested to date and whether the vesting of such Company Restricted Stock is subject to acceleration as a result of the Transactions or any other events and whether the holder has made a timely election with the IRS under Section 83(b) of the Code with respect to such Company Restricted Stock.

(d) All holders of Company Restricted Stock are current employees or directors of the Company. Each holder of Company Restricted Stock has made a timely election with the IRS under Section 83(b) of the Code with respect to such Company Restricted Stock.

(e) Except for the Plan, the Company has never adopted, sponsored or maintained any stock option plan or any other plan or agreement providing for equity or equity-related compensation to any Person (whether payable in shares, cash or otherwise). The Company has reserved 5,609,286 shares of Company Common Stock for issuance to employees and directors of, and consultants to, the Company upon the issuance of stock or the exercise of options or the granting or purchase of restricted stock or the granting of restricted stock units granted under the Plan, of which (i) 4,341,129 shares are issuable, as of the date hereof, upon the exercise of outstanding, unexercised options granted under the Plan, (ii) 734,071 shares have been issued upon the exercise of options granted under the Plan and remain outstanding as of the date hereof, (iii) no shares have been issued as restricted stock awards under the Plan and remain outstanding as of the date hereof, and (iv) 534,086 shares remain available for future grant. Each Company Option was originally granted with an exercise price that the Company Board in good faith, based on a reasonable valuation method utilized at the time of grant, determined to be at least equal to the fair market value of a share of Company Common Stock on the date of grant. The terms of the Plan and the applicable agreements for each Company Option and/or Company Restricted Stock award permit the assumption of options to purchase Parent Common Stock, and the cashout and/or termination of Company Options or Company Restricted Stock, as applicable, as provided in this Agreement, without the consent or approval of the holders of such securities, the Stockholders or otherwise and without any acceleration of the exercise schedules or vesting provisions in effect for such Company Options or Company Restricted Stock, as applicable. True and complete copies of all agreements and instruments relating to or issued under the Plan have been Made Available and such agreements and instruments have not been amended, modified or supplemented, and there are no agreements to amend, modify or supplement such agreements or instruments from the forms thereof Made Available. No holder of Company Options has the ability to early exercise any Company Options for shares of Company Restricted Stock under the Plan or any other Contract relating to such Company Options. All Company Optionholders are current or former employees, consultants, advisors or non-employee directors of the Company.

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(f) **Section 2.5(f)** of the Disclosure Schedule sets forth for each outstanding Company Option and Company Warrant, the name of the holder, the type of entity of such holder, and the country and state of residence of record of such holder, whether such holder is an Employee, the number of shares of Company Capital Stock issuable upon the exercise of such option or warrant (as applicable), the date of grant, the exercise price (if any), the vesting schedule, including the extent vested to date and whether such vesting is subject to acceleration as a result of the Transactions or any other events, whether such option is a nonstatutory option or intended to qualify as an incentive stock option as defined in Section 422 of the Code and whether (and to what extent) such Company Option is or has ever been subject to Section 409A (whether or not subsequently amended to comply with or be exempt from the requirements of Section 409A and any action taken to amend such Company Option to comply with or be exempt from the requirements of Section 409A).

(g) No bonds, debentures, notes or other indebtedness of the Company (i) having the right to vote on any matters on which stockholders may vote (or which is convertible into, or exchangeable for, securities having such right) or (ii) the value of which is in any way based upon or derived from capital or voting stock of the Company, are issued or outstanding as of the date hereof.

(h) Except for the Company Options or Company Warrants, there are no options, warrants, calls, rights, convertible securities, commitments or agreements of any character, written or oral, to which the Company is or has ever been a party or by which the Company is or has ever been bound obligating the Company to issue, deliver, sell, repurchase or redeem, or cause to be issued, delivered, sold, repurchased or redeemed, any shares of the capital stock of the Company or obligating the Company to grant, extend, accelerate the vesting of, change the price of, otherwise amend or enter into any such option, warrant, call, right, commitment or agreement. None of the Company, the Company Board, any committee thereof or the administrator of the Plan has resolved to accelerate or accelerated the vesting of any Company Restricted Stock or Company Options in contemplation of the Transactions. There are no outstanding or authorized stock appreciation, phantom stock, profit participation, or other similar rights with respect to the Company (whether payable in shares, cash or otherwise). Except as contemplated hereby, there are no voting trusts, proxies, or other agreements or understandings with respect to the voting stock of the Company, and there are no agreements to which the Company is a party relating to the registration, sale or transfer (including agreements relating to rights of first refusal, co-sale rights or “drag-along” rights) of any Company Capital Stock. As a result of, and immediately following, the First Merger, Parent will be the sole record and beneficial holder of all issued and outstanding Company Capital Stock and all rights to acquire or receive any shares of Company Capital Stock, whether or not such shares of Company Capital Stock are outstanding.

(i) **Section 2.5(i)** of the Disclosure Schedule sets forth the outstanding principal, accrued interest and applicable rate of interest of all outstanding Indebtedness from the Company (as lender) to Stockholders (as borrowers).

(j) **Section 2.5(j)** of the Disclosure Schedule sets forth a complete and correct list of all outstanding PPP Loans for the Company and the outstanding balance thereof as of the date of this Agreement.

(k) All Company Warrants will be cancelled at the Closing pursuant to the Termination Agreement and there will not be any Company Warrants outstanding as of immediately prior to the First Merger Effective Time.

2.6 **Company Subsidiaries.**

(a) The Company does not have, and has never had, any Subsidiaries.
Section 2.6(b) of the Disclosure Schedule lists each corporation, limited liability company, partnership, association, joint venture or other business entity in which the Company owns any shares or any interest. The Company has not agreed and it is not obligated to make any future investment in or capital contribution to any Person. The operations now being conducted by the Company are not now and have never been conducted by the Company under any name other than the name of the Company.

2.7 Company Financial Statements; Internal Financial Controls.

(a) Section 2.7(a) of the Disclosure Schedule sets forth the Company’s (i) unaudited consolidated balance sheets as of December 31, 2018 and December 31, 2019, and the related consolidated statements of income, cash flow and stockholders’ equity for the respective twelve (12) month periods then ended (the “Year-End Financials”), and (ii) unaudited consolidated balance sheet as of October 31, 2020 (the “Balance Sheet Date”), and the related unaudited consolidated statements of income, cash flow and stockholders’ equity for the ten (10) months then ended (the “Interim Financials”). The Year-End Financials and the Interim Financials (collectively referred to as the “Financials”) have been prepared in accordance with GAAP consistently applied on a consistent basis throughout the periods indicated and consistent with each other (except that the Interim Financials do not contain footnotes, and may not include adjustments relating to stock compensation, current versus long term balance sheet reclasses and other presentation items that may be required by GAAP). The Financials present fairly, in all material respects, the Company’s consolidated financial condition, operating results and cash flows as of the dates and during the periods indicated therein, subject in the case of the Interim Financials to normal year-end adjustments, which are not material in amount or significance in any individual case or in the aggregate. The Company’s unaudited consolidated balance sheet as of the Balance Sheet Date is referred to hereinafter as the “Current Balance Sheet.” The Books and Records of the Company have been, and are being, maintained, in all material respects, in accordance with applicable legal and accounting requirements and the Financials are consistent in all material respects with such Books and Records.

(b) The Company has Made Available an aging schedule with respect to the billed accounts receivable of the Company as of the Balance Sheet Date indicating a range of days elapsed since invoice. All of the accounts receivable, whether billed or unbilled, of the Company arose in the ordinary course of business, are carried at values determined in accordance with GAAP consistently applied, are not subject to any valid set-off or counterclaim, do not represent obligations for goods sold on consignment, on approval or on a sale-or-return basis and are not subject to any other repurchase or return arrangement. No Person has any Lien on any accounts receivable of the Company and no request or agreement for deduction or discount has been made with respect to any accounts receivable of the Company.

(c) The Company adheres to a system of internal accounting controls which are effective in providing reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements (including the Financials), in accordance with GAAP, including procedures that (i) require the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the Company, (ii) provide assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP, and that receipts and expenditures of the Company are being made only in accordance with appropriate authorizations of management and the Company Board and (iii) provide assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the assets of the Company. The Company has not identified or been made aware of (i) any significant deficiency or material weakness in the system of internal accounting controls utilized by the Company, (ii) any fraud that involves the Company’s management or other Employees who have a role in the preparation of financial statements or the internal accounting controls utilized by the Company or (iii) any claim or allegation regarding any of the foregoing.
(d) The Company is not a party to, and does not have any commitment to become a party to, any joint venture, partnership agreement or any similar Contract (including any Contract relating to any transaction, arrangement or relationship between or among the Company, on the one hand, and any unconsolidated affiliate, including any structured finance, special purpose or limited purpose entity or Person, on the other hand (such as any arrangement described in Section 303(a)(4) of Regulation S-K of the SEC)) where the purpose or effect of such arrangement is to avoid disclosure of any material transaction involving the Company in the Company’s consolidated financial statements.

(e) Neither the Company, nor, to the Company’s Knowledge, any director, officer, Employee, auditor, accountant consultant or representative of the Company, has received any written complaint, allegation, assertion or claim that the Company has engaged in any accounting practices in violation of Legal Requirements, nor does the Company have any Knowledge as of the date hereof of any such practices. No attorney representing the Company has provided to the Company written notice or evidence of a material violation of securities laws, breach of fiduciary duty or similar violation by the Company or any of its officers, directors, employees or agents to the Company Board or any committee thereof or to any director or executive officer of the Company.

(f) Section 2.7(f) of the Disclosure Schedule sets forth the consolidated balance sheet of the Company as of October 31, 2020 (the “Pre-Closing Date Balance Sheet”) prepared on a basis consistent with the Financials in a form consistent with the Interim Financials and that fairly presents an estimate by the Company in good faith based on reasonable assumptions of the consolidated balance sheet of the Company as of October 31, 2020; provided, that the Pre-Closing Date Balance Sheet shall not include any purchase accounting or other adjustments arising out of the consummation of the Transactions.

2.8 No Undisclosed Liabilities. The Company does not have any liability, whether accrued, absolute, contingent, matured, unmatured or other (whether or not required to be reflected in financial statements prepared in accordance with GAAP), except for those liabilities (a) which have been reflected in the Current Balance Sheet, (b) incurred pursuant to this Agreement, (c) relating to the performance of the Material Contracts identified in Section 2.15 of the Disclosure Schedule (none of which is a liability relating to breach of contract) or (d) which have arisen in the ordinary course of business consistent with past practices since the Balance Sheet Date and do not exceed $100,000 in the aggregate.

2.9 No Changes. Since the Balance Sheet Date, except for actions expressly contemplated by this Agreement, the business of the Company has been conducted, in all material respects, in the ordinary course consistent with past practice, and (a) no Company Material Adverse Effect has occurred, and (b) the Company has not taken any action that would require the consent of Parent under Section 4.2 if proposed to be taken after the date hereof.

2.10 Tax Matters.

(a) Tax Returns and Payments. Each return (including any information return), report, statement, declaration, estimate, schedule, notice, notification, form, election, certificate or other document or information filed with or submitted to, or required to be filed with or submitted to, any Governmental Entity in connection with the determination, assessment, collection or payment of any Tax or in connection with the administration, implementation or enforcement of or compliance with any Legal Requirement relating to any Tax, including any amendment thereof or attachment thereto (each, a “Tax Return”) required to be filed by the Company with any Governmental Entity with respect to any taxable period ending on or before the Closing Date or any taxable event occurring prior to or on the Closing Date (the “Company Returns”): (i) has been or will be filed on or before the applicable due date (including any extensions of such due date); and (ii) has been, or will be when filed, accurately and completely prepared in all material respects in compliance with all applicable Legal Requirements. All Taxes required to be
(b) **Reserves for Payment of Taxes.** The Financials fully accrue all actual and contingent liabilities for Taxes with respect to all periods through the dates thereof in accordance with GAAP. The Company will establish, in the ordinary course of business and consistent with its past practices, reserves adequate for the payment of all Taxes for the period from the date of the Balance Sheet Date through the Closing Date, and the Company will disclose the dollar amount of such reserves to Parent on or prior to the Closing Date. The Company has not incurred any liability for Taxes since the Balance Sheet Date outside of the ordinary course of business. All payments of estimated Taxes have been made in the ordinary course of business consistent with past practice.

(c) **Audits; Claims.** No Company Return has ever been examined or audited by any Governmental Entity. The Company has not received from any Governmental Entity any: (i) written notice indicating an intent to open an audit or other review; (ii) written request for information related to Tax matters; or (iii) notice of deficiency or proposed Tax adjustment. No extension or waiver of the limitation period applicable to any Company Returns has been granted by or requested from the Company. No claim or legal proceeding is pending or, to the Knowledge of the Company, threatened against the Company in respect of any Tax. There are no Liens for Taxes upon any of the assets of the Company except Liens for current Taxes not yet delinquent or which are being contested in good faith by appropriate proceedings (and for which there are adequate accruals, in accordance with GAAP).

(d) **Legal Proceedings; Etc.** There are no unsatisfied liabilities for Taxes with respect to any notice of deficiency or similar document received by the Company with respect to any Tax (other than liabilities for Taxes asserted under any such notice of deficiency or similar document which are being contested in good faith by the Company and with respect to which adequate reserves for payment have been established).

(e) **Distributed Stock.** The Company has not distributed stock of another Person, and the Company has not had its stock distributed by another Person, in a transaction that was purported or intended to be governed in whole or in part by Section 355 or Section 361 of the Code.

(f) **Adjustment in Taxable Income.** The Company is not currently, and has not been, for any period for which a Company Return has not been filed will be, required to include any adjustment in taxable income for any taxable period (or portion thereof) beginning after the Closing Date pursuant to Section 481 or 263A of the Code (or any comparable provision under state, local or non-U.S. Tax Legal Requirements) as a result of transactions, events or accounting methods employed prior to the Closing Date.

(g) **280G; Tax Indemnity Agreements; Etc.** There is (i) no agreement, plan, arrangement or other Contract covering any Employee that, considered individually or considered collectively with any other such Contracts, will, or would reasonably be expected to, give rise directly or indirectly to the payment of any amount that would not be deductible pursuant to Section 280G or Section 404 of the Code or that would be characterized as a “parachute payment” within the meaning of Section 280G(b)(1) of the Code or (ii) agreement, plan, arrangement or other Contract by which the Company is bound to compensate any Employee for excise taxes paid pursuant to Section 4999 of the Code. The Company is not currently, and it has never been, a party to or bound by any tax indemnity agreement, tax sharing agreement, tax allocation agreement or similar Contract (other than a Contract, such as a lease, the primary purpose of which does not relate to Taxes). Section 2.10(g) of the Disclosure Schedule lists all persons who are “disqualified individuals” (within the meaning of Section 280G of the Code and the
regulations promulgated thereunder) as determined as of the date hereof. The Company does not have any liability for Taxes of any Person under Section 1.1502-6 of the Treasury Regulations (or any similar provision of state, local or non-U.S. law) as a transferee or successor, by Contract (other than a Contract, such as a lease, the primary purpose of which is not related to Taxes), by operation of law or otherwise.

(h) **No Other Jurisdictions for Filing Tax Returns.** There are no jurisdictions in which the Company is required to file a Tax Return other than the jurisdictions in which the Company has filed Tax Returns. The Company is not subject to net income Tax in any country other than its country of incorporation or formation by virtue of having a permanent establishment or other fixed place of business in that country. No written claim has ever been received by the Company from a Governmental Entity in a jurisdiction where the Company does not file Tax Returns that the Company is or may be subject to Tax by that jurisdiction.

(i) **Transfer Pricing.** The Company is in compliance in all material respects with all applicable transfer pricing Legal Requirements, including the execution and maintenance of contemporaneous documentation substantiating the transfer pricing practice and methodology. The prices for any property or service (or for the use of any property), including interest and other prices for financial services, provided by or to the Company are arm’s length prices for purposes of the relevant transfer pricing Legal Requirements, including Treasury Regulations promulgated under Section 482 of the Code.

(j) **Tax Shelters; Listed Transactions; Etc.** The Company has not consummated or participated in, nor is the Company currently participating in, any transaction which was or is a “tax shelter” as defined in Section 6662 of the Code or the Treasury Regulations promulgated thereunder. The Company has not ever participated in, nor is currently participating in, a “Listed Transaction” or a “Reportable Transaction” within the meaning of Section 6707A(c) of the Code or Treasury Regulation Section 1.6011-4(b), or any transaction requiring disclosure under a corresponding or similar provision of state, local, or non-U.S. Legal Requirement. The Company has disclosed on its Tax Returns any Tax reporting position taken in any Tax Return which could result in the imposition of penalties under Section 6662 of the Code (or any comparable provisions of state, local or non-U.S. Legal Requirement).

(k) **Section 83(b).** No Person holds shares of Company Common Stock that are subject to a substantial risk of forfeiture within the meaning of Section 83 of the Code with respect to which a valid election under Section 83(b) of the Code has not been made.

(l) **Withholding.** The Company (i) has complied with all applicable Legal Requirements relating to the payment, reporting and withholding of Taxes (including withholding of Taxes pursuant to Sections 1441, 1442, 1445 and 1446 of the Code or similar provisions under any non-U.S. Legal Requirement), (ii) has, within the time and in the manner prescribed by applicable Legal Requirements, withheld from employee wages or consulting compensation or other payments to third parties and timely paid over to the proper Governmental Entities (or is properly holding for such timely payment) all amounts required to be so withheld and paid over under all applicable Legal Requirements, including U.S. federal and state income and employment Taxes, Federal Insurance Contribution Act, Medicare, Federal Unemployment Tax Act, and relevant non-U.S. income and employment Tax withholding Legal Requirements, and (iii) has timely filed all withholding Tax Returns, for all periods.

(m) **Change in Accounting Methods; Closing Agreements; Etc.** The Company will not be required to include any item of income in, or exclude any item of deduction from, taxable income for any taxable period (or portion thereof) beginning after the First Merger Effective Time as a result of: (i) any change in method of accounting made prior to the First Merger Effective Time; (ii) any closing agreement as described in Section 7121 of the Code (or any corresponding or similar provision of state, local, or non-U.S. Tax Legal Requirement) executed prior to the First Merger Effective Time; (iii) any
intercompany transactions entered into prior to the First Merger Effective Time or excess loss accounts (to the extent existing immediately prior to the First Merger Effective Time) described in Treasury Regulations under Section 1502 of the Code (or any corresponding or similar provision of state, local, or non-U.S. Tax Legal Requirement); (iv) any installment sale or open transaction disposition made on or prior to the First Merger Effective Time; (v) any prepaid amount received prior to the First Merger Effective Time; (vi) the forgiveness of a PPP Loan incurred on or prior to the Closing Date; or (vii) the application of Section 965(a) of the Code (or any corresponding or similar provision of state, local, or non-U.S. Tax Legal Requirement). The Company has not made any election under 965(h) of the Code (or any corresponding or similar provision of state, local or non-U.S. Tax Legal Requirement).

(n) **Consolidated Groups.** The Company has never been a member of an affiliated, combined, consolidated or unitary group (including within the meaning of Section 1504(a) of the Code) filing a consolidated federal income Tax Return (other than a group the common parent of which was the Company).

(o) **Section 1503.** The Company has not incurred a dual consolidated loss within the meaning of Section 1503 of the Code (or any similar provision of U.S., state, local, or non-U.S. Tax Legal Requirement).

(p) **Section 897.** The Company: (i) is not and has never been a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code during the applicable period specified in Section 897(c)(1)(A)(ii) of the Code; or (ii) has made the election provided under section 897(i) of the Code.

(q) **Payroll Taxes.** The Company has (i) paid all payroll or employment Taxes and made all required deposits of such Taxes when due, determined without regard to any provisions of the 2020 Tax Acts, and (ii) not applied for or received any credits of any payroll or employment Taxes described in the 2020 Tax Acts.

(r) **Section 409A.**

(i) **Section 2.10(r)(i) of the Disclosure Schedule lists each Company Employee Plan and Contract between the Company or any ERISA Affiliate and any Employee, in each case, that is a “nonqualified deferred compensation plan” (as such term is defined in Section 409A(d)(1) of the Code) subject to Section 409A of the Code (or any state law equivalent) and the regulations and guidance thereunder (“Section 409A”). Each such nonqualified deferred compensation plan, if any, has been at all times since January 1, 2005 in operational compliance with Section 409A and at all times since January 1, 2009 in documentary compliance with Section 409A. No nonqualified deferred compensation plan that was originally exempt from application of Section 409A has been “materially modified” (within the meaning of IRS Notice 2005-2) at any time after October 3, 2004. No compensation shall be includable in the gross income of any Employee as a result of the operation of Section 409A with respect to any Company Employee Plan or other arrangements or agreements which is or has been in effect at any time prior to the First Merger Effective Time. To the extent required, the Company has properly reported and/or withheld and remitted on amounts deferred under any Company nonqualified deferred compensation plan subject to Section 409A. There is no Contract to which the Company or any of its ERISA Affiliates is a party, including the provisions of this Agreement, covering any Employee, which individually or collectively could require the Company or any of its Affiliates to pay a Tax gross up payment to, or otherwise indemnify or reimburse, any Employee for Tax-related payments under Section 409A. There is no Contract to which the Company is a party, including the provisions of this Agreement, which, individually or collectively, could give rise to a Parent, Company, Second Merger Surviving Entity, or Subsidiary Tax under Section 409A or that would give rise to an Employee Tax and/or Parent, Company, or Second Merger Surviving Entity reporting obligations under Section 409A.

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(ii) No Company Option or other stock right (as defined in U.S. Treasury Department regulation 1.409A-1(l)) (w) has an exercise price that was less than the fair market value of the underlying equity as of the date such option or right was granted (as determined in accordance with Section 409A of the Code or, in the case of incentive stock options, in accordance with Section 422 of the Code), (x) has any feature for the deferral of compensation other than the deferral of recognition of income until the later of exercise or disposition of such option or rights, (y) has been granted after December 31, 2004, with respect to any class of stock of the Company that is not “service recipient stock” (within the meaning of applicable regulations under Section 409A), or (z) has ever been accounted for other than fully in accordance with GAAP in the Company’s financial statements provided to Parent.

(s) **Statutory Merger.**

(i) **Ownership Continuity.** To the Company’s Knowledge, there is no plan or intention by the Stockholders to sell, exchange, or otherwise dispose of a number of shares of Parent Common Stock received in the Transactions that would reduce the Stockholders’ ownership of Parent Common Stock to a number of shares having a value of less than forty percent (40%) of the value of all of the formerly outstanding Company Capital Stock. For purposes of this representation, shares of Company Capital Stock exchanged for cash or other property, surrendered by dissenters, or exchanged for cash in lieu of fractional shares of Parent Common Stock will be treated as outstanding Company Capital Stock.

(ii) **Company Liabilities.** The liabilities of Company assumed by Parent and the liabilities to which the transferred assets of Company are subject were incurred by Company in the ordinary course of its business.

(iii) **Transaction Expenses.** Except as specifically provided otherwise herein, Company and the Stockholders will pay their respective expenses, if any, incurred in connection with the First Merger.

(iv) **No Intercorporate Indebtedness.** There is no intercorporate indebtedness existing between Company and Parent that was issued, acquired, or will be settled at a discount.

(v) **No Investment Companies.** Company is not an investment company as defined in Section 368(a)(2)(F)(iii) and (iv) of the Code.

(vi) **No Bankruptcy.** Company is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of Section 368(a)(3)(A) of the Code.

(t) **Relative Values of Assets and Liabilities.** The fair market value of the Company assets transferred to Parent will equal or exceed the sum of the liabilities assumed by Parent plus the amount of liabilities, if any, to which the transferred assets are subject.

(u) **Other.** Other than the representations and warranties contained in Section 2.10(f) and 2.10(m), no representation or warranty contained in this Section 2.10 shall be deemed to apply directly or indirectly with respect to any taxable period (or portion thereof) beginning after the Closing Date. Notwithstanding anything to the contrary in this Section 2.10, the Company makes no representation as to the amount of, or limitations on, any net operating losses, Tax credit carry-forwards or other Tax attributes that the Company may have following the Closing.
2.11 Real Property. The Company does not own any real property, and the Company has never owned any real property. Section 2.11 of the Disclosure Schedule sets forth a list of all real property currently leased, subleased or licensed by or from the Company or otherwise occupied by the Company (collectively, the “Leased Real Property”). Section 2.11 of the Disclosure Schedule sets forth a list of all leases, lease guarantees, subleases, agreements for the leasing, use or occupancy of, or otherwise granting a right in or relating to the Leased Real Property, including the name of the lessor, licensor, sub-lessee, master lessee and/or lessee, the amount of any deposit or other security or guarantee granted in connection with any such lease, license, sublease or other occupancy right, and all amendments, terminations and modifications thereof (collectively, the “Lease Agreements”). The Company currently occupies all of the Leased Real Property for the operation of its business. There are no other parties occupying, or with a right to occupy, the Leased Real Property. The Company does not owe brokerage commissions or finders’ fees with respect to any such Leased Real Property or would owe any such fees if any existing Lease Agreement were renewed pursuant to any renewal options contained in such Lease Agreements. The Company has performed all of its obligations under any termination agreements pursuant to which it has terminated any leases, subleases, licenses or other occupancy agreements for real property that are no longer in effect and has no continuing liability with respect to such terminated agreements. To the Knowledge of the Company, the Leased Real Property is in good operating condition and repair, free from any material structural, physical and mechanical defects, is maintained in a manner consistent with standards generally followed with respect to similar properties, and is structurally sufficient and otherwise suitable for the conduct of the Company’s business as currently conducted. The operation of the Company on the Leased Real Property does not, and to the Company’s Knowledge, such Leased Real Property, including the improvements thereon, do not, violate in any material respect any applicable building code, zoning requirement or statute relating to such Leased Real Property or operations thereon, and any such non-violation is not dependent on so-called non-conforming use exceptions.

2.12 Tangible Property. The Company has good and valid title to, or, in the case of leased properties and assets, valid leasehold interests in, all of its material tangible properties and assets, real, personal and mixed, used or held for use in its business, free and clear of any Liens, except for Permitted Liens. The material items of equipment owned or leased by the Company (i) are adequate for the conduct of the business of the Company as currently conducted and (ii) in good operating condition, regularly and properly maintained, subject to normal wear and tear.

2.13 Intellectual Property.

(a) Disclosures. The Disclosure Schedule accurately identifies and describes: (i) in Section 2.13(a)(i) of the Disclosure Schedule, each Company Product; (ii) in Section 2.13(a)(ii) of the Disclosure Schedule, (A) each item of Registered IP in which the Company has or purports to have an ownership interest; (B) the jurisdiction in which such item of Registered IP has been registered or filed and the applicable application, registration or serial number and the date of such registration or filing; and (C) each other Person (other than the Company) who has any ownership interest in such item of Registered IP; (iii) in Section 2.13(a)(iii) of the Disclosure Schedule, (A) all Licensed IP Contracts pursuant to which the Company obtains rights (via license, sublicense, covenant not to assert or otherwise) in Licensed IP (other than software subject to Open Source Licenses and any non-customized software (collectively, “Excepted Software”) that: (1) is licensed solely in executable or object code form pursuant to a nonexclusive, internal use software license; (2) is not incorporated into, or used directly in the development, delivery, hosting, provision or distribution of, the Company Products; and (3) is generally available on standard terms for less than $25,000 per copy, seat or user, as applicable); and (B) whether the license or licenses so granted to the Company, as the case may be, are exclusive or nonexclusive; and (iv) in Section 2.13(a)(iv) of the Disclosure Schedule, each Company IP Contract, other than (A) non-disclosure agreements, (B) nonexclusive licenses with terms that do not materially differ from the terms of any Standard Form IP Contracts, and (C) rights granted to contractors or vendors to use Company IP for the sole benefit of the Company.
(b) **Standard Form IP Agreements.** The Company has Made Available a true, correct and complete copy of each Standard Form IP Contract.

(c) **Ownership Free and Clear.** The Company exclusively owns all right, title and interest to and in the Company IP free and clear of any Liens (other than Permitted Liens). Without limiting the generality of the foregoing:

(i) all documents and instruments necessary to perfect the rights of the Company in the Company IP that is Registered IP have been validly executed, delivered and filed with the applicable Governmental Entity;

(ii) each Employee has signed a valid and enforceable agreement sufficient to irrevocably assign to the Company all Intellectual Property Rights developed by such Employee for or in the performance of services for the Company and containing confidentiality provisions protecting the Company IP, with each such agreement substantially in the Company’s Standard Form IP Contract for employees (a copy of which is attached to Section 2.13(c)-A of the Disclosure Schedule) or substantially in the Company’s Standard Form IP Contract for consultants or independent contractors (a copy of which is attached to Section 2.13(c)-B of the Disclosure Schedule), as the case may be;

(iii) to the extent that any Technology or Intellectual Property Rights were acquired by the Company from, or developed for the Company by, any Person other than any Employee, the Company has a written agreement with such Person pursuant to which the Company obtained ownership of, and the Company is now the exclusive owner of, all such Technology and Intellectual Property Rights by operation of law, or by valid assignment;

(iv) no Employee or former employer of any Employee has any claim, right or interest to or in any Company IP;

(v) to the Knowledge of the Company, no Employee is in breach of any Contract with any former employer or other Person concerning Intellectual Property Rights or confidentiality;

(vi) (a) no funding, facilities or personnel of any Governmental Entity, university, college, other educational institution or research center were used to develop or create any Company IP, (b) no Governmental Entity, university, college, other educational institution or research center has any claim or right in or to any Company IP, and (c) the Company owns all Intellectual Property Rights in or to any work product developed by the Company for any Governmental Entity, university, college, other educational institution or research center;

(vii) no current or former Employee who was involved in, or who contributed to, the creation or development of any Company IP has performed services for any Governmental Entity, a university, college or other educational institution, or a research center, during a period of time during which such Employee was also performing services for the Company;

(viii) The Company has taken reasonable steps to maintain the confidentiality of all proprietary information held by such entity, or purported to be held by such entity, as a trade secret, including any confidential information or trade secrets provided to the Company under an obligation of confidentiality;
The Company has not assigned or otherwise transferred ownership, or agreed to assign or otherwise transfer ownership, to any Person of any Technology or Intellectual Property Right that is (or was at the time of assignment or transfer) material to any of the respective businesses of the Company, or permitted any rights of the Company with respect to such Technology or Intellectual Property Right to enter into the public domain;

the Company is not currently and it has never been a member or promoter of, or a contributor to, any industry standards body or similar organization that could require or obligate the Company to grant or offer to any other Person any license or right to any Company IP, or to the Knowledge of the Company, any Intellectual Property Rights exclusively licensed to the Company;

(a) no third party that has licensed Intellectual Property Rights that are included in or used for the provision of Company Products or provided any Intellectual Property Rights that is included in or used for the provision of Company Products, has retained ownership of or exclusive license to any Intellectual Property Rights in any improvements or derivative works made solely or jointly by the Company under such license; and (b) no third party that has licensed any Company IP from the Company has ownership rights in or to any improvements or derivative works thereof made by such third party;

the Company owns or otherwise has, and after the Closing will continue to have, all Intellectual Property Rights needed to conduct the business of such entity as currently conducted; and

following the Closing, all Company IP will be fully transferable, alienable, licensable and exportable (subject to applicable Legal Requirements) by one of the Surviving Entities without restriction and without payment of any kind to any third party.

Valid and Enforceable. All filings, payments and other actions required to be made or taken on or before the Closing Date to maintain each item of Company IP that is Registered IP in full force and effect have been or will be made by the applicable deadline. All such Registered IP is valid and subsisting and in compliance with all formal legal requirements promulgated by applicable Governmental Entities necessary to maintain such Registered IP as valid and subsisting. To the Knowledge of the Company, there is no basis for a claim that any Company IP is invalid or, except for pending applications, unenforceable. There are no actions that must be taken by Company within one hundred twenty (120) calendar days of the Closing Date, including the payment of any registration, maintenance or renewal fees or the filing of any documents, applications or certificates for the purposes of perfecting, maintaining or renewing any Registered IP.

Effects of the Transactions. Neither the execution, delivery or performance of this Agreement or any other agreements referred to in this Agreement nor the consummation of the Transactions or any such other agreement will, with or without notice or the lapse of time, result in or give any other Person the right or option to cause or declare: (i) a loss of, or Lien on, any Company IP or any Technology exclusively licensed to the Company; (ii) a breach of any Contract listed or required to be listed in Sections 2.13(a)(ii), 2.13(a)(iii) and 2.13(a)(iv) of the Disclosure Schedule; (iii) the release, disclosure or delivery of any Company IP or any Technology exclusively licensed to the Company by or to any escrow agent or other Person; (iv) the grant, assignment or transfer to any other Person of any license or other right or interest under, to or in any of the Company IP or any Intellectual Property Rights owned by, or licensed to, Parent, other than pursuant to Contracts to which Parent is a party; or (v) payment of any royalties or other license fees with respect to Intellectual Property Rights of any third party in excess of those payable by the Company in the absence of this Agreement or the Transactions.
(f) **No Third Party Infringement of Company IP.** To the Knowledge of the Company, no Person has infringed, misappropriated, or otherwise violated, or is currently infringing, misappropriating or otherwise violating, any Company IP or any Technology exclusively licensed to the Company. Section 2.13(f) of the Disclosure Schedule accurately identifies (and the Company has Made Available a true, correct and complete copy of) each letter or other written or electronic communication or correspondence that has been sent or otherwise delivered by, on behalf of, or to the Company or any of its Representatives regarding any actual, alleged or suspected infringement or misappropriation of any Company IP or any Technology exclusively licensed to the Company.

(g) **No Infringement of Third Party IP Rights.** The Company is not infringing, misappropriating or otherwise violating, and it has never infringed, misappropriated or otherwise violated, any Intellectual Property Right of any other Person or violated any right of any Person (including any right to privacy or publicity), or conducted the business of the Company in a manner that constitutes or constituted unfair competition or trade practices under any Legal Requirement. The conduct of the business of the Company when conducted in substantially the same manner after the date hereof by Parent, either of the Surviving Entities or their respective Subsidiaries, will not infringe, misappropriate or otherwise violate any Intellectual Property Right of any other Person (including patents issuing on patent applications filed as of the date hereof), violate any right of any Person (including any right to privacy or publicity), or constitute unfair competition or trade practices under any Legal Requirement. Without limiting the generality of the foregoing: (i) no infringement, misappropriation or similar claim or legal proceeding is pending or has been threatened in writing (or, to the Knowledge of the Company, orally) against the Company or, to the Knowledge of the Company, against any other Person who may be entitled to be indemnified, defended, held harmless or reimbursed by the Company with respect to such claim or legal proceeding; (ii) the Company has not received any written notice (or, to the Knowledge of the Company, oral) (A) relating to any actual, alleged or suspected infringement, misappropriation or violation of any Intellectual Property Right of another Person (B) inviting the Company to license the Intellectual Property Right of another Person or (C) claiming that the Company Product or the operation of the business constitutes unfair competition or trade practices under any Legal Requirements; (iii) the Company is not bound by any Contract to indemnify, defend, hold harmless or reimburse any other Person with respect to any infringement, misappropriation or violation of any Intellectual Property Right (other than pursuant to Contracts in the form of the Standard Form IP Contract); and (iv) to the Knowledge of the Company, no claim or legal proceeding involving any Licensed IP is pending or has been threatened in writing (or, to the Knowledge of the Company, orally), except for any such claim or legal proceeding that, if adversely determined, would not adversely affect (A) the use or exploitation of such Licensed IP by the Company or (B) the distribution, hosting, provision, delivery or sale of any Company Product.

(h) **No Harmful Code.** To the Knowledge of the Company, none of the Company Software contains any “back door,” “drop dead device,” “time bomb,” “Trojan horse,” “virus,” or “worm” (as such terms are commonly understood in the software industry) or any other code designed or intended to have any of the following functions: (i) disrupting, disabling, harming or otherwise impeding in any manner the operation of, or providing unauthorized access to, a computer system or network or other device on which such code is stored or installed; or (ii) damaging, destroying, taking, appropriating, or exfiltrating any data or file without the user’s consent (collectively, "Harmful Code").

(i) **No Spyware or Malware.** None of the Company Software is intended to perform the following functions, without the consent of the owner or authorized user of a computer system: (i) collect Personal Data stored on the computer system; (ii) interfere with the owner’s or an authorized user’s control of the computer system; (iii) change or interferes with settings, preferences or commands already installed or stored on the computer system without the knowledge of the owner or an authorized user of the computer system; (iv) change, take, appropriate, exfiltrate or interfere with data, that is stored, accessed or accessible on any computer system or obstruct, interrupt or interfere with lawful access to or use of data by the owner.
or an authorized user of the computer system; (v) cause the computer system to communicate with another computer system or other device without the authorization of the owner or an authorized user of the computer system; or (vi) install a computer program that may be activated by a third party without the knowledge and permission of the owner or an authorized user of the computer system (all of the foregoing, collectively, “Harmful Actions”). To the extent the Company or any Company Software has performed any Harmful Actions or delivered any Testing Content at any time, such performance was expressly within the specific consent provided by the owner or authorized user of the applicable computer system and complied with all applicable Legal Requirements.

(j) Use of Open Source Code.

(i) Section 2.13(j) of the Disclosure Schedule accurately identifies and describes: (i) each item of software licensed or distributed under the GNU General Public License, the GNU Affero General Public License, the GNU Lesser General Public License, the Eclipse Public License, the Common Public License, the Mozilla Public License, or any other license identified as an open source license by the Open Source Initiative (www.opensource.org) (each, an “Open Source License” and, such software, collectively, “Open Source Software”) that has been or was used by, incorporated into, linked with, or distributed with, any Company Product; (ii) the applicable Open Source License for such item of Open Source Software; and (iii) the manner in which such item of Open Source Software was used by, incorporated into or linked with the Company Product (which description includes whether (and, if so, how) such item was modified and/or distributed by the Company and whether (and, if so, how) such item was incorporated into and/or linked with any Company Product). The Company has not distributed or made available to any third parties any Company Products, or offered Company Products to third parties interacting remotely through a computer network, in a manner that would require the Company to release any of its proprietary source code. With respect to Open Source Software that is incorporated into, linked with, or distributed with, or used in the development of, any Company Product, the Company has complied in all respects with the terms of each Open Source License, including all requirements pertaining to attribution and copyright notices.

(ii) The Company has not used, modified, or distributed any Open Source Software in a manner that: (i) requires the disclosure, licensing or distribution of any source code for any Company IP or any portion of Company Product other than such Open Source Software; (ii) requires the licensing or disclosure of any Company IP for the purpose of making derivative works; (iii) otherwise imposes any limitation, restriction or condition on the right or ability of the Company to use or distribute any Company IP, including restrictions on the consideration to be charged for the distribution of any Company Product; or (iv) creates obligations for the Company with respect to Company IP or grants to any third party any rights or immunities under Company IP.

(k) No License of Source Code. No source code for any Company IP has been delivered, licensed or made available to any escrow agent or other Person who was not, as of the date of such delivery, license, or making available, an employee or consultant of the Company subject to a written confidentiality obligation, including under any Open Source License. The Company does not have any duty or obligation (whether present, contingent or otherwise) to deliver, license or make available the source code for any Company Software to any escrow agent or other Person who is not, as of the date of this Agreement, an employee of the Company. No event has occurred, and no circumstance or condition exists, that (with or without notice or lapse of time) will, or would reasonably be expected to, result in the delivery, license or disclosure of any source code for any Company Software owned or purported to be owned by the Company to any other Person who is not, as of the date of this Agreement, an employee of the Company.
2.14 Information Technology (IT) and Privacy

(a) **Company Products.** Each Company Product has been and is in conformity with all material applicable and material contractual commitments of the Company, or any material non-conformities have been addressed in a manner consistent with the terms of the underlying Contracts. Without limiting the foregoing, each Company Product provided or made available to a customer or partner complies with all material requirements and specifications of the applicable Contract between the Company and such customer or partner, or any material non-compliance has been addressed in a manner consistent with the terms of the underlying Contracts. No Action has been filed by any third party, or is pending, and to Company’s Knowledge, no threat or notice of any Action has been received by Company, with respect to any Company Products (including with respect to any delay, defect, deficiency of any product, or quality of any service), and to the Company’s Knowledge, there is no reasonable basis for any present or future such Action.

(b) **Bugs.** The Company stores and tracks all such known bugs in a bug tracking system in a manner consistent with reasonable software industry customs. To Company’s Knowledge, no Company Software: (i) contains any bug, defect or error that materially and adversely affects the use, functionality or performance of such Company Software or any Company Product; or (ii) fails to materially comply with any applicable warranty or other contractual commitment relating to the use, functionality or performance of such Company Software or any Company Product or any material non-compliance has been addressed in a matter consistent with the terms of the underlying Contracts.

(c) **IT Systems.** The computer, information technology and data processing systems, facilities and services used in the business of the Company, including all software, hardware, networks, communications facilities, platforms and related systems and services in the custody or control of the Company (collectively, “Systems”), are reasonably sufficient for the existing and currently planned future needs of the Company. To the Knowledge of the Company, the Systems are in good working condition to perform all computing, information technology and data processing operations necessary for the operation of the business of the Company as currently conducted and currently contemplated to be conducted. Immediately after the Closing, the Surviving Entities (or their respective Subsidiaries) will have and be permitted to exercise the same rights with respect to the Systems as the Company would have had and been able to exercise had this Agreement not been entered into and the Transactions contemplated hereby not occurred, without the payment of any additional amounts or consideration other than ongoing fees.

(d) **Security Measures.** The Company has taken commercially reasonable steps designed to ensure that the information technology systems used in connection with the operation of the businesses of the Company are free from any Harmful Code. The Company has reasonably appropriate disaster recovery and security plans, procedures and facilities for its businesses and has taken commercially reasonable steps designed to safeguard the information technology systems utilized in the operation of the business of the Company as such is currently conducted. To the Company’s Knowledge, there have been no material unauthorized intrusions or breaches of the security of the information technology systems used in connection with the operation of the businesses of the Company.

(e) **Privacy and Data Protection.** Section 2.14(e) of the Disclosure Schedule identifies and describes the general categories of Private Information and Customer Data currently maintained by or for the Company. Copies of all Company Privacy Policies have been Made Available to Parent. The Company does not collect or process Behavioral Data relating to consumers. The Company, the Company Products, and all third parties who have been contracted by the Company to perform, and have performed, services for the Company and have had access to Personal Data or Customer Data in connection with the performance of such services, comply, and have complied, with all applicable Privacy Legal Requirements relating to (A) the privacy of users of all Company Products; (B) consumer protection, marketing,
promotion, and text messaging, email, and other communications; and (C) the use, collection, retention, storage, security, disclosure, transfer, disposal, and other processing of any Private Information or Customer Data. At all times since inception, the Company has provided accurate notice of its privacy practices on all Company Products when required by the Privacy Legal Requirements and these notices have not contained any material omissions of the Company’s privacy practices and have not been misleading, deceptive, or in violation of any applicable Privacy Legal Requirement. The execution, delivery, and performance of this Agreement and the Transactions contemplated hereby will not result in a breach or violation of any Privacy Legal Requirements. The Company has full rights to transfer to Parent any and all Personal Data and Customer Data collected or otherwise maintained by the Company without violating any Privacy Legal Requirement. The Company has obtained written agreements from each Person performing services for the Company that the Company has permitted to access or process Personal Data or Customer Data that bind such Person to at least the same restrictions and conditions that apply to the Company with respect to such Personal Data and Customer Data and to implement reasonable and appropriate means for protecting such Personal Data and Customer Data from unauthorized access, use, and disclosure. There is not and has not been any audit, proceeding, or claim against, or to the Company’s Knowledge, investigation (formal or informal) or complaint against, or to the Company’s Knowledge, any of its customers (in the case of customers, to the extent relating to the Company Products or the practices of the Company) by any private party, data protection authority, the Federal Trade Commission, or any other Governmental Entity, foreign or domestic, with respect to the collection, use, retention, disclosure, transfer, storage, security, disposal, or other processing of Personal Data or Customer Data. With respect to the Company Products (including their underlying systems, networks, and technology) and all Personal Data and Customer Data collected, stored, used or maintained by or for the Company, the Company has at all times taken commercially reasonable steps to ensure that such Personal Data and Customer Data are protected against loss and against unauthorized access, use, modification, destruction, alteration, disclosure or other misuse, and no unauthorized access to or unauthorized use, modification, destruction, alteration, disclosure, or other misuse of, such Personal Data, or Customer Data has occurred.

(f) **Data Processing Agreements.** The Company has Made Available a true, correct and complete copy of each standard form of Company Data Processing Contract used by the Company at any time, including each standard form of: (i) data, storage or hosting agreement; or (ii) professional services, outsourced services, or consulting agreement containing obligations of the Company relating to Private Information. The Company has Made Available each Company Data Processing Contract that deviates in any material respect from the corresponding standard form agreement Made Available pursuant to this Section 2.14(f).

2.15 **Material Contracts.**

(a) **Section 2.15(a) of the Disclosure Schedule** identifies, in each subpart that corresponds to the subsection listed below, any Contract in effect as of the date hereof, (x) to which the Company is a party, (y) by which the Company or any of their assets is bound or under which the Company has any obligation, or (z) under which the Company has any right or interest (the Contracts described below, whether or not set forth in Section 2.15(a) of the Disclosure Schedule, being referred to herein as the “**Material Contracts**”):

(i) that is with a Significant Customer or a Significant Supplier;

(ii) pursuant to which the Company has been appointed a partner, reseller, dealer, or distributor or OEM;
pursuant to which the Company has appointed another party as dealer, distributor, sales representative, OEM, value added reseller, remarketer or reseller of any of the Company Products;

pursuant to which the Company is bound to or has committed to provide any Company Product to any third party on a most favored pricing basis;

pursuant to which the Company is bound to, or has committed to provide or license, any Company Product to any third party on an exclusive basis or to acquire or license any material product or service on an exclusive basis from a third party;

imposing any restriction by its terms on the right or ability of the Company (or that would purported by its terms to limit the freedom of Parent or any of its Affiliates): (A) to compete with any other Person or to engage in any line of business, market or geographic area, or to sell, license, manufacture or otherwise distribute any of its technology or products, or to provide services, to any customers or potential customers or any class of customers, in any geographic area, during any period of time, or in any segment of the market; (B) to solicit the employment of, or hire, any potential employees, consultants or independent contractors (other than non-disclosure agreements entered into in the ordinary course of business); (C) to acquire any product, property or other asset (tangible or intangible), or any services, from any other Person, or to sell any product or other asset to or perform any services for any other Person; or (D) to develop or distribute any Technology;

pursuant to which (A) the Company is granted a license (other than a license to Excepted Software), a covenant not to assert, or other rights (other than rights to Excepted Software) with respect to any Licensed IP, (B) the Company has granted to a customer of the Company a license, covenant not to assert, or other rights with respect to any Company IP or any Intellectual Property Rights exclusively licensed to the Company, or (C) the Company has granted to a Person (other than a customer of the Company) a license, covenant not to assert, or other rights with respect to any Company IP or any Intellectual Property Rights exclusively licensed to the Company (other than, in the case of Sections 2.15(a)(vii)(B) and 2.15(a)(vii)(C), (1) non-disclosure agreements entered into in the ordinary course of business consistent with past practices, (2) nonexclusive licenses with terms that do not materially differ from the terms of any Standard Form IP Contracts, and (3) non-exclusive rights granted to contractors or vendors to use Company IP for the sole benefit of the Company);

that grants (A) any right of first refusal, right of first offer or similar rights with respect to any material assets, rights or properties of the Company, or (B) any royalties to any Person;

set forth or required to be set forth in Sections 2.13(a)(iii) or 2.13(a)(iv) of the Disclosure Schedule;

any Contract with any union, works council, employee group representatives, personnel delegates or similar labor entity or labor organization or group of employees, or specifically authorized employees;

that is with a current Employee, trainee, freelancer or temporary worker other than at-will offer letters or agreements made in the ordinary course of business in each case cancellable without penalty to the Company (other than any statutory severance obligations);

that grants any non-statutory severance or termination pay or benefits or non-statutory post-termination payments (in cash or otherwise) to any Employee or consultant of the Company;
(xiii) that is with insurance companies covering healthcare, disability, and pension schemes in force in the Company, together with any existing documents supporting these schemes within the Company, including internal information notices;

(xiv) that is a Lease Agreement;

(xv) that is a Company Data Processing Contract;

(xvi) relating to capital expenditures and involving future payments in excess of $50,000 individually or $150,000 in the aggregate;

(xvii) relating to the settlement of any material Action on or after February 24, 2016;

(xviii) relating to (A) the disposition or acquisition of material assets or any material interest in any Person (other than the Company) or (B) the acquisition, issuance or transfer of any securities of any Person (other than the Company);

(xix) relating to mortgages, indentures, guarantees, loans or credit agreements, security agreements or other Contracts or instruments relating to Indebtedness or extension of credit or the creation of any Lien with respect to any asset of the Company;

(xx) involving or incorporating any guaranty, pledge, performance or completion bond or surety arrangement;

(xxi) creating or governing any partnership or joint venture or any sharing of revenues, profits or losses;

(xxii) relating to the purchase or sale of any product or other asset by or to, or the performance of any services by or for, any Interested Party;

(xxiii) constituting any (A) prime contract, subcontract, letter contract, material task order or delivery order executed or submitted to or on behalf of any Governmental Entity or any prime contractor or higher-tier subcontractor, or under which any Governmental Entity or a prime contractor or higher-tier subcontractor otherwise has or may acquire any right or interest, or (B) quotation, bid or proposal submitted to any Governmental Entity or a prime contractor or higher-tier subcontractor of any Governmental Entity;

(xxiv) any service contract, whether for services provided to the Company by a consultant or independent contractor, that is material to the operations of the business of the Company; and

(xxv) that contemplates or involves in any calendar year beginning on January 1, 2017 and ending on December 31, 2020: (A) the payment or delivery of cash or other consideration in an amount or having a value in excess of $250,000 in the aggregate; or (B) the performance of services having a value in excess of $250,000 in the aggregate.

(b) The Company has Made Available true, correct and complete copies of all written Material Contracts in effect as of the date hereof, including all amendments thereto. Section 2.15(b) of the Disclosure Schedule provides an accurate description of the terms of each Material Contract that is not in written form. Each Material Contract is valid and in full force and effect and is enforceable against the Company and by the Company in accordance with its terms, subject to the Enforceability Limitations. The
Company has not violated or breached in any material respect, or committed any material default under, any Material Contract, and, to the Knowledge of the Company, no other Person has violated or breached in any material respect, or committed any material default under, any such Material Contract. To the Knowledge of the Company, no event has occurred, and no circumstance or condition exists, that (with or without notice or lapse of time) will, or would reasonably be expected to (i) result in a violation or breach of any of the provisions of any Material Contract; (ii) give any Person the right to declare a default or exercise any remedy under any Material Contract; (iii) give any Person the right to accelerate the maturity or performance of any Material Contract; or (iv) give any Person the right to cancel, terminate or modify any Material Contract. The Company has not received any written notice regarding any actual or possible violation or breach of, or default under, any Material Contract. The Company has not waived any of its material rights under any Material Contract. The Company has not received any written notice from a Person threatening to terminate or refuse to perform its obligations under any Material Contract (regardless of whether such Person has the right to do so under such Contract).

2.16 Employee Benefit Plans.

(a) Schedule. Section 2.16(a) of the Disclosure Schedule contains an accurate and complete list of each material Company Employee Plan and each material Employee Agreement, including any specific Employee Agreement providing severance or material post-termination payments and/or benefits and any specific Employee Agreement providing any specific obligations resulting in additional material liability for the Company as a result of the Transactions.

(b) No Person who is ineligible to participate in a Company Employee Plan is a participant in any Company Employee Plan. Neither the Company nor any ERISA Affiliate has made any commitment to establish any new Company Employee Plan or Employee Agreement, to modify any Company Employee Plan or Employee Agreement materially (except to the extent required by Legal Requirement or to conform any such Company Employee Plan or Employee Agreement to the requirements of any applicable Legal Requirement, in each case as previously disclosed to Parent in writing, or as required by this Agreement), or to enter into any Company Employee Plan or Employee Agreement.

(c) Section 2.16(c) of the Disclosure Schedule sets forth a table setting forth the (i) name, (ii) hiring date, (iii) title, (iv) annual salary or base wages and commissions earned from January 1, 2019 through December 31, 2019, (v) current annual salary or base wages and commissions earned for the current year through September 30, 2020, (vi) current annual bonus target (if any), and (vii) accrued but unpaid vacation balances of each current employee of the Company as of December 31, 2019, including with respect to any Employees on a leave of absence, the date the leave commenced and the expected date of return to work of such Employee whose annual base salary shall exceed $200,000 on a full time basis. To the Knowledge of the Company, no employee listed on Section 2.16(c) of the Disclosure Schedule has delivered written notice to the Company evidencing an intent to terminate his or her employment for any reason, other than in accordance with any employment arrangements as may be provided for in this Agreement. Section 2.16(c)(3) of the Disclosure Schedule contains an accurate and complete list of all Persons that currently have a consulting or advisory relationship with the Company.

(d) Documents. The Company has Made Available (i) correct and complete copies of all documents embodying each Company Employee Plan and each Employee Agreement including all amendments thereto and all related trust documents and all related management, (ii) the three most recent annual reports (Form Series 5500 and all schedules and financial statements attached thereto), if any, required under ERISA or the Code in connection with each Company Employee Plan, (iii) if the Company Employee Plan is funded, the most recent annual and periodic accounting of Company Employee Plan assets, (iv) the most recent summary plan description together with the summary(ies) of material modifications thereto, if any, required under ERISA with respect to each Company Employee Plan, (v) all
material written agreements and contracts relating to each Company Employee Plan, including existing administrative service agreements and group or
other insurance contracts, (vi) all correspondence and/or notifications in the three (3) year period preceding the date of this Agreement to or from any
governmental agency or administrative service relating to any Company Employee Plan, (vii) all policies pertaining to fiduciary liability insurance
covering the fiduciaries of each Company Employee Plan, (viii) all discrimination tests for each Company Employee Plan for the three most recent plan
years, and (ix) the most recent IRS or equivalent non-U.S. Tax authority determination, opinion, notification or advisory letters issued with respect to
each Company Employee Plan. To the Knowledge of the Company, there is no fact, condition, or circumstance since the date the documents were
provided in accordance with this paragraph (d), which would materially affect the information contained therein and, in particular, and without limiting
the generality of the foregoing, no promises or commitments have been made to amend any Company Employee Plan or Employee Agreement or to
provide increased or improved benefits thereunder or accelerate vesting or funding thereunder. To the Knowledge of the Company, no verbal promises
or representations have been made to any Employees to materially increase their compensation or to continue their employment for any specific
duration.

(e) Employee Plan Compliance. The Company and each of the ERISA Affiliates has, in all material respects, performed all obligations
required to be performed by them under, and are in compliance with, the requirements prescribed by any and all applicable statutory or regulatory Legal
Requirements, are not in material default or violation of, and the Company has no Knowledge of any default or violation by any other party to, any
Company Employee Plan, and each Company Employee Plan has been established and maintained in accordance with its terms and in material
compliance with all applicable Legal Requirements, including ERISA and the Code. For each Company Employee Plan that is intended to be qualified
under Section 401(a) of the Code, the Company has obtained a favorable determination and/or opinion letter and, there has been no event, condition or
circumstances that has adversely affected or is likely to adversely affect such qualified status. No “prohibited transaction,” within the meaning of
Section 4975 of the Code or Sections 406 and 407 of ERISA, and not otherwise exempt under Section 408 of ERISA, has occurred with respect to any
Company Employee Plan. There are no Actions pending or threatened or reasonably anticipated (other than routine claims for benefits) against any
Company Employee Plan or against the assets of any Company Employee Plan. Each Company Employee Plan can be amended, terminated or
otherwise discontinued after the First Merger Effective Time in accordance with its terms, without liability to Parent, the Company, or any ERISA
Affiliate (other than ordinary administration expenses or with respect to benefits, other than bonuses, commissions or amounts under other compensation
plans, that were previously earned, vested or accrued under Company Employee Plans prior to the First Merger Effective Time). There are no audits,
inquiries or proceedings pending or, to the Company’s Knowledge, threatened by the IRS, DOL, or any other Governmental Entity with respect to any
Company Employee Plan. None of the Company or any ERISA Affiliate is subject to any penalty or Tax with respect to any Company Employee Plan
under Section 502(i) of ERISA or Sections 4975 through 4980 of the Code. The Company and each of the ERISA Affiliates have timely made all
contributions and other payments required by and due under the terms of each Company Employee Plan and/or pursuant to applicable Legal
Requirements.

(f) Bonus Plan Compliance. The Company is in compliance in all material respects with all of its bonus, commission and other
compensation plans and has paid any and all amounts required to be paid under such plans as of the date of this Agreement, including any and all
bonuses and commissions (or pro rata portion thereof) that may have accrued or been earned through the calendar quarter preceding the Closing Date,
and is not liable for any material payments, taxes or penalties for failure to comply with any of the terms or conditions of such plans or the laws
governing such plans.

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(g) **No Pension Plan.** Neither the Company nor any ERISA Affiliate has ever maintained, established, sponsored, participated in, or contributed to, any Pension Plan subject to Part 3 of Subtitle B of Title I of ERISA, Title IV of ERISA or Section 412 of the Code.

(h) **No Self-Insured Plan.** Neither the Company nor any ERISA Affiliate has ever maintained, established, sponsored, participated in or contributed to any self-insured plan that provides benefits to employees (including any such plan pursuant to which a stop-loss policy or contract applies).

(i) **Multiemployer and Multiple-Employer Plan, Funded Welfare Plans and MEWAs.** Neither the Company nor any ERISA Affiliate has contributed to or been obligated to contribute to any multiemployer plan (as defined in Section 3(37) of ERISA). Neither the Company nor any ERISA Affiliate has at any time ever maintained, established, sponsored, participated in or contributed to any multiple employer plan or to any plan described in Section 413 of the Code, a “funded welfare plan” within the meaning of Section 419 of the Code, or a Multiple Employer Welfare Arrangement, as defined under Section 3(40)(A) of ERISA (without regard to Section 514(b)(6)(B) of ERISA).

(j) **International Employee Plans.** There are no, and there have never been any, International Employee Plans.

(k) **No Post-Employment Obligations.** No Company Employee Plan or Employee Agreement provides, or reflects or represents any liability to provide, post-termination or retiree or post-employment life insurance, health or other employee welfare benefits to any person for any reason, except as may be required by COBRA or other applicable Legal Requirements, and the Company has never represented, promised or contracted (whether in oral or written form) to any Employee (either individually or to Employees as a group) or any other person that such Employee(s) or other person would be provided with life insurance, health or other employee welfare benefits, except to the extent required by statute or other applicable Legal Requirements. **Section 2.16(k) of the Disclosure Schedule accurately:** (i) identifies each former Employee who is receiving or is scheduled to receive (or whose spouse or other dependent is receiving or is scheduled to receive) any post-termination or retiree compensation or benefits (whether from the Company or otherwise) relating to such former Employee’s service with the Company, excluding any potential distributions from the Company’s 401(k) plan and/or any continuation coverage under COBRA or other applicable Legal Requirements; and (ii) briefly describes such benefits.

(l) **Effect of Mergers.** Neither the execution and delivery of this Agreement nor the consummation of the Transactions (alone or in connection with additional or subsequent events) or any termination of employment or service in connection therewith will (i) result in any payment or benefit (including severance, golden parachute, bonus or otherwise) becoming due to any Employee, (ii) result in any forgiveness of Indebtedness, (iii) materially increase any payments or benefits otherwise payable or to be provided by the Company or (iv) result in the acceleration of the time of payment or vesting of any such payments or benefits except as required under Section 411(d)(3) of the Code.

(m) **No Loans.** There are no outstanding loans or loan balances due by any Employee to the Company (other than outstanding advances to Employees in respect of business expenses made in the ordinary course of business consistent with past practice).

2.17 **Employment Matters.**

(a) **Compliance with Employment Laws.** The Company is in compliance with all applicable foreign, federal, state and local Legal Requirements and other agreements or arrangements with any works council, employee representative or other labor organization or group of employees, and its own policies and internal regulations respecting employment, employment practices, terms and conditions of
employment, worker classification, tax withholding and reporting, social security contributions withholding, prohibited discrimination, working time, employee representation, equal employment, fair employment practices, meal and rest periods, immigration status, employee safety and health, wages (including overtime wages), compensation, and hours of work, or the equivalent under applicable Legal Requirements, and in each case, with respect to Employees: (i) has withheld and reported all amounts required by Legal Requirements or by Contract to be withheld and reported with respect to wages, salaries and other payments to Employees, (ii) is not liable for any arrears of wages, severance pay or any Taxes or social security contributions or any penalty for failure to comply with any of the foregoing, and (iii) is not liable for any payment to any trust or other fund governed by or maintained by or on behalf of any Governmental Entity, with respect to unemployment compensation benefits, social security and other payroll taxes or other benefits or obligations for Employees (other than routine payments to be made in the normal course of business and consistent with past practice). There are no Actions pending, or to the Knowledge of the Company, threatened or reasonably anticipated against the Company, or any of its Employees relating to any Employee, Employee Agreement or Company Employee Plan. There are no pending or, or to the Knowledge of the Company, threatened or reasonably anticipated material Actions against Company or any Company trustee under any worker’s compensation policy or long-term disability policy. The Company is not currently a party to a conciliation agreement, consent decree or other agreement or order with any federal, state, or local agency or Governmental Entity with respect to employment practices. The services provided by each of the Company’s and its ERISA Affiliates’ current employees inside the United States are terminable at the will of the Company and its ERISA Affiliates, and outside the United States are terminable in compliance with applicable Legal Requirements, and any such termination would result in no expenses to the Company or any ERISA Affiliate (other than statutory severance obligations, ordinary administration expenses, previously agreed to severance pay or benefits, bonuses, commissions or amounts under other compensation plans, that were previously earned, vested or accrued under Company Employee Plans prior to the First Merger Effective Time). Section 2.17(a) of the Disclosure Schedule lists all current amounts owed to any Employee that would result from the termination by the Company or Parent of such Employee’s employment or provision of services, other than those disclosed in Section 2.16(i). To the Knowledge of the Company, neither the Company nor any ERISA Affiliate has direct or indirect liability with respect to any misclassification of any person as an independent contractor, intern and/or temporary worker rather than as an employee, with respect to any employee leased from another employer or with respect to any employee currently or formerly classified as exempt from overtime wages, or the equivalent under applicable Legal Requirements.

(b) Labor. The Company is not a party to any collective bargaining or other agreements with any union, works council, employee group representative or other similar labor organization or employee groups. No strike, labor dispute, slowdown, concerted refusal to work overtime, or work stoppage or labor strike against the Company is pending, or to the Knowledge of the Company, threatened, or reasonably anticipated. The Company has no Knowledge of any activities or proceedings of any labor union, works council, employee group representative or other similar labor organization or employee groups to organize current Employees. There are no Actions, labor disputes or grievances pending or, to the Knowledge of the Company, threatened relating to any labor matters involving any Employee, including charges of unfair labor practices. To the Knowledge of the Company, the Company has not engaged in any unfair labor practices within the meaning of the National Labor Relations Act or similar Legal Requirement. The Company is not presently, and it has never been in the past, a party to, or bound by, any collective bargaining agreement, or other agreements with any union, works council, employee representative or other labor organization or group of employees with respect to Employees and no such agreement is being negotiated by the Company.

(c) Immigration Documentation. The Employees are authorized and have legally required documentation to work in jurisdictions in which they are working. Section 2.17(c) of the Disclosure Schedule sets forth an accurate and complete list of (i) all U.S.-based current employees of the

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Company who are not U.S. citizens or permanent residents and (ii) any current employees of the Company based outside of the United States that are not citizens or permanent residents of the jurisdiction in which they perform services. Each of the U.S.-based employees required to be listed on Section 2.17(c) of the Disclosure Schedule is authorized under applicable U.S. immigration Legal Requirements to work in his or her current position for the Company or its Affiliate and each non-U.S.-based employee required to be listed on Section 2.17(c) of the Disclosure Schedule is authorized under applicable Legal Requirements to work in his or her current positions for the Company.

(d) No Interference. No current Employee is obligated under any Contract or subject to any Order, in each case, that would materially interfere with such person’s efforts to carry out his/her functions to promote the interests of the Company or that would materially interfere with the Company’s business.

2.18 Governmental Authorizations. Each notification, consent, license, permit, grant or other authorization (a) pursuant to which the Company currently operates or holds any interest in any of its properties, or (b) which is required for the operation of the Company’s business as currently conducted or the holding of any such interest (collectively, “Company Authorizations”) has been issued or granted to the Company. The Company Authorizations are in full force and effect, and no suspension or cancellation of any such Company Authorizations is pending or, to the Knowledge of the Company, threatened. The Company Authorizations constitute all Company Authorizations required to permit the Company to operate or conduct its businesses or hold any interest in its properties or assets and none of the Company Authorizations is subject to any term, provision, condition or limitation which may adversely change or terminate such Company Authorizations by virtue of the completion of the Mergers. Since February 24, 2016, (i) the Company has been and is in compliance with the terms and conditions of the Company Authorizations, and (ii) the Company has not received any written notice from any Governmental Entity regarding any violation by the Company of any Company Authorizations, or any actual or threatened revocation, cancellation or termination of any Company Authorizations.

2.19 Litigation and Orders.

(a) There is no material Action of any nature pending, or to the Knowledge of the Company threatened, against the Company, its properties and assets (tangible or intangible) or any of its officers or directors (solely in their capacities as such). To the Knowledge of the Company, there is no Action of any nature pending against any Person who has a contractual right or a right pursuant to applicable Legal Requirements to indemnification from the Company in respect of such Action related to facts and circumstances existing prior to the First Merger Effective Time.

(b) No Governmental Entity has at any time challenged the legal right of the Company to conduct its operations as presently or previously conducted.

(c) The Company is not subject to any outstanding Order.

2.20 Insurance. Section 2.20 of the Disclosure Schedule lists all insurance policies and fidelity bonds covering the assets, business, equipment, properties, operations, employees, officers and directors of the Company, or any ERISA Affiliate. There is no claim by the Company or any ERISA Affiliate pending under any of such policies or bonds as to which coverage has been questioned, denied or disputed. In addition, there is no pending claim of which its total value (inclusive of defense expenses) would reasonably be expected to exceed the policy limits. All premiums due and payable under all such policies and bonds have been paid, (or if installment payments are due, will be paid if incurred prior to the Closing Date) and the Company and its ERISA Affiliates are otherwise in material compliance with the terms of such policies and bonds (or other policies and bonds providing substantially similar insurance coverage). Such policies
and bonds are in full force and effect. The Company has not received any written threat of termination of, or premium increase with respect to, any of such policies. Neither the Company nor any controlled Affiliate of the Company has ever maintained, established, sponsored, participated in or contributed to any self-insurance plan.

2.21 Compliance with Legal Requirements. Since February 24, 2016, except as is not material in any case or in the aggregate, the Company has complied with, and is not in violation of, any Legal Requirement. Since February 24, 2016, the Company has not received any written notices of any violation of any Legal Requirement, or has provided any written notice to any Governmental Entity regarding any violation by the Company of any Legal Requirement.

2.22 Export Control Laws.

(a) The Company has complied in all material respects with all applicable export and re-export control Legal Requirements ("Export Controls"), including the Export Administration Regulations ("EAR") maintained by the U.S. Department of Commerce, economic sanctions maintained by the Treasury Department’s Office of Foreign Assets Control ("OFAC"), and the International Traffic in Arms Regulations ("ITAR") maintained by the Department of State, and any applicable anti-boycott regulations. The Company has not directly or indirectly sold, exported, re-exported, transferred, diverted, or otherwise disposed of any products, software, or technology (including products derived from or based on such technology) to any destination, entity, or Person prohibited by the Legal Requirements of the United States, without first obtaining any required authorization from the competent government authorities as required by those Legal Requirements. The Company is in compliance with all applicable import Legal Requirements ("Customs Laws"), including Title 19 of the U.S. Code and Title 19 of the Code of Federal Regulations.

(b) Except as authorized under applicable Legal Requirements, the Company has not released or disclosed ITAR-controlled technical data or EAR-controlled technology requiring a license in order to be exported to any foreign national whether in the United States or abroad.

(c) No Action, claim, request for information, or subpoena is pending, or to the Knowledge of the Company, threatened, concerning or relating to any export or import activity of the Company. No voluntary self-disclosures have been filed by or for the Company with respect to possible violations of Export Controls and Customs Laws.

(d) The Company has maintained any records required to be maintained in the Company’s possession as required under the Export Control and Customs Laws.

(e) The Company has not, in violation of applicable Legal Requirements, provided any hardware, software, technology, or services to any individual or entity in a prohibited country, including Cuba, Iran, North Korea, Sudan, Syria or the Crimea Region of the Ukraine or on any relevant list of prohibited parties including but not limited to the Commerce Department’s Denied Persons List ("DPL"), Entity List, and Unverified List; the Treasury Department’s List of Specially Designated Nationals List ("SDN List"), and the State Department’s list of debarred parties.

(f) The Company has not exported (i) any hardware, software or technical data controlled by the ITAR or (ii) any hardware, software or technology controlled under the EAR that is classified as anything other than EAR99.

2.23 Anti-Corruption. Neither the Company nor any director or officer of the Company, nor, to the Knowledge of the Company, any employee, distributor, reseller, consultant, agent or other third party
retained by the Company and while acting on behalf of the Company, has provided, offered, promised, or authorized the provision of anything of value (including payments, meals, entertainment, travel expenses or accommodations, or gifts), directly or indirectly, to any Person, including a “foreign official”, as defined by the FCPA, which includes employees or officials working for state-owned or controlled entities, a foreign political party or candidate, any individual employed by or working on behalf of a public international organization for the purpose of corruptly assisting the Company in (i) obtaining or retaining business for or with, or directing business to, any person; (ii) influencing any act or decision of a foreign government official in his or her official capacity; (iii) inducing a foreign government official to do or omit to do any act in violation of his/her lawful duties; or (iv) securing any improper advantage, in violation of the FCPA, United Kingdom Bribery Act 2010, the U.S. Travel Act, Title 18 of the U.S. Code section 201, or any applicable local, domestic, or international anticorruption, anti-bribery, or anti-money laundering laws (collectively hereinafter “Anti-Corruption Laws”). Neither the Company nor any of its directors or officers or, to the Knowledge of the Company, employees or agents while acting on behalf of the Company has used any corporate funds to maintain any off-the-books funds or engage in any off-the-books transactions nor has any of the before stated parties entered, submitted, or otherwise included any false, fictitious, or inaccurate entries in the Company’s books and records in violation of applicable Legal Requirements. The Company has not made any provisions to any person (including any “foreign officials”), or taken any act in furtherance of such a provision, that would constitute an improper rebate, commercial bribe, influence payment, extortion, kickback, or other improper payment in violation of applicable Anti-Corruption Laws. The Company has not conducted any internal or government-initiated investigation, or made a voluntary, directed, or involuntary disclosure to any governmental body or agency with respect to any alleged act or omission arising under or relating to any noncompliance with applicable Anti-Corruption Laws.

2.24 Environmental Law. The Company has not released any Hazardous Material in material violation of Environmental Law. Except in compliance with Environmental Law and in a manner that would not reasonably be expected to result in material liability to the Company, no Hazardous Materials are present in, on or under any real property, including the land, improvements, ground water and surface water thereof, that the Company (i) currently leases, operates, or occupies or (ii) formerly leased, operated or occupied as of the date on which the real property ceased to be leased, operated or occupied by the Company. The Company has conducted all Hazardous Material Activities in compliance in all material respects with all Environmental Laws. All of the Company’s products comply in all material respects with the European Union Directives 2011/65/EU on the restriction on the use of certain hazardous substances in electrical and electronic equipment or ROHS Directive and the 2012/12/EU, the Waste Electrical and Electronic Equipment Directive, and all implementing Legal Requirements.

2.25 Customers and Suppliers.

(a) The Company does not have any outstanding material disputes concerning any Company Products with any customer, user, reseller, distributor, OEM or other licensor who, in either (i) the fiscal year ended December 31, 2018 and/or (ii) the fiscal year ended December 31, 2019, represented aggregate revenues to the Company of $100,000 or more during such period for Company Products (each, a “Significant Customer”). The Company has not received any written notice from any Significant Customer that such Significant Customer intends to terminate or materially and negatively modify any existing Contracts with the Company.

(b) The Company does not have any outstanding material dispute concerning products and/or services provided by any supplier who, in either (i) the fiscal year ended December 31, 2018 and/or (ii) the fiscal year ended December 31, 2019 was one of the ten (10) largest suppliers of products and/or services to the Company based on amounts paid or payable by the Company to such supplier during such period (each, a “Significant Supplier”). The Company has not received any written notice from any Significant Supplier that such Significant Supplier intends to terminate or materially and negatively modify any existing Contracts with the Company (or the Second Merger Surviving Entity or Parent).
2.26 Interested Party Transactions. No officer or director of the Company or, to the Knowledge of the Company, any stockholder holding more than five percent (5%) of the outstanding shares of capital stock of the Company (nor any immediate family member of any of such Persons, or any trust, partnership or corporation in which any of such Persons has or has had an interest) (each, an “Interested Party”), has or has had, directly or indirectly, (i) any interest in any Person which furnished or sold, or furnishes or sells, services, products, technology or Intellectual Property Rights that the Company furnishes or sells, or proposes to furnish or sell, or (ii) any interest in any Person that purchases from or sells or furnishes to the Company, any goods or services, or (iii) any interest in, or is a party to, any Contract to which the Company is a party (other than in such Person’s capacity as an officer of director of the Company); provided, however, that ownership of five percent (5%) or less of the outstanding voting stock of a publicly traded corporation shall not be deemed to be an “interest in any Person” for purposes of this Section 2.26; provided, further, that the investments held in entities made by pooled investments funds of which a director or a stockholder may be affiliated shall not be deemed to be an “interest in any Person” for purposes of this Section 2.26. Other than as set forth in the Charter Documents and on Schedule 5.7 hereto, there are no Contracts with regard to contribution or indemnification between the Company and any of the Stockholders. All transactions pursuant to which any Interested Party has purchased any services, products, technology or Intellectual Property Rights from, or sold or furnished any services, products, technology or Intellectual Property Rights to, the Company have been on an arms-length basis on terms no less favorable to the Company than would be available from an unaffiliated party.

2.27 Government Contracts.

(a) With respect to each Contract between the Company and any Governmental Entity, and each outstanding bid, quotation or proposal by the Company (each, a “Bid”) that if accepted or awarded could lead to a Contract between the Company and any Governmental Entity, (each such Contract or Bid, a “Company Government Contract”) and each Contract between the Company and any prime contractor or upper-tier subcontractor relating to a Contract between such person and any Governmental Entity (each such Contract or Bid, a “Company Government Subcontract”):

(i) to the Knowledge of the Company, each such Company Government Contract or Company Government Subcontract (A) was legally awarded and (B) unless expired prior to the effective date of this Agreement, is binding on the parties thereto and is in full force and effect; provided that for purposes of this clause (i), the terms Company Government Contract and Company Government Subcontract shall not include any Bids;

(ii) to the Company’s Knowledge, no reasonable basis exists to give rise to (A) a material claim for fraud (as such concept is defined under the state or federal laws of the United States) in connection with any Company Government Contract or Company Government Subcontract or under the United States False Claims Act or the United States Procurement Integrity Act; (B) a material claim under the United States Truth in Negotiations Act; (C) a finding of material violation of any labor Legal Requirement; or (D) a finding of material failure to perform any material obligation of any Company Government Contract or Company Government Subcontract.

(iii) neither the United States government nor any prime contractor or subcontractor has notified the Company, in writing, that the Company has, or may have, breached or violated in any material respect any Legal Requirements, certification, representation, clause, provision or requirement pertaining to such Company Government Contract or Company Government Subcontract, and, to the Knowledge of the Company, any representations or certifications submitted by the Company in connection with such Company Government Contract or Company Government Subcontract were current, accurate and complete in all material respects on the date of submission;
the Company has not received, in writing, any notice of termination for convenience, notice of termination for default, cure notice or show cause notice pertaining to such Company Government Contract or Company Government Subcontract, and, to the Company’s Knowledge, there is no basis for such any notice of termination for default, cure notice, or show cause notice. To the Company’s Knowledge, no termination for convenience of a Company Government Contract or Company Government Subcontract is being contemplated.

(v) to the Knowledge of the Company, no cost incurred or material amount invoiced by the Company pertaining to such Company Government Contract or Company Government Subcontract has been questioned or challenged, is the subject of any audit or investigation, or has been disallowed by any Governmental Entity;

(vi) no payment due to the Company pertaining to such Company Government Contract or Company Government Subcontract has been withheld or set off, and, to the Company’s Knowledge, the Company is entitled to all progress or other payments received to date with respect thereto; and

(vii) the Company has complied in all material respects with all material requirements of such Company Government Contract or Company Government Subcontract and any Legal Requirements relating to the safeguarding of, and access to, classified information (or, in the case of Contracts governed by Legal Requirements other than the state or federal laws of the United States, the functional equivalent thereof, if any).

(b) Neither the Company nor any of the directors or officers of the Company, is, or within the past three (3) years has been, to the Knowledge of the Company (i) under any material administrative, civil or criminal investigation, audit, or indictment by any Governmental Entity, (ii) the subject of any material audit or investigation by the Company with respect to any alleged violation of Legal Requirements or Contract arising under or relating to any Company Government Contract or Company Government Subcontract or (iii) debarred or suspended, or proposed for debarment or suspension, or received notice of actual or proposed debarment or suspension (or for purposes of this clause (iii), in the case of Contracts governed by Legal Requirements other than the state or federal laws of the United States, the functional equivalents thereof, if any), from participation in the award of any Contract with any Governmental Entity. To the Knowledge of the Company, there exist no facts or circumstances that would warrant the institution of suspension or debarment proceedings or a finding of non-responsibility or ineligibility with respect to the Company or any of its directors or officers, in any such case, for purposes of doing business with any Governmental Entity.

(c) The Company has not received written notice of any (i) outstanding material claims against the Company, either by any Governmental Entity or by any prime contractor, subcontractor, vendor or other person, arising under or relating to any Company Government Contract or Company Government Subcontract, (ii) bid protest filed by another Person challenging the award of a Company Government Contract to the Company, or (iii) outstanding material claims or requests for equitable adjustment or disputes between the Company, on the one hand, and the United States government, on the other hand, under the United States Contract Disputes Act, as amended, or between the Company, on the one hand, and any prime contractor, subcontractor, vendor or other person, on the other hand, arising under or relating to any Company Government Contract or Company Government Subcontract. To the Knowledge of the Company, the Company has not received any written adverse or negative past performance evaluations or ratings in connection with any Company Government Contract or Company
Government Subcontract. The Company does not have (A) any interest in any pending or potential claim against any Governmental Entity or (B) any interest in any pending claim against any prime contractor, subcontractor, vendor or other person arising under or relating to any Company Government Contract or Company Government Subcontract.

(d) The Company has not made any mandatory or voluntary disclosures to any government agency of credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery or gratuity violations found in Title 18 of the United States Code, or a violation of the Civil False Claims Act, with respect to any Company Government Contract or Company Government Subcontract.

(e) The Company has not been involved in any transaction or dealing with any individual or entity on the GSA Excluded Parties List that violates any applicable requirement of the Federal Acquisition Regulation.

2.28 Facility Security Clearances; Personal Security Clearances.

(a) The Company possesses all facility security clearances required to perform the applicable Company Government Contracts and Company Government Subcontracts (“Facility Security Clearances”). Such clearances are (i) all of the Facility Security Clearances reasonably necessary to conduct the current business of the Company and (ii) valid and in full force and effect. No termination, denial of eligibility, notice of rescission, notice of wrongdoing, marginal or unsatisfactory or failed vulnerability assessment, notice of breach, cure notice or show cause notice from Defense Counterintelligence and Security Agency or any other Governmental Entity has been issued and remains unresolved with respect to any of the Facility Security Clearances, and to the Knowledge of the Company, no event, condition or omission has occurred or exists that would constitute grounds for such action or notice.

(b) The appropriate employees of the Company possess all United States Government security clearances required to perform the applicable Company Government Contracts and Company Government Subcontracts (“Security Clearances”). The subcontractor(s) and independent contractor(s) of the Company possess all necessary security clearances required to perform the applicable Company Government Contracts and Company Government Subcontracts. Such clearances are (i) all of the personnel Security Clearances reasonably necessary to conduct the current business of the Company and (ii) valid and in full force and effect. To the Knowledge of the Company, no termination, denial of eligibility, notice of rescission, notice of wrongdoing, notice of breach, cure notice or show cause notice from Defense Counterintelligence and Security Agency or any other Governmental Entity has been issued and remains unresolved with respect to any of the personnel Security Clearances held by any of the employees of the Company to the extent held or required in connection with the conduct of the business of the Company.

(c) The Company and its employees who hold Security Clearances, are in compliance with all applicable national security obligations, including those specified in the National Industrial Security Program Operating Manual, DOD 5220.22-M (February 2006), and any supplements, amendments or revised editions thereof. To the Knowledge of the Company, there has been no audit relating to the Company’s compliance with the requirements of the National Industrial Security Program that resulted in material adverse findings against the Company.

2.29 No Organizational Conflicts of Interest. No Governmental Entity nor any prime contractor or subcontractor has ever provided the Company with any written (or to the Knowledge of the Company, oral) notice alleging that the Company has an actual, apparent or potential organizational conflict of interest as defined in FAR Subpart 9.5.
2.30 Books and Records. The minute books of the Company have been Made Available and have been maintained in all material respects in accordance with Legal Requirements. The business records, financial books and records, personnel records, ledgers, sales accounting records, tax records and related work papers and other books and records maintained by the Company (collectively, the “Books and Records”) fairly reflect, in all material respects, the business activities of the Company. The Company has not engaged in any material transaction, maintained any bank account or used any material amount of corporate funds except as reflected in its normally maintained Books and Records. At the Closing, the minute books and other Books and Records will be in the possession of the Company.

2.31 Brokers. There is no investment banker, broker, finder, agent or other Person that has been retained by or is authorized to act on behalf of the Company who is entitled to any financial advisor’s, brokerage, finder’s or other similar fee or commission in connection with this Agreement or the Transactions.

2.32 Compliance with Regulation D. The Company is aware that the Parent Common Stock to be issued pursuant to the Transactions will constitute “restricted securities” within the meaning of Securities Act. At no time was any holder of Company Capital Stock, Company Options or Company Warrants solicited by means of general advertising or general solicitation in connection with this Agreement or the Transactions.

2.33 No Other Representations and Warranties. Except as expressly set forth in Article II, neither the Company nor any of the Company’s agents, employees or Representatives have made, nor are any of them making any representation or warranty, written or oral, express or implied, in respect of the Company or its businesses, including any representations and warranties about the accuracy or completeness of any information or documents previously provided, and any such other representations or warranties are hereby expressly disclaimed. Parent and each of the Merger Subs expressly acknowledges and agrees that none of Parent, any of the Merger Subs or any of their respective agents, employees or Representatives is relying on any other representation or warranty of the Company or any of its agents, employees or Representatives, including regarding the accuracy or completeness of any such other representations and warranties, whether express or implied. Notwithstanding the foregoing, the Company hereby acknowledges that during the course of the due diligence investigation of the Company conducted by or on behalf of Parent in connection with Parent’s consideration of the Transactions, the Company provided information and made statements to Parent and its Representatives regarding the Company and its business, operations, financial condition and other matters. Parent understands and hereby acknowledges and agrees that neither Parent nor any other Indemnified Party shall have any right to file, bring or make (and hereby expressly waives to the fullest extent allowable under applicable Legal Requirements the right to file, bring or make) any lawsuit or other claims against any Indemnifying Party under this Agreement or otherwise as a result of any inaccuracies in any such information or statements unless and solely to the extent that such information or statements (i) are the subject of an express representation and warranty set forth in this Article II, or (ii) Parent can demonstrate the commission of actual fraud or an intentional misrepresentation by or on behalf of the Company when such information or such statements were provided or otherwise made; provided, however, that notwithstanding the foregoing, Parent understands and hereby acknowledges and agrees that neither Parent nor any other Indemnified Party shall have any right to bring (and hereby expressly waives to the fullest extent allowable under applicable Legal Requirements the right to file, bring or make) any lawsuit or other claims against any Indemnifying Party under this Agreement or otherwise arising out of any forward looking, predictive or prospective information or statements.

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ARTICLE III
REPRESENTATIONS AND WARRANTIES
OF PARENT AND MERGER SUBS

Subject to such exceptions as are disclosed (i) in the specific section, subsection or sub-clause of the disclosure schedule, if any, delivered by Parent to the Company on the date hereof prior to the execution and delivery hereof (the "Parent Disclosure Schedule") that corresponds to the specific section, subsection or sub-clause of each representation and warranty set forth in this Article III (provided, however, that any information set forth in a section, subsection or sub-clause of the Disclosure Schedule shall be deemed to be disclosed for purposes of, and shall qualify, the corresponding section, subsection or sub-clause of this Agreement and any other section, subsection or sub-clause of this Agreement, where it is reasonably apparent on the face of such disclosure that such information applies to such other section, subsection or sub-clause) or (ii) in the Parent SEC Documents (other than in any “risk factor” disclosure or any other forward looking statements set forth therein), each of Parent and the Merger Subs hereby represents and warrants to the Company as follows:

3.1 Organization and Standing. Each of Parent and Merger Sub I is a corporation duly organized, validly existing and in good standing under the laws of Delaware. Merger Sub II (a) is a limited liability company duly formed, validly existing and in good standing under the laws of Delaware, (b) is a disregarded entity for federal income Tax purposes and (c) does not intend to elect to be treated as anything other than a disregarded entity for federal income Tax purposes as of immediately following the Closing. Each of Parent, Merger Sub I and Merger Sub II is duly qualified to do business in each jurisdiction in which the nature of its business or the ownership of its properties makes such qualification necessary, except for where such failures to be so qualified would not, individually or in the aggregate, reasonably be expected to delay or impair Parent’s, Merger Sub I’s or Merger Sub II’s abilities to consummate the Mergers. Parent owns beneficially and of record all outstanding capital stock of Merger Sub I and all outstanding membership interests of Merger Sub II, in each case free and clear of any Liens, and no other Person holds any capital stock of Merger Sub I or interests of Merger Sub II nor has any rights to acquire any interest in either Merger Sub. Each of the Merger Subs was incorporated or formed, as applicable, solely for the purpose of engaging in the Transactions contemplated by this Agreement. Each of the Merger Subs (i) has engaged in no business activities or operations, and (ii) has conducted its operations only as contemplated by this Agreement.

3.2 Authority and Enforceability. Each of Parent, Merger Sub I and Merger Sub II has all requisite corporate power and authority to enter into this Agreement and any Related Agreements to which it is a party and to consummate the Transactions. The execution and delivery by each of Parent, Merger Sub I and Merger Sub II of this Agreement and any Related Agreements to which it is a party and the consummation of the Transactions have been duly authorized by all necessary corporate and other action on the part of Parent and the Merger Subs. This Agreement and any Related Agreements to which Parent and/or Merger Sub I or Merger Sub II is a party have been duly executed and delivered by Parent, Merger Sub I and Merger Sub II and constitute the valid and binding obligations of Parent, Merger Sub I and Merger Sub II, enforceable against Parent, Merger Sub I and Merger Sub II in accordance with their terms, subject to the Enforceability Limitations.

3.3 Governmental Approvals and Consents. No consent, waiver, approval, Order or authorization of, or registration, declaration or filing with, any Governmental Entity is required by or with respect to Parent or the Merger Subs in connection with the execution and delivery of this Agreement and any Related Agreements to which Parent, Merger Sub I or Merger Sub II is a party or the consummation of the Transactions, except for (a) such consents, waivers, approvals, orders, authorizations, registrations, declarations and filings as may be required under applicable securities laws and state “blue sky” laws, in (b) the filing of the First Merger Certificate of Merger and the Second Merger Certificate of Merger with
the Secretary of State of the State of Delaware, and (c) such consents, waivers, approvals, orders, authorizations, registrations, declarations and filings that have been obtained prior to the execution of this Agreement on terms that in the aggregate would not materially impair Parent’s ability to consummate the Mergers.

3.4 No Conflicts. The execution and delivery by Parent and each of the Merger Subs of this Agreement and any Related Agreement to which Parent or such Merger Sub is a party, and the consummation of the Transactions, will not result in any violation of or default under (with or without notice or lapse of time, or both) or give rise to a right of termination, cancellation, modification or acceleration of any material obligation or loss of any material benefit under (a) any provision of the certificate of incorporation or bylaws (or equivalent organizational documents) of Parent or such Merger Sub, as amended or (b) any Legal Requirement or Order applicable to Parent or any of its direct or indirect subsidiaries.

3.5 SEC Reports and Financial Statements.

3.5.1 A true and complete copy of each quarterly report and registration statement filed by Parent with the SEC since the initial public offering of Parent Common Stock on January 1, 2017 and prior to the date hereof (the “Parent SEC Documents”) is available on the Web site maintained by the SEC at http://www.sec.gov, other than portions in respect of which confidential treatment was granted by the SEC. As of their respective filing dates, the Parent SEC Documents complied in all material respects with the requirements of the Securities Act and the Exchange Act, as the case may be, and the rules and regulations of the SEC promulgated thereunder applicable to such Parent SEC Documents, and none of the Parent SEC Documents contained on their filing dates any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading, except to the extent corrected by a subsequently filed Parent SEC Document.

3.5.2 Except as set forth in any Parent SEC Document, the financial statements of Parent, including the notes thereto, included in the Parent SEC Documents (the “Parent Financial Statements”) complied as to form in all material respects with the published rules and regulations of the SEC with respect thereto as of their respective dates, were prepared in accordance with GAAP (except as may be indicated in the notes thereto, except in the case of pro forma statements, or, in the case of unaudited financial statements, except as permitted under Form 10-Q under the Exchange Act) and fairly presented in all material respects the consolidated financial position of Parent and its consolidated subsidiaries as of the respective dates thereof and the consolidated results of Parent’s operations and cash flows for the periods indicated (subject to, in the case of unaudited statements, normal and recurring year-end audit adjustments).

3.5.3 Parent maintains a system of internal controls over financial reporting (as defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act) which is designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP, and includes those policies and procedures that: (i) pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of Parent; (ii) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP and that receipts and expenditures are being made only in accordance with authorizations of management and directors of Parent; and (iii) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the assets of Parent that could have a material effect on the Parent Financial Statements. Parent has established and maintains disclosure controls and procedures (as defined in Rules 13a-15(e) and 15d-15(e) of the Exchange Act) reasonably designed to provide reasonable assurance that all material information required to be disclosed by Parent in the reports that it files or furnishes under the Exchange.
Act is recorded, processed, summarized and reported within the time periods specified in the rules and forms of the SEC, and that all such material information is accumulated and communicated to Parent’s management as appropriate to allow timely decisions regarding required disclosure and to make the certifications required pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act. Since December 31, 2014, neither Parent nor Parent’s independent registered accountant has identified or been made aware of: (A) any significant deficiency or material weakness in the design or operation of internal control over financial reporting utilized by Parent; (B) any illegal act or fraud, whether or not material, that involves Parent or its management or other employees; or (C) any claim or allegation regarding any of the foregoing. There are no outstanding loans made by Parent or any of its direct or indirect subsidiaries to any executive officer (as defined in Rule 3b-7 under the Exchange Act) or director of Parent.

3.6 Parent Capitalization. The authorized capital stock of Parent consists of 1,000,000,000 shares of Parent Common Stock, of which 229,632,046 shares were issued and outstanding as of November 16, 2020 and 100,000,000 shares of preferred stock, of which none are issued and outstanding as of the close of business on the day immediately preceding the date of this Agreement. All of the outstanding shares of Parent Common Stock have been duly authorized and validly issued, and are fully paid and non-assessable.

3.7 Merger Consideration.

(a) Parent has sufficient cash and cash equivalents on hand to pay the cash portion of the Merger Consideration.

(b) The Parent Common Stock to be issued by Parent as part of the Merger Consideration has been duly authorized, and upon consummation of the First Merger and the issuance of such shares of Parent Common Stock pursuant to and in accordance with the terms hereof, will be validly issued, fully paid and non-assessable.

(c) The Parent Common Stock to be issued by Parent as part of the Merger Consideration will be, when issued in accordance with the terms of this Agreement, validly issued, fully paid and non-assessable.

3.8 Brokers. There is no investment banker, broker, finder, agent or other Person that has been retained by or is authorized to act on behalf of Parent or any of its subsidiaries who is entitled to any financial advisor’s, brokerage, finder’s or other similar fee or commission in connection with this Agreement and the Transactions.

3.9 Statutory Merger. To the Knowledge of Parent, there are no facts or circumstances that would reasonably be expected to prevent the Mergers, taken together, from qualifying as a reorganization under Section 368(a)(1)(A) of the Code.

3.10 No Litigation. There is no Action pending or, to the Parent’s knowledge, threatened against Parent that challenges or seeks to prevent or otherwise delay the validity of this Agreement, the Related Agreements, or the consummation of the Transactions, or any other action taken or to be taken by Parent in connection herewith or therewith.

3.11 No Other Representations and Warranties. Except as expressly set forth in Article III, none of Parent, the Merger Subs nor any of their respective agents, employees or Representatives have made, nor are any of them making any representation or warranty, written or oral, express or implied, in respect of Parent, the Merger Subs, or any of their respective Subsidiaries or businesses, including any representations and warranties about the accuracy or completeness of any information or documents previously provided, and any such other representations or warranties are hereby expressly disclaimed. The
Company expressly acknowledges and agrees that none of the Company or any of its agents, employees or Representatives is relying on any other representation or warranty of Parent, the Merger Subs or any of its agents, employees or Representatives, including regarding the accuracy or completeness of any such other representations and warranties, whether express or implied. Notwithstanding the foregoing, Parent hereby acknowledges that during the course of the due diligence investigation of Parent conducted by or on behalf of the Company in connection with the Company’s consideration of the Transactions, Parent provided information and made statements to the Company and its Representatives regarding Parent and its business, operations, financial condition and other matters. The Company understands and hereby acknowledges and agrees that neither the Company nor any other Person shall have any right to file, bring or make (and hereby expressly waives to the fullest extent allowable under applicable Legal Requirements the right to file, bring or make) any lawsuit or other claims against Parent or any of its Affiliates or Representatives under this Agreement or otherwise as a result of any inaccuracies in any such information or statements unless and solely to the extent that such information or statements (i) are the subject of an express representation and warranty set forth in this Article III, or (ii) the Company can demonstrate the commission of actual fraud or an intentional misrepresentation by or on behalf of Parent or the Merger Sub when such information or such statements were provided or otherwise made; provided, however, that notwithstanding the foregoing, the Company understands and hereby acknowledges and agrees that neither the Company nor any other Person shall have any right to bring (and hereby expressly waives to the fullest extent allowable under applicable Legal Requirements the right to file, bring or make) any lawsuit or other claims against Parent or any of its Affiliates or Representatives under this Agreement or otherwise arising out of any forward looking, predictive or prospective information or statements. As of the execution and delivery of this Agreement, Parent does not have Knowledge (excluding, for this purpose, any duty of inquiry) of any material claims for indemnification that it has against the Indemnifying Parties pursuant to Section 7.2(a)(i) that relate to currently outstanding Losses; provided, however, that (A) Parent has Knowledge of matters which could result in one or more claims for indemnification pursuant to Section 7.2(a)(i) if any Indemnified Party pays, incurs, suffers or sustains any Losses in connection with any such matters and (B) no representations or warranties are made by Parent as to any claims for indemnification pursuant to Section 7.2(a)(i) that involve or are based in part on matters Known to Parent as of the execution and delivery of this Agreement.

ARTICLE IV
CONDUCT OF COMPANY BUSINESS
DURING PENDENCY OF TRANSACTION

4.1 Affirmative Obligations of the Company. During the period from the date of this Agreement and continuing until the earlier of the valid termination of this Agreement pursuant to Section 6.1 or the First Merger Effective Time, except to the extent that Parent shall otherwise consent in writing, the Company shall conduct the business of Company in the usual, regular and ordinary course and in substantially the same manner as heretofore conducted, pay all Taxes of the Company when due (subject to Parent’s review and consent to the filing of Tax Returns, as set forth in Section 4.2(p)), pay or perform all other obligations of the Company when due (including the timely withholding, collecting, remitting and payment of all Taxes required under Legal Requirement), and, to the extent consistent with such business, preserve intact the present business organizations of the Company, keep available the services of the present officers and Employees of the Company, preserve the assets (including intangible assets) and properties of the Company and preserve the relationships of the Company with customers, suppliers, distributors, licensors, licensees, and others having business dealings with them, all with the goal of preserving unimpaired the goodwill and ongoing businesses of the Company at the First Merger Effective Time.

4.2 Restrictions on Company Business and Operations. In furtherance and not in limitation of Section 4.1, during the period from the date of this Agreement and continuing until the earlier of the valid termination of this Agreement pursuant to Section 6.1 or the First Merger Effective Time, except as expressly contemplated by this Agreement, the Company shall not:
(a) cause or permit any modifications, amendments or changes to the Charter Documents;

(b) declare, set aside, or pay any dividends on or make any other distributions (whether in cash, stock or property) in respect of any Company Capital Stock, or make any other actual, constructive or deemed distribution in respect of the such shares of capital stock;

(c) split, combine or reclassify any Company Capital Stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of Company Capital Stock, or directly or indirectly repurchase, redeem or otherwise acquire any shares of Company Capital Stock (or options, warrants or other rights convertible into, exercisable or exchangeable for Company Common Stock), except in accordance with the agreements evidencing Company Options or Company Restricted Stock outstanding and as in effect on the date hereof;

(d) issue, grant, deliver or sell or authorize or propose the issuance, grant, delivery or sale of, or purchase or propose the purchase of, any Company Capital Stock or equity-based awards (whether payable in cash, stock or otherwise) or any securities convertible into, exercisable or exchangeable for, or subscriptions, rights, warrants or options to acquire, or other agreements or commitments of any character obligating any of them to issue or purchase any such shares or other convertible securities, except for: (1) the issuance of Company Capital Stock pursuant to the exercise of Company Options or Company Warrants outstanding as of the date of this Agreement in accordance with their terms as in effect on the date hereof, (2) the vesting of any shares of Company Restricted Stock outstanding as of the date of this Agreement in accordance with their terms as in effect on the date hereof, and (3) the issuance of shares of Company Common Stock upon conversion of shares of Company Preferred Stock;

(e) form, or enter into any commitment to form, a subsidiary, or acquire, or enter into any commitment to acquire, an interest in any corporation, association, joint venture, partnership or other business entity or division thereof;

(f) make or agree to make any capital expenditure or commitment exceeding $100,000 individually or $250,000 in the aggregate;

(g) acquire or agree to acquire or dispose or agree to dispose of any assets of the Company or any business enterprise or division thereof outside the ordinary course of the business of the Company, and consistent with past practice, or merge or consolidate with or into any other Person;

(h) propose or adopt a plan of complete or partial liquidation, dissolution, merger, consolidation, restructuring, recapitalization or other reorganization of the Company;

(i) enter into any agreement, contract or commitment for the (i) sale, lease, license or transfer of any Company IP or any Technology exclusively licensed to the Company or enter into any agreement, contract, commitment, modification or amendment to any agreement with respect to Company IP or any Technology exclusively licensed to the Company with any Person, (ii) purchase or license of any Technology or Intellectual Property Rights or execution, modification or amendment of any agreement with respect to the Technology or Intellectual Property Rights of any Person, or (iii) change in pricing or royalties set or charged by the Company to its customers or licensees or in pricing or royalties set or charged by Persons who have licensed Intellectual Property Rights to the Company, except, in each case, pursuant to Contracts substantially in the form of the Standard Form IP Contracts in the ordinary course of business;
(j) incur any Indebtedness (other than the obligation to reimburse employees for travel and business expenses or indebtedness incurred in connection with the purchase of goods and services, each in the ordinary course of the Company’s business consistent with past practices), issue or sell any debt securities, create a Lien over any asset of the Company or amend the terms of any outstanding loan agreement;

(k) assume, guarantee, endorse or otherwise become liable or responsible (whether directly, contingently or otherwise) for the obligations of any other Person except with respect to obligations of direct or indirect wholly owned Subsidiaries;

(l) make any loan to any Person (except for advances to employees for reasonable business travel and expenses in the ordinary course of business consistent with past practice), purchase debt securities of any Person or guarantee any Indebtedness of any Person;

(m) commence or settle any Action or threat of any Action by or against the Company or relating to any of their businesses, properties or assets;

(n) pay, discharge, release, waive or satisfy any claims, rights or liabilities, other than the payment, discharge or satisfaction in the ordinary course of business of liabilities reflected on the Current Balance Sheet or incurred in the ordinary course of business after the Balance Sheet Date;

(o) adopt or change accounting methods or practices (including any change in depreciation or amortization policies or rates or any change to practices that would impact the methodology for recognizing revenue) other than as required by GAAP;

(p) make or change any election in respect of Taxes, adopt or change any accounting method in respect of Taxes, enter into any agreement in respect of Taxes, settle or compromise any claim or assessment in respect of Taxes, consent to any extension or waiver of the limitation period applicable to any claim or assessment in respect of Taxes, make or request any Tax ruling, enter into any Tax sharing or similar agreement or arrangement (other than a Contract, such as a lease, the primary purpose of which is not related to Taxes), enter into any transactions giving rise to deferred gain or loss, amend any Tax Return or file any income Tax Return including any estimated Tax Return or other material Tax Return unless a copy of such Tax Return has been submitted to Parent for review a reasonable period of time prior to filing and Parent has consented to such filing (which consent shall not be unreasonably withheld, conditioned or delayed);

(q) subject to subsection (s) below, adopt, amend or terminate, or start a termination process of, any Company Employee Plan, collective bargaining agreement and other agreements or arrangements with any works councils, employee group representative or labor organization or employee groups or any Employee Agreement including any indemnification agreement, enter into or amend any Employee Agreement or otherwise hire any Person as an Employee, except as required by the terms of such agreements or arrangement;

(r) increase or make any other change that would result in increased cost to the Company to the salary, wage rate, incentive compensation opportunity, employment status, title or other compensation (including equity based compensation) payable or to become payable by the Company to any Employee;

(s) hire employees at the executive level or higher or, other than in the ordinary course of business consistent with past practice, any other employees;
(t) terminate any employees of the Company or otherwise cause any employees of the Company to resign, in each case other than (x) in the ordinary course of business consistent with past practice or (y) for cause or poor performance (documented in accordance with the Company’s past practices);

(u) make any declaration, payment, commitment or obligation of any kind for the payment (whether in cash, equity or otherwise) of a severance payment or other change in control payment, termination payment, bonus, special remuneration or other additional salary or compensation (including equity based compensation) to any Employee, except payments made pursuant to written agreements existing on the date hereof and disclosed on Schedule 4.2(u) hereto;

(v) take any action to accelerate the vesting or payment of, or otherwise modify the terms of any of the outstanding Company Options or Company Restricted Stock or accelerate the vesting or payment of, any other compensation to any Employee, except as required by the terms of any applicable option agreement, restricted stock agreement, warrant agreement or similar agreement outstanding on the date hereof;

(w) cancel, amend (other than in connection with the addition of customers and suppliers to such insurance policies from time to time in the ordinary course of business consistent with past practices) or fail to renew (on substantially similar terms) any insurance policy of the Company;

(x) except as required by applicable Legal Requirements, convene any regular or special meeting (or any adjournment or postponement thereof) of the Stockholders;

(y) except as required by applicable Legal Requirements, send any written communications (including electronic communications) to Employees regarding this Agreement or the Transactions or make any representations or issue any communications to Employees that, in each case, are inconsistent with this Agreement or the Transactions, including any representations regarding offers of employment from Parent;

(z) (i) terminate, amend, waive, or modify in any material manner relative to such Contract or the Company’s businesses or operations, or violate, the terms of any Material Contract, or (ii) enter into any Contract which would have constituted a Material Contract had such Contract been entered into prior to the date hereof;

(aa) enter into any new line of business or change its material operating policies in any material respect, except as required by applicable Legal Requirements or by policies imposed by any Governmental Entity;

(bb) amend, revise or modify any existing Company Privacy Policy, or publish any new Company Privacy Policy;

(cc) other than in the ordinary course of business consistent with past practice, (i) introduce any material new products or services or any material marketing campaigns or (ii) introduce any material new sales compensation or incentive programs or arrangements; or

(dd) take, commit, or agree in writing or otherwise to take, any of the actions described the foregoing clauses of this Section 4.2, or any other action that would (i) prevent the Company from performing, or cause the Company not to perform, its covenants or agreements hereunder or (ii) cause or result in any of its representations and warranties set forth herein being untrue or incorrect.

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5.1 No Solicitation of Competing Acquisition Proposals.

(a) Termination of Pending Discussions. The Company shall immediately cease and cause to be terminated any negotiations, discussions or agreements (other than with Parent) regarding any Alternative Transaction. The Company agrees that it shall, as soon as practicable following the date hereof, but in any event within two (2) Business Days, request of each Third Party that has heretofore executed a confidentiality agreement in connection with its consideration of a transaction with the Company to return or destroy (in accordance with the terms of such confidentiality agreement) all confidential information furnished prior to the execution of this Agreement to or for the benefit of such Third Party by or on behalf of the Company, or Representatives.

(b) No Solicitation of Competing Acquisition Proposals. Commencing on the date hereof and continuing at all times until the earlier to occur of the First Merger Effective Time and the valid termination of this Agreement pursuant to the provisions of Section 6.1, the Company shall not, through any of its directors, officers or other employees, stockholders, Affiliates, representatives, or other agents including its financial, legal or accounting advisors (together, “Representatives”), directly or indirectly: (i) solicit, initiate, seek, knowingly encourage, promote, formally approve or support any inquiry, proposal or offer from, (ii) furnish any non-public information regarding the Company (other than in connection with the sale of products and services in the ordinary course of business consistent with past practice or license of Intellectual Property Rights in connection therewith) to, (iii) take any other action that is intended or would be reasonably expected to assist or facilitate any inquiries or the making of any proposal that constitutes or could lead to an Alternative Transaction with, (iv) participate in any discussions or negotiations (except to state that such discussions or negotiations are not permitted pursuant to these provisions) with, (v) approve, endorse or recommend, or propose to approve, endorse or recommend, an Alternative Transaction by, (vi) terminate, amend or waive any rights under (or fail to enforce by seeking an injunction or by seeking to specifically enforce the material terms of) any confidentiality or “standstill” or other similar agreement between the Company with, (vii) take any action to exempt from Section 203 of Delaware Law or any other Takeover Law, in each of the preceding clauses (i)-(vii) above, any corporation, limited liability company, general or limited partnership, business trust, unincorporated association or other entity, person or group of any of the foregoing (other than Parent and its Representatives acting in their capacities as such) (each, a “Third Party”) regarding (A) any acquisition of all or any part of the Company (including by way of any merger or consolidation with or involving the Company) or any acquisition, issuance, grant, sale or transfer of any of the securities, business, properties or assets of the Company (other than the sale of products and services in the ordinary course of business consistent with past practice or license of Intellectual Property Rights in connection therewith), (B) any joint venture or other strategic investment in or involving the Company (other than a commercial or strategic relationship in the ordinary course of business), including any new financing, investment round or recapitalization of the Company, (C) the employment of all or substantially all of the Employees or (D) any other similar transaction involving the Company that is not in the ordinary course of business (each, an “Alternative Transaction”); or (viii) enter into any Contract, whether binding or non-binding, with any Third Party providing for an Alternative Transaction (including a letter of intent or exclusivity agreement) or committing the Company to do any of the actions contemplated by the preceding clauses (i)-(vii) above.

(c) Notice of Competing Acquisition Proposals. In the event that the Company or any of its Representatives shall receive, prior to the First Merger Effective Time or the termination of this Agreement in accordance with Section 6.1, any inquiry offer, proposal or indication of interest regarding a potential Alternative Transaction, or any request for disclosure of information or access of the type referenced in clause (ii) of Section 5.1(b), the Company or such Affiliate or Representative shall
immediately notify Parent thereof, which notice shall include the identity of the Third Party making any such inquiry, offer, proposal, indication of interest or request, and the specific terms of such inquiry, offer, proposal, indication or request, as the case may be (including a copy of any written material and electronic communications received from such Third Party), and such other information related thereto as Parent may reasonably request.

(d) **Actions of Representatives.** The parties hereto understand and agree that any violation of the restrictions set forth above by any Representative of the Company shall be deemed to be a breach of this Agreement by the Company.

(e) **Specific Performance.** The parties hereto agree that irreparable damage would occur in the event that the provisions of this Section 5.1 were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed by the parties hereto that Parent shall be entitled to an immediate injunction or injunctions, without the necessity of proving the inadequacy of money damages as a remedy and without the necessity of posting any bond or other security, to prevent breaches of the provisions of this Section 5.1 and to enforce specifically the terms and provisions hereof in any court of the United States or any state having jurisdiction, this being in addition to any other remedy to which Parent may be entitled at law or in equity.

5.2 **Stockholder Approval.** Promptly following the execution of this Agreement, the Company shall solicit written consent from the Major Stockholders in the form attached hereto as Exhibit E (the “Stockholder Written Consent”) and, concurrently therewith, deliver the information statement in the form attached hereto as Exhibit F (the “Information Statement”), in each case in accordance with Delaware Law. The Company shall promptly deliver to Parent a copy of each executed Stockholder Written Consent upon receipt thereof from any Stockholder pursuant to such solicitation. It is anticipated that, promptly after the execution of this Agreement, the Company will receive Stockholder Written Consents from Stockholders pursuant to the preceding solicitation that are sufficient to fully and irrevocably deliver the Requisite Stockholder Approval. Promptly upon obtaining the Requisite Stockholder Approval, the Company shall prepare and, as soon as reasonably practicable, send to all Stockholders on the record date for the Stockholder Written Consent who did not execute a Stockholder Written Consent the notices required pursuant to Delaware Law. Such materials submitted to the Stockholders in connection with such Stockholder Written Consents shall be subject to review and comment by Parent. Each party agrees that information supplied by such party for inclusion in the Information Statement will not, on the date the Information Statement is first sent or furnished to the Stockholders, contain any statement which, at such time, is false or misleading with respect to any material fact, or omit to state any material fact necessary in order to make the statements made therein, in light of the circumstances under which they are made, not false or misleading.

5.3 **Reasonable Best Efforts to Close.** Subject to the terms and conditions provided in this Agreement, each of the parties hereto (other than the Stockholder Representative) shall use reasonable best efforts to take promptly, or cause to be taken promptly, all actions, and to do promptly, or cause to be done promptly, all things necessary, proper or advisable under applicable Legal Requirements to consummate and make effective Transactions as promptly as practicable, including by using reasonable best efforts to take all action necessary to satisfy all of the conditions to the obligations of the other party or parties hereto to effect the Mergers set forth in Section 1.2(b), to obtain all necessary waivers, consents, approvals and other documents required to be delivered hereunder and to effect all necessary registrations and filings and to remove any injunctions or other impediments or delays, legal or otherwise, in each case in order to consummate and make effective the Transactions for the purpose of securing to the parties hereto the benefits contemplated by this Agreement. Each party hereto, at the request of another party hereto, shall execute and deliver such other instruments and do and perform such other acts and things as may be reasonably necessary or desirable for effecting completely the consummation of the Transactions.

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5.4 Access to Information. The Company shall afford Parent and its Representatives reasonable access during the period from the date hereof and prior to the First Merger Effective Time to (i) all of the properties, Books and Records and Contracts of the Company, including all Company IP, (ii) all other information concerning the business, properties and personnel (subject to restrictions imposed by applicable Legal Requirements) of the Company as Parent may reasonably request, and (iii) all Employees of the Company as identified by Parent. The Company agrees to provide to Parent and its accountants, counsel and other Representatives copies of internal financial statements (including Tax Returns and supporting documentation) promptly upon request. No information or knowledge obtained in any investigation pursuant to this Section 5.4 or otherwise shall affect or be deemed to modify, amend or supplement any representation or warranty set forth herein or in the Disclosure Schedule or the conditions to the obligations of the parties to consummate the Mergers in accordance with the terms and provisions hereof, restrict, impair or otherwise affect any Indemnified Parties’ right to indemnification hereunder or otherwise prevent or cure any misrepresentations, breach of warranty or breach of covenant.

5.5 Transfer Taxes. All transfer, documentary, registration and other similar Taxes (including, without limitation, charges for or in connection with the recording of any instrument or document as provided in this Agreement and any indirect or direct Taxes (including Taxes on capital gains) imposed on the transfer or deemed transfer of any Subsidiary of the Company pursuant to the Transactions contemplated by this Agreement) payable in connection with the execution and delivery of this Agreement, the consummation of the Closing and the Mergers (“Transfer Taxes”) shall be borne and timely paid one-half by Parent and one-half by the Stockholders. The Person(s) required by applicable Legal Requirement to file any necessary Tax Returns and other documentation with respect to Transfer Taxes shall file such Tax Returns and documentation and, if required by an applicable Legal Requirement, the Company or Parent, as the case may be, shall join in the execution of such Tax Returns and documentation.

5.6 Treatment of 401(k) Plan. Unless instructed otherwise by Parent, effective as of no later than the day immediately preceding the Closing Date, the Company shall terminate any and all Company Employee Plans intended to include group severance pay or benefits and any arrangement pursuant to Section 401(k) of the Code (each, a “401(k) Plan”) (unless Parent provides written notice to the Company that such 401(k) plans shall not be terminated). The Company shall provide Parent with evidence that any such 401(k) Plan has been terminated pursuant to resolutions of the board of directors (or similar body) of the Company or its ERISA Affiliates, as the case may be. The form and substance of such resolutions shall be subject to review and approval of Parent (which approval shall not be unreasonably withheld or delayed). The Company also shall take such other actions in furtherance of terminating any such Company Employee Plan as Parent may reasonably require. In the event that termination of a 401(k) Plan would reasonably be anticipated to trigger liquidation charges, surrender charges or other fees, then such charges and/or fees shall be included in Third Party Expenses and shall be the responsibility of the Company, and the Company shall take such actions as are necessary to reasonably estimate the amount of such charges and/or fees and provide such estimate in the Statement of Expenses.

5.7 Directors’ and Officers’ Indemnification.

(a) For a period of six (6) years following the First Merger Effective Time, Parent shall, and Parent shall cause the Second Merger Surviving Entity or its successor to, fulfill and honor in all respects the obligations of the Company with respect to all rights to indemnification (including advancement of expenses) or exculpation existing in favor of, and all limitations on the personal liability of, any Person who is now, or has been at any time prior to the date hereof, or who becomes prior to the First Merger Effective Time, a director, officer, employee, fiduciary or agent of the Company under the Charter Documents or in any indemnification agreements in effect as of the date hereof and set forth on Schedule 5.7 hereto to the fullest extent permitted by applicable Legal Requirements (each, a “D&O Indemnified Party” and collectively, the “D&O Indemnified Parties”). Notwithstanding the foregoing,
Parent shall have no obligation to maintain the existence of the Second Merger Surviving Entity for any specified period following the First Merger Effective Time. The Company hereby represents to Parent that no claim for indemnification has been made as of the date hereof by any director or officer of the Company.

(b) Prior to the First Merger Effective Time, the Company shall purchase (and pay in full all premiums on) an extended reporting period endorsement under the Company’s existing directors’ and officers’ liability insurance coverage for the Company’s directors and officers on terms reasonably acceptable to Parent that shall provide such directors and officers with coverage for six (6) years following the First Merger Effective Time of not less than the existing coverage and have other terms not materially less favorable to the insured Persons than the directors’ and officers’ liability insurance coverage presently maintained by the Company and any premiums with respect to such policy shall be Third Party Expenses hereunder (the “D&O Tail Policy”). After the First Merger Effective Time, Parent and the Second Merger Surviving Entity shall maintain such policy in full force and effect, and continue to honor the obligations thereunder; provided, however, that Parent and the Second Merger Surviving Entity shall have no obligation to pay premiums or any other amounts with respect to such policy. In addition, prior to the First Merger Effective Time, the Company shall purchase (which expense shall not be a Third Party Expense) a single premium tail coverage policy with respect to the Company’s errors and omissions insurance policies that provides coverage for events occurring prior to the First Merger Effective Time (the “Errors and Omissions Insurance”) for a period of thirty-six (36) months following the Closing Date.

(c) Notwithstanding anything in this Agreement to the contrary, the obligations under this Section 5.7 shall not be terminated or modified in such a manner as to adversely affect any D&O Indemnified Party to whom this Section 5.7 applies without the consent of such affected D&O Indemnified Party (it being expressly agreed that the D&O Indemnified Parties to whom this Section 5.7 applies shall be third party beneficiaries of this Section 5.7 and shall be entitled to enforce the covenants contained herein).

(d) In the event that, following the Second Merger Effective Time, Parent or the Second Merger Surviving Entity or any of their respective successors or assigns (i) consolidates with or merges into any other Person and shall not be the continuing or surviving corporation or entity of such consolidation or merger, (ii) transfers or conveys all or substantially all of its properties and assets to any Person or (iii) commences a dissolution, liquidation, assignment for the benefit of creditors or similar action, then, and in each such case, to the extent necessary, proper provision shall be made so that either the successors and assigns of Parent or the Second Merger Surviving Entity, as the case may be, shall assume the obligations set forth in this Section 5.7.

5.8 Tax Matters.

(a) Limitation on Return Filing for Pre-Closing Periods. Neither Parent nor any Affiliate of Parent shall file, amend, re-file or otherwise modify any Tax Return relating in whole or in part to the Company for any Pre-Closing Tax Period which results in the Indemnifying Parties becoming liable for additional Taxes, without consulting the Stockholder Representative and considering in good faith the Stockholder Representative’s reasonable comments. Parent and any Affiliate of Parent shall prepare any such Tax Returns relating in whole or in part to the Company for any Pre-Closing Tax Period consistent with the past practices of the Company unless otherwise required by applicable Legal Requirements. Neither Parent nor any Affiliate of Parent shall elect to waive any carryback of the Company’s net operating losses (if any) under Section 172(b)(3) of the Code on any Tax Return of the Company filed for any Pre-Closing Tax Period (or any similar provision of local, state or non-U.S. Legal Requirement), to the extent that such net operating loss is attributable to a period ending on or before the Closing Date.
Transaction Related Deductions. For all purposes, including with respect to the preparation of any Tax Returns, Parent, the Company and the Stockholder Representative agree that (i) all Transaction Deductions shall be treated as properly allocable to the taxable period or portion thereof ending on or before the Closing Date and shall be included as deductions on the Tax Returns of the Company for such period to the maximum extent permitted by applicable Legal Requirement, and (ii) such Tax Returns shall be prepared for a pre-Closing short year in accordance with Treasury Regulations Section 1.1502-7(b)(1)(ii)(A)(1) (and not using the “next day” rule of Treasury Regulations Section 1.1502-76(b)(1)(ii)(B)).

“Transaction Deductions” means all items of loss, deduction or credit resulting from or attributable to (x) the repayment at or prior to Closing of Indebtedness of the Company and the payment at or prior to Closing of any related fees, expenses or interest, and (y) Third Party Expenses. The Transaction Deductions described in clause (y) shall be computed consistent with the safe harbor for treating success-based fees pursuant to Revenue Procedure 2011-29, 2011-18 I.R.B. 746 in lieu of maintaining the documentation required by Treasury Regulations Section 1.263(a)-5(f).

Closing of Books for Straddle Period. In the case of any tax period that begins prior to the Closing Date but does not end on the Closing Date (a “Straddle Period”), the amount of any Taxes based on or measured by income of the Company for the Pre-Closing Tax Period shall be determined based on an interim closing of the books as if the Straddle Period ended as of the close of business on the Closing Date, except that any exemptions, allowances or deductions that are calculated on an annual basis shall be calculated on a per diem basis, and the amount of Taxes charged on a periodic basis (such as ad valorem or property Taxes) that relate to a Pre-Closing Tax Period shall be deemed to be the amount of such Taxes for the entire Straddle Period multiplied by a fraction the numerator of which is the number of days in the portion of such Straddle Period in the Pre-Closing Tax Period and the denominator of which is the number of days in the entire Straddle Period.

Past Tax Claims. If any item on a Tax Return of the Company for any Pre-Closing Tax Period, or the amount of taxable gain or loss resulting therefrom, is disputed by any Governmental Entity as part of a tax claim (a “Past Tax Claim”), the party receiving notice of the Past Tax Claim shall promptly notify the other parties. The control and resolution of Past Tax Claims shall be governed by Section 7.4(b).

Cooperation on Tax Matters. Parent and the Stockholders shall, and the parties shall cause the Company to, cooperate, as and to the extent reasonably requested by the other parties, in connection with the filing of Tax Returns and any audit, litigation or other proceeding with respect to Taxes. Such cooperation shall include, (A) the retention and (upon another party’s request) the provision of records and information reasonably relevant to any such audit or litigation, (B) directing any holder, professional firm, accountant, or other Person in possession of any records, materials, work papers which may be relevant to Parent in respect of any audit, compliance matter, or other reason to provide Parent direct access to, and possession of, all such materials, work papers, records, memos, files, and the like, or (C) making officers, accountants, or other representatives reasonably available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder. The Stockholders and Parent agree, and shall cause the Company (A) to retain all books and records with respect to tax matters pertinent to the Company relating to any taxable period beginning before the Closing Date until expiration of the statute of limitations (and, to the extent notified by Parent, any extensions thereof) of the respective taxable periods, and to abide by all record retention agreements entered into with any Governmental Entity, and (B) to give the other party reasonable written notice prior to transferring, destroying or discarding any such books and records and, if the other party so requests, Parent or the Stockholders, as the case may be, shall, and shall cause the Company to, allow the other party to take possession of such books and records.
ARTICLE VI
PRE-CLOSING TERMINATION OF AGREEMENT

6.1 Pre-Closing Termination. Except as provided in Section 6.2, this Agreement may be terminated and the Mergers abandoned at any time prior to the Closing:

(a) by mutual written agreement of the Company and Parent;

(b) by Parent if the Requisite Stockholder Approval shall not have been obtained by the Company and delivered to Parent within four (4) hours after the execution and delivery of this Agreement by Parent and the Company;

(c) by Parent or the Company if the Closing Date shall not have occurred prior to 11:59 PM Pacific time on November 25, 2020 (the “End Date”); provided, however, that the right to terminate this Agreement under this Section 6.1(c) shall not be available to any party whose action or failure to act has been a principal cause of or resulted in the failure of the Mergers to occur on or before such date and such action or failure to act constitutes a breach of this Agreement;

(d) by Parent or the Company if any Legal Requirement shall be in effect which has the effect of making the Mergers illegal or otherwise prevents consummation of the Mergers, provided that in the case of any such Legal Requirement that is an Order, such Order has become final and non-appealable;

(e) by Parent if there has been a breach of or inaccuracy in any representation, warranty, covenant or agreement of the Company set forth in this Agreement such that the conditions set forth in Section 1.2(b)(ii)(A) and Section 1.2(b)(ii)(B) would not be satisfied as of the time of such breach or inaccuracy and such breach or inaccuracy has not been cured within ten (10) calendar days after written notice thereof to the Company; provided, however, that no cure period shall be required (i) for a breach or inaccuracy which by its nature cannot be cured or (ii) if any of the conditions to Closing in Section 1.2(b) for the benefit of Parent are incapable of being satisfied on or before the End Date; or

(f) by the Company if there has been a breach of or inaccuracy in any representation, warranty, covenant or agreement of Parent set forth in this Agreement such that the conditions set forth in Section 1.2(b)(iii)(A) and Section 1.2(b)(iii)(B) would not be satisfied as of the time of such breach or inaccuracy and such breach or inaccuracy has not been cured within ten (10) calendar days after written notice thereof to Parent; provided, however, that no cure period shall be required (i) for a breach or inaccuracy which by its nature cannot be cured or (ii) if any of the conditions to Closing in Section 1.2(b) for the benefit of the Company are incapable of being satisfied on or before the End Date.

6.2 Termination Procedures; Effect of Termination. If Parent wishes to terminate this Agreement pursuant to Section 6.1, Parent shall deliver to the Company a written notice stating that Parent is terminating this Agreement and setting forth a brief description of the basis on which Parent is terminating this Agreement. If the Company wishes to terminate this Agreement pursuant to Section 6.1, the Company shall deliver to Parent a written notice stating that the Company is terminating this Agreement and setting forth a brief description of the basis on which the Company is terminating this Agreement. In the event of termination of this Agreement as provided in Section 6.1 and the proceeding two sentences, this Agreement shall forthwith become void and there shall be no liability or obligation on the part of Parent, the Merger Subs or the Company, or their respective officers, directors or stockholders, if applicable; provided, however, that each party hereto and each Person shall remain liable for any willful and intentional breaches of this Agreement, Related Agreements or in any certificate or other instruments delivered pursuant to this Agreement prior to its termination; and provided further, however, that, the provisions of this Section 6.2,
ARTICLE VII
POST-CLOSING INDEMNIFICATION

7.1 Survival of Representations, Warranties and Related Indemnification Claims. The representations and warranties of the Company set forth in this Agreement, and the right to make indemnification claims in respect thereof under this Agreement, shall survive until 11:59 p.m. Pacific time on the eighteen (18) month anniversary of the Closing Date (the date of expiration of such period, the “Expiration Date”); provided, however, that each Specified Representation, and the right to make indemnification claims in respect of such Specified Representation, shall survive until the expiration of all applicable underlying statutes of limitations governing the subject matters addressed by each such Specified Representation (including all periods of extension, whether automatic or permissive and without giving effect to the limitations of 10 Del. C. § 8106(a)); provided, further, that all representations and warranties of the Company, and the right to make indemnification claims in respect thereof under this Agreement, shall survive beyond the Expiration Date or other survival periods specified above with respect to any inaccuracy therein or breach thereof if an Indemnification Claim Notice is timely made in accordance with the terms hereunder prior to the expiration of the survival period for such representation and warranty, in which case such representation and warranty, and the right to make indemnification claims in respect thereof under this Agreement, shall survive as to such claim until such claim has been finally resolved without giving effect to the limitations of 10 Del. C. § 8106(a); provided further, that where any survival period that extends beyond the Expiration Date would otherwise be limited by 10 Del. C. § 8106(c) the parties intend that 10 Del. C. § 8106(c) shall apply. The representations and warranties of Parent and the Merger Subs set forth in this Agreement, the Related Agreements or in any certificate or other instrument delivered pursuant to this Agreement shall terminate at the Closing. For the avoidance of doubt, it is the intention of the parties hereto that the foregoing respective survival periods and termination dates supersede any applicable statutes of limitations that would otherwise apply to such representations and warranties and the right to make indemnification claims in respect thereof under this Agreement.

7.2 Indemnification.

(a) From and after the consummation of the First Merger, subject to the terms and limitations of this Article VII, the Stockholders and Vested Company Optionholders (each, an “Indemnifying Party” and collectively, the “Indemnifying Parties”) shall severally, but not jointly, indemnify and hold harmless Parent and its affiliates (including the Second Merger Surviving Entity) and their respective directors, officers and other employees (each, an “Indemnified Party” and collectively, the “Indemnified Parties”), from and against all losses, liabilities and damages of any kind or nature, Taxes, awards, judgments penalties, fees, costs and expenses, including reasonable out-of-pocket attorneys’ and consultants’ fees and expenses and any such reasonable out-of-pocket fees, costs and expenses incurred in connection with investigating, defending against or settling any claims that are indemnifiable hereunder (hereinafter individually a “Loss” and collectively “Losses”) paid, incurred, suffered or sustained by the Indemnified Parties, or any of them (including the Second Merger Surviving Entity) (regardless of whether or not such Losses relate to any third party claims), resulting from or arising out of any of the following:

(i) any breach of or inaccuracy in, as of the date hereof or as of the Closing, a representation or warranty of the Company set forth in this Agreement, without giving effect to any update of or modification to the Disclosure Schedule made or purported to have been made on or after the date of this Agreement; provided, however, that in the event of any such breach or inaccuracy, for purposes of determining the amount of any Loss relating thereto no effect will be given to any qualifications based on
the word “material” or similar phrases (including “Company Material Adverse Effect”) contained therein (it being agreed and understood however that such qualifications will continue to apply, as applicable, to the determination of whether a breach or inaccuracy of representation or warranty has occurred);

(ii) regardless of the disclosure of any matter set forth in the Disclosure Schedule, any inaccuracy in any information required to be set forth in the Payment Spreadsheet, including any failure to properly calculate any item required to be contained therein or any inaccuracy in any information underlying any such calculation;

(iii) any failure by the Company to perform or comply with any covenant or agreement of the Company set forth in this Agreement which is required to be performed prior to the Closing;

(iv) any payment in respect of any Dissenting Shares in excess of the consideration that otherwise would have been payable in respect of such shares in accordance with this Agreement, and any other Losses paid, incurred, suffered or sustained in respect of any Dissenting Shares, including all out-of-pocket attorneys’ and consultants’ fees, costs and expenses and including any such out-of-pocket fees, costs and expenses incurred in connection with investigating, defending against or settling any Action in respect of Dissenting Shares;

(v) (A) any Taxes of the Company attributable to any taxable period or portion thereof that ends on or prior to the Closing Date (“Pre-Closing Tax Period”), (B) any Taxes attributable to the Transactions contemplated by this Agreement, including any Transaction Payroll Taxes and the Stockholders’ share of any Transfer Taxes as set forth in Section 5.5, (C) any Taxes arising as a result of the Company being (or ceasing to be), on or prior to the Closing Date, (1) a member of an affiliated or combined group pursuant to Treasury Regulations Section 1.1502-6 or any similar provision of state, local or foreign law or (2) a transferee or successor by contract (other than a Contract, the primary purpose of which is not related to Taxes or otherwise), which relate to an event occurring on or before the Closing Date, (D) any Taxes arising as a result of an express obligation arising on or prior to the Closing Date to indemnify or otherwise assume or succeed to the Taxes of any other Person, or (E) any Taxes that would have been due or payable on or prior to the Closing Date but for any provision of the 2020 Tax Acts, to the extent such Taxes are due and payable following the Closing Date; provided, however, that the Indemnifying Parties shall not indemnify the Indemnified Parties from and against: (1) any Taxes arising as a result of any election made pursuant to Sections 336(e) or 338 of the Code by Parent or any of its Affiliates (including the Second Merger Surviving Entity) after the Closing, (2) any Taxes arising as a result of any action taken by Parent or the Second Merger Surviving Entity on the Closing Date after the Closing outside of the ordinary course of business, or (3) Parent’s share of any Transfer Taxes as set forth in Section 5.5;

(vi) any Post-Closing Net Working Capital Deficit Amount; and

(vii) any actual fraud, willful breach or intentional misrepresentation by or on behalf of the Company in connection with this Agreement (including, for the avoidance of doubt, the Disclosure Schedules) or the Transactions.

(b) The Indemnifying Parties shall not have any right of contribution, indemnification or right of advancement from the Second Merger Surviving Entity, Parent or any of their respective Affiliates with respect to any Loss claimed by and/or paid to an Indemnified Party pursuant to the indemnification provisions hereof.

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(c) Any payments made to an Indemnified Party pursuant to any indemnification obligations under this Article VII will be treated as adjustments to the Merger Consideration for Tax purposes and such agreed treatment will govern for purposes of this Agreement, unless otherwise required by applicable Legal Requirements.

(d) Notwithstanding anything herein to the contrary, subject to Section 7.3(b)(iv), the indemnification rights set forth in this Article VII shall be the sole and exclusive remedy of the Indemnified Parties from and after the First Merger Effective Time for any claims arising under this Agreement, including claims of any inaccuracy in or breach of any representation, warranty or covenant in this Agreement; provided, however, that (i) this Section 7.2(d) shall not be deemed a waiver by any party of any right to specific performance or injunctive relief and (ii) nothing in this Agreement shall limit the liability of an Indemnifying Party (and this Article VII shall not be the sole and exclusive remedy in respect of such Indemnifying Party) in connection with a claim based on actual fraud, willful breach or intentional misrepresentation committed by or with the actual knowledge of such Indemnifying Party.

(e) Nothing in this Agreement shall limit the right of any party to a Related Agreement to pursue remedies under such Related Agreement against the other parties thereto; provided that with respect to monetary Losses incurred by any Indemnified Party under the Joinder Agreements, the Option Equity Award Consents, or the Escrow Agreement as a result of the Company’s or any Indemnifying Party’s breach of or inaccuracy in a representation or warranty or failure to perform or comply with any covenant therein, such Indemnified Party’s rights to indemnification shall be governed by this Article VII of this Agreement. Notwithstanding anything to the contrary contained in this Agreement, no breach of any representation, warranty, covenant or agreement contained herein or in any Related Agreement shall give rise to any right on the part of any Indemnified Party, after the consummation of the Transactions, to rescind this Agreement or any of the Transactions contemplated hereby.

7.3 Limitations on Indemnification.

(a) Threshold. Except in the case of actual fraud, willful breach or intentional misrepresentation, and for breaches of or inaccuracies in the Specified Representations, the Indemnified Parties, as a group, may not recover any Losses pursuant to an indemnification claim under Section 7.2(a)(i) unless and until the Indemnified Parties, as a group, shall have paid, incurred, suffered or sustained at least $1,000,000 in Losses in the aggregate in respect of indemnification claims under Section 7.2(a)(i) (the “Threshold Amount”), in which case the Indemnified Parties shall be entitled to recover all such Losses without regard to the Threshold Amount. For the avoidance of doubt, the limitations set forth in this Section 7.3(a) shall not apply to indemnification claims under any other clause of Section 7.2(a).

(b) Maximum Liability.

(i) Except in the case of actual fraud, willful breach or intentional misrepresentation, and indemnification claims for breaches of or inaccuracies in the Specified Representations and the IP Representations, the Indemnified Parties’ sole and exclusive source of recovery for indemnification claims under Section 7.2(a)(i) shall be recourse against the Escrow Amount held in the Escrow Fund. For the avoidance of doubt, the limitations set forth in this Section 7.3(b)(i) shall not apply to any indemnification claim under clauses (ii), (iii), (iv), (v), (vi) and (vii) and of Section 7.2(a), but shall remain subject to the limitations set forth in Section 7.2(d).

(ii) Except in the case of actual fraud, willful breach or intentional misrepresentation, the liability of the Indemnifying Parties for indemnification claims for breaches of or inaccuracies in the IP Representations shall be limited, in the aggregate, to a dollar amount equal to twenty-five percent (25%) of the Total Consideration (net of any amounts distributed from the Escrow Fund to the Indemnified Parties in satisfaction of such claims).
(iii) The Indemnified Parties’ first source of recovery for indemnification claims under Section 7.2(a) shall be recourse against the Escrow Amount held in the Escrow Fund, but if the Escrow Fund is insufficient to satisfy any portion of a Loss for which an indemnification claim has been made under Section 7.2(a)(i) for breaches of or inaccuracies in the Specified Representations or IP Representations, or for which an indemnification claim has been made under clauses (ii), (iii), (iv), (v), (vi) or (vii) of Section 7.2(a), the Indemnified Parties shall, subject in each case to the limitations set forth in this Article VII, be entitled to recover such excess portion of such Losses in respect of such indemnification claims (the portion of any such excess Loss for which such indemnification is not satisfied by the Escrow Fund is referred to as an “Excess Loss”) directly from the Indemnifying Parties and each Indemnifying Party shall, subject to the limitations set forth in this Article VII, be liable, severally and not jointly, solely for its, his or her Pro Rata Portion of the Excess Losses in respect of such indemnification claim.

(iv) The liability of each Indemnifying Party for indemnification claims under this Agreement shall be limited, in the aggregate, to a dollar amount equal to the aggregate portion of the Merger Consideration actually received by such Indemnifying Party pursuant to this Agreement (without regard to any withholding, vesting or other similar limitation applicable to such payments); provided, however, that nothing in this Article VII shall limit the liability of an Indemnifying Party in connection with a claim based on actual fraud, willful breach or intentional misrepresentation committed by or with the actual knowledge of such Indemnifying Party.

(c) The rights of the Indemnified Parties to indemnification, compensation or reimbursement, payment of Losses or any other remedy under this Agreement shall not be affected by any investigation conducted with respect to, or any knowledge acquired (or capable of being acquired) at any time, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of or compliance with, any representation, warranty, covenant or agreement made by the Company or any other matter. The waiver of any condition based on the accuracy of any such representation or warranty, or on the performance of or compliance with any such covenant or agreement, will not affect the right to indemnification, compensation or reimbursement, payment of Losses, or any other remedy based on any such representation, warranty, covenant or agreement. Other than with respect to any claim for fraud, no Indemnified Party shall be required to show reliance on any representation, warranty, certificate or other agreement in order for such Indemnified Party to be entitled to indemnification, compensation or reimbursement hereunder.

(d) The amount of any Losses that are subject to indemnification under this Article VII shall be calculated net of the amount of any insurance proceeds, indemnification payments, contribution payments or reimbursements actually received by the Indemnified Parties in respect of such Losses or any of the events or circumstances giving rise or otherwise related to such Losses (net of any costs or expenses incurred in obtaining such insurance, indemnification, contribution or reimbursement, including any increases in insurance premiums resulting from any insurance recovery), provided, that nothing in this Section 7.3(d) shall be construed as or give rise to an obligation to seek any such insurance, indemnification, contribution or reimbursement (other than the D&O Tail Policy). In the event that any insurance or other recovery is made by Parent or any Affiliate of Parent with respect to any Losses for which Parent or any such Affiliate has been indemnified hereunder, then a refund equal to the net aggregate amount of the recovery shall be made promptly to the Indemnifying Parties (on a pro rata basis based on the portion of the Loss paid by or on behalf of each Indemnifying Party in respect of which such recovery is made).
(e) Notwithstanding anything to the contrary elsewhere in this Agreement, no Indemnifying Party shall, in any event, be liable to any other Indemnified Party for any exemplary or punitive damages, or any damages measures by a multiple of earnings, incurred, suffered or sustained by an Indemnified Party except to the extent such exemplary or punitive damages are paid to a third party.

(f) No Indemnified Party shall be entitled to recover Losses relating to any matter arising under one provision of this Agreement to the extent that such Indemnified Party has recovered Losses in respect of the same matter under another provision of this Agreement.

7.4 Indemnification Claim Procedures. Subject to the limitations set forth in Section 7.1, if an Indemnified Party wishes to make an indemnification claim under this Article VII, such Indemnified Party shall deliver a written notice (an “Indemnification Claim Notice”) to the Stockholder Representative (with a copy to the Escrow Agent) (or in the event an Indemnified Party elects to pursue such indemnification claim directly against an Indemnifying Party, to such Indemnifying Party directly) (i) stating that an Indemnified Party has paid, incurred, suffered or sustained, or reasonably anticipates in good faith that it may pay, incur, suffer or sustain Losses, and (ii) specifying in reasonable detail the individual items of such Losses, the date each such item was paid, incurred, suffered or sustained, or the basis for such anticipated liability, and the nature of the misrepresentation, breach of warranty or covenant to which such item is related. Parent may update an Indemnification Claim Notice from time to time to reflect any new information discovered with respect to the claim set forth in such Indemnification Claim Notice. Following the delivery of an Indemnification Claim Notice, Parent shall provide the Stockholder Representative and its representatives and agents with such documents and records of the Second Merger Surviving Entity and its Subsidiaries as they may reasonably require, and reasonable access to such personnel or representatives of the Second Merger Surviving Entity (including but not limited to the individuals responsible for the matters that are subject of the Indemnification Claim Notice) as they may reasonably require, for the purposes of investigating or resolving any disputes or responding to any matters or inquiries raised in the Indemnification Claim Notice.

(b) In the event of the assertion or commencement by any Person (other than a party to this Agreement) of any Action with respect to which the Indemnifying Parties may become obligated to indemnify any Indemnified Party pursuant to this Article VII (each, a “Third Party Action”), the Stockholder Representative shall (on behalf of the Indemnifying Parties) have the right to participate in (at the expense of the Indemnifying Parties), but not to determine, control or conduct, the defense of such Third Party Action. In the event that the Stockholder Representative has affirmatively consented in writing to the settlement of a Third Party Action, the Indemnifying Parties shall have no power or authority to object to the recovery by Parent of the amount of such settlement pursuant to this Article VII. In the event that the Stockholder Representative does not consent to any such settlement, and the Indemnified Parties wish to seek indemnification hereunder in respect of such Third Party Action, then the Indemnified Parties shall make such indemnification claims pursuant to the procedures set forth in this Article VII. A party’s settlement of a Third Party Action without the consent of the Stockholder Representative shall not be used as evidence of the truth of the allegations in any Third Party Action or the merits of such Third Party Action and the existence of any Third Party Action shall not create a presumption of any breach by a party to this Agreement of any of its representations, warranties or covenants set forth in this Agreement.

(c) If the Stockholder Representative on behalf of the Indemnifying Parties shall not object in writing within the forty-five (45) day period after receipt of an Indemnification Claim Notice by delivery of a written notice of objection containing a reasonably detailed description of the facts and circumstances supporting an objection to the applicable indemnification claim (an “Indemnification Claim Objection Notice”), such failure to so object shall be an irrevocable acknowledgment by the Stockholder Representative on behalf of the Indemnifying Parties (or the applicable Indemnifying Party) that the Indemnified Party is entitled to the full amount of the claim for Losses set forth in such Indemnification
Claim Notice. In such event and subject to Section 7.4(i), the Escrow Agent shall promptly release from the Escrow Fund a portion of the Escrow Amount equal to the Losses set forth in such Indemnification Claim Notice.

(d) In the event that the Stockholder Representative shall deliver an Indemnification Claim Objection Notice in accordance with Section 7.4(c) within forty-five (45) days after delivery of such Indemnification Claim Notice, the Stockholder Representative (on behalf of the Indemnifying Parties) and Parent shall attempt in good faith to agree upon the rights of the respective parties with respect to each of such claims. If the Stockholder Representative and Parent should so agree, a memorandum setting forth such agreement shall be prepared and signed by both parties and, in the case of an indemnification claim to be recovered from the Escrow Fund, shall be furnished to the Escrow Agent. The Escrow Agent shall be entitled to rely on any such memorandum and make distributions from the Escrow Fund in accordance with the terms thereof. In such event, the Escrow Agent shall, subject to Section 7.4(i), promptly release from the Escrow Fund the portion of the Escrow Amount set forth in such memorandum. Should the amount held in the Escrow Fund, if any, be insufficient to satisfy in whole the amount owed to an Indemnified Party in accordance with such memorandum and this Agreement (including the limitations set forth in this Article VII), then each Indemnifying Party shall, within ten (10) Business Days following the date of such memorandum, pay to the Indemnified Party such Indemnifying Party’s Pro Rata Portion of such shortfall as though such shortfall was an Excess Loss.

(e) If no such agreement can be reached after good faith negotiation and prior to forty-five (45) days after delivery of an Indemnification Claim Objection Notice, either Parent or the Stockholder Representative may demand arbitration of the matter unless the amount of the Loss that is at issue is the subject of a pending litigation with a third party, in which event arbitration shall not be commenced until such amount is ascertained or both parties agree to arbitration, and in either such event the matter shall be settled by arbitration conducted by one arbitrator mutually agreeable to Parent and the Stockholder Representative. In the event that, within thirty (30) calendar days after submission of any dispute to arbitration, Parent and the Stockholder Representative cannot mutually agree on one arbitrator, then, within fifteen (15) calendar days after the end of such thirty (30) calendar day period, Parent and the Stockholder Representative shall each select one independent arbitrator. The two (2) arbitrators so selected shall select a third independent arbitrator.

(f) Any such arbitration shall be held in Santa Clara County, California, under the Comprehensive Arbitration Rules and Procedures of JAMS (“JAMS”). The arbitrator(s) shall determine how all expenses relating to the arbitration shall be paid (in the case of the Stockholder Representative, solely on behalf of the Indemnifying Parties), including the respective expenses of each party, the fees of each arbitrator and the administrative fee of JAMS. The arbitrator or arbitrators, as the case may be, shall set a limited time period and establish procedures designed to reduce the cost and time for discovery while allowing the parties an opportunity, adequate in the sole judgment of the arbitrator or majority of the three arbitrators, as the case may be, to discover relevant information from the opposing parties about the subject matter of the dispute. The arbitrator, or a majority of the three arbitrators, as the case may be, shall rule upon motions to compel or limit discovery and shall have the authority to impose sanctions, including attorneys’ fees and costs, to the same extent as a competent court of law or equity, should the arbitrators or a majority of the three arbitrators, as the case may be, determine that discovery was sought without substantial justification or that discovery was refused or objected to without substantial justification. The decision of the arbitrator or a majority of the three arbitrators, as the case may be, as to the validity and amount of any claim in such Indemnification Claim Notice shall be final, binding, and conclusive upon the parties to this Agreement and the Indemnifying Parties. Such decision shall be written and shall be supported by written findings of fact and conclusions which shall set forth the award, judgment, decree or order awarded by the arbitrator(s), and the Escrow Agent shall be entitled to rely on, and make distributions from the Escrow Fund in accordance with, the terms of such award, judgment, decree or order as applicable.
Within thirty (30) days of a decision of the arbitrator(s) requiring payment by Parent to the Indemnifying Parties or by the Indemnifying Parties to Parent, such Person(s) shall make the payment to such other person(s), including any distributions out of the Escrow Fund, as applicable. Judgment upon any award rendered by the arbitrator(s) may be entered in any court having jurisdiction. The forgoing arbitration provision shall apply to any dispute among the Indemnifying Parties or any Indemnifying Party and the Indemnified Parties under this Article VII, whether relating to claims to recover funds from the Escrow Fund or to the other indemnification obligations set forth in this Article VII.

(g) Notwithstanding anything to the contrary herein, at any time from time to time that any amounts shall be required to be disbursed from the Escrow Fund, Parent and the Stockholder Representative shall promptly and in any event within five (5) Business Days deliver to the Escrow Agent a memorandum setting forth such amounts, which shall be prepared and signed by both parties and shall set forth the portion of the Escrow Amount to be disbursed from the Escrow Fund with appropriate wiring and disbursement instructions with respect thereto. The Escrow Agent shall be entitled to rely on any such memorandum and make distributions from the Escrow Fund in accordance with the terms thereof. In such event, the Escrow Agent shall promptly release from the Escrow Fund the portion of the Escrow Amount set forth in such memorandum.

(h) On the second (2nd) Business Day following the twelve (12) month anniversary of the Closing Date, Parent and the Stockholder Representative shall cause the Escrow Agent to (i) retain an amount equal to (A) the aggregate amount of any claims for indemnification asserted in good faith in an Indemnification Claim Notice delivered in accordance with Section 7.4 prior to the twelve (12) month anniversary of the Closing Date but which are not yet resolved plus (B) one-third of the Escrow Amount and (ii) release any remaining Escrow Amount net of such retained amounts to the Exchange Agent for further distribution to the Stockholders and Vested Company Optionholders in accordance with Section 1.6(b).

(i) On the second (2nd) Business Day following the Expiration Date, Parent and the Stockholder Representative shall cause the Escrow Agent to (i) retain an amount equal to the amount of any claims for indemnification asserted in good faith in an Indemnification Claim Notice delivered in accordance with Section 7.4 prior to the termination of the Expiration Date but which are not yet resolved (each such claim, an “Unresolved Claim”) and (ii) release any remaining Escrow Amount net of such Unresolved Claims to the Exchange Agent for further distribution to the Stockholders and Vested Company Optionholders in accordance with Section 1.6(b). If Parent or any of its direct or indirect Subsidiaries has not paid, prior to the Expiration Date, any signing bonus included in the calculation of the Estimated Closing Net Working Capital Amount, then Parent shall, prior to the further distribution referred to in clause (ii) of the preceding sentence, deliver to the Escrow Agent the amount of such unpaid signing bonus for deposit into the Escrow Fund and inclusion in such further distribution.

(j) The amount of the Escrow Amount retained for each Unresolved Claim shall be released (to the extent such funds are not utilized to indemnify any Indemnified Party for such Unresolved Claim in accordance with the terms of this Agreement) by the Escrow Agent to the Exchange Agent in accordance with the prior sentence up on the resolution of such Unresolved Claim in accordance with this Article VII.

7.5 Stockholder Representative.

(a) By virtue of the execution and delivery of a Joinder Agreement, an Option Equity Award Consent, and/or a Stockholder Written Consent, and the adoption of this Agreement and approval of the Mergers by the Stockholders, each of the Indemnifying Parties shall be deemed to have agreed to appoint Fortis Advisors LLC as its representative, exclusive agent and attorney-in-fact, as the Stockholder
Representative for and on behalf of the Indemnifying Parties for all purposes in connection with this Agreement and any agreements ancillary hereto, including to give and receive notices and communications in respect of indemnification claims under this Agreement, to authorize payment to any Indemnified Party from the Escrow Fund in satisfaction of any indemnification claims hereunder by any Indemnified Party, to object to such payments, to agree to, negotiate, enter into settlements and compromises of, and demand arbitration and comply with orders of courts and awards of arbitrators with respect to any such indemnification claims, to assert, negotiate, enter into settlements and compromises of, and demand arbitration and comply with orders of courts and awards of arbitrators with respect to any such indemnification claim by any Indemnified Party hereunder against any Indemnifying Party or by any such Indemnifying Party against any Indemnified Party or any dispute between any Indemnified Party and any such Indemnifying Party, in each case relating to this Agreement or the Transactions, and to take all other actions that are either (i) necessary or appropriate in the judgment of the Stockholder Representative for the accomplishment of the foregoing or (ii) specifically mandated or permitted by the terms of this Agreement, the Escrow Agreement or the Stockholder Representative Engagement Agreement. Such agency may be changed by the Stockholders from time to time upon not less than thirty (30) days prior written notice to Parent; provided, however, that the Stockholder Representative may not be removed unless holders of a majority interest of the Escrow Fund agree to such removal and to the identity of the substituted agent. Notwithstanding the foregoing, in the event of a resignation of the Stockholder Representative or other vacancy in the position of Stockholder Representative, such vacancy may be filled by the holders of a majority in interest of the Escrow Fund. The immunities and rights to indemnification shall survive the resignation or removal of the Stockholder Representative or any member of the Advisory Group and the Closing and/or any termination of this Agreement and the Escrow Agreement. No bond shall be required of the Stockholder Representative. After the Closing, notices or communications to or from the Stockholder Representative shall constitute notice to or from the Indemnifying Parties.

(b) Certain Indemnifying Parties have entered into an engagement agreement (the “Stockholder Representative Engagement Agreement”) with the Stockholder Representative to provide direction to the Stockholder Representative in connection with its services under this Agreement, the Escrow Agreement and the Stockholder Representative Engagement Agreement (such Stockholders, including their individual representatives, collectively hereinafter referred to as the “Advisory Group”). Neither the Stockholder Representative nor its members, managers, directors, officers, contractors, agents and employees nor any member of the Advisory Group (collectively, the “Stockholder Representative Group”) shall be liable for any act done or omitted in connection with the Stockholder Representative’s services pursuant to this Agreement, the Escrow Agreement or the Stockholder Representative Engagement Agreement and any agreements ancillary hereto, while acting in good faith and without gross negligence or willful misconduct. The Stockholder Representative shall not be liable for any action or omission pursuant to the advice of counsel. The Indemnifying Parties shall indemnify and defend the Stockholder Representative Group and hold the Stockholder Representative Group harmless against any and all losses, liabilities, damages, claims, penalties, fines, forfeitures, actions, fees, costs and expenses arising out of or in connection with the acceptance or administration of the Stockholder Representative’s duties hereunder, under the Escrow Agreement or under the Stockholder Representative Engagement Agreement, including the reasonable fees and expenses of any legal counsel retained by the Stockholder Representative and any amounts required to be paid by the Stockholder Representative to the Escrow Agent pursuant to the Escrow Agreement (“Stockholder Representative Expenses”), in each case, as such Stockholder Representative Expense is incurred or suffered; provided, that in the event that any such Stockholder Representative Expense is finally adjudicated to have been directly caused by the gross negligence or willful misconduct of the Stockholder Representative, the Stockholder Representative will reimburse the Indemnifying Parties the amount of such indemnified Stockholder Representative Expense to the extent attributable to such gross negligence or willful misconduct. If not paid directly to the Stockholder Representative by the Indemnifying Parties, any such Stockholder Representative Expenses may be recovered by the Stockholder Representative from (i) the Representative Expense Amount and (ii) the amounts in the Escrow Fund at -70-
such time as remaining amounts would otherwise be distributed to the Indemnifying Parties. The Representative Expense Amount shall be available to pay directly, or reimburse the Stockholder Representative for, any Stockholder Representative Expenses. Following the Expiration Date, the Stockholder Representative shall have the right to recover Stockholder Representative Expenses not previously recovered from the Representative Fund from the Escrow Fund prior to any distribution to the Indemnifying Parties (provided that such funds would otherwise be released to the Indemnifying Parties and are no longer subject to any pending indemnification claims), and prior to any such distribution, shall deliver to the Escrow Agent a certificate setting forth the Stockholder Representative Expenses actually incurred and not previously recovered. For the avoidance of doubt, while this section allows the Stockholder Representative to be paid from the Representative Fund and the Escrow Fund, this Section 7.5(b) shall not limit the obligation of any Indemnifying Party to promptly pay such Stockholder Representative Expenses as they are incurred, nor does it prevent the Stockholder Representative from seeking any remedies available to it at law or otherwise. In no event will the Stockholder Representative be required to advance its own funds on behalf of the Indemnifying Parties or otherwise. The Indemnifying Parties acknowledge and agree that the foregoing indemnities in this Section 7.5(b) will survive the resignation or removal of the Stockholder Representative or the termination of this Agreement (notwithstanding Section 7.2). The Indemnifying Parties acknowledge that the Stockholder Representative shall not be required to expend or risk its own funds or otherwise incur any financial liability in the exercise or performance of any of its powers, rights, duties or privileges or pursuant to this Agreement, the Escrow Agreement or the Transactions contemplated hereby or thereby. Furthermore, the Stockholder Representative shall not be required to take any action unless the Stockholder Representative has been provided with funds, security or indemnities which, in its determination, are sufficient to protect the Stockholder Representative against the costs, expenses and liabilities which may be incurred by the Stockholder Representative in performing such actions.

(c) The Stockholder Representative shall be entitled to: (i) rely upon the Payment Spreadsheet, (ii) rely upon any signature believed by it to be genuine, and (iii) reasonably assume that a signatory has proper authorization to sign on behalf of the applicable Indemnifying Party or other party. Notwithstanding anything in this Agreement to the contrary, any restrictions or limitations on liability or indemnification obligations of, or provisions limiting the recourse against non-parties otherwise applicable to, the Indemnifying Parties set forth elsewhere in this Agreement are not intended to be applicable to the indemnities provided to the Stockholder Representative under this Section 7.5. As soon as reasonably determined by the Stockholder Representative that the Representative Fund is no longer required to be withheld, the Stockholder Representative shall distribute or cause the distribution of such portion of the Representative Expense Amount that has not been used to reimburse the Stockholder Representative for Stockholder Representative Expenses, if any, to the Indemnifying Parties in accordance with their respective Pro Rata Portions; provided, however, that while any amounts remain in the Escrow Fund, the Stockholder Representative may deliver such portion of the Representative Expense Amount to the Escrow Agent for further prompt distribution to the Indemnifying Parties in accordance with their respective Pro Rata Portions; provided, further, that any such amounts delivered to the Escrow Agent by the Stockholder Representative shall not be used as a source of recovery for indemnification claims under this Agreement that are recoverable solely against the Escrow Fund pursuant to Section 7.2(a)(i). A decision, act, consent or instruction of the Stockholder Representative, including an amendment, extension or waiver of this Agreement pursuant to Section 8.2 or Section 8.3, shall constitute a decision of the Indemnifying Parties and shall be final, conclusive and binding upon the Indemnifying Parties and the Indemnifying Parties’ successors as if expressly confirmed and ratified in writing by such Indemnifying Party, and all defenses which may be available to any Indemnifying Party to contest, negate or disaffirm the action of the Stockholder Representative taken in good faith under this Agreement, the Escrow Agreement or the Stockholder Representative Engagement Agreement are waived. The Escrow Agent and Parent may rely upon any such decision, act, consent or instruction of the Stockholder Representative as being the decision, act, consent or instruction of the Indemnifying Parties. The Escrow Agent and Parent are hereby relieved

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from any liability to any person for any acts done by them in accordance with such decision, act, consent or instruction of the Stockholder Representative. The powers, immunities and rights to indemnification granted to the Stockholder Representative Group hereunder: (i) are coupled with an interest and shall be irrevocable and survive the death, incompetence, bankruptcy or liquidation of any Stockholder and shall be binding on any successor thereto, and (ii) shall survive the delivery of an assignment by any Stockholder of the whole or any fraction of his, her or its interest in the Escrow Fund.

(d) Notwithstanding that the Company has been represented by Goodwin Procter LLP (the “Firm”) in the preparation, negotiation and execution of this Agreement and the Related Agreements (collectively, the “Transaction Agreements”), each of Parent and the Company agrees that after the Closing the Firm may represent the Stockholder Representative, the Indemnifying Parties and/or their Affiliates (collectively, the “Seller Parties”) in all matters related to the Transaction Agreements and the Transactions contemplated hereby and thereby, including without limitation in respect of disputes in which the interests of the Seller Parties may be directly adverse to Parent and its Affiliates (including the Company) and any indemnification claims pursuant to the Transaction Agreements, and even though the Firm may have represented the Company in a matter substantially related to any such dispute, or may be handling ongoing matters for the Company. Each of Parent and the Company further agrees to the communication by the Firm to the Seller Parties in connection with any such representation of any fact known to the Firm arising by reason of the Firm’s prior representation of the Company. Each of Parent and the Company hereby acknowledges, on behalf of itself and its Affiliates, that it has had an opportunity to ask for and has obtained information relevant to such representation, including disclosure of the reasonably foreseeable adverse consequences of such representation, and it hereby irrevocably waives and agrees not to assert any conflict arising out of (i) the Firm’s prior representation of the Company and (ii) the Firm’s representation of the Seller Parties prior to and after the Closing.

(e) Each of Parent and the Company hereby acknowledges, on behalf of itself and its Affiliates, that the Firm has represented the Company in connection with the transactions contemplated by the Transaction Agreements. Such parties agree that any attorney-client privilege and attorney work-product protection belonging to the Company and related to the transactions contemplated by the Transaction Agreements, and all information and documents to the extent covered by such privilege or protection shall, after the Closing, belong to, be deemed the right of, and be controlled solely by the Indemnifying Parties and may only be waived by the Stockholder Representative on behalf of the Indemnifying Parties. To the extent that Parent or the Company receives or takes physical possession of any privileged or protected material covered by this Section 7.5(e) after the Closing, such physical possession or receipt shall not, in any way, be deemed a waiver by the Indemnifying Parties of the privileges or protections described in this Section 7.5.

ARTICLE VIII
GENERAL PROVISIONS

8.1 Certain Interpretations. When a reference is made in this Agreement to an Annex, Exhibit or Schedule, such reference shall be to an Annex, Schedule or Exhibit to this Agreement unless otherwise indicated. When a reference is made in this Agreement to an Article or a Section, such reference shall be to an Article or a Section of this Agreement unless otherwise indicated. The words “include,” “includes” and “including” when used herein shall be deemed in each case to be followed by the words “without limitation.” All references in this Agreement to “$” or dollars shall mean U.S. denominated dollars. The table of contents and headings set forth in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. The parties hereto agree that they have been represented by counsel during the negotiation and execution of this Agreement and,
therefore, waive the application of any law, regulation, holding or rule of construction providing that ambiguities in an agreement or other document will be construed against the party drafting such agreement or document. The Company, Parent and the Merger Subs shall each be responsible for compliance with this Agreement by its officers, directors, employees and other agents (in their capacities as such). No prior draft of this Agreement, any Related Agreement nor any course of performance or course of dealing shall be used in the interpretation or construction of this Agreement. No parole evidence shall be introduced in the construction or interpretation of this Agreement unless the ambiguity or uncertainty in issue is plainly discernible from a reading of this Agreement without consideration of any extrinsic evidence. Although the same or similar subject matters may be addressed in different provisions of this Agreement, the parties intend that, except as reasonably apparent on the face of the Agreement or as expressly provided in this Agreement, each such provision shall be read separately, be given independent significance and not be construed as limiting any other provision of this Agreement (whether or not more general or more specific in scope, substance or content).

8.2 Amendment. This Agreement may be amended by Parent and the Stockholder Representative (and, prior to the First Merger Effective Time, the Company) at any time by execution of an instrument in writing signed on behalf of the party against whom enforcement is sought, provided, that no amendment to be effected after the receipt of the Requisite Stockholder Approval and which requires stockholder approval under Delaware Law shall be effective until the receipt of the Requisite Stockholder Approval with respect to such amendment. For purposes of this Section 8.2, subject to the proviso in the prior sentence, the Stockholders are deemed to have agreed that any amendment of this Agreement signed by the Stockholder Representative shall be binding upon and effective against the Stockholders whether or not they have signed such amendment.

8.3 Waiver. At any time prior to the Closing, Parent, on the one hand, and the Company, on the other hand, may, to the extent permitted under any applicable Legal Requirements, (a) extend the time for the performance of any of the obligations of the other party hereto, (b) waive any inaccuracies in the representations and warranties made to such party set forth herein or in any document delivered pursuant hereto, and (c) waive compliance with any of the covenants, agreements or conditions for the benefit of such party set forth herein. Any agreement on the part of a party hereto to any such extension or waiver shall be valid only if set forth in an instrument in writing signed on behalf of such party. For purposes of this Section 8.3, the Stockholders are deemed to have agreed that any extension or waiver signed by the Company shall be binding upon and effective against all Stockholders whether or not they have signed such extension or waiver.

8.4 Assignment. This Agreement shall not be assigned by operation of law or otherwise, except that Parent may assign its rights and delegate its obligations hereunder to its Affiliates as long as Parent remains ultimately liable for all of Parent’s obligations hereunder.

8.5 Notices. All notices and other communications hereunder shall be in writing and shall be deemed given if delivered personally or by commercial messenger or courier service, or mailed by registered or certified mail (return receipt requested) or sent via electronical mail to the parties at the following addresses (or at such other address for a party as shall be specified by like notice or, if specifically provided for elsewhere in this Agreement, by email); provided, however, that notices sent by registered or certified mail will not be deemed given until received and notices by electronic mail will not be deemed given until received as evidenced by delivery confirmation from the recipient: -73-
8.6 Confidentiality. Each of Parent, the Merger Subs, and the Company hereby agrees that the information obtained in any investigation pursuant to Section 5.4, or otherwise pursuant to the negotiation and execution of this Agreement or the effectuation of the Transactions, shall be governed by the terms of the Mutual Non-Disclosure Agreement effective as of September 10, 2020 (the “Confidential Disclosure Agreement”), between the Company and Parent. In this regard, the Company acknowledges
that the Parent Common Stock is publicly traded and that certain information obtained during the course of its due diligence could be considered to be material non-public information within the meaning of federal and state securities laws. Accordingly, the Company acknowledges and agrees not to engage in any discussions, correspondence or transactions in the Parent Common Stock in violation of applicable securities laws. The Stockholder Representative agrees to keep confidential all information disclosed to the Stockholder Representative in connection with this Agreement and the effectuation of the Transactions; provided, however, following the Closing, the Stockholder Representative shall be permitted to disclose information as required by law or to employees, advisors, agents or consultants of the Stockholder Representative and to the Stockholders, in each case who have a need to know such information, provided that such Persons are subject to confidentiality obligations with respect thereto.

8.7 Public Disclosure. Except as required by Legal Requirements and other than with respect to information that is publicly disclosed, or approved for public disclosure, by Parent, neither the Company nor any of its Representatives shall issue any statement or communication to any third party (other than its agents that are bound by confidentiality restrictions) regarding the subject matter of this Agreement or the Transactions, including, if applicable, the termination of this Agreement and the reasons therefor, without the consent of Parent. Notwithstanding anything in this Agreement to the contrary, following the Closing and any public announcement of the Mergers, the Stockholder Representative shall be permitted to publicly announce that it has been engaged to serve as the Stockholder Representative in connection with the Mergers as long as such announcement does not disclose any of the other terms of the Mergers or the other transactions contemplated herein.

8.8 Third Party Expenses. Except as otherwise provided in this Agreement, each party shall be responsible for its own expenses and costs that it incurs with respect to the negotiation, execution, delivery and performance of this Agreement and the Related Agreements; provided, however, that all Third Party Expenses that are unpaid at the Closing shall be reflected in the calculation of Closing Net Working Capital.

8.9 Entire Agreement. This Agreement, Annex A hereeto, the Exhibits and Schedules hereto, the Disclosure Schedule, the Related Agreements, and the documents and instruments and other agreements among the parties hereto referenced herein constitute the entire agreement among the parties hereto with respect to the subject matter hereof and supersede all prior agreements and understandings both written and oral, among the parties with respect to the subject matter hereof, and are not intended to confer upon any other person any rights or remedies hereunder.

8.10 No Third Party Beneficiaries. Nothing in this Agreement, except for Section 5.7, is intended to, or shall be construed to, confer upon any other person any rights or remedies hereunder.

8.11 Specific Performance and Other Remedies.

(a) The parties to this Agreement agree that, in the event of any breach or threatened breach by the other party or parties hereto, any Stockholder or the Stockholder Representative of any covenant, obligation or other agreement set forth in this Agreement, (i) each party shall be entitled, without any proof of actual damages (and in addition to any other remedy that may be available to it), to a decree or order of specific performance or mandamus to enforce the observance and performance of such covenant, obligation or other agreement and an injunction preventing or restraining such breach or threatened breach, and (ii) no party hereto shall be required to provide or post any bond or other security or collateral in connection with any such decree, order or injunction or in connection with any related Action.

(b) Any and all remedies herein expressly conferred herein upon a party hereto shall, subject in all respects to the limitations set forth in Article VII (including Section 7.2(d)), be deemed to be
cumulative with, and not exclusive of, any other remedy conferred hereby, or by Legal Requirement or in equity upon such party, and the exercise by a party hereto of any one remedy will not preclude the exercise of any other remedy.

(c) Notwithstanding anything to the contrary set forth in this Agreement, none of the provisions set forth in this Agreement, including the provisions set forth in Article VII, shall be deemed a waiver by any party to this Agreement of any right or remedy which such party may have at law or in equity based on any other Person’s fraudulent acts or omissions or intentional misrepresentation, nor will any such provisions limit, or be deemed to limit (i) the amounts of recovery sought or awarded in any such claim for actual fraud or intentional misrepresentation, (ii) the time period during which a claim for actual fraud or intentional misrepresentation may be brought or (iii) the recourse which any such party may seek against another Person with respect to a claim for actual fraud or intentional misrepresentation.

8.12 Severability. In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void or unenforceable, the remainder of this Agreement will continue in full force and effect and the application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto. The parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the extent possible, the economic, business and other purposes of such void or unenforceable provision.

8.13 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof.

8.14 Exclusive Jurisdiction. Subject to Sections 7.4(e) and 7.4(f), each of the parties hereto irrevocably consents to the exclusive jurisdiction and venue of the state courts of the State of Delaware in connection with any matter based upon or arising out of this Agreement and the Transactions or any other matters contemplated herein (or, only if the state courts of the State of Delaware decline to accept jurisdiction over a particular matter, any federal court within the State of Delaware). Subject to Sections 7.4(e) and 7.4(f), each party agrees not to commence any legal proceedings related hereto except in such state courts of the State of Delaware (or, only if the state courts of the State of Delaware decline to accept jurisdiction over a particular matter, in any federal court within the State of Delaware). By execution and delivery of this Agreement, subject to Sections 7.4(e) and 7.4(f), each party hereto and the Stockholders irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and to the appellate courts therefrom solely for the purposes of disputes arising under the this Agreement and not as a general submission to such jurisdiction or with respect to any other dispute, matter or claim whatsoever. The parties hereto and the Stockholders irrevocably consent to the service of process out of any of the aforementioned courts in any such Action by the delivery of copies thereof by overnight courier to the address for such party to which notices are deliverable hereunder. Any such service of process shall be effective upon delivery. Nothing herein shall affect the right to serve process in any other manner permitted by applicable Legal Requirements. The parties hereto and the Stockholders hereby waive any right to stay or dismiss any Action under or in connection with this Agreement brought before the foregoing courts on the basis of (i) any claim that it is not personally subject to the jurisdiction of the above-named courts for any reason, or that it or any of its property is immune from the above-described legal process, (ii) that such Action is brought in an inconvenient forum, that venue for the Action is improper or that this Agreement may not be enforced in or by such courts, or (iii) any other defense that would hinder or delay the levy, execution or collection of any amount to which any party hereto is entitled pursuant to any final judgment of any court having jurisdiction.
8.15 Waiver of Jury Trial. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY AND ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT, OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE ACTIONS OF ANY PARTY HERETO IN NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT HEREOF.

8.16 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other party, it being understood that all parties need not sign the same counterpart. The exchange of a fully executed Agreement (in counterparts or otherwise) by electronic transmission in .PDF format or by facsimile shall be sufficient to bind the parties to the terms and conditions of this Agreement.

(Remainder of Page Intentionally Left Blank)
IN WITNESS WHEREOF, Parent, Merger Sub I, Merger Sub II, the Company and the Stockholder Representative have caused this Agreement to be executed as of the date first written above.

FIREYE, INC.

By: /s/ Alexa King
Name: Alexa King
Title: EVP & General Counsel

BRAVO MERGER ACQUISITION CORPORATION

By: /s/ Frank Verdecanna
Name: Frank E. Verdecanna
Title: President

BRAVO MERGER ACQUISITION LLC

By: /s/ Frank Verdecanna
Name: Frank E. Verdecanna
Title: Manager

RESPOND SOFTWARE, INC.

By: /s/ Michael Armistead
Name: Michael Armistead
Title: Chief Executive Officer

FORTIS ADVISORS LLC, solely in its capacity as the Stockholder Representative

By: /s/ Ryan Simkin
Name: Ryan Simkin
Title: Managing Director

[SIGNATURE PAGE TO AGREEMENT AND PLAN OF REORGANIZATION]
ANNEX A

CERTAIN DEFINED TERMS

“2020 Tax Acts” shall mean The Families First Coronavirus Response Act, the CARES Act or any executive order or presidential memorandum deferring the withholding or payment of any payroll Taxes in connection with the 2019 novel coronavirus (COVID-19), including any Treasury Regulations, notice or other official guidance promulgated or issued under or in connection with any of the foregoing.

“Action” shall mean any action, suit, claim, complaint, litigation, investigation, audit, proceeding, arbitration or other similar dispute.

“Affiliate” of any Person shall mean another Person that directly or indirectly through one of more intermediaries controls, is controlled by or is under common control with, such first Person.

“Applicable Accounting Principles” shall mean GAAP and shall include, to the extent permitted by GAAP, the accounting methodologies, practices, estimation techniques, assumptions and principles used by the Company in its Year-End Financials, subject to such adjustments as described on Schedule 1.11.

“Behavioral Data” shall mean data collected from an IP address, web beacon, pixel tag, ad tag, cookie, local storage object, software, or by any other means, or from a particular computer, Web browser, mobile telephone, or other device or application, where such data (i) is collected from a particular computer or device regarding Web viewing or other activities of an identified or identifiable user; or (ii) is or may be used to identify, locate or contact an individual or device or application, to predict or infer the preferences, interests, or other characteristics of the device or application or of a user of such device or application, or to target advertisements or other content to a device or application, or to a user of such device or application.

“Business Day” shall mean each day that is not a Saturday, Sunday or other day on which banking institutions located in San Francisco, California are authorized or obligated by Legal Requirement or executive order to close.

“CARES Act” shall mean the Coronavirus Aid, Relief, and Economic Security Act.

“Closing Net Working Capital” shall mean the Net Working Capital of the Company as of the Closing.

“COBRA” shall mean the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

“Code” shall mean the Internal Revenue Code of 1986, as amended.

“Company 401(k) Plan” shall mean any 401(k) plan maintained by the Company or an ERISA Affiliate.

“Company Board” shall mean the Board of Directors of the Company.

“Company Capital Stock” shall mean the Company Common Stock, the Company Preferred Stock and any other shares of capital stock, if any, of the Company, taken together.

“Company Data Processing Contract” shall mean any Contract to which the Company is or was a party or by which the Company is or was bound, that relates to the collection, use, disclosure, transfer, transmission, storage, hosting, disposal, retention, interception or other processing of Private Information or Customer Data by the Company or a third party acting for or on behalf of the Company.
“Company Employee Plan” shall mean any plan, program, policy, practice, contract, agreement or other arrangement providing for compensation, severance, change of control, termination pay, deferred compensation, performance awards, equity or equity-related awards, welfare benefits, health benefits or medical insurance retirement benefits, fringe benefits or other employee benefits or remuneration of any kind, whether written, unwritten or otherwise, funded or unfunded, including each “employee benefit plan,” within the meaning of Section 3(3) of ERISA which is maintained, contributed to or required to be contributed to by the Company or any ERISA Affiliate for the benefit of any Employee, or with respect to which the Company or any ERISA Affiliate has or may have any liability or obligation, including any International Employee Plan.

“Company IP” shall mean any and all Intellectual Property Rights that are owned or purported to be owned by, filed or registered in the name of, or subject to an obligation of assignment to, the Company.

“Company IP Contract” shall mean any Contract to which the Company is a party or by which the Company is bound, that contains any assignment or license of, or any covenant not to assert or enforce, any Company IP or any Intellectual Property Rights exclusively licensed to the Company.

“Company Material Adverse Effect” shall mean any change, event, violation, inaccuracy, circumstance or effect (any such item, an “Effect”), individually or when taken together with all other Effects that have occurred prior to the date of determination of the occurrence of the Company Material Adverse Effect, that has had or would reasonably be expected to have a material adverse effect on the business, assets (including intangible assets), liabilities, financial condition or results of operations of the Company taken as a whole, provided, however, that in no event shall any of the following Effects alone or in combination be deemed to constitute or be taken into account in determining whether there has been a Company Material Adverse Effect: (a) any changes in the economy or financial or capital markets (including interest rates) or political conditions of the United States or any foreign country in which the Company has significant operations; (b) any changes that generally affect any of the industries in which the Company operates or participates; (c) any failure by the Company to meet internal or other estimates, predictions, projections or forecasts (provided, that the facts giving rise or contributing to any such failure may be deemed to constitute, or be taken into account in determining whether there has been, a Company Material Adverse Effect); (d) any change in GAAP or any change in Legal Requirements (or, in each case, the interpretations thereof), in each case after the date hereof; (e) war, hostilities, terrorism or natural disasters; (f) any epidemic, pandemic or disease outbreak (including the COVID-19 virus); or (g) compliance by the Company with the terms of this Agreement or the Related Agreements, except, for purposes of clauses (a), (b), (c), (d), (e) and (f) if such Effects have a materially disproportionate negative effect on the Company, taken as a whole, as compared to the other Persons engaged in the same industry as the Company.

“Company Optionholder” shall mean any holder of any Company Options.

“Company Options” shall mean all options (including commitments to grant options) to purchase or otherwise acquire Company Common Stock (whether or not vested) held by any Person that are outstanding and unexercised as of immediately prior to the First Merger Effective Time.

“Company Preferred Stock” shall mean the Series Seed Preferred Stock, the Series A Preferred Stock and the Series B Preferred Stock, taken together.

Annex A-2
“Company Privacy Policy” shall mean each external or internal past or present privacy policy of the Company, including any policy relating to (i) the privacy of users of any website or service operated by or on behalf of the Company; (ii) the collection, storage, hosting, disclosure, transmission, transfer, disposal, other processing or security of any Private Information; or (iii) information about individuals who are Employees or are associated with Persons with which the Company has an Agreement.

“Company Product” shall mean each product (including software, databases, and mobile applications) or service (including websites and online services) owned, made, developed (including products and services currently under development), marketed, distributed, imported, licensed out, provided, made available, offered online, or sold by or on behalf of the Company at any time since its inception. For the avoidance of doubt, Company Product includes, without limitation, network traffic, code and data delivered by the Company to any of their customers and used in performing security testing (such network traffic, code and data, collectively, the “Testing Content”).

“Company Restricted Stock” shall mean any shares of Company Common Stock owned by Employees that are issued and outstanding immediately prior to the First Merger Effective Time and that are subject to a repurchase option at less than the fair market value of such stock, risk of forfeiture or other vesting condition under any applicable stock restriction agreement or other agreement with the Company.

“Company Software” shall mean any software embedded in, or used in the development, delivery, hosting or distribution of, any Company Products, including any such software that is used to collect, transfer, transmit, store, host, or otherwise process Private Information or Customer Data.

“Company Warrants” shall mean all issued and outstanding warrants to purchase Company Capital Stock.

“Consideration Holdback Agreement” shall mean the Consideration Holdback Agreement in substantially the form attached hereto as Exhibit C.

“Consideration Holdback Amount” shall mean, with respect to any Consideration Holdback Employee, the lesser of (i) a number of shares of Parent Common Stock equal to the quotient obtained by dividing (i) twenty percent (20%) of the aggregate value of Merger Consideration such Consideration Holdback Employee (before any deductions or withholdings) is entitled to receive pursuant to Section 1.6(b) (with each share of Parent Common Stock being valued at the Parent Trading Price) by (ii) the Parent Trading Price, rounded down to the nearest whole share or (ii) the aggregate number of shares of Parent Common Stock that such Consideration Holdback Employee (before any deductions or withholdings) is entitled to receive pursuant to Section 1.6(b).

“Continuing Employee” shall mean any Employee who is employed by the Company as of immediately prior to the Closing and is reasonably anticipated to continue his or her employment, either affirmatively or by operation of Legal Requirements, with Parent, the Company or one of their respective subsidiaries on the day following the Closing Date (including, for the avoidance of doubt, any employee who is on maternity leave, short-term disability leave, long-term disability leave, military leave or another approved leave of absence as of the Closing Date).

“Contract” shall mean any contract, mortgage, indenture, lease, license, covenant, plan, insurance policy or other agreement, instrument, arrangement, understanding or commitment, permit, concession, franchise or license.


Annex A-3
“Customer Data” shall mean (i) all data and content uploaded or otherwise provided by or for customers of the Company to, or stored by customers of the Company on, the Company Products; (ii) all data and content created, compiled, inferred, derived, or otherwise collected or obtained by or for the Company Products or by or for the Company in its provision of the Company Products or operation of the business of the Company; and (iii) data and content compiled, inferred, or derived directly or indirectly from any of the data and content described in subclauses (i) and (ii) above.

“Delaware Law” shall mean the General Corporation Law of the State of Delaware or, with respect to limited liability companies, the Limited Liability Company Act of Delaware.

“DOL” shall mean the United States Department of Labor.

“Employee” shall mean any current or former employee, individual engaged through a third party agency, consultant, independent contractor or director of the Company or any ERISA Affiliate.

“Employee Agreement” shall mean each management, employment, severance, separation, settlement, consulting, contractor, relocation, change of control, retention, bonus, repatriation, expatriation, loan, visa, work permit, offer letter, non-disclosure or proprietary rights agreement, or other employment agreement between the Company, on the one hand, and any Employee, on the other, obligating the Company to provide material compensation and benefits including those providing for acceleration of Company Options or Company Restricted Stock to such Employee at or following the Closing.

“Environmental Law” shall mean any Legal Requirement to prohibit, regulate or control a Hazardous Material, a Hazardous Material Activity, or the protection of the environment or the health and safety of persons based on exposure to or the presence of Hazardous Materials.

“ERISA” shall mean the Employee Retirement Income Security Act of 1974, as amended.

“ERISA Affiliate” shall mean any other Person under common control with the Company that, together with the Company, could be deemed a “single employer” within the meaning of Section 4001(b)(1) of ERISA or within the meaning of Section 414(b), (c), (m) or (o) of the Code, and the regulations issued thereunder.

“Escrow Agent” shall mean the escrow agent designated under the Escrow Agreement and any successor escrow agent appointed pursuant to the Escrow Agreement.

“Escrow Agreement” shall mean the Escrow Agreement executed and delivered concurrently herewith and attached hereto as Exhibit G.

“Escrow Amount” shall mean an amount of cash equal to $30,000,000.

“Estimated Net Working Capital Deficit” shall mean the dollar amount, if any, by which the Estimated Closing Net Working Capital Amount is less than negative $610,000.

“Estimated Net Working Capital Surplus” shall mean the dollar amount, if any, by which the Estimated Closing Net Working Capital Amount exceeds negative $610,000.


“FCPA” shall mean the U.S. Foreign Corrupt Practices Act of 1977, as amended.

Annex A-4
“Final Net Working Capital Deficit” shall mean the dollar amount, if any, by which the Final Closing Net Working Capital Amount is less than negative $610,000.

“Final Net Working Capital Surplus” shall mean the dollar amount, if any, by which the Final Closing Net Working Capital Amount exceeds negative $610,000.

“First Merger Certificate of Merger” shall mean the certificate of merger filed with the Secretary of State of the State of Delaware for the purpose of effecting the First Merger.

“GAAP” shall mean United States generally accepted accounting principles consistently applied.

“Governmental Entity” shall mean any court, administrative agency or commission or other federal, state, county, local or other foreign Governmental Entity, instrumentality, agency or commission.

“Hazardous Material” shall mean any substance, waste emission, or chemical that is regulated by, or has been designated by any Governmental Entity or by applicable Environmental Law to be hazardous, toxic, a pollutant, or contaminant, or otherwise a danger to health, reproduction or the environment, including without limitation, polychlorinated biphenyls ("PCBs"), asbestos, petroleum, urea-formaldehyde and all substances listed as hazardous substances pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, or defined as a hazardous waste pursuant to the United States Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, and the regulations promulgated pursuant to CERCLA and RCRA.

“Hazardous Material Activity” shall mean the transportation, transfer, recycling, storage, use, treatment, manufacture, removal, remediation, release, labeling, exposure of others to, sale, or distribution of any Hazardous Material or any product or waste containing a Hazardous Material, including, without limitation, compliance with any registration, recycling, product take-back or product content requirements, including without limitation and, solely to the extent required under applicable Legal Requirements, the European Union directives on the restriction on the use of hazardous material in electrical and electronic equipment (or ROHS Directive 2011/65/EU), the waste electrical and electronic equipment directive (or WEEE Directive 2012/12/EU), and China’s Management Methods on the Control of Pollution Caused by Electronic Information Products (or China ROHS).

“Indebtedness” of any Person shall mean, without duplication: (i) all liabilities of such Person for borrowed money, whether current or funded, secured or unsecured and all obligations evidenced by bonds, debentures, notes or similar instruments; (ii) all liabilities of such Person for the deferred purchase price of property or services, which are required to be classified and accounted for under GAAP as liabilities; (iii) all liabilities of such Person in respect of any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which are, and to the extent, required to be classified and accounted for under GAAP as capital leases; (iv) all liabilities of such Person evidenced by any letter of credit or similar credit transaction entered into for the purpose of securing any lease deposit; (v) all liabilities of such Person for the reimbursement of any obligor on any letter of credit, banker’s acceptance or similar credit transaction securing obligations of a type described in clauses (i), (ii) or (iii) above to the extent of the obligation secured; and (vi) all guarantees by such Person of any liabilities of a third party of a nature similar to the types of liabilities described in clauses (i), (ii), (iii) or (v) above, to the extent of the obligation guaranteed; provided, that Indebtedness shall not be deemed to include (x) any accounts payable incurred in the ordinary course of business (to the extent not overdue), (y) any obligations under undrawn letters of credit, banker’s acceptance or similar transaction, or (z) Third Party Expenses.

“Intellectual Property Rights” shall mean all rights of the following types, which may exist or be created under the laws of any jurisdiction in the world: (i) rights associated with works of authorship,
including exclusive exploitation rights, copyrights and moral rights; (ii) trademark, business name, domain name and trade name rights and similar rights; (iii) trade secret rights; (iv) patent and industrial design property rights; (v) other proprietary rights in, or arising out of, Technology; (vi) rights in, arising out of, or associated with domain names or their registrations; (vii) rights in or relating to applications, registrations, renewals, extensions, combinations, divisions, continuations and reissues of, and applications for, any of the rights referred to in clauses (i) through (vi) above; (viii) any similar, corresponding or equivalent rights to any of the foregoing in clauses (i) through (vii) above; and (ix) rights to sue for past, present and future infringement or misappropriation of any of the foregoing in clauses (i) through (viii) above.

“International Employee Plan” shall mean each Company Employee Plan or Employee Agreement that has been adopted or maintained by the Company or any ERISA Affiliate, whether formally or informally, or with respect to which the Company or any ERISA Affiliate will or may have any liability, with respect to Employees who perform services outside the United States.

“IP Representations” shall mean each of the representations and warranties of the Company set forth in Section 2.13 (Intellectual Property).

“IRS” shall mean the United States Internal Revenue Service.

“Key Employees” shall mean the Employees listed on Schedule A.

“Knowledge” or “Known” shall mean, (i) with respect to the Company, the actual knowledge of the Key Employees and Tim Danser, in each case, after due inquiry and (ii) with respect to Parent, the actual knowledge of Kevin Mandia, Frank Verdecanna and Alexa King, in each case, after due inquiry.

“Legal Requirement” shall mean any applicable U.S. or non-U.S. federal, state, local or other constitution, law, statute, ordinance, rule, regulation, published administrative position, policy or principle of common law, or any Order, in any case issued, enacted, adopted, promulgated, implemented or otherwise put into legal effect by or under the authority of any Governmental Entity.

“Licensed IP” shall mean (a) all Intellectual Property Rights and Technology incorporated into, or used in the development, delivery, hosting or distribution of, the Company Products and (b) all other material Intellectual Property Rights and Technology used or held for use in the conduct of the businesses of the Company, in each case that are not owned by the Company.

“Licensed IP Contract” shall mean any Contract to which the Company is or was a party or by which the Company is or was bound, pursuant to which the Company is granted a license, covenant not to sue, or other rights with respect to Licensed IP.

“Lien” shall mean any lien, pledge, charge, claim, mortgage, security interest or other encumbrance, except for Permitted Liens.

“Made Available” shall mean that the Company or any of its Representatives has posted such materials to the virtual data room hosted on behalf of the Company and made available to Parent and its Representatives, but only if so posted and made available on or prior to November 17, 2020.

“Net Working Capital” shall mean (A) cash plus (B) accounts receivable minus (C) accounts payable minus (D) Indebtedness minus (E) credit card payables minus (F) any unpaid Third Party Expenses and minus (G) the aggregate amount of any signing bonuses that have been promised by the Company to individuals upon the commencement of their employment with the Company after the Closing.

Annex A-6
“OEM” shall mean original equipment manufacturer.

“Option Equity Award Consent” shall mean an Option Equity Award Consent in substantially the form attached hereto as Exhibit H.

“Option Exchange Ratio” shall mean the quotient obtained by dividing (A) the Per Share Total Consideration Value by (B) the Parent Trading Price.

“Option Vesting Amendment” shall mean the Option Vesting Amendment in substantially the form attached hereto as Exhibit I.

“Order” shall mean any order, judgment, injunction, ruling, edict, or other decree, whether temporary, preliminary or permanent, enacted, issued, promulgated, enforced or entered by any Governmental Entity.

“Parent Common Stock” shall mean shares of the common stock, par value $0.0001 per share, of Parent.

“Parent Option” shall mean any option to purchase shares of Parent Common Stock, including those options to purchase shares of Parent Common Stock issued or to be issued in connection with the assumption of Company Options under the terms of this Agreement.

“Parent Trading Price” shall mean the price determined by calculating the average of the daily volume weighted average prices of a share of Parent Common Stock on the NASDAQ Global Select Market as determined on each day of the thirty (30) consecutive trading days ending on and including the last trading day prior to the date of this Agreement, which the parties agree is $14.1930.

“Pension Plan” shall mean each Company Employee Plan that is an “employee pension benefit plan,” within the meaning of Section 3(2) of ERISA.

“Per Share Escrow Consideration” shall mean an amount of cash equal to the quotient obtained by dividing (A) the Escrow Amount by (B) the Total Outstanding Shares (excluding the aggregate number of shares of Company Common Stock issuable upon the exercise of Unvested Company Options outstanding as of immediately prior to the First Merger Effective Time).

“Per Share Representative Fund Consideration” shall mean an amount of cash equal to the quotient obtained by dividing (A) the Representative Expense Amount by (B) the Total Outstanding Shares (excluding the aggregate number of shares of Company Common Stock issuable upon the exercise of Unvested Company Options outstanding as of immediately prior to the First Merger Effective Time).

“Per Share Stockholder Closing Cash Consideration” shall mean an amount of cash equal to the quotient obtained by dividing (A) the Total Stockholder Closing Cash Consideration by (B) the Total Outstanding Shares (excluding the aggregate number of shares of Company Common Stock issuable upon the exercise of Company Options outstanding as of immediately prior to the First Merger Effective Time).

“Per Share Stockholder Closing Stock Consideration” shall mean a number of shares of Parent Common Stock equal to the quotient obtained by dividing (A) the Total Stockholder Closing Stock Consideration by (B) the Total Outstanding Shares (excluding the aggregate number of shares of Company Common Stock issuable upon the exercise of Company Options outstanding as of immediately prior to the First Merger Effective Time).

Annex A-7
“Per Share Total Consideration Value” shall mean an amount equal to the quotient obtained by dividing (A) the Total Consideration by (B) the Total Outstanding Shares.

“Per Vested Option Closing Cash Consideration” shall mean, with respect to each share of Company Common Stock subject to a Vested Company Option, an amount of cash equal to the Per Share Total Consideration Value minus the exercise price per share attributable to such Vested Company Option minus the Per Share Escrow Consideration minus the Per Share Representative Fund Consideration.

“Permitted Liens” shall mean: (i) Liens reflected in the Current Balance Sheet; (ii) Liens for current Taxes, assessments not yet due and payable or that are being contested in good faith by appropriate proceedings and with respect to which adequate reserves for payment have been established in accordance with GAAP; (iii) statutory or common law Liens to secure obligations to landlords, lessors or renters under leases or rental agreements incurred in the ordinary course of business; (iv) deposits or pledges made in connection with, or to secure payment of, workers’ compensation, unemployment insurance, old age pension or other social security programs mandated under applicable Legal Requirements; (v) statutory or common law Liens in favor of carriers, warehousemen, mechanics and materialmen, to secure claims for labor, materials or supplies for amounts not yet due or payable, and other like Liens incurred in the ordinary course of business; (vi) restrictions on transfer of securities imposed by applicable state and federal securities Legal Requirements; (vii) easements, reservations, rights-of-way, restrictions, minor defects or irregularities in title and other similar Liens affecting real property not interfering in any material respect with the ordinary conduct of the business of the Company or materially detracting from the value of the property upon which such Liens exists; (viii) Liens in favor of customs and revenue authorities arising as a matter of law to secure payment of customs duties in connection with the importation of goods; and (ix) any Liens securing the obligations of the Company under the SVB Loan Agreement.

“Person” shall mean an individual or entity, including a partnership, a limited liability company, a corporation, an association, a joint stock company, a trust, a joint venture, an unincorporated organization, or a Governmental Entity (or any department, agency, or political subdivision thereof).

“Personal Data” shall mean: (i) a natural person’s name, street address, telephone number, e-mail address, photograph, social security number or tax identification number, driver’s license number, passport number, credit card number, bank information, or customer or account number, biometric identifiers or any other piece of information that allows the identification of or contact with a natural person and for greater certainty includes all such information with respect to employees of Company; (ii) any other information defined as “personal data”, “personally identifiable information”, “individually identifiable health information,” “protected health information,” or “personal information” under any Legal Requirement; and (iii) any information that is associated, directly or indirectly (by, for example, records linked via unique keys), to any of the foregoing.

“Plan” shall mean the Company’s 2016 Stock Option and Grant Plan (as amended).

“PPP Loans” means any and all Paycheck Protection Program loans under the Small Business Administration 7(a) loan program received by the Company in connection with the CARES Act, as supplemented by the Paycheck Protection Program and Health Care Enhancement (PPPHCE) Act.

“Privacy Legal Requirement” shall mean any and all (i) Legal Requirements, (ii) Company Privacy Policies, (iii) contractual obligations, (iv) third-party privacy policies, terms of use, and similar documents that the Company is or has been contractually obligated to comply with, (v) rules of any applicable self-regulatory organizations in which the Company is or has been contractually obligated to comply with, (vi) applicable published industry standards.

Annex A-8
“Private Information” shall mean Behavioral Data and Personal Data.

“Pro Rata Portion” shall mean, with respect to any Indemnifying Party, an amount equal to the quotient obtained by dividing (A) the sum of the aggregate number of shares of Company Capital Stock, on an as converted to Company Common Stock basis, if any, held by such Indemnifying Party and the aggregate number of shares of Company Common Stock, if any, issuable upon exercise in full of all Vested Company Options held by such Indemnifying Party, each as of immediately prior to the First Merger Effective Time by (B) the sum of the aggregate number of shares of Company Capital Stock, on an as converted to Company Common Stock basis, held by all Stockholders and the aggregate number of shares of Company Common Stock issuable upon exercise in full of all Vested Company Options held by all Vested Company Optionholders, each as of immediately prior to the First Merger Effective Time.

“Registered IP” shall mean all Intellectual Property Rights that are registered, filed, or issued under the authority of, with or by any Governmental Entity, including all patents, registered copyrights, and registered trademarks, business names and domain names, and all applications for any of the foregoing.

“Related Agreements” shall mean the Confidential Disclosure Agreement, the Joinder Agreements, the Option Equity Award Consents, the Escrow Agreement, the Consideration Holdback Agreements, and all other agreements and certificates entered into by the Company or any of the Stockholders in connection with the Transactions.

“Representative Expense Amount” shall mean an amount in cash equal to $200,000.

“SEC” shall mean the United States Securities and Exchange Commission.

“Second Merger Certificate of Merger” shall mean the certificate of merger filed with the Delaware Secretary of State for the purpose of effecting the Second Merger.

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

“Specified Representations” shall mean each of the representations and warranties of the Company set forth in Section 2.1 (Organization and Good Standing), Section 2.2 (Authority and Enforceability), Section 2.5 (Company Capital Structure) and Section 2.10 (Tax Matters).

“Standard Form IP Contract” shall mean each standard form of Contract used by the Company at any time for the following types of agreements, to the extent Company actually utilizes such a standard form in the conduct of their businesses: (i) license and/or service agreement; (ii) development agreement; (iii) distributor, reseller or affiliate agreement; (iv) employee agreement containing any assignment or license of Intellectual Property Rights or any confidentiality provision; (v) professional services, outsourced development, consulting, or independent contractor agreement containing any assignment or license of Intellectual Property Rights or any confidentiality provision; and (vi) confidentiality or nondisclosure agreement.

“Stockholder” shall mean any holder of any Company Capital Stock as of immediately prior to the First Merger Effective Time.

“Subsidiary” shall mean each corporation, limited liability company, partnership, association, joint venture or other business entity, if any, of which the Company owns, directly or indirectly, more than fifty percent (50%) of the stock or other equity interest entitled to vote on the election of the members of the board of directors or similar governing body.

Annex A-9
“Surviving Entities” shall mean the First Merger Surviving Corporation and the Second Merger Surviving Entity.

“SVB Loan Agreement” shall mean that certain Loan and Security Agreement, dated as of August 21, 2018, by and between the Company and Silicon Valley Bank (as the same may from time to time be amended in accordance with its terms).

“Tax” shall mean (i) any income, alternative or add-on minimum tax, gross income, estimated, gross receipts, sales, use, ad valorem, value added, transfer, franchise, capital stock, profits, license, registration, withholding, payroll, social security (or equivalent), employment, unemployment, disability, excise, severance, stamp, occupation, premium, property (real, tangible or intangible), environmental or windfall profit tax, custom duty or other tax, governmental fee or other like assessment or charge in the nature of a tax, together with any interest or any penalty, addition to tax or additional amount (whether disputed or not) imposed by any Governmental Entity responsible for the imposition of any such tax (domestic or foreign), (ii) any liability for the payment of any amounts of the type described in clause (i) of this sentence as a result of being a member of an affiliated, consolidated, combined, unitary, aggregate or similar group for any taxable period, and (iii) any liability for the payment of any amounts of the type described in clause (i) or (ii) of this sentence as a result of being a transferee of or successor to any Person or as a result of any express obligation to assume such Taxes or to indemnify any other Person (other than pursuant to a Contract, such as a lease, the primary purpose of which is not related to Taxes), including by operation of law.

“Technology” shall mean algorithms, APIs, databases, data collections, diagrams, formulae, inventions (whether or not patentable), know-how, logos, designs, marks (including brand names, product names, logos, and slogans), methods, network configurations and architectures, processes, proprietary information, protocols, schematics, specifications, software, software code (in any form, including source code and executable or object code), subroutines, techniques, user interfaces, URLs, web sites, works of authorship (including written, audio and visual materials) and other forms of technology (whether or not embodied in any tangible form and including all tangible embodiments of the foregoing).

“Termination Agreement” shall mean that certain Termination Agreement, dated on or about the date hereof, by and between the Company and Silicon Valley Bank.

“Third Party Expenses” shall mean, without duplication, all fees and expenses incurred by or on behalf of the Company in connection with this Agreement, the Mergers and the other transactions contemplated hereby, including (i) all legal, accounting, financial advisory, consulting, finders and all other fees and expenses of third parties incurred by the Company in connection with the negotiation and effectuation of the terms and conditions of this Agreement, all other agreements, instruments and other documents referenced herein or contemplated hereby, the Mergers and the other transactions contemplated hereby, (ii) any bonus, severance, change-in-control payments or similar payment obligations (including payments with “single-trigger” provisions triggered at and as of the consummation of the Transactions) of the Company that become due or payable in connection with the consummation of the Transactions, (iii) the cost of premiums for the directors’ and officers’ liability insurance obtained pursuant to Section 5.7(b) (but excluding, for the avoidance of doubt, the cost of the Errors and Omissions Insurance), (iv) all Transaction Payroll Taxes and (v) the Warrant Payment (as defined in the Termination Agreement) to Silicon Valley Bank pursuant to the Termination Agreement.

“Total Cash Consideration” shall mean a dollar amount equal to $117,000,000 plus the Estimated Net Working Capital Surplus, if any, minus the Estimated Net Working Capital Deficit, if any.

Annex A-10
“Total Consideration” shall mean a dollar amount equal to the sum of the Total Cash Consideration and the Total Stock Consideration (with the Total Stock Consideration to be valued for this purpose at the Parent Trading Price).

“Total Outstanding Shares” shall mean (without duplication) (i) the aggregate number of shares of Company Capital Stock issued and outstanding immediately prior to the First Merger Effective Time, on an as converted to Company Common Stock basis, plus (ii) the maximum aggregate number of shares of Company Common Stock issuable upon full exercise, exchange or conversion of any other rights, whether vested or unvested, that are convertible into, exercisable for or exchangeable for, shares of Company Common Stock issued and outstanding immediately prior to the First Merger Effective Time, on an as converted to Company Common Stock basis.

“Total Stock Consideration” shall mean a number of shares of Parent Common Stock equal to the quotient obtained by dividing (A) $83,000,000 by (B) the Parent Trading Price, rounded down to the nearest whole share.

“Total Stockholder Closing Cash Consideration” shall mean a dollar amount equal to (i) the Total Cash Consideration minus (ii) the Total Vested Company Options Value minus (iii) the Escrow Amount minus (iv) the Representative Expense Amount.

“Total Stockholder Closing Stock Consideration” shall mean a number of shares of Parent Common Stock equal to the quotient obtained by dividing (A) (i) $83,000,000 minus (ii) the Total Unvested Company Options Value by (B) the Parent Trading Price, rounded down to the nearest whole share.

“Total Unvested Company Options Value” shall mean a dollar amount equal to the product of (i) the Per Share Total Consideration Value and (ii) the aggregate number of shares of Company Common Stock issuable upon the exercise of Unvested Company Options outstanding as of immediately prior to the First Merger Effective Time, rounded down to the nearest cent.

“Total Vested Company Options Value” shall mean a dollar amount equal to the product of (i) the Per Share Total Consideration Value and (ii) the aggregate number of shares of Company Common Stock issuable upon exercise in full of all Vested Company Options outstanding as of immediately prior to the First Merger Effective Time, rounded down to the nearest cent.

“Total Vested Optionholder Closing Cash Consideration” shall mean a dollar amount equal to the aggregate Per Vested Option Closing Cash Consideration with respect to all shares of Company Common Stock issuable upon exercise in full of all Vested Company Options outstanding as of immediately prior to the First Merger Effective Time, rounded down to the nearest cent.

“Transaction Payroll Taxes” shall mean all employer portion payroll or employment Taxes incurred in connection with any bonuses, option cash-outs or other compensatory payments paid on or in connection with the Closing.

“Unvested Company Option” shall mean any Company Option (or portion thereof) that is unvested and not cancelled as of immediately prior to the First Merger Effective Time.

“Vested Company Option” shall mean any Company Option (or portion thereof) that is vested as of immediately prior to the First Merger Effective Time.

“Vested Company Optionholder” shall mean a holder of a Vested Company Option.

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SECURITIES PURCHASE AGREEMENT

BY AND BETWEEN

FIREEYE, INC.

AND

BTO DELTA HOLDINGS DE L.P.

Dated as of November 18, 2020
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This SECURITIES PURCHASE AGREEMENT dated as of November 18, 2020 (this “Agreement”) is by and between FireEye, Inc., a Delaware corporation (the “Company”), and BTO Delta Holdings DE L.P., a Delaware limited partnership (the “Purchaser”). Capitalized terms used but not defined herein have the meanings assigned to them in Exhibit A.

The Purchaser desires to purchase from the Company, and the Company desires to issue and sell to the Purchaser, 370,000 shares of the Company’s Series A Convertible Preferred Stock, par value $0.0001 per share (the “Series A Preferred Stock”), on the terms and subject to the conditions hereinafter set forth.

In consideration of the premises and the mutual representations, warranties, covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

ARTICLE I
PURCHASE AND SALE OF PURCHASED SHARES

Section 1.1 Purchase and Sale. On the terms and subject to the satisfaction or waiver of the conditions set forth in this Agreement, at the Closing, the Purchaser shall purchase, and the Company shall issue and sell to the Purchaser, 370,000 shares of Series A Preferred Stock with an original purchase price of $1,000 per share (the “Purchased Shares”) for an aggregate purchase price of the Purchased Shares delivered at Closing of $370,000,000 (the “Purchase Price”). The Series A Preferred Stock shall have the rights, powers, preferences and privileges set forth in the Certificate of Designations (the “Certificate of Designations”) attached as Exhibit B.

Section 1.2 Closing. On the terms and subject to the satisfaction or waiver of the conditions set forth in this Agreement, the closing of the issuance, sale and purchase of the Purchased Shares (the “Closing”) shall take place remotely via the exchange of final documents and signature pages, on such date on which all of the conditions set forth in Article V have been satisfied or waived (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of those conditions at such time), or such other time and place as the Company and the Purchaser may agree; provided, that the Purchaser shall not be required to (but for the avoidance of doubt, shall have the right to in accordance with the foregoing) consummate the Closing prior to the date that is fifteen (15) Business Days after the date hereof. The date on which the Closing is to occur is herein referred to as the “Closing Date.” At the Closing, upon receipt by the Company of payment of the full purchase price to be paid at the Closing therefor by or on behalf of such Purchaser to the Company by wire transfer of immediately available funds to an account designated in writing by the Company, the Company will deliver to the Purchaser evidence reasonably satisfactory to the Purchaser of the issuance of the Purchased Shares in the name of the Purchaser through the facilities of The Depository Trust Company.
ARTICLE II

REPRESENTATIONS AND WARRANTIES OF THE COMPANY

The Company represents and warrants to the Purchaser as of the date hereof and as of the Closing Date (except to the extent made only as of a specified date in which case as of such date), that, except (a) as set forth in the SEC Documents filed by the Company with the SEC since January 1, 2018 and prior to the date hereof (other than disclosures in the “Risk Factors” or “Forward-Looking Statements” sections or similarly captioned sections of any such filings) and (b) as set forth on Exhibit D (the “Disclosure Letter”) (all such exceptions disclosed in the Disclosure Letter being numbered to correspond to the applicable Section of this Article II, provided, however, that any such exception shall be deemed to be disclosed with respect to each other representation or warranty to which the relevance of such exception is reasonably apparent on the face of such disclosure):

Section 2.1 Organization and Power. The Company and each of its Subsidiaries is a corporation, limited liability company, partnership or other entity validly existing and in good standing under the laws of the jurisdiction of its incorporation or formation (as applicable) and has all requisite corporate, limited liability company, partnership or other entity power and authority to own or lease its properties and to carry on its business as presently conducted and as presently proposed to be conducted. The Company and each of its Subsidiaries is duly licensed or qualified to do business as a foreign corporation, limited liability company, partnership or other entity in each jurisdiction wherein the character of its property or the nature of the activities presently conducted by it, makes such qualification necessary, except where the failure to so qualify has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. True, correct and complete copies of the Company’s organizational documents are included in the SEC Documents filed with the SEC.

Section 2.2 Authorization; No Conflicts.

(a) The Company has all necessary corporate power and authority and has taken all necessary corporate action required for the due authorization, execution, delivery and performance by the Company of this Agreement and the Registration Rights Agreement, and the consummation by the Company of the transactions contemplated hereby and thereby, the filing of the Certificate of Designations with the Secretary of State of the State of Delaware and, following the effectiveness of such actions, for the due authorization, issuance, sale and delivery of the Purchased Shares and the reservation, issuance and delivery of the Conversion Shares. This Agreement has been, and the Registration Rights Agreement, at the Closing will be, duly executed and delivered by the Company. Assuming due execution and delivery thereof by each of the other parties hereto or thereto, this Agreement and the Registration Rights Agreement will each be a valid and binding obligation of the Company enforceable against the Company in accordance with its terms, except as such enforceability may be limited by applicable laws relating to bankruptcy, insolvency, reorganization, moratorium or other similar legal requirement relating to or affecting creditors’ rights generally and except as such enforceability is subject to general principles of equity (regardless of whether enforceability is considered in a proceeding in equity or at law).
(b) The authorization, execution, delivery and performance by the Company of this Agreement and the Registration Rights Agreement, and the consummation by the Company of the transactions contemplated hereby and thereby, including the filing of the Certificate of Designations and the issuance of the Purchased Shares and the Conversion Shares do not and will not: (x) violate or result in the breach of any provision of the Certificate of Incorporation or Bylaws of the Company; or (y) with such exceptions that have not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect: (i) violate any provision of, constitute a breach of, or default under, any judgment, order, writ, or decree applicable to the Company or any of its Subsidiaries or any mortgage, loan or credit agreement, indenture, bond, note, deed of trust, lease, sublease, license, contract or other agreement (each, a “Contract”) to which the Company or any of its Subsidiaries is a party or accelerate the Company’s or, if applicable, any of its Subsidiaries’ obligations under any such Contract; (ii) violate any provision of, constitute a breach of, or default under, any applicable state, federal or local law, rule or regulation; or (iii) result in the creation of any lien upon any assets of the Company or any of its Subsidiaries or the suspension, revocation or forfeiture of any franchise, permit or license granted by a governmental authority to the Company or any of its Subsidiaries, other than liens under federal or state securities laws or liens created by Purchaser.

Section 2.3 Government Approvals. No consent, approval or authorization of, or filing with, any court or governmental authority is or will be required on the part of the Company in connection with the execution, delivery and performance by the Company of this Agreement and the Registration Rights Agreement, or in connection with the issuance of the Purchased Shares or the Conversion Shares, except for (a) the filing of the Certificate of Designations with the Secretary of State of the State of Delaware; (b) those which have already been made or granted; (c) the filing of a current report on Form 8-K with the SEC; (d) filings with applicable state securities commissions; or (e) the listing of the Conversion Shares with the Nasdaq Stock Market.

Section 2.4 Authorized and Outstanding Stock.

(a) The authorized capital stock of the Company consists of 1,000,000,000 shares of common stock, par value $0.0001 per share (“Common Stock”) and 100,000,000 shares of preferred stock, par value $0.0001 per share (“Preferred Stock”). Of such Preferred Stock, upon the filing of the Certificate of Designations with the Secretary of State of the State of Delaware, 400,000 shares will be designated as the Series A Preferred Stock.

(b) As of the close of business on November 16, 2020 (the “Capitalization Date”), 229,632,046 shares of Common Stock were issued and outstanding, zero shares of Preferred Stock were issued and outstanding, 2,901,101 shares of Common Stock were reserved for issuance upon the exercise of outstanding stock options issued pursuant to the Stock Plans, 20,333,774 shares of Common Stock were reserved for issuance upon the settlement of restricted stock units and performance stock units issued pursuant to the Stock Plans and 33,856,023 shares of Common Stock were reserved for issuance upon conversion of the Convertible Senior Notes (assuming such Convertible Senior Notes were settled solely in shares of Common Stock). Except as set forth in the foregoing sentence, there are no outstanding securities of the Company convertible into or exercisable or exchangeable for shares of capital stock of, or other equity or voting interests of any character in, the Company.
(c) All of the issued and outstanding shares of Common Stock of the Company have been duly authorized and are validly issued, fully paid and non-assessable. The Purchased Shares have been duly authorized and, when issued in accordance with the terms hereof, the Purchased Shares will be, duly authorized and validly issued and fully paid and non-assessable and will not be subject to any preemptive right or any restrictions on transfer under applicable law or any contract to which the Company is a party, other than, in the case of restrictions on transfer, those under applicable state and federal securities laws and Section 4.2 of this Agreement. The shares of Common Stock issuable upon conversion of the Purchased Shares (the “Conversion Shares”) have been duly authorized and reserved for issuance and, when issued upon conversion of the Purchased Shares in accordance with the terms thereof as set forth in the Certificate of Designations, will be validly issued and fully paid and non-assessable. No share of Common Stock has been, and none of the Purchased Shares and Conversion Shares will be when issued, issued in violation of any preemptive right arising by operation of law, under the Certificate of Incorporation, the Bylaws or any contract, or otherwise. None of the Purchased Shares and Conversion Shares will be when issued subject to any restrictions on transfer under applicable law or any contract to which the Company is a party, other than, in the case of restrictions on transfer, those under applicable state and federal securities laws and Section 4.2 of this Agreement. When issued in accordance with the terms hereof and the terms of the Certificate of Designations (as applicable), the Purchased Shares and the Conversion Shares will be free and clear of all liens (other than liens incurred by Purchaser or its Affiliates, restrictions arising under applicable securities laws, or restrictions imposed by this Agreement, the Certificate of Designations or the Registration Rights Agreement).

(d) (i) No subscription, warrant, option, convertible security or other right, commitment, agreement, arrangement issued by the Company or any other obligation of the Company to purchase or acquire any shares of capital stock of the Company is authorized or outstanding; (ii) there is not any commitment, agreement, arrangement or obligation of the Company to issue any subscription, warrant, option, convertible security or other such right or to issue or distribute capital stock of, or other equity or voting interest (or voting debt) in, the Company; (iii) the Company has no obligation to purchase, redeem or otherwise acquire any shares of its capital stock or to pay any dividend or make any other distribution in respect thereof; (iv) there are no obligations of the Company to grant, extend or enter into any subscription, warrant, right, convertible or exchangeable security or other similar agreement or commitment relating to any capital stock of, or other equity or voting interests (or voting debt) in, the Company; (v) there are no outstanding shares of capital stock of, or other equity or voting interests of any character in, the Company as of the date hereof other than shares that have become outstanding after the Capitalization Date which were reserved for issuance as of the Capitalization Date as set forth in Section 2.4(a) or pursuant to the exercise, after the Capitalization Date, of outstanding stock options described in Section 2.4(b); and (vi) there are no agreements, arrangements or commitments between the Company and any Person relating to the acquisition, disposition or voting of the capital stock of, or other equity or voting interest (or voting debt) in, the Company. There exists no preemptive right, whether arising by operation of law, under the Certificate of Incorporation, the Bylaws or any contract, or otherwise, with respect to the issuance of any capital stock of the Company.
Section 2.5 Subsidiaries. The Company’s Subsidiaries consist solely of all the entities listed on Exhibit 21.1 to the Company’s Form 10-K for the year ended December 31, 2019. The Company, directly or indirectly, owns of record and beneficially, free and clear of all liens, all of the issued and outstanding capital stock or equity interests of each of its Subsidiaries. All of the issued and outstanding capital stock or equity interests of the Company’s Subsidiaries has been duly authorized and validly issued, were not issued in violation of any preemptive right, right of first refusal or similar right, and in the case of corporations, is fully paid and non-assessable. Except as described in the SEC Documents, there are no outstanding rights, options, warrants, preemptive rights, conversion rights, rights of first refusal or similar rights for the purchase or acquisition from any of the Company’s Subsidiaries of any securities of such Subsidiaries nor are there any commitments to issue or execute any such rights, options, warrants, preemptive rights, conversion rights or rights of first refusal.

Section 2.6 Private Placement. Assuming the accuracy of the representations and warranties of the Purchaser set forth in Section 3.4, the offer and sale of the Purchased Shares pursuant to this Agreement will be exempt from the registration requirements of the Securities Act. Without limiting the foregoing, neither the Company nor, to the Knowledge of the Company, any other Person authorized by the Company to act on its behalf, has engaged in a general solicitation or general advertising (within the meaning of Regulation D of the Securities Act) of investors with respect to offers or sales of Series A Preferred Stock, and neither the Company nor, to the Knowledge of the Company, any Person acting on its behalf has made any offers or sales of any security or solicited any offers to buy any security, under circumstances that would cause the offering or issuance of Series A Preferred Stock under this Agreement to be integrated with prior offerings by the Company for purposes of the Securities Act that would result in none of Regulation D or any other applicable exemption from registration under the Securities Act to be available, nor will the Company take any action or steps that would cause the offering or issuance of Series A Preferred Stock under this Agreement to be integrated with other offerings by the Company.

Section 2.7 SEC Documents; Financial Information. Since January 1, 2018, the Company has timely filed (a) all annual and quarterly reports and proxy statements (including all amendments, exhibits and schedules thereto) and (b) all other reports and other documents (including all amendments, exhibits and schedules thereto), in each case required to be filed by the Company with the SEC pursuant to the Exchange Act and the Securities Act. As of their respective filing dates, such SEC Documents complied in all material respects with the requirements of the Securities Act, the Exchange Act and the rules and regulations of the SEC thereunder applicable to such SEC Documents, and as of their respective dates none of the SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. The financial statements of the Company included in the SEC Documents (the “Financial Statements”) comply as of their respective dates in all material respects with applicable accounting requirements and the rules and regulations of the SEC with respect thereto (except as may be indicated in the notes thereto or, in the case of the unaudited statements, as permitted by Form 10-Q promulgated by the SEC, have been prepared in accordance with GAAP (except, in the case of unaudited quarterly statements, as permitted by Form 10-Q of the SEC or other rules and regulations of the SEC) applied on a consistent basis during the periods involved (except (i) as may be indicated in the notes thereto or (ii) as permitted by Regulation S-X) and present fairly in all material respects as of their respective dates the consolidated financial position of the Company and its Subsidiaries as of the dates thereof and the
consolidated results of their operations and their consolidated cash flows for each of the respective periods, all in conformity with GAAP. Neither the Company nor any of its Subsidiaries has any liabilities of any nature (whether accrued, absolute, contingent or otherwise) that would be required under GAAP, to be reflected on a consolidated balance sheet of the Company (including the notes thereto) except liabilities (i) reflected or reserved against in the balance sheet (or the notes thereto) of the Company and its Subsidiaries as of September 30, 2020 (the “Balance Sheet Date”) included in the SEC Documents, (ii) incurred after the Balance Sheet Date in the ordinary course of business and that do not arise from any material breach of a Contract, (iii) as expressly contemplated by this Agreement or otherwise incurred in connection with the transactions contemplated hereby, (iv) that have been discharged or paid prior to the date of this Agreement or (v) as would not, individually or in the aggregate, have had or reasonably be expected to have, a Material Adverse Effect. There is no transaction, arrangement or other relationship between the Company and/or any of its Subsidiaries and an unconsolidated or other off-balance sheet entity that is required by applicable law to be disclosed by the Company in its SEC Documents and is not so disclosed.

Section 2.8 Internal Control Over Financial Reporting. The Company has disclosed, based on its most recent evaluation prior to the date hereof, to the Company’s outside auditors and the Audit Committee of the Board of Directors (a) any significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting (as defined in Rule 13a-15(f) under the Exchange Act) that are reasonably likely to adversely affect the Company’s ability to record, process, summarize and report financial information and (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company’s internal control over financial reporting.

Section 2.9 Disclosure Controls and Procedures. The Company has established and maintains, and at all times since January 1, 2018, has maintained, disclosure controls and procedures (as such term is defined in Rule 13a-15 and 15d-15 under the Exchange Act) that are (x) designed to provide reasonable assurance that material information relating to the Company, including its Subsidiaries, that is required to be disclosed by the Company in the reports that it furnishes or files under the Exchange Act is reported within the time periods specified in the rules and forms of the SEC and that such material information is communicated to the Company’s management to allow timely decisions regarding required disclosure. and (y) sufficient to provide reasonable assurance that (a) transactions are executed in accordance with Company management’s general or specific authorization, (b) transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP, consistently applied, and to maintain accountability for assets, (c) access to assets is permitted only in accordance with Company management’s general or specific authorization and (d) the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences. There are no “significant deficiencies” or “material weaknesses” (as defined by the Public Company Accounting Oversight Board) in the design or operation of the Company’s internal controls over, and procedures relating to, financial reporting which would reasonably be expected to adversely affect any material respect the Company’s ability to record, process, summarize and report financial data, in each case which has not been subsequently remediated. Since January 1, 2018, there has not been any fraud, whether or not material, that involves management or other employees of the Company or any of its Subsidiaries who have a significant role in the Company’s internal controls over financial reporting. As of the date of this Agreement, to the Knowledge of the Company, there is no reason that its outside auditors and its chief executive officer and chief financial officer will not be able to give the certifications and attestations required pursuant to the rules and regulations adopted pursuant to Section 404 of the Sarbanes-Oxley Act of 2002, without qualification, when next due.
Section 2.10  **Litigation.** There is no litigation or governmental proceeding, suit, arbitration or, to the Knowledge of the Company, investigation by any Governmental Entity, pending or, to the Knowledge of the Company, threatened in writing, against the Company or any of its Subsidiaries or affecting any of the business, operations, properties, rights or assets of the Company or any of its Subsidiaries which would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. Neither the Company nor any of its Subsidiaries is subject to or in default with respect to any order, writ, injunction, decree, ruling or decision of any court, commission, board or other government agency that is expressly applicable to the Company or any of its Subsidiaries or any of their respective assets which would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

Section 2.11  **Compliance with Laws; Permits.** The Company and its Subsidiaries are in compliance with all applicable laws, common law, statutes, ordinances, codes, rules or regulations enacted, adopted, promulgated, or applied by any governmental authority, except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. The Company and its Subsidiaries possess all permits, franchises, certificates, approvals, authorizations and licenses of governmental authorities that are required to conduct their business, except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

Section 2.12  **Taxes.** The Company and each of its Subsidiaries has filed all Tax Returns required to be filed within the applicable periods for such filings (with due regard to any extension) and has paid all Taxes required to be paid, except for any such failures to file or pay that have not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. Except as would not, in each case, reasonably be expected to have a Material Adverse Effect, the Company (a) has not been advised that any of its returns, federal, state or other, are being audited as of the date hereof, (b) has not been advised of any deficiency in assessment or proposed judgment to its federal, state or other taxes, which has not been paid and (c) has no liability for any tax to be imposed upon its properties or assets as of the date of this Agreement that is not adequately provided for.

Section 2.13  **Employee Matters.**

(a) Except as would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, (i) the Company and its Subsidiaries are in compliance with all applicable laws relating to labor, employment, fair employment practices, terms and conditions of employment, and wages and hours, and with the terms of the Benefit Plans, and each such Benefit Plan is in compliance with all applicable laws (including, without limitation, the applicable requirements of ERISA and the Code); (ii) with respect to the Benefit Plans, no audits, investigations, actions, liens, lawsuits, claims or complaints (other than routine claims for benefits, appeals of such claims and domestic relations order proceedings) are pending or, to the Knowledge of the Company, threatened, and, to the Knowledge of the Company, no facts or circumstances exist that would reasonably be expected to give rise to any such audits, investigations, actions,
liens, lawsuits, claims or complaints; and (iii) to the Knowledge of the Company, no event has occurred with respect to any Benefit Plan which would reasonably be expected to result in a liability of the Company or any of its Subsidiaries to any governmental authority.

(b) Neither the Company, its Subsidiaries, nor any other entity which would be (i) under “common control,” with the Company or its Subsidiaries, within the meaning of Section 4001(a)(14) of ERISA or (ii) together with the Company or its Subsidiaries, treated as a “single employer” under Section 414 of the Code, has during the last six (6) years maintained, sponsored or contributed to or had any liability with respect to any defined benefit pension plan that is subject to Title IV of ERISA or any “multiemployer plan” (as defined in Section 4001(a)(3) of ERISA).

(c) Except as would not reasonably be expected, individually or in the aggregate, to result in a Material Adverse Effect, none of the execution of, or the completion of the transactions contemplated by, this Agreement (whether alone or in connection with any other event(s)), will result in (i) any compensation or benefit becoming due, or any increase in the amount of any compensation or benefit due, to any current or former employee of the Company or its Subsidiaries, or (ii) acceleration of the time of payment, vesting or funding of compensation or benefits to any current or former employee of the Company or its Subsidiaries. No Benefit Plan provides for reimbursement or gross-up of any excise tax under Section 409A or Section 4999 of the Code.

Section 2.14 **Environmental Matters.** The Company and its Subsidiaries are in compliance with all, and have not violated any, applicable Requirements of Environmental Law and possess and are in compliance with all, and have not violated any, required Environmental Permits, except, in each case, where the failure to comply or possess has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. The Company and its Subsidiaries have not received any written notice or claim from any Person of any violation or alleged violation of, or any liability or alleged liability under or related to, any Requirements of Environmental Law or Environmental Permit or any presence or release of any Hazardous Substance, and there is no basis for any such notice or claim, except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. Neither the Company nor any of its Subsidiaries has assumed or retained, as a result of any contract, any liabilities under any Requirements of Environmental Law or concerning any Hazardous Substances, except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

Section 2.15 **Intellectual Property; Security.** Except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, (a) the Company and its Subsidiaries own their material proprietary Intellectual Property that they purport to own, free and clear of all liens of any Person (including current or former employees and contractors), (b) to the Knowledge of the Company, the conduct of the businesses of the Company and its Subsidiaries does not infringe or violate the Intellectual Property of any Person (and no Person has alleged the same in writing, including “cease and desist” letters or invitations to take a patent license) and no Person is infringing or violating their Intellectual Property, (c) the Company and its Subsidiaries take commercially reasonable efforts to protect the confidentiality of their trade secrets and the integrity, continuous operation and security against cyber threats of their Software and Systems
(and all personal, sensitive or regulated data stored or processed therein) and there have been no breaches (or related outages) of or unauthorized accesses to same (except for those that were resolved without material cost or material liability) in the last three (3) years, (d) no software that the Company and its Subsidiaries convey, distribute, license or make available to others is subject to any open source license that requires the license or availability of the Company’s or its Subsidiaries’ material proprietary source code in such circumstances, (e) no third-party (other than the Company or its Subsidiaries, their respective personnel or other service providers working on their behalf) has current (or the contingent right to) access to any material proprietary source code of the Company or its Subsidiaries, and (f) the material Software and Systems of the Company and its Subsidiaries are reasonably sufficient to operate their businesses.

Section 2.16  **Registration Rights.** Except as provided in this Agreement or the Registration Rights Agreement, the Company has not granted any rights to register under the Securities Act any of its presently outstanding securities or any of its securities that may be issued subsequently.

Section 2.17  **Investment Company Act.** As of the Closing Date, the Company is not required to register as, and immediately after giving effect to the sale of the Purchased Shares in accordance with this Agreement and the application of the proceeds as described in this Agreement will not be required to be registered as, an “investment company,” as that term is defined in the Investment Company Act.

Section 2.18  **Nasdaq.** The Company’s Common Stock is listed on the Nasdaq Stock Market, and no event has occurred, and the Company is not aware of any event that is reasonably likely to occur, that would result in the Common Stock being delisted from the Nasdaq Stock Market. The Company is in compliance in all material respects with the listing and listing maintenance requirements of the Nasdaq Stock Market applicable to it for the continued trading of its Common Stock on the Nasdaq Stock Market.

Section 2.19  **No Brokers or Finders.** No Person has or will have, as a result of the transactions contemplated by this Agreement, any right, interest or claim against or upon the Company or any of its Subsidiaries for any commission, fee or other compensation as a finder or broker because of any act of the Company or any of its Subsidiaries, other than Goldman Sachs & Co. LLC whose fees are the sole responsibility of the Company.

Section 2.20  **Illegal Payments; FCPA Violations.** Except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, since January 1, 2015, none of the Company, any of its Subsidiaries or any of their officers, directors, employees or, to the Company’s Knowledge, any agents or representatives acting on behalf of the Company or any of its Subsidiaries has, in connection with the business of the Company: (a) unlawfully offered, paid, promised to pay, or authorized the payment of, directly or indirectly, anything of value, including money, loans, gifts, travel, or entertainment, to any Government Official with the purpose of (i) influencing any act or decision of such Government Official in his or her official capacity; (ii) inducing such Government Official to perform or omit to perform any activity in violation of his or her legal duties; (iii) securing any improper advantage; or (iv) inducing such Government Official to influence or affect any act or decision of a Governmental Entity, in violation of the U.S. Foreign Corrupt Practices Act, the UK Bribery Act,
or other applicable anti-corruption laws (collectively, "Anti-Corruption Laws"); (b) made any illegal contribution to any political party or candidate; (c) made, offered, promised to pay, or accepted any unlawful bribe, payoff, influence payment, kickback, unlawful rebate, or other similar unlawful payment of any nature, directly or indirectly, in connection with the business of the Company, or from any person, including any supplier or customer; (d) knowingly established or maintained any unrecorded fund or asset or made any false entry on any book or record of the Company or any of its Subsidiaries for any purpose; or (e) otherwise violated any applicable Anti-Corruption Laws.

Section 2.21 Sanctions and Export Controls. Since January 1, 2015, none of the Company or its Subsidiaries or, to the Company’s Knowledge, any director, officer, employee or agent of the Company or any of its Subsidiaries, (i) is or was a Sanctioned Person, (ii) has conducted business, directly or indirectly, with any Sanctioned Person or in any Sanctioned Country on behalf of the Company or any of its Subsidiaries, except as authorized by the applicable government authority, or (iii) has violated or engaged in any conduct sanctionable under any applicable Sanctions Laws or Export Controls. The Company and each of its Subsidiaries has instituted and maintains a system of internal controls designed to provide reasonable assurance that violations of applicable Anti-Corruption Laws, Sanctions Laws, and Export Controls will be prevented, detected, and deterred.

Section 2.22 Absence of Certain Changes. (i) Since December 31, 2019, except for the execution and performance of this Agreement and any other agreements contemplated hereby and the discussions, negotiations and transactions related hereto, the business of the Company and its Subsidiaries has been carried on and conducted in all material respects in the ordinary course of business, and since December 31, 2019, there has not been any Material Adverse Effect.

Section 2.23 No Rights Agreement; Anti-Takeover Provisions.

(a) Neither the Company nor any of its Subsidiaries is party to a stockholder rights agreement, “poison pill” or similar anti-takeover agreement or plan.

(b) The Company and the Board of Directors have taken all necessary actions to ensure that no restrictions included in any Antitakeover Provision is, or will be, applicable to the Purchaser or its Affiliates, this Agreement or the Registration Rights Agreement, the Certificate of Designations or any of the transactions contemplated hereby or by the Registration Rights Agreement, including the Purchaser’s acquisition, or the Company’s issuance, of the Purchased Shares and the Conversion Shares in accordance with this Agreement and the Certificate of Designations.

Section 2.24 Government Contracts. The Company and its Subsidiaries, taken as a whole, possess all necessary security clearances required to perform their material classified Government Contracts. The Company and its Subsidiaries have not previously received a rating of less than “satisfactory” from the Defense Counterintelligence and Security Agency with respect to any U.S. Government facility security clearance held by the Company or its Subsidiaries and used in connection with the performance of any material classified Government Contracts.
Section 2.25  No Additional Representations. Except for the representations and warranties made by the Company in this Article II (as modified by the Disclosure Letter) and in any certificate delivered to the Purchaser in connection with this Agreement, neither the Company nor any other Person makes any express or implied representation or warranty with respect to the Company or any Subsidiaries or their respective businesses, operations, assets, liabilities, employees, employee benefit plans, conditions or prospects, and the Company hereby disclaims any such other representations or warranties. In particular, without limiting the foregoing disclaimer, neither the Company nor any other Person makes or has made any representation or warranty to the Purchaser, or any of its Affiliates or representatives, with respect to (a) any financial projection, forecast, estimate, budget or prospect information relating to the Company or any of its Subsidiaries or their respective business, or (b) any oral or written information presented to the Purchaser or any of its Affiliates or representatives in the course of their due diligence investigation of the Company, the negotiation of this Agreement or in the course of the transactions contemplated hereby, or the accuracy or completeness thereof. Notwithstanding anything to the contrary herein, nothing in this Agreement shall limit the right of the Purchaser and its Affiliates to rely on the representations, warranties, covenants and agreements expressly set forth in this Agreement and in any certificate delivered to the Purchaser as may be required by this Agreement, nor will anything in this Agreement operate to limit any claim by any Purchaser or any of its respective Affiliates for fraud.

ARTICLE III

REPRESENTATIONS AND WARRANTIES OF THE PURCHASER

The Purchaser represents and warrants to the Company as of the date hereof and as of the Closing Date (except to the extent made only as of a specified date in which case as of such date) that:

Section 3.1  Organization and Power. The Purchaser is a Delaware limited partnership or Delaware limited liability company duly formed, validly existing and in good standing under the laws of the jurisdiction of its formation and has all necessary power and authority to own its properties and to carry on its business as presently conducted.

Section 3.2  Authorization, Etc. The Purchaser has all necessary power and authority and has taken all necessary entity action required for the due authorization, execution, delivery and performance by the Purchaser of this Agreement and the Registration Rights Agreement and the consummation by the Purchaser of the transactions contemplated hereby and thereby. The authorization, execution, delivery and performance by the Purchaser of this Agreement and the Registration Rights Agreement, and the consummation by the Purchaser of the transactions contemplated hereby and thereby do not and will not: (a) violate or result in the breach of any provision of the organizational documents of the Purchaser; or (b) with the exceptions that are not reasonably likely to have, individually or in the aggregate, a material adverse effect on its ability to perform its obligations under this Agreement and the Registration Rights Agreement: (i) violate any provision of, constitute a breach of, or default under, any judgment, order, writ, or decree applicable to the Purchaser or any material contract to which the Purchaser is a party; or (ii) violate any provision of, constitute a breach of, or default under, any applicable state, federal or local law, rule or regulation. This Agreement has been, and the Registration Rights Agreement
will, at the Closing be, duly executed and delivered by the Purchaser. Assuming due execution and delivery thereof by the other parties hereto or thereto, this Agreement and the Registration Rights Agreement will each be a valid and binding obligation of the Purchaser enforceable against the Purchaser in accordance with its terms, except as the enforceability may be limited by applicable laws relating to bankruptcy, insolvency, reorganization, moratorium or other similar legal requirement relating to or affecting creditors’ rights generally and except as the enforceability is subject to general principles of equity (regardless of whether enforceability is considered in a proceeding in equity or at law).

Section 3.3 Government Approvals. No consent, approval, license or authorization of, or filing with, any court or governmental authority is or will be required on the part of the Purchaser in connection with the execution, delivery and performance by the Purchaser of this Agreement and the Registration Rights Agreement, except for: (a) those which have already been made or granted; (b) the filing with the SEC of a Schedule 13D or Schedule 13G and a Form 3 to report the Purchaser’s ownership of the Purchased Shares; or (c) those where the failure to obtain such consent, approval or license would not have a material adverse effect on the ability of the Purchaser to perform its obligations hereunder.

Section 3.4 Investment Representations.

(a) The Purchaser is an “accredited investor” as that term is defined in Rule 501(a) of Regulation D promulgated under the Securities Act.

(b) The Purchaser has been advised by the Company that the Purchased Shares have not been registered under the Securities Act, that the Purchased Shares will be issued on the basis of the statutory exemption provided by Section 4(a)(2) under the Securities Act or Regulation D promulgated thereunder, or both, relating to transactions by an issuer not involving any public offering and under similar exemptions under certain state securities laws, that this transaction has not been reviewed by, passed on or submitted to any federal or state agency or self-regulatory organization where an exemption is being relied upon, and that the Company’s reliance thereon is based in part upon the representations made by the Purchaser in this Agreement and the Registration Rights Agreement. The Purchaser acknowledges that it has been informed by the Company of, or is otherwise familiar with, the nature of the limitations imposed by the Securities Act and the rules and regulations thereunder on the transfer of securities.

(c) The Purchaser is purchasing the Purchased Shares for its own account and not with a view to, or for sale in connection with, any distribution thereof in violation of federal or state securities laws.

(d) By reason of its business or financial experience, the Purchaser has the capacity to protect its own interest in connection with the transactions contemplated hereunder.

(e) The Company has provided to the Purchaser documents and information that the Purchaser has requested relating to an investment in the Company. The Purchaser recognizes that investing in the Company involves substantial risks, and has taken full cognizance of and understands all of the risk factors related to the acquisition of the Purchased Shares. The Purchaser has carefully considered and has discussed with the Purchaser’s
professional legal, tax and financial advisers the suitability of an investment in the Company, and the Purchaser has determined that the acquisition of
the Purchased Shares is a suitable investment for the Purchaser. The Purchaser has not relied on the Company for any tax or legal advice in connection
with the purchase of the Purchased Shares. In evaluating the suitability of an investment in the Company, the Purchaser has not relied upon any
representations or other information (other than the representations and warranties of the Company set forth in Article II).

Section 3.5  No Prior Ownership. As of the date hereof and as of immediately prior to the Closing, the Purchaser does not have record or
beneficial ownership (within the meaning of Rule 13d-3 under the Exchange Act) of any shares of the Company’s Common Stock.

Section 3.6  No Brokers or Finders. No Person has or will have, as a result of the transactions contemplated by this Agreement, any right, interest
or claim against or upon the Company, any of its Subsidiaries or any Purchaser for any commission, fee or other compensation as a finder or broker
because of any act by the Purchaser and for which the Company will be liable.

Section 3.7  Financing. The Purchaser has delivered to the Company true, correct, and complete copies of an executed commitment letter among
Blackstone Tactical Opportunities Fund III DE L.P. and the Purchaser, dated as of the date hereof (together with all annexes, schedules and exhibits (in
each case, if any) thereto, the “Equity Commitment Letter”, and the commitment thereunder, the “Equity Financing Commitment”) to provide, subject to
the terms and conditions therein, cash in the aggregate amount set forth therein (the “Equity Financing”). The Equity Financing is in amounts sufficient
to enable the Purchaser to perform its obligations under this Agreement and to consummate the transactions contemplated hereby. The Equity
Commitment Letter is in full force and effect and constitutes the enforceable, legal, valid and binding obligations of each of the Purchaser and the other
parties thereto, except as enforceability may be limited by bankruptcy laws, other similar laws affecting creditors’ rights and general principles of equity
affecting the availability of specific performance and other equity remedies. As of the date of this Agreement, the Equity Commitment Letter, including
the Equity Financing Commitment thereunder, have not been withdrawn, terminated, amended, restated, replaced, supplemented or otherwise modified
or waived and no such withdrawal, termination, amendment, restatement, replacement, supplement, modification or waiver is contemplated. There are
no side letters or other agreements, arrangements, contracts or understandings relating to the Equity Commitment Letter that could affect the availability
of the Equity Financing, and the Purchaser does not know of any facts or circumstances that may be expected to result in any of the conditions set forth
in any Equity Commitment Letter not being satisfied, or the Equity Financing not being available to the Purchaser, at the Closing. No event has occurred
that, with or without notice, lapse of time or both, would, or would reasonably be expected to, constitute a default or breach on the part of the Purchaser,
or by any other party thereto, under any term or condition of the Equity Commitment Letter, and the Purchaser has no reason to believe that it will be
unable to satisfy on a timely basis any term or condition of closing to be satisfied by it contained in the Equity Commitment Letter. Except as expressly
set forth in the Equity Commitment Letter, there are no conditions precedent related to the funding of the full amount of the Equity Financing
Commitment. As of the date of this Agreement, the Purchaser is not aware of any fact, circumstance or occurrence that makes any representation or
warranty of the Purchaser included in this Agreement or the Equity Commitment Letter inaccurate. Assuming (i) the satisfaction of the conditions in
Article V hereof and (ii) the Equity Financing is funded in accordance with its conditions, upon funding of the Equity Financing Commitment, the
Purchaser
will have at the Closing, immediately available cash funds sufficient to fund all of the amounts required to be provided by the Purchaser for the consummation of the transactions contemplated hereby, including the payment of the Purchase Price and any other amounts required to be paid in connection with the consummation of the transactions contemplated hereby, including all related fees and expenses, and such funds are sufficient for the satisfaction of all of the Purchaser’s obligations under this Agreement, as applicable.

Section 3.8 No Additional Representations. The Purchaser acknowledges and agrees, on behalf of itself and its Affiliates, that, except for the representations and warranties contained in Article II (as modified by the Disclosure Letter) and in any certificate delivered by the Company in connection with this Agreement, neither the Company nor any other Person, makes any express or implied representation or warranty with respect to the Company, its Subsidiaries or their respective businesses, operations, assets, liabilities, employees, employee benefit plans, conditions or prospects, and the Purchaser, on behalf of itself and its Affiliates, hereby disclaims reliance upon any such other representations or warranties. In particular, without limiting the foregoing disclaimer, the Purchaser acknowledges and agrees, on behalf of itself and its Affiliates, that neither the Company nor any other Person, makes or has made any representation or warranty with respect to, and the Purchaser, on behalf of itself and its Affiliates, hereby disclaims reliance upon (a) any financial projection, forecast, estimate, budget or prospect information relating to the Company, its Subsidiaries or their respective business, or (b) without limiting the representations and warranties made by the Company in Article II, any information presented to the Purchaser or any of its Affiliates or representatives in the course of their due diligence investigation of the Company, the negotiation of this Agreement or in the course of the transactions contemplated hereby, or the accuracy or completeness thereof. To the fullest extent permitted by applicable law, without limiting the representations and warranties contained in Article II, other than in the case of fraud, neither the Company nor any of its Subsidiaries or any other Person shall have any liability to any Purchaser or its Affiliates or representatives on any basis (including in contract or tort, under federal or state securities laws or otherwise) based upon any other representation or warranty, either express or implied, included in any information or statements (or any omissions therefrom) provided or made available by the Company or its Subsidiaries or representatives to the Purchaser or its Affiliates or representatives in the course of their due diligence investigation of the Company, the negotiation of this Agreement or in the course of the transactions contemplated by this Agreement.

ARTICLE IV

COVENANTS OF THE PARTIES

Section 4.1 Board of Directors.

(a) As of the Closing, the Purchaser Representative shall have the right to designate one director to the Board of Directors (the “Series A Director”), subject to Section 4.1(b). Effective as of the Closing, the Board of Directors shall appoint Viral Patel as the initial Series A Director and take all actions necessary or appropriate to appoint the Series A Director as a director of the Board of Directors, to serve as a Class I director, effective as of the Closing Date.
(b) Thereafter, the Purchaser Representative shall have the right to designate, for so long as the Purchaser Parties hold at least 65% of the Purchased Shares (or Conversion Shares issued upon conversion thereof) issued on the Closing, the Series A Director to the Board of Directors. For so long as the Purchaser Parties beneficially own the minimum threshold of Purchased Shares (or Conversion Shares issued upon conversion thereof) that entitles the Purchaser Representative to nominate a Purchaser Nominee as provided above, the Company shall, at each annual meeting of the stockholders of the Company at which the Purchaser Nominee’s term as a director expires, use reasonable best efforts to (i) nominate the Purchaser Nominee for election to the Board of Directors, (ii) recommend that the holders of the Company’s voting stock vote in favor of such Purchaser Nominee and (iii) cause the Purchaser Nominee to be elected to the Board of Directors; provided, however, that the Purchaser Nominee shall comply with the corporate governance principles and practices of the Company as in effect from time to time and applicable to directors generally, including but not limited to the Company’s Corporate Governance Guidelines, the Company’s Code of Business Conduct & Ethics, the Company’s Insider Trading Policy (the “Governance Principles”). If, following election to the Board of Directors, the Purchaser Nominee resigns, is removed, or is otherwise unable to serve for any reason (including as a result of death or disability) and the Purchaser Representative then has the right to designate a Purchaser Nominee pursuant to this Section 4.1, then, subject to compliance with the Governance Principles, the Purchaser Representative shall be entitled to designate a replacement Purchaser Nominee, and the Board of Directors shall use reasonable best efforts to cause such replacement Purchaser Nominee to fill such vacancy and to be appointed to the Board of Directors. If a Purchaser Nominee is not re-elected and the Purchaser Representative still has the right to designate the Purchaser Nominee, then, subject to compliance with the Governance Principles, the Purchaser Representative shall be entitled to designate a replacement Purchaser Nominee, and the Board of Directors shall use its reasonable best efforts to elect such replacement Purchaser Nominee to the Board of Directors. In the event that the Purchaser ceases to hold the minimum percentage of Purchased Shares or Conversion Shares that entitles it to nominate the Purchaser Nominee as provided above, if requested by the Board of Directors, the Purchaser shall cause the Purchaser Nominee to immediately resign as director and the Purchaser shall no longer have any rights under this Section 4.1 with respect to the Series A Director.

(c) Each Purchaser Nominee must be reasonably acceptable to the Board of Directors and meet in all material respects all of the requirements of a director of the Company described in this Section 4.1, provided, however, that Managing Directors (and more senior employees) or Senior Advisors of the Sponsor are deemed to be reasonably acceptable for purposes of this Section 4.1(c).

(d) The Series A Director shall be entitled to reimbursement of expenses and indemnification in the same manner and to the same extent as the other members of the Board of Directors, in accordance with the Company’s organizational documents and applicable Delaware law and including on the basis of the Company’s director indemnification agreement. Neither the Series A Director nor a Purchaser Nominee shall be entitled to any cash or equity compensation for service on the Board. Any director minimum ownership requirements shall be deemed satisfied in respect of the Series A Director or Purchaser Nominee, as applicable, by the Purchased Shares, or any Conversion Shares, as applicable, held by the Purchaser Parties or one or more of their respective Affiliates. The Company acknowledges and agrees that it is the indemnitor of first resort (i.e., its obligations to the Series A Director are primary and any
(e) At the Closing, the Board of Directors shall take all necessary and appropriate action to form and maintain a special committee of the Board of Directors (the “Special Committee”), consisting of three (3) directors (one of whom shall always be either, at the election of the Purchaser Representative: (i) the Series A Director or (ii) another Board member acceptable to the Purchaser), with a specific scope and mandate to be determined by the Board of Directors.

Section 4.2 Restrictions on Transfer.

(a) For a period of one (1) year after the Closing, the Purchaser shall not Transfer any of the Purchased Shares to any Person without the consent of the Company; provided, however, that, without the consent of the Company, a Purchaser may Transfer Purchased Shares to a Permitted Transferee of the Purchaser that agrees to be bound by the terms of this Agreement pursuant to a written agreement (and upon such Transfer the Permitted Transferee shall become a “Purchaser” for purposes of this Agreement (including this Section 4.2)); pursuant to a tender or exchange offer, merger, consolidation, division, acquisition, reorganization or recapitalization involving the Company; or following the date the Company commences a voluntary case under Title 11 of the United States Bankruptcy Code or any other similar insolvency laws.

(b) At no time shall a Purchaser knowingly Transfer any Purchased Shares or Conversion Shares to (i) any Company Competitor, or (ii) any Person who is known to have engaged in activist campaigns in the three years prior to the date of any such proposed Transfer by stating an intention to or actually attempting to (pursuant to proxy solicitation, tender or exchange offer or other means) obtain a seat on the board of directors of a company or effecting a significant change within such company, in each case, that was publicly opposed by the board of directors of such company; provided, that the restrictions set forth in this Section 4.2(b) shall not apply to Transfers into the public market pursuant to a bona fide, broadly distributed public offering, in each case made pursuant to the Registration Rights Agreement or through a bona fide sale to the public without registration effectuated pursuant to Rule 144 under the Securities Act or in connection with a merger, tender offer or exchange offer or other business combination, acquisition of assets or similar transaction or any change of control transaction involving the Company or any Subsidiary thereof.

(c) Notwithstanding anything to the contrary contained herein, the restrictions set forth in this Section 4.2 shall not apply to any Transfer of shares of Series A Preferred Stock, Common Stock issued upon conversion of the Series A Preferred Stock or other Common Stock in connection with any Permitted Loan; provided, however, the Foreclosure Limitations shall be applicable in connection with any foreclosure or exercise of remedies pursuant to a Permitted Loan. “Permitted Loan” means any total return swap or bona fide loan or other financing arrangement, in each case entered into with a nationally recognized financial institution, including a pledge to such a financial institution to secure a bona fide debt financing and any foreclosure by such financial institution or transfer to such financial institution in lieu of foreclosure and subsequent sale of the securities, as long as such financial institution agrees with
the relevant Purchaser Party and the Company that following such foreclosure or in connection with such Transfer it shall not knowingly directly or indirectly Transfer (other than pursuant to Transfers (x) into the public market pursuant to a bona fide, broadly distributed public offering, in each case made pursuant to a registration statement; (y) through a bona fide sale into the public market without registration effectuated pursuant to Rule 144 under the Securities Act or (z) in connection with a merger, tender offer or exchange offer or other business combination, acquisition of assets or similar transaction or any change of control transaction involving the Company or any Subsidiary thereof) such foreclosed or Transferred, as the case may be, Common Stock or Series A Preferred Stock to a Company Competitor without the Company’s consent (such agreement by the relevant financial institution, the “Foreclosure Limitations”). Any Permitted Loan entered into by a Purchaser Party or its Affiliates shall be with one or more financial institutions reasonably acceptable to the Company and, except as specified above, nothing contained in this Agreement or the Registration Rights Agreement shall prohibit or otherwise restrict the ability of any lender (or its securities’ affiliate) or collateral agent to foreclose upon, or accept a Transfer in lieu of foreclosure, and sell, dispose of or otherwise Transfer the Common Stock, the Series A Preferred Stock and/or shares of Common Stock issued upon conversion of Series A Preferred Stock (including shares of Common Stock received upon conversion or redemption of the Series A Preferred Stock following foreclosure or Transfer in lieu of foreclosure on a Permitted Loan) mortgaged, hypothecated and/or pledged to secure the obligations of the borrower following an event of default under a Permitted Loan. Subject to the preceding provisions of this clause (c), in the event that any lender or other creditor under a Permitted Loan transaction (including any agent or trustee on their behalf) or any Affiliate of the foregoing exercises any rights or remedies in respect of the Series A Preferred Stock or the shares of Common Stock issuable or issued upon conversion of the Series A Preferred Stock or any other collateral for any Permitted Loan, no lender, creditor, agent or trustee on their behalf or affiliate of any of the foregoing (other than, for the avoidance of doubt, a Purchaser Party or its Affiliates) shall be entitled to any rights or have any obligations or be subject to any transfer restrictions or limitations hereunder except and to the extent for those expressly provided for in the Registration Rights Agreement.

(d) In any event, Restricted Securities shall not be Transferred except upon the conditions specified in this Section 4.2, which conditions are intended to ensure compliance with the provisions of the Securities Act. Any attempted Transfer in violation of this Section 4.2 shall be void ab initio.

(e) At the Closing, the Purchaser shall deliver to the Company a duly executed, valid, accurate and properly completed Internal Revenue Service ("IRS") Form W-9 certifying that the Purchaser is a U.S. person and with the effect that the Company can make dividend payments to the Purchaser (or its nominee) without deduction or withholding for any U.S. federal withholding taxes. The Purchaser agrees that if the information provided on any IRS Form W-9 previously delivered by the Purchaser changes, or if a lapse in time or change in circumstances renders the information on such IRS Form W-9 obsolete, expired or inaccurate in any material respect, the Purchaser shall promptly inform the Company and deliver promptly an updated IRS Form W-9.
Section 4.3  Restrictive Legends.

(a) Each certificate representing the Purchased Shares or Conversion Shares (unless otherwise permitted by the provisions of Section 4.2(b) or Section 4.3(d)) shall be stamped or otherwise imprinted with a legend in substantially the following form (in addition to any legend required under applicable state securities laws):

“THE OFFER AND SALE OF THIS SECURITY AND THE SHARES OF COMMON STOCK ISSUABLE UPON CONVERSION OF THIS SECURITY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), AND THIS SECURITY AND SUCH SHARES MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED EXCEPT (A) PURSUANT TO A REGISTRATION STATEMENT THAT IS EFFECTIVE UNDER THE SECURITIES ACT; OR (B) PURSUANT TO AN EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.”

(b) In addition, for so long as the Purchased Shares or Conversion Shares are subject to the restrictions set forth in Section 4.2, each certificate representing the Purchased Shares or Conversion Shares shall be stamped or otherwise imprinted with a legend in substantially the following form:

“THE SECURITIES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO RESTRICTIONS ON TRANSFER SET FORTH IN A SECURITIES PURCHASE AGREEMENT. THE COMPANY WILL GIVE TO THE HOLDER OF THIS CERTIFICATE A COPY OF SUCH SECURITIES PURCHASE AGREEMENT, AS IN EFFECT ON THE DATE OF THE GIVING OF SUCH COPY, WITHOUT CHARGE, PROMPTLY AFTER RECEIPT OF A WRITTEN REQUEST THEREFOR.”

(c) The Purchaser consents to the Company making a notation on its records and giving instructions to any transfer agent of the Purchased Shares or the Conversion Shares in order to implement the restrictions on transfer set forth in this Section 4.3.

(d) Prior to any proposed Transfer of any Restricted Securities, unless there is in effect a registration statement under the Securities Act covering the proposed Transfer, a Purchaser shall give written notice to the Company of such Purchaser’s intention to effect such Transfer. Each such notice shall describe the manner and circumstances of the proposed Transfer in sufficient detail, and shall be accompanied by either (i) an opinion of legal counsel reasonably satisfactory to the Company to the effect that the proposed Transfer of the Restricted Securities may be effected without registration under the Securities Act, or (ii) any other evidence reasonably satisfactory to counsel to the Company, whereupon such Purchaser shall be entitled to Transfer such Restricted Securities in accordance with the terms of the notice delivered by such Purchaser to the Company. Notwithstanding the foregoing (1) in the event a Purchaser shall give the Company a representation letter containing such representations as the Company shall reasonably request, the Company will not require such legal opinion or such other evidence (A) in a routine...
sales transaction in compliance with Rule 144 under the Securities Act, (B) in any transaction in which a Purchaser that is a corporation distributes Restricted Securities solely to its majority owned subsidiaries or Affiliates for no consideration or (C) in any transaction in which a Purchaser that is a partnership or limited liability company distributes Restricted Securities solely to its Affiliates (including affiliated fund partnerships), or partners or members of the Purchaser or its Affiliates for no consideration and (2) the requirements of the preceding sentence shall not apply to (x) any pledge of Series A Preferred Stock, Conversion Shares or Common Stock pursuant to a Permitted Loan, or (y) any foreclosure upon, or acceptance of a Transfer in lieu of foreclosure, or any sale, disposition of or other Transfer of Common Stock, the Series A Preferred Stock and/or shares of Common Stock issued upon conversion of Series A Preferred Stock (including shares of Common Stock received upon conversion or redemption of the Series A Preferred Stock following foreclosure or Transfer in lieu of foreclosure on a Permitted Loan) by any lender (or its securities’ affiliate) or collateral agent under a Permitted Loan (which shall instead be governed by the terms of any applicable Issuer Agreements). Each certificate evidencing the Restricted Securities transferred shall bear the appropriate restrictive legend set forth in this Section 4.3, except that such certificate shall not bear the first such restrictive legend if such legend is not required in order to establish compliance with any provisions of the Securities Act. Upon the request of a Purchaser of a certificate bearing the first such restrictive legend and, if necessary, the appropriate evidence as required by clause (i) or (ii) above, the Company shall promptly remove the first such restrictive legend from such certificate and from the certificate to be issued to the applicable transferee if such legend is not required in order to establish compliance with any provisions of the Securities Act and a Purchaser promptly Transfers the Purchased Shares or Conversion Shares. If a Purchaser holds a certificate bearing the second restrictive legend, the Company shall promptly remove such restrictive legend from such certificate when the provisions of Section 4.2 are no longer applicable to the applicable Purchased Shares or Conversion Shares.

Section 4.4 Standstill. Except as otherwise provided in this Agreement or the Certificate of Designations, until the later of (i) one (1) year after the Closing and (ii) the date the Purchaser is no longer entitled to designate one director to the Board of Directors pursuant to Section 4.1, without the prior written consent of the Company, the Purchaser will not at any time, nor will it cause any of its Affiliates to: (a) effect or seek, offer or publicly propose to effect, or publicly announce any intention to effect or cause or participate in or in any way assist, facilitate or encourage any other person to effect or seek, offer or propose (whether publicly or otherwise) to effect or participate in, (i) any acquisition of any equity securities (or beneficial ownership thereof) or rights or options to acquire any equity securities (or beneficial ownership thereof), or any securities convertible into or exchangeable for any such equity securities (or beneficial ownership thereof) of the Company, other than by Purchaser and its Affiliates in a transaction pursuant to which Purchaser and its Affiliates would beneficially own no more than five percent (5%) in the aggregate of the outstanding shares of the Company’s Common Stock (excluding conversion of the shares of Series A Preferred Stock and any Conversion Shares then held by the Purchaser or such Affiliate) after such transaction or any exercise of the Purchaser’s rights to acquire New Securities pursuant to Article VI; (ii) any tender or exchange offer, merger or other business combination involving the Company or its Subsidiaries or assets of the Company or its Subsidiaries constituting a significant portion of the consolidated assets of the Company and its Subsidiaries; (b) make, participate in or encourage any “solicitation” (as such term is used in the proxy rules of SEC) of proxies or consents with respect to the election or removal of directors or any other matter or proposal; (ii) become a “participant” (as such term is used in the proxy rules
of the SEC) in any such solicitation of proxies or consents; (iii) seek to advise, encourage or influence any Person with respect to the voting or disposition of any of the securities of the Company; or (iv) initiate, encourage or participate, directly or indirectly, in any “vote no,” “withhold” or similar campaign; (c) otherwise act to seek representation on or to control or influence the management or policies of the Company or to obtain representation on the Board of Directors of the Company (beyond their right to do so based on their representation on the Board of Directors pursuant to Section 4.1); (d) publicly submit any shareholder proposal to the Company, or (e) publicly propose any change of control or other material transaction involving the Company; it being understood that nothing in this Section 4.4 shall (v) restrict or prohibit a Series A Director or Purchaser Nominee, as applicable, from taking any action, or refraining from taking any action, which he or she determines, in his or her reasonable discretion, is necessary or appropriate in light of his or her fiduciary duties as a member of the Board of Directors, (w) restrict or prohibit the making or submission to the Company and/or the Board of Directors any proposal by the Purchaser Parties that would not reasonably be expected to result in the Company being obligated to publicly disclose such proposal, (x) restrict or prohibit participation in rights offerings made by the Company to all holders of Common Stock, (y) restrict or prohibit the Purchaser’s acquisition, disposition, sale or Transfer of the Purchased Shares (including the accretion of dividends thereon and any dividends payable in any other security) or Conversion Shares issuable upon conversion of the Purchased Shares, in each case, in accordance with the terms of this Agreement and the Certificate of Designations or (z) limit or restrict any Transfer pursuant to a Permitted Loan or any foreclosure thereunder or Transfer in lieu of a foreclosure thereunder.

Section 4.5 Confidentiality.

(a) The Purchaser shall keep all Confidential Information confidential and shall not, without the Company’s prior written consent, disclose any Confidential Information in any manner whatsoever, in whole or in part, and the Purchaser shall not use any Confidential Information, other than in connection with the performance of its obligations hereunder or for purposes of monitoring, administering or managing the Purchaser Parties’ investment in the Company. The Purchaser may disclose the Confidential Information (i) to such of its Representatives who need to know the Confidential Information for such purpose, who are informed by the Purchaser of the confidential nature of the Confidential Information and directed to keep such Confidential Information confidential, (ii) to any prospective purchaser of Purchased Shares (and Conversion Shares) from such Purchaser Party or prospective financing sources in connection with effecting any Permitted Loan (including any syndication and marketing thereof), as long as such prospective purchaser or lender agrees to be bound by a customary confidentiality or non-disclosure agreement with terms substantially similar to the terms contained in this Agreement (with the Company as an express third party beneficiary of such agreement) or (iii) as may be reasonably necessary in connection with such Purchaser Party’s enforcement of its rights in connection with this Agreement or its investment in the Company. The Purchaser shall be responsible for any non-compliance with this Section 4.5 by its Representatives or any such prospective purchaser.

(b) In the event that the Purchaser or any of its Representatives is required or requested by applicable law (including oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or other process) to disclose any of the Confidential Information, the Purchaser will provide the Company with prompt notice.
Section 4.6  Financial Statements and Other Information.

(a) For so long as the Purchaser Parties collectively hold record and beneficial ownership (within the meaning of Rule 13d-3 under the Exchange Act) of more than five percent (5%) of the outstanding shares of the Company’s Common Stock (which shall be determined assuming the conversion of all of the shares of Series APreferred Stock), the Company shall deliver to the Purchaser Parties:

(i) within 90 days after the end of each fiscal year of the Company, (A) an audited, consolidated balance sheet of the Company and its Subsidiaries as of the end of such fiscal year, (B) an audited, consolidated income statement of the Company and its Subsidiaries for such fiscal year and (C) an audited, consolidated statement of cash flows of the Company and its Subsidiaries for such fiscal year;

(ii) within 45 days after the end of each of the first three quarters of each fiscal year of the Company, (A) an unaudited, consolidated balance sheet of the Company and its Subsidiaries as of the end of such fiscal quarter, (B) an unaudited, consolidated income statement of the Company and its Subsidiaries for such fiscal quarter and (C) an unaudited, consolidated statement of cash flows of the Company and its Subsidiaries for such fiscal quarter; and

(iii) reasonable access, to the extent reasonably requested by the Purchaser Parties, to the Company and its Subsidiaries’ office properties, books and records, and to discuss their affairs, finances and matters related to capital structure and financing with its and their officers, all upon reasonable notice and at reasonable times at the Company’s principal place of business; provided that any access pursuant to this Section 4.6 shall be conducted in a manner as not to interfere unreasonably with the conduct of the business of the Company and its Subsidiaries.

(b) Notwithstanding the foregoing, financial statements and other reports required to be delivered pursuant to this Section 4.6 filed by the Company with the SEC and available on EDGAR (or such other free, publicly-accessible internet database that may be established and maintained by the SEC as a substitute for or successor to EDGAR) shall be deemed to have been delivered to the Purchaser Parties on the date on which the Company posts such documents to EDGAR (or such other free, publicly-accessible internet database that may be established and maintained by the SEC as a substitute for or successor to EDGAR).
(c) For so long as the Purchaser has the right, pursuant to Section 4.1(b), to nominate the Purchaser Nominee for election to the Board of Directors, the Company shall deliver to the Series A Director copies of all material, substantive materials provided to the Board of Directors at substantially the same time as provided to the directors of the Company.

(d) Notwithstanding anything to the contrary contained in this Section 4.6, the Company shall not be required to furnish information, board materials or reports or provide access to their books and records pursuant to this Section 4.6 if the Company determines in good faith that declining to furnish such information or reports or provide such access is reasonably necessary to preserve the attorney-client privilege or to protect highly confidential or proprietary information.

Section 4.7 Antitakeover Provisions; Other Actions.

(a) Antitakeover Provisions. The Company and the Board of Directors shall (i) take all actions necessary so that no Antitakeover Provision becomes applicable to this Agreement or the Purchaser’s acquisition, or the Company’s issuance, of the Purchased Shares and the Conversion Shares in accordance with this Agreement and the Certificate of Designations, and (ii) if any such Antitakeover Provision becomes applicable thereto to any extent or in any regard, to take all actions necessary so that such transactions may be consummated as promptly as practicable on the terms required by, or provided for, in this Agreement, the Registration Rights Agreement and the Certificate of Designations, and otherwise to take all such other actions as are reasonably necessary to eliminate or minimize to the greatest extent possible the effects of any such Antitakeover Provision thereupon or upon the transactions contemplated thereby.

(b) Notwithstanding anything in this Agreement to the contrary, nothing in this Agreement shall require or obligate the Sponsor and its respective Affiliates and any investment funds or investment vehicles affiliated with, or managed or advised by, the Sponsor or any portfolio company (as such term is commonly understood in the private equity industry) or investment of the Sponsor or of any such investment fund or investment vehicle to propose, negotiation, commit to, and/or effect, by consent decree, holder separate order, or otherwise, the sale, divestiture, transfer, license, disposition, or hold separate (through the establishment of a trust or otherwise) of such assets, properties, or businesses of the Sponsor or any of its respective Affiliates, Subsidiaries, investment funds, or portfolio companies, in order to avoid the entry of any decree, judgment, injunction (permanent or preliminary), or any other order that would make the transactions contemplated by this Agreement unlawful or would otherwise materially delay or prevent the consummation of the transactions contemplated hereby.

Section 4.8 Tax Matters.

(a) USRPHC Status. At the Purchaser’s written request from time to time while the Purchaser owns an equity interest in the Company, the Company shall use commercially reasonable efforts to determine as promptly as practicable whether it is a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code (a “USRPHC”) and shall, within a reasonable period after receipt of such request, notify the Purchaser in writing of its determination of its status as a USRPHC (and if in connection with a sale of an interest in the Company, shall promptly provide to the Purchaser a statement in accordance with Treasury Regulations Section 1.897-2(h)(1) where it determines the interest being sold is not a United States real property interest within the meaning of Section 897 of the Code).
(b) Tax Treatment. The Company and the Purchaser acknowledge and agree that the Purchased Shares are not intended to be “preferred stock” for purposes of Section 305 of the Code, and neither the Company nor the Purchaser shall take an inconsistent position with respect to the Purchased Shares for U.S. federal income tax purposes, unless otherwise required by a “determination” within the meaning of Section 1313(a) of the Code. The Company and the Purchaser further agree that the Purchaser shall not be required to include in income as a dividend for U.S. federal income tax purposes any income or gain in respect of the Preferred Stock on account of the accrual of a Dividend (as defined in the Certificate of Designations) in respect of the Series A Preferred Stock, unless and until such dividends are declared and paid in cash unless otherwise required by a “determination” within the meaning of Section 1313(a) of the Code. For the avoidance of doubt, in no event shall the Company be liable to the Purchaser or to any other party for any damages arising from either of the foregoing “determinations.”

Section 4.9 Nasdaq Listing. To the extent the Company has not done so prior to the execution of this Agreement, the Company shall apply to cause the Conversion Shares to be approved for listing prior to Closing on the Nasdaq Stock Market, subject to official notice of issuance. The Company shall use its reasonable best efforts to maintain the listing of all of the Conversion Shares upon each national securities exchange and automated quotation system, if any, upon which shares of Common Stock are then listed (subject to official notice of issuance) and shall maintain, so long as any other shares of Common Stock shall be so listed, such listing of the Conversion Shares. In accordance with the Certificate of Designations, the Company shall cause a number of shares of Common Stock equal to the total number of Conversion Shares to be authorized, reserved, and kept available at all times, free and clear of preemptive rights and all liens, to allow for full conversion of the Series A Preferred Stock in accordance with the terms thereof. From time to time following the Closing Date, the Company shall cause the number of shares of Common Stock issuable upon conversion or redemption of the then outstanding shares of Series A Preferred Stock to be approved for listing on the Nasdaq Stock Market. The Company shall pay all fees and expenses in connection with satisfying the obligations under this Section 4.9.

Section 4.10 State Securities Laws. The Company shall use its reasonable best efforts to (a) obtain all necessary permits and qualifications, if any, or secure an exemption therefrom, required by any state or country prior to the offer and sale of Common Stock and/or Series A Preferred Stock and (b) cause such authorization, approval, permit or qualification to be effective as of the Closing and as of any conversion of Series A Preferred Stock.

Section 4.11 Section 16b-3 Matters. If the Company becomes a party to a consolidation, merger or other similar transaction or otherwise or if there is any event or circumstance that may result in the Purchaser and each Permitted Transferee of the Purchaser to whom shares of Preferred Stock or Common Stock issued upon conversion of shares of Preferred Stock are transferred pursuant to Section 4.2 (the “Purchaser Parties”), their respective Affiliates and/or the Series A Director being deemed to have made a disposition or acquisition of the Preferred Stock or Common Stock issued or issuable upon conversion of shares of Preferred Stock for purposes of Section 16 of the Exchange Act, and if the Series A Director is serving on the Board at such time or has served on the Board during the preceding six (6) months (i) the Board
or a committee thereof composed solely of two or more “non-employee directors” as defined in Rule 16b-3 of the Exchange Act will pre-approve such acquisition or disposition of the Preferred Stock or Common Stock issued or issuable upon conversion of shares of Preferred Stock for the express purpose of exempting the Purchaser Parties’, their respective Affiliates’ and the Series A Director’s interests (for the Purchaser Parties and/or their respective Affiliates, to the extent such persons may be deemed to be “directors by deputization”) in such transaction from Section 16(b) of the Exchange Act pursuant to Rule 16b-3 thereunder and (ii) if the transaction involves (A) a merger or consolidation to which the Company is a party and the Common Stock is, in whole or in part, converted into or exchanged for equity securities of a different issuer, (B) a potential acquisition or deemed acquisition, or disposition or deemed disposition, by the Purchaser Parties, their respective Affiliates, and/or the Series A Director of equity securities of such other issuer or derivatives thereof and (C) an Affiliate or other designee of the Purchaser Parties or their respective Affiliates will serve on the board of directors (or its equivalent) of such other issuer pursuant to the terms of an agreement to which the Company is a party (or if the Purchaser Parties notify the Company of such service a reasonable time in advance of the closing of such transactions), then if the Company requires that the other issuer pre-approve any acquisition of equity securities or derivatives thereof for the express purpose of exempting the interests of any director or officer of the Company or any of its subsidiaries in such transactions from Section 16(b) of the Exchange Act pursuant to Rule 16b-3 thereunder, the Company shall require that such other issuer pre-approve any such acquisitions of equity securities or derivatives thereof for the express purpose of exempting the interests of the Purchaser Parties’, their respective Affiliates’ and the Series A Director (for the Purchaser Parties and/or their respective Affiliates, to the extent such persons may be deemed to be “directors by deputization” of such other issuer) in such transactions from Section 16(b) of the Exchange Act pursuant to Rule 16b-3 thereunder.

Section 4.12 Negative Covenants. Except as set forth on Section 4.12 of the Disclosure Letter, from the date of this Agreement through the Closing, the Company and its Subsidiaries shall use their reasonable best efforts to operate their businesses in the ordinary course, and, without the prior written consent of the Purchaser Parties (which consent shall not be unreasonably withheld, conditioned or delayed), the Company shall not and shall cause its Subsidiaries not to:

(a) take any action that would require the consent of the Holders (as defined in the Certificate of Designations) pursuant to Section 9(a) (i) of the Certificate of Designations;

(b) redeem, purchase, repurchase or otherwise acquire any of its outstanding shares of capital stock or other equity or voting interests, or any rights, warrants or options to acquire any shares of its capital stock or other equity or voting interests, except in the ordinary course of business, consistent with past practice pursuant to the terms of the Stock Plans or Benefit Plans;

(c) establish a record date for, declare, set aside for payment or pay any dividend on, or make any other distribution in respect of, any shares of its capital stock or other equity or voting interests;
(d) split, combine, subdivide, recapitalize, reclassify or make like change to any shares of its capital stock or other equity or voting interests;

(e) amend, supplement or otherwise change, or waive any provision of, the Company’s Certificate of Incorporation, Bylaws or other organizational documents or make any material amendments or changes to the organizational documents of any of the Company’s Subsidiaries or take or authorize any action to wind up its affairs or dissolve (in each case except as and to the extent contemplated by Section 2.23(b) or Section 4.7(a) or in connection with the filing of the Certificate of Designations);

(f) enter into any new, or amend, terminate or renew in any material respect, any material Benefit Plan, other than in the ordinary course of business and consistent with past practice;

(g) enter into any new, or amend, terminate or renew in any material respect, any material Contract between the Company or one of its Subsidiaries, on the one hand, and any other Person (other than the Company’s Subsidiaries) including officer or director of the Company or any of its Subsidiaries, on the other hand, outside the ordinary course of business;

(h) make any material change in the Company’s or its Subsidiaries’ financial accounting principles, except as required by changes in GAAP (or any interpretation thereof) or in applicable Law; or

(i) agree, authorize or commit to do any of the foregoing.

Section 4.13 Sponsor.

(a) Notwithstanding anything to the contrary set forth in this Agreement, none of the terms or provisions of this Agreement (including, for the avoidance of doubt, Section 4.2 and Section 4.4) shall in any way limit the activities of The Blackstone Group Inc. (the “Sponsor”) or any of its Affiliates (collectively, the “Sponsor Group”), other than the Purchaser Parties, in their businesses distinct from the corporate private equity business of Sponsor (the “Excluded Sponsor Parties”), so long as (i) no such Excluded Sponsor Party or any of its Representatives is acting on behalf of or at the direction of any Purchaser Party with respect to any matter that otherwise would violate any term or provision of this Agreement and (ii) no Confidential Information is made directly available to any Excluded Sponsor Party or any of its Representatives who are not involved in the corporate private equity business of Sponsor by or on behalf of any Purchaser Party or any of their Representatives, except with respect to any such Representative who is (x) compliance personnel for compliance purposes and (y) non-compliance personnel of Sponsor who are directors or officers of, or function in a similar oversight role at, such Affiliate as long as Confidential Information is not otherwise disclosed to such Affiliate.

(b) The Purchaser Parties and the Company hereby agree, notwithstanding anything to the contrary in any other agreement or at law or in equity, that, to the maximum extent permitted by law, when the Purchaser Parties take any action under this Agreement to give or withhold their consent, the Purchaser Parties shall have no duty (fiduciary or other) to consider the interests of the Company or the other stockholders of the Company and may act exclusively in their own interest; provided, however, that the foregoing shall in no way affect the obligations of the parties hereto to comply with the provisions of this Agreement. For the avoidance of doubt, the foregoing sentence shall not limit or otherwise affect the fiduciary duties of the Series A Director.
(c) The Purchaser Parties and the Company hereby agree and acknowledge that, subject to applicable law, the Series A Director may share Confidential Information with the Purchaser Parties.

Section 4.14 Use of Proceeds. The Company shall use the proceeds from the issuance and sale of the Purchased Shares for stock buy backs, general corporate purposes and, potentially, acquisitions with strategic impact.

Section 4.15 Corporate Actions.

(a) If any occurrence since the date of this Agreement until the Closing would have resulted in an adjustment to the Conversion Price (as defined in the Certificate of Designations) pursuant to the Certificate of Designations if the Series A Preferred Stock had been issued and outstanding since the date of this Agreement, the Company shall adjust the Conversion Price, effective as of the Closing, in the same manner as would have been required by the Certificate of Designations if the Series A Preferred Stock had been issued and outstanding since the date of this Agreement.

(b) The Company shall not adopt any stockholder rights agreement, “poison pill” or similar anti-takeover agreement or plan that prohibits the Purchaser Parties from taking any of the actions permitted by this Agreement under Section 4.2 or the Certificate of Designations.

Section 4.16 Corporate Opportunities. In recognition and anticipation that (1) certain directors, principals, officers, employees and/or other representatives of the Purchaser Parties and their Affiliates may serve as directors, officers or agents of the Company, (2) the Purchaser Parties and their Affiliates may now engage and may continue to engage in the same or similar activities or related lines of business as those in which the Company, directly or indirectly, may engage and/or other business activities that overlap with or compete with those in which the Company, directly or indirectly, may engage or proposes to engage, and (3) members of the Board who are not employees of the Company or its subsidiaries (the “Non-Employee Directors”) and their respective Affiliates may now engage and may continue to engage in the same or similar activities or related lines of business as those in which the Company, directly or indirectly, may engage and/or other business activities that overlap with or compete with those in which the Company, directly or indirectly, may engage or proposes to engage, the provisions of this Section 4.16 are set forth to regulate and define the conduct of certain affairs of the Company with respect to certain classes or categories of business opportunities as they may involve the Purchaser Parties, the Non-Employee Directors or their respective Affiliates, as applicable, and the powers, rights, duties and liabilities of the Company and its directors, officers and stockholders in connection therewith. None of (1) the Purchaser Parties or any of their Affiliates, or (2) any Non-Employee Director or his or her Affiliates (the Persons identified in (1) and (2) above being referred to, collectively, as “Identified Persons” and, individually, as an “Identified Person”) shall, to the fullest extent permitted by law, have any duty to refrain from, directly or indirectly,
(A) engaging in the same or similar business activities or lines of business in which the Company or any of its Affiliates now engages or proposes to engage or (B) otherwise competing with the Company or any of its Affiliates, and, to the fullest extent permitted by law, no Identified Person shall be liable to the Company or its stockholders or to any Affiliate of the Company for breach of any fiduciary duty solely by reason of the fact that such Identified Person engages in any such activities. To the fullest extent permitted by law, the Company hereby renounces any interest or expectancy in, or right to be offered an opportunity to participate in, any business opportunity that may be a corporate opportunity for an Identified Person and the Company or any of its Affiliates. Subject to the following sentence, in the event that any Identified Person acquires knowledge of a potential transaction or other business opportunity that may be a corporate opportunity for itself, herself or himself and the Company or any of its Affiliates, such Identified Person shall, to the fullest extent permitted by law, have no duty to communicate or offer such transaction or other business opportunity to the Company or any of its Affiliates and, to the fullest extent permitted by law, shall not be liable to the Company or its stockholders or to any Affiliate of the Company for breach of any fiduciary duty as a stockholder, director or officer of the Company solely by reason of the fact that such Identified Person pursues or acquires such corporate opportunity for itself, herself or himself, or offers or directs such corporate opportunity to another Person or does not communicate information regarding such corporate opportunity to the Company. Notwithstanding the foregoing, the Company does not renounce its interest in any corporate opportunity offered to any Non-Employee Director (including any Non-Employee Director who serves as an officer of this Company) if such opportunity is offered to such person solely in his or her capacity as a director or officer of the Company, and this section shall not apply to any such corporate opportunity. In addition to and notwithstanding the foregoing provisions of this Agreement or anything to the contrary in the Certificate of Designations, to the fullest extent permitted by law, a potential corporate opportunity shall not be deemed to be a corporate opportunity for the Company if it is a business opportunity that (1) the Company is neither financially or legally able, nor contractually permitted to undertake, (2) from its nature, is not in the line of the Company’s business or is of no practical advantage to the Company, or (3) is one in which the Company has no interest or reasonable expectancy.

Section 4.17 Financing Cooperation. If requested by the Purchaser Parties, the Company will provide the following cooperation in connection with the Purchaser Parties obtaining any Permitted Loan following the Closing: (i) using good faith and commercially reasonable efforts to enter into an issuer agreement (an “Issuer Agreement”) with each lender in customary form in connection with such transactions (which agreement may include, without limitation, agreements and obligations of the Company relating to procedures and specified time periods for effecting Transfers and/or conversions upon foreclosure, agreements to not intentionally hinder or delay exercises of remedies on foreclosure, acknowledgments regarding corporate policy, if applicable, certain acknowledgments regarding securities law status of the pledge arrangements and a specified list of Company Competitors) and subject to the consent of the Company (which will not be unreasonably withheld or delayed), with such changes thereto as are requested by such lender and customary for similar financings, (ii) using commercially reasonable efforts to (A) remove any restrictive legends on certificates representing pledged Series A Preferred Stock, Conversion Shares or Common Stock and depositing such pledged Series A Preferred Stock, Conversion Shares or Common Stock in book entry form on the books of The Depository Trust Company, when eligible to do so (for the avoidance of doubt, shares of Common Stock will not be considered so eligible prior to the date the lender has a valid one year “holding
period” (as defined in Rule 144) in such shares of Common Stock) or (B) without limiting the generality of clause (A), if such Series A Preferred Stock is eligible for resale under Rule 144A, depositing such pledged Series A Preferred Stock in book entry form on the books of The Depository Trust Company or other depository with customary Rule 144A restrictive legends in lieu of the legends specified in Section 4.3 above, (iii) if so requested by such lender or counterparty, as applicable, (x) re-issuing the pledged Series A Preferred Stock, Conversion Shares or Common Stock in certificated form or in book-entry form, as so requested, in the name of the relevant lender, counterparty, custodian or similar party to a Permitted Loan, with respect to Permitted Loans solely as securities intermediary and only to the extent a Purchaser Party or its Affiliates continues to beneficially own such pledged Series A Preferred Stock, Conversion Shares or Common Stock in certificated form or in book-entry form, as so requested, in the name of a Purchaser Party or its Affiliates and/or (y) re-registering the pledged Series A Preferred Stock, Conversion Shares or Common Stock in certificated form or in book-entry form, as so requested, in the name of the relevant lender, counterparty, custodian or similar party to a Permitted Loan, with respect to Permitted Loans solely as securities intermediary and only to the extent a Purchaser Party or its Affiliates continues to beneficially own such pledged Series A Preferred Stock, Conversion Shares or Common Stock, (iv) entering into customary triparty agreements with each lender and the Purchaser Parties relating to the delivery of the Series A Preferred Stock, Conversion Shares or Common Stock to the relevant lender for crediting to the relevant collateral accounts upon funding of the loan and payment of the purchase price including a right for such lender as a third party beneficiary of the Company’s obligations hereunder to issue the Series A Preferred Stock, Conversion Shares or Common Stock upon payment of the purchase price therefor in accordance with the terms of this Agreement and (v) such other cooperation and assistance as the Purchaser Parties may reasonably request (which cooperation and assistance, for the avoidance of doubt, shall not include any requirements that the Company deliver information, compliance certificates or any other materials typically provided by borrowers to lenders) that will not unreasonably disrupt the operation of the Company’s business, in the cases of clauses (ii) and (iii), subject to receipt of customary legal opinions and certificates and the satisfaction of any relevant requirements of the Company’s transfer agent. Notwithstanding anything to the contrary in the preceding sentence, the Company’s obligation to deliver an Issuer Agreement is conditioned on (i) the relevant Purchaser Party certifying to the Company in writing that (A) the loan agreement with respect to which the Issuer Agreement is being delivered constitutes a Permitted Loan being entered into in accordance with this Agreement, such Purchaser Party has pledged Common Stock or the Series A Preferred Stock and/or the underlying shares of Common Stock as collateral to the lenders under such Permitted Loan and that the execution of such Permitted Loan and the terms thereof do not violate the terms of this Agreement, (B) to the extent applicable, whether the registration rights under the Registration Rights Agreement are being assigned to the lenders under that Permitted Loan and (C) such Purchaser Party acknowledges and agrees that the Company will be relying on such certificate when entering into the Issuer Agreement and any inaccuracy in such certificate will be deemed a breach of this Agreement and (ii) the Issuer Agreement containing customary representations, warranties and covenants for the benefit of the Company from the relevant Purchaser Party and the lender reasonably satisfactory to the Company (including, for the avoidance of doubt, an undertaking of the lender to sell any pledged Series A Preferred Stock and/or common stock in compliance with the Foreclosure Limitations). The Purchaser Parties acknowledge and agree that the statements and agreements of the Company in an Issuer Agreement are solely for the benefit of the applicable lenders party thereto and that in any dispute between the Company and the Purchaser Parties under this Agreement the Purchaser Parties shall not be entitled to use the statements and agreements of the Company in an Issuer Agreement against the Company.
Section 4.18 Voting Agreement. For so long as the Purchaser has the right to designate or nominate a director to the Board of Directors pursuant to Section 4.1, at each meeting of the stockholders of the Company and at every postponement or adjournment thereof, the Purchaser shall take such action as may be required so that all of the Purchased Shares, owned, directly or indirectly, of record or beneficially by the Purchaser and entitled to vote at such meeting of stockholders are voted (a) in favor of the Company’s “say-on-pay” proposal and any proposal by the Company relating to equity compensation that has been approved by the Board of Directors or the Compensation Committee of the Board of Directors (or any successor committee, however denominated), (b) in favor of the Company’s proposal for ratification of the appointment of the Company’s independent registered public accounting firm and (c) in favor of the Company’s proposal for amendment of its organizational documents in a manner that does not have an adverse effect on the holders of Series A Preferred Stock to increase number of authorized shares of capital stock of the Company, but the Purchaser shall not be under any obligation to vote in the same manner as recommended by the Board of Directors or in any other manner, other than in its sole discretion, with respect to any other matter. In furtherance of the foregoing, for so long as the Purchaser has the right to designate or nominate a director to the Board of Directors pursuant to Section 4.1, the Purchaser shall take such action as may be required so that the Purchaser is present, in person or by proxy, at each meeting of the stockholders of the Company and at every postponement or adjournment thereof so that all of the Purchased Shares, owned, directly or indirectly, of record or beneficially by the Purchaser may be counted for the purposes of determining the presence of a quorum and voted in accordance with the terms and conditions of this Section 4.18.

ARTICLE V
CONDITIONS TO THE PARTIES’ OBLIGATIONS

Section 5.1 Conditions of the Purchaser. The obligations of the Purchaser to consummate the transactions contemplated hereby to be consummated at the Closing are subject to the satisfaction or written waiver (to the extent any such waiver is permitted by applicable Law) by the Purchaser, on or prior to the Closing Date, of each of the following conditions precedent:

(a) Representations and Warranties. (i) Each of the representations and warranties of the Company contained in Article II of this Agreement (other than Sections 2.1 (Organization and Power), 2.2(a) (Authorization), 2.4(a) and (b) (Authorized and Outstanding Stock), 2.6 (Private Placement), 2.18 (Nasdaq Listing), 2.19 (No Brokers or Finders), 2.22(ii) (Absence of Certain Changes) and 2.23 (No Rights Agreement; Anti-Takeover Provisions) of this Agreement) shall be true and correct on and as of the date hereof and on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of the Closing Date, except for representations and warranties that speak as of a specific date or time other than the Closing Date (which need only be true and correct as of such date or time), except where the failure of such representations and warranties to be so true and correct, without giving effect to any qualification or limitation as to “materiality,” “Material Adverse Effect” or similar qualifier set forth therein, has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, (ii) each of the representations and warranties of the Company contained in Sections 2.1 (Organization and Power), 2.2(a) (Authorization), 2.4(a) and (b) (Authorized and Outstanding Stock), 2.6 (Private Placement), 2.18 (Nasdaq Listing),
Section 5.2 Conditions of the Company. The obligations of the Company to consummate the transactions contemplated hereby are subject to the satisfaction or written waiver (to the extent any such waiver is permitted by applicable Law) by the Purchaser, on or prior to the Closing Date, of each of the following conditions precedent:

(a) **Representations and Warranties; Performance.** (i) Each of the representations and warranties of the Purchaser contained in Article III of this Agreement shall be true and correct on and as of the date hereof and on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of the Closing Date, except for representations and warranties that speak as of a specific date or time other than the Closing Date (which need only be true and correct in all material respects as of such date or time) and (iii) the representations and warranties of the Company contained in 2.22(ii) (Absence of Certain Changes) of this Agreement shall be true and correct on and as of the date hereof and on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of the Closing Date.

(b) **Covenants.** The Company shall have performed and complied in all material respects with all covenants and agreements required by this Agreement to be performed or complied with by it at or prior to the Closing.

(c) **Certificate of Designations.** The Certificate of Designations shall have been duly filed with the Secretary of State of the State of Delaware and a certified copy shall have been delivered to the Purchaser.

(d) **VCOC Letter Agreement.** The Purchaser (or at Purchaser’s election, any Purchaser Party) shall have received a duly executed VCOC Letter Agreement, in the form of Exhibit E hereto.

(e) **Officer’s Certificate.** The Purchaser shall have received a certificate signed on behalf of the Company by a duly authorized officer certifying to the effect that the conditions set forth in Section 5.1(a) and (b) have been satisfied.

(f) **No Order.** There shall be no injunction, order or decree of any nature of any governmental authority in effect that restrains, prohibits or makes illegal the consummation of the transactions contemplated hereby.
(b) **Covenants**, The Purchaser shall have performed and complied in all material respects with all covenants and agreements required by this Agreement to be performed or complied with by the Purchaser at or prior to the Closing.

(c) **Consideration for the Securities**, The Purchaser shall have paid the purchase price of the Purchased Shares to be purchased by such Purchaser in full at the Closing by wire transfer of immediately available funds to an account designated in writing by the Company.

(d) **Certificate of Designations**, The Certificate of Designations shall have been duly filed with the Secretary of State of the State of Delaware.

(e) **Officer’s Certificate**, The Company shall have received a certificate signed on behalf of the Purchaser by a duly authorized officer certifying to the effect that the conditions set forth in Sections 5.2(a) and (b) have been satisfied.

(f) **No Order**, There shall be no injunction, order or decree of any nature of any governmental authority in effect that restrains, prohibits or makes illegal the consummation of the transactions contemplated hereby.

ARTICLE VI

PREEMPTIVE RIGHTS

Section 6.1 **Generally**, So long as the Purchaser owns beneficially and of record at least 25% of the Purchased Shares, if the Company makes any public or non-public offering of any capital stock of, other equity or voting interests in, or equity-linked securities of, the Company or any securities that are convertible or exchangeable into (or exercisable for) capital stock of, other equity or voting interests in, or equity-linked securities of, the Company (collectively “Preemptive Securities”), including, for the purposes of this Article VI, warrants, options or other such rights (any such security, a “New Security”) (other than (1) issuances of any securities to directors, officers, employees, consultants or other agents of the Company, (2) issuances of any securities pursuant to an employee stock option plan, management incentive plan, restricted stock plan, stock purchase plan or stock ownership plan or similar benefit plan, program or agreement, (3) issuances made as consideration for any acquisition (by sale, merger in which the Company is the surviving corporation, or otherwise) by the Company of equity in, or assets of, another Person, business unit, division or business, (4) issuances of any securities issued as a result of a stock split, stock dividend, spin-off, reclassification or reorganization or similar event, (5) securities issued pursuant to the conversion, exercise or exchange of Series A Preferred Stock issued to the Purchaser and (6) shares of a Subsidiary of the Company issued to the Company or a wholly owned Subsidiary of the Company), the Purchaser shall be afforded the opportunity to acquire from the Company its Preemptive Rights Portion of such New Securities for the same price and on the same terms as that offered to the other purchasers of such New Securities; provided, that the Purchaser shall not be entitled to acquire any New Securities pursuant to this Article VI to the extent the issuance of such New Securities to the Purchaser would require approval of the stockholders of the Company as a result of the Purchaser status, if applicable, as an Affiliate of the Company or pursuant to the rules and listing standards of Nasdaq until the Company obtains such approval, and the Company shall use reasonable best efforts to obtain such approval as promptly as practicable.
Section 6.2 Calculation of Preemptive Rights Portion. Subject to the foregoing proviso in Section 6.1, the amount of New Securities that each Purchaser shall be entitled to purchase in the aggregate shall be determined by multiplying (1) the total number of such offered shares of New Securities by (2) a fraction, the numerator of which is the number of shares of Series A Preferred Stock and/or shares of Common Stock (in the aggregate and on an as converted basis) held by the Purchaser, as of such date, and the denominator of which is the aggregate number of shares of Common Stock (on an as converted basis) outstanding as of such date (the “Preemptive Rights Portion”).

Section 6.3 Preemptive Rights Notices and Procedures. If the Company proposes to offer New Securities, it shall give the Purchaser written notice of its intention, describing the anticipated price (or range of anticipated prices), anticipated amount of New Securities and other material terms and timing upon which the Company proposes to offer the same (including, in the case of a registered public offering and to the extent possible, a copy of the prospectus included in the registration statement filed with respect to such offering) at least seven (7) Business Days prior to such issuance (or, in the case of a registered public offering, at least seven (7) Business Days prior to the commencement of such registered public offering) (provided that, to the extent the terms of such offering cannot reasonably be provided seven (7) Business Days prior to such issuance, notice of such terms may be given as promptly as reasonably practicable but in any event prior to such issuance). The Company may provide such notice to the Purchaser on a confidential basis prior to public disclosure of such offering. Other than in the case of a registered public offering, the Purchaser may notify the Company in writing at any time on or prior to the second (2nd) Business Day immediately preceding the date of such issuance (or, if notice of all such terms has not been given prior to the second (2nd) Business Day immediately preceding the date of such issuance, at any time prior to such issuance) whether the Purchaser will exercise such preemptive rights and as to the amount of New Securities the Purchaser desires to purchase, up to the maximum amount calculated pursuant to Section 6.2. In the case of a registered public offering, the Purchaser shall notify the Company in writing at any time prior to the second (2nd) Business Day immediately preceding the date of commencement of such registered public offering (or, if notice of all such terms has not been given prior to the second (2nd) Business Day immediately preceding the date of commencement of such registered public offering, at any time prior to the date of commencement of such registered public offering) whether the Purchaser will exercise such preemptive rights and as to the amount of New Securities the Purchaser desires to purchase, up to the maximum amount calculated pursuant to Section 6.2. Such notice to the Company shall constitute a binding commitment by the Purchaser to purchase the amount of New Securities so specified at the price and other terms set forth in the Company’s notice to it. Subject to receipt of the requisite notice of such issuance by the Company, the failure of a Purchaser to respond prior to the time a response is required pursuant to this Section 6.3 shall be deemed to be a waiver of the Purchaser’s purchase rights under this Article VI only with respect to the offering described in the applicable notice.

Section 6.4 Purchase of New Securities. The Purchaser shall purchase the New Securities that it has elected to purchase under this Article VI concurrently with the related issuance of such New Securities by the Company (subject to the receipt of any required approvals);
provided, that if such related issuance is prior to the twentieth (20th) Business Day following the date on which the Purchaser has notified the Company that it has elected to purchase New Securities pursuant to this Article VI, then the Purchaser shall purchase such New Securities within twenty (20) Business Days following the date of the related issuance. If the proposed issuance by the Company of securities which gave rise to the exercise by the Purchaser of its preemptive rights pursuant to this Article VI shall be terminated or abandoned by the Company without the issuance of any New Securities, then the purchase rights of the Purchaser pursuant to this Article VI shall also terminate as to such proposed issuance by the Company (but not any subsequent or future issuance), and any funds in respect thereof paid to the Company by the Purchaser in respect thereof shall be promptly refunded in full.

Section 6.5 Consideration Other than Cash. In the case of the offering of securities for consideration in whole or in part other than cash, including securities acquired in exchange therefor (other than securities by their terms so exchangeable), the consideration other than cash shall be deemed to be the fair value thereof as reasonably determined by the Board of Directors; provided, however, that such fair value as determined by the Board of Directors shall not exceed the aggregate market price of the securities being offered as of the date the Board of Directors authorizes the offering of such securities.

Section 6.6 Miscellaneous. The election by the Purchaser to not exercise its subscription rights under this Article VI in any one instance shall not affect its rights as to any subsequent proposed issuance. The Company and the Purchaser shall cooperate in good faith to facilitate the exercise of the Purchaser’s rights pursuant to this Article VI, including securing any required approvals or consents.

ARTICLE VII
MISCELLANEOUS

Section 7.1 Survival. Except for the representations and warranties of the Company contained in Sections 2.1 (Organization and Power), 2.2(a) (Authorization), 2.4(a) and (b) (Authorized and Outstanding Stock), and 2.6 (Private Placement), which shall survive indefinitely, the representations and warranties contained in Article II and Article III hereof shall survive for six (6) months following the Closing Date and then expire; provided that nothing herein shall relieve any party of liability for any inaccuracy or breach of such representations and warranties in the case of fraud. All other covenants and agreements of the parties contained herein shall survive the Closing in accordance with their terms.

Section 7.2 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement, and will become effective when one or more counterparts have been signed by a party and delivered to the other parties. Copies of executed counterparts of signature pages to this Agreement may be transmitted by PDF (portable document format) or facsimile and such PDFs or facsimiles will be deemed as sufficient as if actual signature pages had been delivered.
Section 7.3 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, without giving effect to any choice of law or conflict of law rules or provisions (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware.

(b) Any dispute relating hereto shall be heard in the Court of Chancery of the State of Delaware, and, if applicable, in any state or federal court located in the State of Delaware in which appeal from the Court of Chancery of the State of Delaware may validly be taken under the laws of the State of Delaware (or, if the Court of Chancery of the State of Delaware declines to accept jurisdiction over such dispute, any state or federal court within the State of Delaware) (each a “Chosen Court” and collectively, the “Chosen Courts”), and the parties hereto agree to the exclusive jurisdiction and venue of the Chosen Courts. Such Persons further agree that any proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby or by any matters related to the foregoing (the “Applicable Matters”) shall be brought exclusively in a Chosen Court, and that any proceeding arising out of this Agreement or any other Applicable Matter shall be deemed to have arisen from a transaction of business in the State of Delaware and each of the foregoing Persons hereby irrevocably consents to the jurisdiction of such Chosen Courts in any such proceeding and irrevocably and unconditionally waives, to the fullest extent permitted by law, any objection that such Person may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such Chosen Court or that any such proceeding brought in any such Chosen Court has been brought in an inconvenient forum.

(c) Such Persons further covenant not to bring a proceeding with respect to the Applicable Matters (or that could affect any Applicable Matter) other than in such Chosen Court and not to challenge or enforce in another jurisdiction a judgment of such Chosen Court.

(d) Process in any such proceeding may be served on any Person with respect to such Applicable Matters anywhere in the world, whether within or without the jurisdiction of any such Chosen Court. Without limiting the foregoing, each such Person agrees that service of process on such party as provided in Section 7.6 shall be deemed effective service of process on such Person.

(e) Waiver of Jury Trial. EACH PARTY HERETO, FOR ITSELF AND ITS AFFILIATES, HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT OR OTHER PROCEEDING (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THE ACTIONS OF THE PARTIES HERETO OR THEIR RESPECTIVE AFFILIATES PURSUANT TO THIS AGREEMENT OR IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT HEREOF.

Section 7.4 Entire Agreement; No Third Party Beneficiary. This Agreement and the Registration Rights Agreement contain the entire agreement by and among the parties with respect to the subject matter hereof and all prior negotiations, writings and understandings relating to the subject matter of this Agreement. This Agreement is not intended to confer upon any Person not a party hereto (or their successors and permitted assigns) any rights or remedies hereunder.
Section 7.5 Expenses. All fees, costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby, including accounting and legal fees and excluding any investment banking fees (collectively, “Transaction Expenses”) shall be paid by the party incurring such expenses, except that, upon consummation of the Closing, the Company shall reimburse the Purchaser for its reasonable and documented Transaction Expenses in an aggregate amount not to exceed one hundred thousand dollars ($100,000).

Section 7.6 Notices. All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed to have been duly given or made as follows: (a) if sent by registered or certified mail in the United States return receipt requested, upon receipt; (b) if sent by nationally recognized overnight air courier, one (1) Business Day after mailing; (c) if sent by e-mail transmission, with a copy sent on the same day in the manner provided in the foregoing clause (a) or (b), when transmitted and receipt is confirmed; and (d) if otherwise actually personally delivered, when delivered, provided, that such notices, requests, demands and other communications are delivered to the address set forth below, or to such other address as any party shall provide by like notice to the other parties to this Agreement:

If to the Company, to:
FireEye, Inc.
601 McCarthy Blvd.
Milpitas, CA 95035
Attention: Alexa King
Email: [***]

with a copy (which shall not constitute notice) to:
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
Attention: Steven E. Bochner
Email: [***]

If to a Purchaser or to the Purchaser Representative, to:
BTO Delta Holdings DE L.P.
c/o The Blackstone Group Inc.
345 Park Avenue
New York, NY 10154
Attention: Viral Patel
E-mail: [***]
Section 7.7 **Successors and Assigns.** This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. This Agreement may be assigned (a) in connection with a Transfer to a Permitted Transferee permitted by Section 4.2(g)(i) and (b) as collateral security to any lender to the Purchaser; provided, however, that a Purchaser Party may assign its rights, interests and obligations under this Agreement in whole or in part (including, without limitation, solely the right to purchase Series A Preferred Stock at the Closing in accordance with Section 1.2) to one or more Permitted Transferees, including as contemplated in Section 4.2(g)(i) and in the event of such assignment, the assignee shall agree in writing to be bound by the provisions of this Agreement, including the rights, interests and obligations so assigned. No other assignment of this Agreement or of any rights or obligations hereunder may be made by any party hereto without the prior written consent of the other parties hereto. Any purported assignment or delegation in violation of this Agreement shall be null and void ab initio.

Section 7.8 **Headings.** The Section, Article and other headings contained in this Agreement are inserted for convenience of reference only and will not affect the meaning or interpretation of this Agreement.

Section 7.9 **Amendments and Waivers.** This Agreement may not be modified or amended except by an instrument or instruments in writing signed by each party hereto. Any party hereto may, only by an instrument in writing, waive compliance by any other party or parties hereto with any term or provision hereof on the part of such other party or parties hereto to be performed or complied with. No failure or delay of any party in exercising any right or remedy hereunder shall operate as a waiver thereof, nor will any single or partial exercise of any right or power, or any abandonment or discontinuance of steps to enforce such right or power, preclude any other or further exercise thereof or the exercise of any other right or power. The waiver by any party hereto of a breach of any term or provision hereof shall not be construed as a waiver of any subsequent breach. The rights and remedies of the parties heretoo are cumulative and are not exclusive of any rights or remedies that they would otherwise have hereunder.

Section 7.10 **Interpretation; Absence of Presumption.**

(a) For the purposes hereof: (i) words in the singular shall be held to include the plural and vice versa and words of one gender shall be held to include the other gender as the context requires; (ii) the terms “hereof,” “herein,” and “herewith” and words of similar import shall, unless otherwise stated, be construed to refer to this Agreement as a whole (including all of the Schedules and Exhibits) and not to any particular provision of this Agreement, and Article, Section, paragraph, Exhibit and Schedule references are to the Articles, Sections, paragraphs, Exhibits, and Schedules to this Agreement unless otherwise specified; (iii) the word “including” and words of similar import when used in this Agreement shall mean “including, without limitation,” unless the context otherwise requires or unless otherwise specified; and
(iv) the word “or”, “any” or “either” shall not be exclusive. References to a Person are also to its permitted assigns and successors. When calculating the period of time between which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded (and unless, otherwise required by Law, if the last day of such period is not a Business Day, the period in question shall end on the next succeeding Business Day).

(b) With regard to each and every term and condition of this Agreement and any and all agreements and instruments subject to the terms hereof, the parties hereto understand and agree that the same have or has been mutually negotiated, prepared and drafted, and if at any time the parties hereto desire or are required to interpret or construe any such term or condition or any agreement or instrument subject hereto, no consideration will be given to the issue of which party hereto actually prepared, drafted or requested any term or condition of this Agreement or any agreement or instrument subject hereto.

Section 7.11 Severability. Any provision hereof that is held to be invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, shall be ineffective only to the extent of such invalidity, illegality or unenforceability, without affecting in any way the remaining provisions hereof, provided, however, that the parties will attempt in good faith to reform this Agreement in a manner consistent with the intent of any such ineffective provision for the purpose of carrying out such intent.

Section 7.12 Specific Performance. The parties hereto agree that irreparable damage could occur and that a party may not have any adequate remedy at law in the event that any of the provisions of this Agreement are not performed in accordance with their terms or were otherwise breached. Accordingly, each party shall without the necessity of proving the inadequacy of money damages or posting a bond be entitled to seek an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms, provisions and covenants contained therein (including, for the avoidance of doubt, the right of the Company to specifically enforce the obligation of the Purchaser to cause the Equity Financing to be funded and the purchase of the Purchased Shares to be consummated on the terms and subject to the conditions set forth in this Agreement), this being in addition to any other remedy to which they are entitled at law or in equity. Under no circumstances will the Company be permitted or entitled to receive both (i) a grant of specific performance resulting in the consummation of the issuance of the Purchased Shares in exchange for receipt in full by the Company of the Purchase Price therefor, and (ii) the payment of monetary damages at any time.

Section 7.13 Public Announcement. Subject to each party’s disclosure obligations imposed by applicable law or the rules of any stock exchange upon which its securities are listed, each of the parties hereto will cooperate with each other in the development and distribution of all news releases and other public information disclosures with respect to this Agreement and any of the transactions contemplated by this Agreement, and neither the Company nor any Purchaser will make any such news release or public disclosure without first consulting with the other, and, in each case, also receiving the other’s consent (which shall not be unreasonably withheld or delayed) and each party shall coordinate with the party whose consent is required with respect to any such news release or public disclosure. Notwithstanding the foregoing, this Section 7.13 shall not apply to any press release or other public statement made by
the Company or a Purchaser (a) that is consistent with prior disclosure and does not contain any information relating to the transactions that has not been previously announced or made public in accordance with the terms of this Agreement or (b) is made to its auditors, attorneys, accountants, financial advisors, limited partners or other Permitted Transferees. Notwithstanding anything to the contrary in this Agreement or the Confidentiality Agreement, in no event shall either this Section 7.13 or any provision of the Confidentiality Agreement limit disclosure by any Purchaser Party and their respective Affiliates of ordinary course communications regarding this Agreement and the transactions contemplated by this Agreement to its existing or prospective general and limited partners, equityholders, financing sources, members, managers and investors of any Affiliates of such Person, including disclosing information about the transactions contemplated by this Agreement on their websites in the ordinary course of business consistent with past practice.

Section 7.14 Purchaser Representative. Each Purchaser Party hereby consents to and authorizes (a) the appointment of BTO Delta Holdings DE L.P. as the Purchaser Representative hereunder (the "Purchaser Representative") and as the attorney-in-fact for and on behalf of the Purchaser Party, and (b) the taking by the Purchaser Representative of any and all actions and the making of any decisions required or permitted by, or with respect to, this Agreement and the transactions contemplated hereby, including (i) the exercise of the power to agree to execute any consents under this Agreement and (ii) to take all actions necessary in the judgment of the Purchaser Representative for the accomplishment of the foregoing and all of the other terms, conditions and limitations of this Agreement and the transactions contemplated hereby. Each Purchaser Party shall be bound by the actions taken by the Purchaser Representative exercising the rights granted to it by this Agreement, and the Company shall be entitled to rely on any such action or decision of the Purchaser Representative. If the Purchaser Representative shall resign or otherwise be unable to fulfill its responsibilities hereunder, the Purchaser Parties shall appoint a new Purchaser Representative as soon as reasonably practicable by written consent of holders of a majority of the then outstanding Series A Preferred Stock and/or shares of Common Stock that were issued upon conversion of shares of Series A Preferred Stock beneficially owned by the Purchaser or Purchaser Parties that are successors or assigns of the Purchaser by sending notice and a copy of the duly executed written consent appointing such new Purchaser Representative to the Company.

Section 7.15 Non-Recourse. Any claim or cause of action based upon, arising out of, or related to this Agreement or the Equity Commitment Letter may only be brought against the entities that are expressly named as parties hereto or thereto (the "Contract Parties") and then only with respect to the specific obligations of such party and subject to the terms, conditions and limitations set forth herein or therein. No Person other than the Contract Parties, including no member, partner, stockholder, unitholder, Affiliate or Representative thereof, nor any member, partner, stockholder, unitholder, Affiliate or Representative of any of the foregoing, shall have any liability (whether in contract or in tort, in law or in equity, or granted by statute) for any claims, causes of action, obligations, or liabilities arising under, out of, in connection with, or related in any manner to this Agreement or the Equity Commitment Letter or based on, in respect of, or by reason of this Agreement or the Equity Commitment Letter or their respective negotiation, execution, performance, or breach; and, to the maximum extent permitted by law, each of the Contract Parties hereby waives and releases all such liabilities, claims, causes of action, and obligations against any such third Person.
Section 7.16 Further Assurances. From the date hereof until the Closing, without further consideration, the Company and the Purchaser shall use their respective reasonable best efforts to take, or cause to be taken, all actions necessary, appropriate or advisable to consummate the transactions contemplated by this Agreement, the Registration Rights Agreement, the Certificate of Designations and any and all other agreements or instruments executed and delivered to the Purchaser by the Company hereunder or thereunder, as applicable.

ARTICLE VIII
TERMINATION

Section 8.1 Termination. This Agreement may be terminated at any time prior to Closing:

(a) by mutual written consent of the Company and Purchaser;

(b) by either the Company or Purchaser, if any Governmental Entity with lawful jurisdiction shall have issued a final order, decree or ruling or taken any other final action restraining, enjoining or otherwise prohibiting the transactions contemplated by this Agreement and such order, decree, ruling or other action is or shall have become final and nonappealable;

(c) by notice given by the Company to the Purchaser if there have been one or more inaccuracies in or breaches of one or more representations, warranties, covenants or agreements made by the Purchaser in this Agreement such that the conditions in Section 5.2(a) or Section 5.2(b) would not be satisfied and, if capable of being cured, which have not been cured by the Purchaser thirty (30) days after receipt by the Purchaser of written notice from the Company requesting such inaccuracies or breaches to be cured; provided, however, that the Company is not then in breach of any of its obligations hereunder; or

(d) by notice given by the Purchaser to the Company, if there have been one or more inaccuracies in or breaches of one or more representations, warranties, covenants or agreements made by the Company in this Agreement such that the conditions in Section 5.1(a) or Section 5.1(b) would not be satisfied and, if capable of being cured, which have not been cured by the Company within thirty (30) days after receipt by the Company of written notice from the Purchaser requesting such inaccuracies or breaches to be cured; provided, however, that the Purchaser is not then in breach of any of its obligations hereunder.

Section 8.2 Certain Effects of Termination. In the event that this Agreement is terminated in accordance with Section 8.1, neither party (nor any of its Affiliates) shall have any liability or obligation to the other (or any of its Affiliates) under or in respect of this Agreement, except to the extent of (a) any liability arising from any breach by such party of its obligations pursuant to this Agreement arising prior to such termination, and (b) any actual and intentional fraud or intentional or willful breach of this Agreement; provided that, notwithstanding any other provision set forth in this Agreement, neither the Purchaser, on the one hand, nor the Company, on the other hand, shall have any such liability in excess of the Purchase Price. In the event of any such termination, this Agreement shall become void and have no effect, and the transactions
contemplated hereby shall be abandoned without further action by the parties, in each case, except (x) as set forth in the preceding sentence and (y) that the provisions of Section 4.5 (Confidentiality), Sections 7.2 to 7.4 (Counterparts, Governing Law, Entire Agreement) and Sections 7.6 through 7.15 (Notices, Successors and Assigns, Headings, Amendments and Waivers, Interpretations; Absence of Presumption, Severability, Specific Performance and Public Announcement, Purchaser Representative, Non-Recourse) shall survive the termination of this Agreement.

(Signature page follows)
The parties have caused this Securities Purchase Agreement to be executed as of the date first written above.

FIREYE, INC.

By: /s/ Alexa King
   Name: Alexa King
   Title: Executive Vice President, General Counsel and Secretary

[Signature page to Securities Purchase Agreement]
Purchaser

BTO DELTA HOLDINGS DE L.P.

By: BTO Holdings Manager L.L.C., its general partner

By: Blackstone Tactical Opportunities Associates L.L.C., its managing member

By: BTOA L.L.C., its sole member

By: /s/ Christopher J. James
Name: Christopher J. James
Title: Authorized Person

[Signature page to Securities Purchase Agreement]
EXHIBIT A

DEFINED TERMS

1. The following capitalized terms have the meanings indicated:

“Affiliate” of any Person means any Person, directly or indirectly, Controlling, Controlled by or under common Control with such Person; provided, however, that (i) the Company and its Subsidiaries, on the one hand, and any Purchaser Party or any of its Affiliates, on the other hand, shall not be deemed to be Affiliates, (ii) “portfolio companies” (as such term is customarily used among institutional investors) in which any Purchaser Party or any of its Affiliates has an investment (whether as debt or equity) shall not be deemed an Affiliate of such Purchaser Party and (iii) the Excluded Sponsor Parties shall not be deemed to be Affiliates of any Purchaser Party, the Company or any of the Company’s Subsidiaries.

“Antitakeover Provisions” means the provisions of any rights plan or agreement, poison pill (including any distribution under a rights plan or agreement), or any control share acquisition, business combination, interested stockholder, fair price, moratorium or similar anti-takeover provision under the Certificate of Incorporation, the Bylaws, or applicable law (including Section 203 of the Delaware General Corporation Law).

“Benefit Plans” means all “employment benefit plans” as defined in Section 3(3) of ERISA, including the Stock Plans and any retirement, pension, profit sharing, deferred compensation, equity or equity-based, bonus, incentive, severance, change-in-control, welfare, fringe benefit and each other similar employee benefit plan, policy, program, employment agreement, contract, or arrangement, whether written or oral, qualified or nonqualified, or funded or unfunded, that are maintained or sponsored by the Company or its Subsidiaries for the benefit of their respective current or former employees or with respect to which the Company or its Subsidiaries have any liability.

“Board of Directors” means the Company’s board of directors.

“Business Day” means any day other than a Saturday, a Sunday or any day on which the Federal Reserve Bank of New York is authorized or required by law or executive order to close or be closed.

“Bylaws” means the Amended and Restated Bylaws of the Company, as amended and restated on August 2, 2016, as the same may be further amended or restated.

“Certificate of Incorporation” means the Company’s Amended and Restated Certificate of Incorporation, as the same has been and may be further amended or restated.


“Company Competitor” means, as of any date of determination, a Person directly engaged in the business of cybersecurity products, threat intelligence and/or incident response, together with such Person’s Affiliates; provided, however, that for the avoidance of doubt, a private equity fund, financial institution, asset management firm or similar firm shall not be
considered a “Company Competitor” but its portfolio companies, if any, that are directly engaged in the business of cybersecurity products, threat intelligence and/or incident response would be considered a “Company Competitor”.

“Confidential Information” means information regarding the Company or its Subsidiaries furnished by or on behalf of the Company, directly or indirectly, to the Purchaser or its Representatives, together with all analyses, compilations, forecasts, studies or other documents prepared by the Purchaser or its Representatives which contain or otherwise reflect such information. “Confidential Information” shall not include such portions of the Confidential Information that (a) are or become generally available to the public other than as a result of the Purchaser’s or its Affiliates’ disclosure in violation of this Agreement, (b) become available to the Purchaser or its Affiliates on a non-confidential basis from a source other than the Company or its Subsidiaries, (c) was already in the Purchaser’s or its Affiliate’s possession prior to the date of this Agreement and which was not obtained from the Company or its Subsidiaries or (d) are independently developed by the Purchaser Parties or their respective Affiliates or Representatives without reference to the Confidential Information.

“Control” (including its correlative meanings “under common Control with” and “Controlled by”) means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through ownership of securities or partnership or other interests, by contract or otherwise.

“Convertible Senior Notes” means the Company’s (i) 1.000% convertible senior notes due in 2035, (ii) 1.625% convertible senior notes due in 2035 and (iii) 0.875% convertible senior notes due in 2024.

“Environmental Permit” means any permit, license, certificate, approval or other authorization under any applicable Requirements of Environmental Law.


“Export Controls” means all laws, regulations, and restrictive measures relating to the import, export, re-export, transfer of information, data, goods, and technology (including the Export Administration Regulations administered by the U.S. Department of Commerce, the International Traffic in Arms Regulations administered by the U.S. Department of State, and customs and import Laws administered by U.S. Customs and Border Protection).

“GAAP” means generally accepted accounting principles as in effect in the United States, consistently applied.

“Government Contract” means a Contract with a U.S. Governmental Entity, any prime contractor of a U.S. Governmental Entity in its capacity as a prime contractor or any subcontractor with respect to any such Contract.
“Governmental Entity” means any supranational, national, state, municipal, local or foreign government, any court, tribunal, arbitrator, administrative agency, commission or other governmental official, authority or instrumentality (including any legislature, commission, regulatory administrative authority, governmental agency, bureau, branch or department).

“Government Official” means any officer or employee of a foreign governmental authority or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such foreign governmental authority or department, agency, or instrumentality, or for or on behalf of any such public international organization, or any political party, party official, or candidate thereof, excluding officials of the governments of the United States, the several states thereof, any local subdivision of any of them or any agency, department or unit of any of the foregoing.

“Hazardous Substance” means any waste, substance, product or material defined or regulated as “hazardous” or “toxic” or as a “pollutant” or “contaminant”, or words of similar meaning, by any applicable Requirements of Environmental Law, including petroleum and any fraction thereof, and any biomedical or radioactive materials and waste.

“Intellectual Property” means all intellectual property and proprietary rights, including (i) patents, trade secrets, know-how, inventions, algorithms, methods and processes; (ii) copyrights; (iii) trademarks, service marks, trade names, trade dress, logos, domain names, social and mobile media identifiers and other source indicators and all associated goodwill; and (iv) all registrations, applications, renewals, continuations, continuations-in-part, divisions, re-issues, re-examinations, foreign counterparts and equivalents of the foregoing.

“Investment Company Act” mean the Investment Company Act of 1940, as amended.

“Knowledge” means the actual knowledge of Kevin Mandia, Frank Verdecanna, Alexa King and Peter Bailey, in each case after due inquiry.

“Material Adverse Effect” means any event, change, development, circumstance, condition, state of facts or occurrence that individually or in the aggregate is, or would reasonably be expected to be, materially adverse to (x) the condition (financial or otherwise), assets, properties, or liabilities of the Company and its Subsidiaries (taken as a whole) or results of operations of the Company and its Subsidiaries (taken as a whole), or (y) the ability of the Company to perform its obligations or consummate the transactions contemplated hereby, but shall exclude any prospects and shall also exclude any event, change, development, circumstance, condition, state of facts or occurrence to the extent resulting or arising from: (a) any change or prospective change in any applicable law or GAAP or interpretation thereof; (b) any change in general economic conditions in the industries or markets in which the Company and its Subsidiaries operate or affecting the United States of America or any foreign economies in general; (c) any change made by any Governmental Entity that is generally applicable to the industries or markets in which the Company and its Subsidiaries operate; (d) the announcement of this Agreement and/or the consummation of the transactions contemplated hereby; (e) any action that is consented to or requested by the Purchaser in writing; (f) any action expressly required by, or the failure to take any action expressly prohibited by this Agreement; (g) any national or
international political or social conditions, including the engagement by the United States of America or any foreign government in hostilities, whether or not pursuant to the declaration of a national emergency or war, or the occurrence of any military or terrorist attack upon the United States of America or any foreign government or any of their respective territories, possessions, or diplomatic or consular offices or upon any military installation, equipment or property of the United States of America or any foreign government; (h) any acts of God, including any earthquakes, hurricanes, tornados, floods, tsunamis or other natural disasters, or any other damage to or destruction of assets caused by casualty; (i) any epidemic, pandemic, disease outbreak (including, for the avoidance of doubt, COVID-19) or other health crisis or public health event; and (j) any failure of the Company and its Subsidiaries to meet internal or published projections, estimates or forecasts of revenues, earnings or other measures of financial or operating performance for any period; provided, that the underlying causes of such failure (subject to the other provisions of this definition of “Material Adverse Effect”) shall not be excluded; provided, however, that in the case of each of clauses (a), (b), (c) and (g) of the foregoing, any such event, change, circumstance or occurrence shall not be excluded to the extent that it has or would reasonably be expected to have a disproportionate adverse effect on the condition (financial or otherwise), assets, properties, or liabilities of the Company and its Subsidiaries (taken as a whole), or results of operations of the Company and its Subsidiaries (taken as a whole) relative to other companies operating in the same industry in which the Company and its Subsidiaries operates.

“Permitted Transferee” means, with respect to any Person, (i) any Affiliate of such Person, (ii) any successor entity of such Person and (iii) with respect to any Person that is an investment fund, vehicle or similar entity, any other investment fund, vehicle or similar entity of which such Person or an Affiliate, advisor or manager of such Person serves as the general partner, managing member, manager or advisor.

“Person” means an individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or a government or other agency or political subdivision thereof.

“Purchaser Nominee” means any person designated by the Purchaser Representative to be nominated by the Company for election to the Board of Directors as a Series A Director pursuant to Section 4.1(b).

“Registration Rights Agreement” means the Registration Rights Agreement between the Company and the Purchaser in the form attached to the Agreement as Exhibit C, as it may be amended or modified in accordance with the terms thereof.

“Representatives” means a Persons’ Affiliates, employees, agents, consultants, accountants, attorneys or financial advisors.

“Requirements of Environmental Law” means all laws (including the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Clean Water Act, the Clean Air Act, and any state analogues of any of the foregoing), common law, statutes, ordinances, codes, rules, regulations, orders or similar requirements of any Governmental Entity which relate to (a) pollution, protection or clean-up of the environment, including air, surface water, ground water or land; (b) solid, gaseous or liquid...
waste or the generation, recycling, reclamation, release, threatened release, treatment, storage, disposal or transportation of harmful or deleterious substances; (c) exposure of Persons or property to harmful or deleterious substances; or (d) the manufacture, presence, processing, distribution in commerce, use, discharge, releases, threatened releases, emissions or storage of harmful or deleterious substances into the environment.

“Restricted Securities” means Purchased Shares or Conversion Shares required to bear the legend set forth in Section 4.3(a) under the applicable provisions of the Securities Act.

“Sanctioned Country” means any of the Crimea region of Ukraine, Cuba, Iran, North Korea, and Syria.

“Sanctioned Person” means any Person with whom dealings are restricted or prohibited under the Sanctions Laws of the United States, the United Kingdom, the European Union, or the United Nations, including (i) any Person identified in any list of sanctioned person maintained by (A) the United States Department of Treasury, Office of Foreign Assets Control, the United States Department of Commerce, Bureau of Industry and Security, or the United States Department of State; (B) Her Majesty’s Treasury of the United Kingdom; (C) any committee of the United Nations Security Council; or (D) the European Union; (ii) any Person located, organized, or resident in, organized in, or a Governmental Entity or government instrumentality of, any Sanctioned Country; and (iii) any Person directly or indirectly 50% or more owned or controlled by, or acting for the benefit or on behalf of, a Person described in clause (i) or (ii).

“Sanctions Laws” means those trade, economic and financial sanctions laws, regulations, embargoes, and restrictive measures (in each case having the force of law) administered, enacted or enforced from time to time by (a) the United States (including without limitation the Department of Treasury, Office of Foreign Assets Control), (b) the European Union and enforced by its member states, (c) the United Nations, (d) Her Majesty’s Treasury, or (e) other similar governmental bodies from time to time.

“SEC” means the Securities and Exchange Commission.

“SEC Documents” means all reports, schedules, registration statements, proxy statements and other documents (including all amendments, exhibits and schedules thereto) filed by the Company with the SEC.

“Securities Act” means the Securities Act of 1933, as amended.

“Software and Systems” means all computers, hardware, software, systems, networks, websites, databases, applications and other information technology assets and equipment.

“Stock Plans” means the FireEye, Inc. 2013 Equity Incentive Plan, FireEye, Inc. 2013 Employee Stock Purchase Plan and all other equity-based compensation plans maintained or sponsored by the Company or its Subsidiaries for the benefit of their respective current or former employees.
“Subsidiary” means, when used with reference to a party, any corporation or other organization, whether incorporated or unincorporated, of which such party or any other Subsidiary of such party is a general partner or serves in a similar capacity, or, with respect to such corporation or other organization, at least a majority of the securities or other interests having by their terms ordinary voting power to elect a majority of the board of directors or others performing similar functions is directly or indirectly owned or controlled by such party or by any one or more of its Subsidiaries, or by such party and one or more of its Subsidiaries.

“Tax” and “Taxes” means all federal, state, local and foreign taxes (including, without limitation, income, franchise, property, sales, withholding, payroll and employment taxes), assessments, fees or other charges imposed by any Governmental Entity, including any interest, additions to tax or penalties applicable thereto.

“Tax Return” means any return, report or similar filing (including the attached schedules) filed or required to be filed with respect to Taxes (and any amendments thereto), including any information return, claim for refund or declaration of estimated Taxes.

“Transfer” means any direct or indirect (a) sale, transfer, hypothecation, assignment, gift, bequest or disposition by any other means, whether for value or no value and whether voluntary or involuntary (including, without limitation, by realization upon any lien or by operation of law or by judgment, levy, attachment, garnishment, bankruptcy or other legal or equitable proceedings) or (b) grant of any option, warrant or other right to purchase or the entry into any hedge, swap or any other agreement or any transaction that transfers, in whole or in part, directly or indirectly, the economic consequence of ownership of Common Stock; provided, however, that, notwithstanding anything to the contrary in this Agreement, a Transfer shall not include (i) the conversion of one or more shares of Series A Preferred Stock into shares of Common Stock pursuant to the Certificate of Designations, (ii) the redemption, repurchase or other acquisition of Common Stock or Series A Preferred Stock by the Company, or (iii) the direct or indirect transfer of any limited partnership interests or other equity interests in a Purchaser Party (or any direct or indirect parent entity of such Purchaser Party) (provided that if any transferor or transferee referred to in this clause (iii) ceases to be controlled (directly or indirectly) by the Person (directly or indirectly) controlling such Person immediately prior to such transfer, such event shall be deemed to constitute a “Transfer”). The term “Transferred” shall have a correlative meaning.

“Treasury Regulations” means the U.S. Treasury regulations promulgated under the Code, as amended.

“VCOC Letter Agreement” means that certain letter agreement, the form of which is attached as Exhibit E.
2. The following terms are defined in the Sections of the Agreement indicated:

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EXHIBIT B

FORM OF CERTIFICATE OF DESIGNATIONS

Form of

FireEye, Inc.

Certificate of Designations

4.5% Series A Convertible Preferred Stock
Exhibit A: Form of Convertible Preferred Stock Certificate
Exhibit B: Form of Restricted Stock Legend
On [date], the Board of Directors of FireEye, Inc., a Delaware corporation (the “Company”), adopted the following resolution designating and creating, out of the authorized and unissued shares of preferred stock of the Company, 400,000 authorized shares of a series of preferred stock of the Company titled the “4.5% Series A Convertible Preferred Stock”:

RESOLVED that, pursuant to the authority of the Board of Directors pursuant to the Certificate of Incorporation, the Bylaws and applicable law, a series of preferred stock of the Company titled the “4.5% Series A Convertible Preferred Stock,” and having a par value of $0.0001 per share and an initial number of authorized shares equal to four hundred thousand (400,000), is hereby designated and created out of the authorized and unissued shares of preferred stock of the Company, which series has the rights, designations, preferences, voting powers and other provisions set forth below:

Section 1.  DEFINITIONS.

“Affiliate” of any Person means any Person, directly or indirectly, Controlling, Controlled by or under common Control with such Person; provided, however, that (i) the Company and its Subsidiaries, on the one hand, and any Purchaser Party or any of its Affiliates, on the other hand, shall not be deemed to be Affiliates, (ii) “portfolio companies” (as such term is customarily used among institutional investors) in which any Purchaser Party or any of its Affiliates has an investment (whether as debt or equity) shall not be deemed an Affiliate of such Purchaser Party and (iii) the Excluded Sponsor Parties (as defined in each Purchase Agreement) shall not be deemed to be Affiliates of any Purchaser Party, the Company or any of the Company’s Subsidiaries.

“Board of Directors” means the Company’s board of directors or a committee of such board duly authorized to act with the authority of such board.

“Business Day” means any day other than a Saturday, a Sunday or any day on which the Federal Reserve Bank of New York is authorized or required by law or executive order to close or be closed.

“Bylaws” means the Amended and Restated Bylaws of the Company, as amended and restated on August 2, 2016, as the same may be further amended or restated.

“Capital Stock” of any Person means any and all shares of, interests in, rights to purchase, warrants or options for, participations in, or other equivalents of, in each case, however designated, the equity of such Person, but excluding any debt securities convertible into such equity.

“Certificate” means a Physical Certificate or an Electronic Certificate.

“Certificate of Designations” means this Certificate of Designations, as amended from time to time.
“Certificate of Incorporation” means the Company’s Amended and Restated Certificate of Incorporation, as the same has been and may be further amended or restated.

“Close of Business” means 5:00 p.m., New York City time.

“Common Stock” means the common stock, $0.0001 par value per share, of the Company, subject to Section 10(i).

“Common Stock Change Event” has the meaning set forth in Section 10(i)(i).

“Common Stock Liquidity Conditions” will be satisfied with respect to a Mandatory Conversion or Redemption if:

(a) the offer and sale of such share of Common Stock by such Holder are registered pursuant to an effective registration statement under the Securities Act and such registration statement is reasonably expected by the Company to remain effective and usable, by the Holder to sell such share of Common Stock, continuously during the period from, and including, the date the related Mandatory Conversion Notice or Redemption Notice Date, as applicable, is sent to, and including, the one (1) year anniversary after the date such share of Common Stock is issued;

(b) each share of Common Stock referred to in clause (a) above (i) will, when issued and when sold or otherwise transferred pursuant to the registration statement referred to in such clause (a), (1) be admitted for book-entry settlement through The Depository Trust Company with an “unrestricted” CUSIP number; and (2) unless sold to the Company or an Affiliate of the Company, not be evidenced by any Certificate that bears a legend referring to transfer restrictions under the Securities Act or other securities laws; and (ii) will, when issued, be listed and admitted for trading, without suspension or material limitation on trading, on any of The New York Stock Exchange, The NYSE American, The NASDAQ Capital Market, The NASDAQ Global Market or The NASDAQ Global Select Market (or any of their respective successors);

(c) (i) the Company has not received any written threat or notice of delisting or suspension by the applicable exchange referred to in clause (b)(ii) above with a reasonable prospect of delisting, after giving effect to all applicable notice and appeal periods; and (ii) no such delisting or suspension is reasonably likely to occur or is pending based on the Company falling below the minimum listing maintenance requirements of such exchange;

(d) the conversion of all shares of Convertible Preferred Stock pursuant to such Mandatory Conversion or that are subject to such Redemption, as applicable, would not be limited or otherwise restricted by Section 10(h).

“Common Stock Participating Dividend” has the meaning set forth in Section 5(c)(i).

“Company” has the meaning set forth in the preliminary paragraph hereto.
“Continuing Share Reserve Requirement” means, as of any time, a number of shares of Common Stock equal to the product of (a) two (2); and (b) the number of shares of Common Stock that would be issuable (without regard to Section 10(h)) upon conversion of all Convertible Preferred Stock outstanding as of such time (assuming such conversion occurred as of such time).

“Control” (including its correlative meanings “under common Control with” and “Controlled by”) means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through ownership of securities or partnership or other interests, by contract or otherwise.

“Conversion Agent” has the meaning set forth in Section 3(f)(i).

“Conversion Share” means any share of Common Stock issued or issuable upon conversion of any Convertible Preferred Stock.

“Conversion Consideration” means, with respect to the conversion of any Convertible Preferred Stock, the type and amount of consideration payable to settle such conversion, determined in accordance with Section 10.

“Conversion Date” means an Optional Conversion Date or a Mandatory Conversion Date.

“Conversion Price” initially means $18.00 per share of Common Stock; provided, however, that the Conversion Price is subject to adjustment pursuant to Sections 10(f) and 10(g). Each reference in this Certificate of Designations to the Conversion Price as of a particular date without setting forth a particular time on such date will be deemed to be a reference to the Conversion Price immediately before the Close of Business on such date.

“Convertible Preferred Stock” has the meaning set forth in Section 3(a).

“Deficit Shares” has the meaning set forth in Section 10(b)(i)(1).

“Distributed Entity” means any Subsidiary of the Company distributed in a Distribution Transaction.

“Distribution Transaction” means any transaction by which an Affiliate or Subsidiary of the Company ceases to be an Affiliate or Subsidiary of the Company by reason of the distribution of such Affiliate’s or Subsidiary’s equity securities to holders of Common Stock, whether by means of a spin-off, split-off, redemption, reclassification, exchange, stock dividend, share distribution, rights offering or similar transaction.


“Dividend” means any Regular Dividend or Participating Dividend.
“Dividend Junior Stock” means any class or series of the Company’s stock, the terms of which would result in such class or series ranking junior to the Convertible Preferred Stock with respect to the payment of dividends (without regard to whether or not dividends accumulate cumulatively). Dividend Junior Stock includes the Common Stock. For the avoidance of doubt, Dividend Junior Stock will not include any securities of the Company’s Subsidiaries.

“Dividend Parity Stock” means any class or series of the Company’s stock (other than the Convertible Preferred Stock), the terms of which would result in such class or series ranking equally with the Convertible Preferred Stock with respect to the payment of dividends (without regard to whether or not dividends accumulate cumulatively). For the avoidance of doubt, Dividend Parity Stock will not include any securities of the Company’s Subsidiaries.

“Dividend Payment Date” means each Regular Dividend Payment Date with respect to a Regular Dividend and each date on which any declared Participating Dividend is scheduled to be paid on the Convertible Preferred Stock with respect to a Participating Dividend.

“Dividend Senior Stock” means any class or series of the Company’s stock, the terms of which would result in such class or series ranking senior to the Convertible Preferred Stock with respect to the payment of dividends (without regard to whether or not dividends accumulate cumulatively). For the avoidance of doubt, Dividend Senior Stock will not include any securities of the Company’s Subsidiaries.

“Electronic Certificate” means any electronic book entry maintained by the Transfer Agent that evidences any share(s) of Convertible Preferred Stock.

“Equity Treatment Limitation” has the meaning set forth in Section 10(h)(i)(1).

“Ex-Dividend Date” means, with respect to an issuance, dividend or distribution on the Common Stock, the first date on which shares of Common Stock trade on the applicable exchange or in the applicable market, regular way, without the right to receive such issuance, dividend or distribution (including pursuant to due bills or similar arrangements required by the relevant stock exchange). For the avoidance of doubt, any alternative trading convention on the applicable exchange or market in respect of the Common Stock under a separate ticker symbol or CUSIP number will not be considered “regular way” for this purpose.


“Exchange Preferred Stock” means a series of convertible preferred stock issued by the Company and having terms, conditions, designations, dividend rights, voting powers, rights on liquidation and other preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof that are identical, or as nearly so as is practicable in the good faith judgment of the Board of Directors, to those of the Convertible Preferred Stock, except that the Liquidation Preference and the Conversion Price thereof will be determined as provided herein.

“Expiration Date” has the meaning set forth in Section 10(f)(i)(5).

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“Expiration Time” has the meaning set forth in Section 10(f)(i)(5).

“Final Fundamental Change Notice” has the meaning set forth in Section 8(f).

“Fundamental Change” means any of the following events, whether in a single transaction or a series of related transactions:

(a) a “person” or “group” (within the meaning of Section 13(d) and 14(d) of the Exchange Act), other than the Company or its Wholly Owned Subsidiaries, or their respective employee benefit plans, files any report with the SEC indicating that such person or group, has become the direct or indirect “beneficial owner” (as defined below) of shares of the Common Stock representing more than fifty percent (50%) of the voting power of all of the Company’s Common Stock in a transaction or series of related transactions approved by the Board of Directors;

(b) the consummation of (i) any sale, lease or other transfer, in one transaction or a series of transactions, of all or substantially all of the assets of the Company and its Subsidiaries, taken as a whole, to any Person other than one of the Company’s Wholly Owned Subsidiaries; or (ii) any transaction or series of related transactions in connection with which (whether by means of merger, consolidation, share exchange, combination, reclassification, recapitalization, acquisition, liquidation or otherwise) all of the Common Stock is exchanged for, converted into, acquired for, or constitutes solely the right to receive, other securities, cash or other property; provided, however, that any merger, consolidation, share exchange, combination, reclassification or recapitalization of the Company pursuant to which the Persons that directly or indirectly “beneficially owned” (as defined below) all classes of the Company’s common equity immediately before such transaction directly or indirectly “beneficially own,” immediately after such transaction, more than fifty percent (50%) of all classes of common equity of the surviving, continuing or acquiring company or other transferee, as applicable, or the parent thereof, in substantially the same proportions vis-à-vis each other as immediately before such transaction, will be deemed not to be a Fundamental Change pursuant to this clause (b); or

(c) neither shares of Common Stock nor shares of any other Capital Stock into which the Convertible Preferred Stock is convertible are listed for trading on any United States national securities exchange or all such shares cease to be traded in contemplation of a de-listing (other than as a result of a transaction described in clause (b) above).

For the purposes of this definition, (x) any transaction or event described in both clause (a) and in clause (b)(i) or (ii) above (without regard to the proviso in clause (b)) will be deemed to occur solely pursuant to clause (b) above (subject to such proviso); and (y) whether a Person is a “beneficial owner”, whether shares are “beneficially owned”, and percentage beneficial ownership, will be determined in accordance with Rules 13d-3 and 13d-5 under the Exchange Act.

“Fundamental Change Repurchase Date” means the date fixed, pursuant to Section 8(c), for the repurchase of any Convertible Preferred Stock by the Company pursuant to a Repurchase Upon Fundamental Change.
"Fundamental Change Repurchase Notice" means a notice (including a notice substantially in the form of the “Fundamental Change Repurchase Notice” set forth in Exhibit A) containing the information, or otherwise complying with the requirements, set forth in Section 8(g)(i) and Section 8(g)(ii).

"Fundamental Change Repurchase Price" means the cash price payable by the Company to repurchase any share of Convertible Preferred Stock upon its Repurchase Upon Fundamental Change, calculated pursuant to Section 8(d).

"Fundamental Change Repurchase Right" has the meaning set forth in Section 8(a).

"Holder" means a person in whose name any Convertible Preferred Stock is registered on the Registrar’s books.

"Initial Issue Date” means the Closing Date (as defined in each Purchase Agreement).

"Initial Fundamental Change Notice” has the meaning set forth in Section 8(e).

"Initial Liquidation Preference” means one thousand dollars ($1,000.00) per share of Convertible Preferred Stock.

"Initial Share Reserve Requirement” means a number of shares of Common Stock equal to the product of (a) two (2); and (b) the number of shares of Common Stock that would be issuable (without regard to Section 10(h)) upon conversion of all Convertible Preferred Stock outstanding as of the Initial Issue Date (assuming such conversion occurred on the Initial Issue Date).

"Last Reported Sale Price” of the Common Stock for any Trading Day means the closing sale price per share (or, if no closing sale price is reported, the average of the last bid price and the last ask price per share or, if more than one in either case, the average of the average last bid prices and the average last ask prices per share) of the Common Stock on such Trading Day as reported in composite transactions for the principal U.S. national or regional securities exchange on which the Common Stock is then listed. If the Common Stock is not listed on a U.S. national or regional securities exchange on such Trading Day, then the Last Reported Sale Price will be the last quoted bid price per share of Common Stock on such Trading Day in the over-the-counter market as reported by OTC Markets Group Inc. or a similar organization. If the Common Stock is not so quoted on such Trading Day, then the Last Reported Sale Price will be the average of the mid-point of the last bid price and the last ask price per share of Common Stock on such Trading Day from a nationally recognized independent investment banking firm the Company selects.

"Liquidation Event” has the meaning set forth in Section 6(a).

"Liquidation Junior Stock” means any class or series of the Company’s stock, the terms of which would result in such class or series ranking junior to the Convertible Preferred Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up. Liquidation Junior Stock includes the Common Stock. For the avoidance of doubt, Liquidation Junior Stock will not include any securities of the Company’s Subsidiaries.
“Liquidation Multiple” means, if the Fundamental Change or Liquidation Event, as applicable, occurs (i) on or prior to the second anniversary of the Initial Issue Date, 105%, (ii) after the second anniversary but on or prior to the fifth anniversary of the Initial Issue Date, 103%, and (iii) after the fifth anniversary of the Initial Issue Date, 100%.

“Liquidation Parity Stock” means any class or series of the Company’s stock (other than the Convertible Preferred Stock), the terms of which would result in such class or series ranking equally with the Convertible Preferred Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up. For the avoidance of doubt, Liquidation Parity Stock will include any Mirror Preferred Stock issued in accordance with the terms hereof, but does not include any securities of the Company’s Subsidiaries.

“Liquidation Preference” means, with respect to the Convertible Preferred Stock, an amount initially equal to the Initial Liquidation Preference per share of Convertible Preferred Stock; provided, however, that the Liquidation Preference is subject to adjustment pursuant to Section 5(b)(i).

“Liquidation Senior Stock” means any class or series of the Company’s stock, the terms of which would result in such class or series ranking senior to the Convertible Preferred Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up. For the avoidance of doubt, Liquidation Senior Stock will not include any securities of the Company’s Subsidiaries.

“Majority Holders” has the meaning set forth in Section 10(f)(iv)(1).

“Mandatory Conversion” has the meaning set forth in Section 10(c)(i).

“Mandatory Conversion Date” means a Conversion Date designated with respect to any Convertible Preferred Stock pursuant to Section 10(c)(i) and 10(c)(iii).

“Mandatory Conversion Notice” has the meaning set forth in Section 10(c)(iv).

“Mandatory Conversion Notice Date” means, with respect to a Mandatory Conversion, the date on which the Company sends the Mandatory Conversion Notice for such Mandatory Conversion pursuant to Section 10(c)(iv).

“Mandatory Conversion Right” has the meaning set forth in Section 10(c)(i).

“Mandiant Solutions” means the operating division of the Company comprising Mandiant Consulting, Threat Intelligence, Security Validation, Managed Defense and Mandiant Advantage and any other business units that become part of the Mandiant Solutions operating segment.

“Market Disruption Event” means, with respect to any date, the occurrence or existence, during the one-half hour period ending at the scheduled close of trading on such date on the principal U.S. national or regional securities exchange or other market on which the Common
Stock is listed for trading or trades, of any material suspension or limitation imposed on trading (by reason of movements in price exceeding limits permitted by the relevant exchange or otherwise) in the Common Stock or in any options contracts or futures contracts relating to the Common Stock.

"Mirror Preferred Stock" means a series of convertible preferred stock issued by the Distributed Entity and having terms, conditions, designations, dividend rights, voting powers, rights on liquidation and other preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof that are identical, or as nearly so as is practicable in the good faith judgment of the Board of Directors, to those of the Convertible Preferred Stock, except that the Liquidation Preference and the Conversion Price thereof will be determined as provided herein.

"Net Debt" means indebtedness for borrowed money minus cash, cash equivalents and short-term investments; provided that, unless such cash proceeds are used to retire or refinance existing indebtedness substantially concurrently with the incurrence of any indebtedness, such determination shall exclude the proceeds of any such debt incurrence. For the avoidance of doubt, "Net Debt" shall exclude any Convertible Preferred Stock.

"Number of Reserved Shares" means, as of any time, the number of shares of Common Stock that, at such time, the Company has reserved (out of its authorized but unissued shares of Common Stock that are not reserved for any other purpose) for delivery upon conversion of the Convertible Preferred Stock.

"Officer" means the Chairman of the Board of Directors, the Chief Executive Officer, the President, the Chief Operating Officer, the Chief Financial Officer, the Treasurer, any Assistant Treasurer, the Controller, the Secretary or any Vice-President of the Company.

"Open of Business" means 9:00 a.m., New York City time.

"Optional Conversion" means the conversion of any Convertible Preferred Stock other than pursuant to a Mandatory Conversion.

"Optional Conversion Date" means, with respect to the Optional Conversion of any Convertible Preferred Stock, the first Business Day on which the requirements set forth in Section 10(d)(ii) for such conversion are satisfied.

"Optional Conversion Notice" means a notice substantially in the form of the “Optional Conversion Notice” set forth in Exhibit A.

"Participating Dividend" has the meaning set forth in Section 5(c)(i).

"Paying Agent" has the meaning set forth in Section 3(f)(i).
“Person” or “person” means any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or government or other agency or political subdivision thereof. Any division or series of a limited liability company, limited partnership or trust will constitute a separate “person” under this Certificate of Designations.

“Physical Certificate” means any certificate (other than an Electronic Certificate) evidencing any share(s) of Convertible Preferred Stock, which certificate is substantially in the form set forth in Exhibit A, registered in the name of the Holder of such share(s) and duly executed by the Company and countersigned by the Transfer Agent.

“Purchase Agreements” mean (i) that certain Securities Purchase Agreement by and between the Company and BTO Delta Holdings DE L.P. dated as of November 18, 2020, and (ii) that certain Securities Purchase Agreement by and among the Company and ClearSky Security Fund I LLC and ClearSky Power & Technology Fund II LLC dated as of November 18, 2020, each as may be amended, supplemented or otherwise modified from time to time, with respect to certain terms and conditions concerning, among other things, the rights of and restrictions on the Holders.

“Purchasers” has the meaning set forth in each Purchase Agreement.

“Purchaser Parties” means the Purchasers and each Permitted Transferee (as defined in each Purchase Agreement) of a Purchaser to whom shares of Convertible Preferred Stock or Common Stock issued upon conversion of shares of Convertible Preferred Stock are transferred pursuant to Section 4.2 of each Purchase Agreement or Common Stock issued under each Purchase Agreement.

“Record Date” means, with respect to any dividend or distribution on, or issuance to holders of, Convertible Preferred Stock or Common Stock, the date fixed (whether by law, contract or the Board of Directors or otherwise) to determine the Holders or the holders of Common Stock, as applicable, that are entitled to such dividend, distribution or issuance.

“Redemption” has the meaning set forth in Section 7(a).

“Redemption Date” means the date fixed, pursuant to Section 7(b), for the settlement of the repurchase of the Convertible Preferred Stock by the Holder pursuant to a Redemption.

“Redemption Notice” has the meaning set forth in Section 7(d).

“Redemption Notice Date” means, with respect to a Redemption, the date on which the Holder sends the Redemption Notice for such Redemption pursuant to Section 7(d).

“Redemption Price” means the consideration payable by the Company to repurchase any Convertible Preferred Stock upon its Redemption, calculated pursuant to Section 7(c).

“Reference Property” has the meaning set forth in Section 10(i)(i).

“Reference Property Unit” has the meaning set forth in Section 10(i)(i).

“Register” has the meaning set forth in Section 3(f)(ii).
"Registrar” has the meaning set forth in Section 3(f)(i).

"Regular Dividend Payment Date” means, with respect to any share of Convertible Preferred Stock, each March 31, June 30, September 30 and December 31 of each year, beginning on December 31, 2020 (or beginning on such other date specified in the Certificate evidencing such share).

"Regular Dividend Period” means each period from, and including, a Regular Dividend Payment Date (or, in the case of the first Regular Dividend Period, from, and including, the Initial Issue Date) to, but excluding, the next Regular Dividend Payment Date.

"Regular Dividend Rate” means four and one-half percent (4.5%) per annum or, to the extent and during the period with respect to which such rate has been adjusted as provided in Section 8(b), such adjusted rate.

"Regular Dividend Record Date” has the following meaning: (a) March 15, in the case of a Regular Dividend Payment Date occurring on March 31; (b) June 15, in the case of a Regular Dividend Payment Date occurring on June 30; (c) September 15, in the case of a Regular Dividend Payment Date occurring on September 30; and (d) December 15, in the case of a Regular Dividend Payment Date occurring on December 31.

"Regular Dividends” has the meaning set forth in Section 5(a)(i).

"Repurchase Upon Fundamental Change” means the repurchase of any Convertible Preferred Stock by the Company pursuant to Section 8.

"Restricted Stock Legend” means a legend substantially in the form set forth in Exhibit B.

"Rule 144” means Rule 144 under the Securities Act (or any successor rule thereto), as the same may be amended from time to time.

"SEC” means the U.S. Securities and Exchange Commission.

"Securities Act” means the U.S. Securities Act of 1933, as amended.

"Security” means any Convertible Preferred Stock or Conversion Share.

"Share Agent” means the Transfer Agent or any Registrar, Paying Agent or Conversion Agent.

"Spin-Off Exchange Offer” has the meaning set forth in Section 10(f)(iv)(1).
“Subsidiary” means, with respect to any Person, (a) any corporation, association or other business entity (other than a partnership or limited liability company) of which more than 50% of the total voting power of the Capital Stock entitled (without regard to the occurrence of any contingency, but after giving effect to any voting agreement or stockholders’ agreement that effectively transfers voting power) to vote in the election of directors, managers or trustees, as applicable, of such corporation, association or other business entity is owned or controlled, directly or indirectly, by such Person or one or more of the other Subsidiaries of such Person; and (b) any partnership or limited liability company where (x) more than fifty percent (50%) of the capital accounts, distribution rights, equity and voting interests, or of the general and limited partnership interests, as applicable, of such partnership or limited liability company are owned or controlled, directly or indirectly, by such Person or one or more of the other Subsidiaries of such Person, whether in the form of membership, general, special or limited partnership or limited liability company interests or otherwise; and (y) such Person or any one or more of the other Subsidiaries of such Person is a controlling general partner of, or otherwise controls, such partnership or limited liability company.

“Successor Person” has the meaning set forth in Section 10(i)(ii).

“Tender/Exchange Offer Valuation Period” has the meaning set forth in Section 10(f)(i)(5).

“Trading Day” means any day on which (a) trading in the Common Stock generally occurs on the principal U.S. national or regional securities exchange on which the Common Stock is then listed or, if the Common Stock is not then listed on a U.S. national or regional securities exchange, on the principal other market on which the Common Stock is then traded; and (b) there is no Market Disruption Event. If the Common Stock is not so listed or traded, then “Trading Day” means a Business Day.

“Transfer Agent” means American Stock Transfer & Trust Company, LLC or its successor.

“Transfer-Restricted Security” means any Security that constitutes a “restricted security” (as defined in Rule 144); provided, however, that such Security will cease to be a Transfer-Restricted Security upon the earliest to occur of the following events:

(a) such Security is sold or otherwise transferred to a Person (other than the Company or an Affiliate of the Company) pursuant to a registration statement that was effective under the Securities Act at the time of such sale or transfer;

(b) such Security is sold or otherwise transferred to a Person (other than the Company or an Affiliate of the Company) pursuant to an available exemption (including Rule 144) from the registration and prospectus-delivery requirements of, or in a transaction not subject to, the Securities Act and, immediately after such sale or transfer, such Security ceases to constitute a “restricted security” (as defined in Rule 144); and

(c) (i) such Security is eligible for resale, by a Person that is not an Affiliate of the Company and that has not been an Affiliate of the Company during the immediately preceding three (3) months, pursuant to Rule 144 without any limitations thereunder as to volume, manner...
of sale, availability of current public information or notice; and (ii) the Company has received such certificates or other documentation or evidence as
the Company may reasonably require to determine that the Holder, holder or beneficial owner of such Security is not, and has not been during the
immediately preceding three (3) months, an Affiliate of the Company.

“Wholly Owned Subsidiary” of a Person means any Subsidiary of such Person all of the outstanding Capital Stock or other ownership interests
of which (other than directors’ qualifying shares) are owned by such Person or one or more Wholly Owned Subsidiaries of such Person.

Section 2. RULES OF CONSTRUCTION. For purposes of this Certificate of Designations:

(a) “or” is not exclusive;

(b) “including” means “including without limitation”;

(c) “will” expresses a command;

(d) the “average” of a set of numerical values refers to the arithmetic average of such numerical values;

(e) a merger involving, or a transfer of assets by, a limited liability company, limited partnership or trust will be deemed to include any division
of or by, or an allocation of assets to a series of, such limited liability company, limited partnership or trust, or any unwinding of any such division or
allocation;

(f) words in the singular include the plural and in the plural include the singular, unless the context requires otherwise;

(g) “herein,” “hereof” and other words of similar import refer to this Certificate of Designations as a whole and not to any particular Section or
other subdivision of this Certificate of Designations, unless the context requires otherwise;

(h) references to currency mean the lawful currency of the United States of America, unless the context requires otherwise; and

(i) the exhibits, schedules and other attachments to this Certificate of Designations are deemed to form part of this Certificate of Designations.

Section 3. THE CONVERTIBLE PREFERRED STOCK.

(a) Designation; Par Value. A series of stock of the Company titled the “4.5% Series A Convertible Preferred Stock” (the “Convertible
Preferred Stock”) is hereby designated and created out of the authorized and unissued shares of preferred stock of the Company. The par value of the
Convertible Preferred Stock is $0.0001 per share.

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(b) **Number of Authorized Shares.** The total authorized number of shares of Convertible Preferred Stock is four hundred thousand (400,000); provided, however that, by resolution of the Board of Directors, the total number of authorized shares of Convertible Preferred Stock may be increased or reduced to a number that is not less than the number of shares of Convertible Preferred Stock then outstanding.

(c) **Form, Dating and Denominations.**

(i) **Form and Date of Certificates Evidencing Convertible Preferred Stock.** Each Certificate evidencing any Convertible Preferred Stock will (1) be substantially in the form set forth in Exhibit A and (2) bear the legends required by Section 3(g) and may bear notations, legends or endorsements required by law, stock exchange rule or usage or the depositary.

(ii) **Electronic Certificates; Physical Certificates.** The Convertible Preferred Stock will be originally issued initially in the form of one or more Electronic Certificates. Electronic Certificates may be exchanged for Physical Certificates, and Physical Certificates may be exchanged for Electronic Certificates, upon request by the Holder thereof pursuant to customary procedures, subject to Section 3(h).

(iii) **Electronic Certificates; Interpretation.** For purposes of this Certificate of Designations, (1) each Electronic Certificate will be deemed to include the text of the stock certificate set forth in Exhibit A; (2) any legend or other notation that is required to be included on a Certificate will be deemed to be affixed to any Electronic Certificate notwithstanding that such Electronic Certificate may be in a form that does not permit affixing legends thereto; (3) any reference in this Certificate of Designations to the “delivery” of any Electronic Certificate will be deemed to be satisfied upon the registration of the electronic book entry representing such Electronic Certificate in the name of the applicable Holder; (4) upon satisfaction of any applicable requirements of the General Corporation Law of the State of Delaware, the Certificate of Incorporation and the Bylaws of the Company, and any related requirements of the Transfer Agent, in each case, for the issuance of Convertible Preferred Stock in the form of one or more Electronic Certificates, such Electronic Certificates will be deemed to be executed by the Company and countersigned by the Transfer Agent.

(iv) **Appointment of Depositary.** If any Convertible Preferred Stock is admitted to the book-entry clearance and settlement facilities of any electronic depositary, then, notwithstanding anything to the contrary in this Certificate of Designations, each reference in this Certificate of Designation to the delivery of, or payment on, any such Convertible Preferred Stock, or the delivery of any related notice or demand, will be deemed to be satisfied to the extent the applicable procedures of such depositary governing such delivery or payment, as applicable, are satisfied.

(v) **No Bearer Certificates; Denominations.** The Convertible Preferred Stock will be issued only in registered form and only in whole numbers of shares.
(vi) **Registration Numbers.** Each Certificate evidencing any share of Convertible Preferred Stock will bear a unique registration number that is not affixed to any other Certificate evidencing any other then-outstanding shares of Convertible Preferred Stock.

(d) **Execution, Countersignature and Delivery.**

**Due Execution by the Company.** At least two (2) duly authorized Officers will sign each Certificate evidencing any Convertible Preferred Stock on behalf of the Company by manual, facsimile or electronic signature. The validity of any Convertible Preferred Stock will not be affected by the failure of any Officer whose signature is on any Certificate evidencing such Convertible Preferred Stock to hold, at the time such Certificate is countersigned by the Transfer Agent, the same or any other office at the Company.

(i) **Countersignature by Transfer Agent.** No Certificate evidencing any share of Convertible Preferred Stock is valid until such Certificate is countersigned by the Transfer Agent. Each Certificate will be deemed to be duly countersigned only when an authorized signatory of the Transfer Agent (or a duly appointed agent thereof) signs (by manual, facsimile or electronic signature) the countersignature block set forth in such Certificate.

(e) **Method of Payment; Delay When Payment Date is Not a Business Day.**

(i) **Method of Payment.**

(1) **Electronic Certificates.** The Company will pay (or cause the Paying Agent to pay) all cash amounts due on any Convertible Preferred Stock evidenced by an Electronic Certificate, out of funds legally available therefor, by wire transfer of immediately available funds.

(2) **Physical Certificates.** The Company will pay (or cause the Paying Agent to pay) all cash amounts due on any Convertible Preferred Stock evidenced by a Physical Certificate, out of funds legally available therefor, as follows:

(A) if the aggregate Liquidation Preference of the Convertible Preferred Stock evidenced by such Physical Certificate is at least five million dollars ($5,000,000.00) (or such lower amount as the Company may choose in its sole and absolute discretion) and the Holder of such Convertible Preferred Stock entitled to such cash Dividend or amount has delivered to the Paying Agent, no later than the time set forth in the next sentence, a written request to receive payment by wire transfer to an account of such Holder within the United States, by wire transfer of immediately available funds to such account; and

(B) in all other cases, by check mailed to the address of such Holder set forth in the Register.

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To be timely, such written request must be delivered no later than the Close of Business on the following date: (x) with respect to the payment of any declared cash Dividend due on a Dividend Payment Date for the Convertible Preferred Stock, the related Record Date; and (y) with respect to any other payment, the date that is fifteen (15) calendar days immediately before the date such payment is due.

(ii) Delay of Payment when Payment Date is Not a Business Day. If the due date for a payment on any Convertible Preferred Stock as provided in this Certificate of Designations is not a Business Day, then, notwithstanding anything to the contrary in this Certificate of Designations, such payment may be made on the immediately following Business Day and no interest, dividend or other amount will accrue or accumulate on such payment as a result of the related delay. Solely for purposes of the immediately preceding sentence, a day on which the applicable place of payment is authorized or required by law or executive order to close or be closed will be deemed not to be a “Business Day.”

(f) Transfer Agent, Registrar, Paying Agent and Conversion Agent.

(i) Generally. The Company designates its principal U.S. executive offices, and any office of the Transfer Agent in the continental United States, as an office or agency where Convertible Preferred Stock may be presented for (1) registration of transfer or for exchange (the “Registrar”); (2) payment (the “Paying Agent”); and (3) conversion (the “Conversion Agent”). At all times when any Convertible Preferred Stock is outstanding, the Company will maintain an office in the continental United States constituting the Registrar, Paying Agent and Conversion Agent.

(ii) Maintenance of the Register. The Company will keep, or cause there to be kept, a record (the “Register”) of the names and addresses of the Holders, the number of shares of Convertible Preferred Stock held by each Holder and the transfer, exchange, repurchase, Redemption and conversion of the Convertible Preferred Stock. Absent manifest error, the entries in the Register will be conclusive and the Company and the Transfer Agent may treat each Person whose name is recorded as a Holder in the Register as a Holder for all purposes. The Register will be in written form or in any form capable of being converted into written form reasonably promptly. The Company will promptly provide a copy of the Register to any Holder upon its request.

(iii) Subsequent Appointments. By notice to each Holder, the Company may, at any time, appoint any Person (including any Subsidiary of the Company) to act as Registrar, Paying Agent or Conversion Agent.

(iv) If the Company or any of its Subsidiaries acts as Paying Agent or Conversion Agent, then (1) it will segregate for the benefit of the Holders all money and other property held by it as Paying Agent or Conversion Agent; and (2) references in this Certificate of Designations to the Paying Agent or Conversion Agent holding cash or other property, or to the delivery of cash or other property to the Paying Agent or Conversion Agent, in each case, for payment or delivery to any Holders or with respect to the Convertible Preferred Stock, will be deemed to refer to cash or other property so segregated, or to the segregation of such cash or other property, respectively.
(g) **Legends.**

(i) **Restricted Stock Legend.**

(1) Each Certificate evidencing any share of Convertible Preferred Stock that is a Transfer-Restricted Security will bear the Restricted Stock Legend.

(2) If any share of Convertible Preferred Stock is issued in exchange for, in substitution of, or to effect a partial conversion of, any other share(s) of Convertible Preferred Stock (such other share(s) being referred to as the “old share(s)” for purposes of this Section 3(g)(i)(2)), including pursuant to Section 3(i) or 3(k), then the Certificate evidencing such share will bear the Restricted Stock Legend if the Certificate evidencing such old share(s) bore the Restricted Stock Legend at the time of such exchange or substitution, or on the related Conversion Date with respect to such conversion, as applicable; provided, however, that the Certificate evidencing such share need not bear the Restricted Stock Legend if such share does not constitute a Transfer-Restricted Security immediately after such exchange or substitution, or as of such Conversion Date, as applicable.

(ii) **Other Legends.** The Certificate evidencing any Convertible Preferred Stock may bear any other legend or text, not inconsistent with this Certificate of Designations, as may be required by applicable law, by the rules of any applicable depositary for the Convertible Preferred Stock or by any securities exchange or automated quotation system on which such Convertible Preferred Stock is traded or quoted or as may be otherwise reasonably determined by the Company to be appropriate.

(iii) **Acknowledgement and Agreement by the Holders.** A Holder’s acceptance of any Convertible Preferred Stock evidencing by a Certificate bearing any legend required by this Section 3(g) will constitute such Holder’s acknowledgement of, and agreement to comply with, the restrictions set forth in such legend.

(iv) **Legends on Conversion Shares.**

(1) Each Conversion Share will bear a legend substantially to the same effect as the Restricted Stock Legend if the Convertible Preferred Stock upon the conversion of which such Conversion Share was issued was (or would have been had it not been converted) a Transfer-Restricted Security at the time such Conversion Share was issued; provided, however, that such Conversion Share need not bear such a legend if the Company determines, in its reasonable discretion, that such Conversion Share need not bear such a legend.

(2) Notwithstanding anything to the contrary in Section 3(g)(iv)(1), a Conversion Share need not bear a legend pursuant to Section 3(g)(iv)(1) if such Conversion Share is issued in an uncertificated form that does not permit affixing legends thereto, provided the Company takes measures (including the assignment thereto of a “restricted” CUSIP number) that it reasonably deems appropriate to enforce the transfer restrictions referred to in such legend.
(h) **Transfers and Exchanges; Transfer Taxes; Certain Transfer Restrictions.**

(i) **Provisions Applicable to All Transfers and Exchanges.**

(1) **Generally.** Subject to this Section 3(h), Convertible Preferred Stock evidenced by any Certificate may be transferred or exchanged from time to time and the Company will cause the Registrar to record each such transfer or exchange in the Register.

(2) **No Services Charge; Transfer Taxes.** The Company and the Share Agents will not impose any service charge on any Holder for any transfer, exchange or conversion of any Convertible Preferred Stock, but the Company, the Transfer Agent, the Registrar and the Conversion Agent may require payment of a sum sufficient to cover any transfer tax or similar governmental charge that may be imposed in connection with any transfer, exchange or conversion of Convertible Preferred Stock, other than exchanges pursuant to Section 3(i) or Section 3(q) not involving any transfer (and; provided, that (A) any such taxes or charges incurred in connection with the original issuance of the Convertible Preferred Stock shall be paid and borne by the Company; and (B) any such taxes or charges incurred in connection with a conversion of the Convertible Preferred Stock pursuant to Section 10 shall be paid and borne as provided in Section 11(c)).

(3) **No Transfers or Exchanges of Fractional Shares.** Notwithstanding anything to the contrary in this Certificate of Designations, all transfers or exchanges of Convertible Preferred Stock must be in an amount representing a whole number of shares of Convertible Preferred Stock, and no fractional share of Convertible Preferred Stock may be transferred or exchanged.

(4) **Legends.** Each Certificate evidencing any share of Convertible Preferred Stock that is issued upon transfer of, or in exchange for, another share of Convertible Preferred Stock will bear each legend, if any, required by Section 3(g).

(5) **Settlement of Transfers and Exchanges.** Upon satisfaction of the requirements of this Certificate of Designations to effect a transfer or exchange of any Convertible Preferred Stock, the Company will cause such transfer or exchange to be effected as soon as reasonably practicable but in no event later than the second (2nd) Business Day after the date of such satisfaction.

(6) **Exchanges to Remove Transfer Restrictions.** For the avoidance of doubt, and subject to the terms of this Certificate of Designations, as used in this Section 3(h), an “exchange” of a Certificate includes an exchange effected for the sole purpose of removing any Restricted Stock Legend affixed to such Certificate.

(ii) **Transfers and Exchanges of Convertible Preferred Stock.**

(1) Subject to this Section 3(h), a Holder of any Convertible Preferred Stock evidenced by a Certificate may (x) transfer any whole number of shares of such Convertible Preferred Stock to one or more other Person(s); and (y) exchange any whole number of shares of such Convertible Preferred Stock for an equal
number of shares of Convertible Preferred Stock evidenced by one or more other Certificates; provided, however, that, to effect any such transfer or exchange, such Holder must, if such Certificate is a Physical Certificate, surrender such Physical Certificate to the office of the Transfer Agent or the Registrar, together with any endorsements or transfer instruments reasonably required by the Company, the Transfer Agent or the Registrar.

(2) Upon the satisfaction of the requirements of this Certificate of Designations to effect a transfer or exchange of any whole number of shares of a Holder’s Convertible Preferred Stock evidenced by a Certificate (such Certificate being referred to as the “old Certificate” for purposes of this Section 3(b)(ii)(2)):

   (A) such old Certificate will be promptly cancelled pursuant to Section 3(m);

   (B) if fewer than all of the shares of Convertible Preferred Stock evidenced by such old Certificate are to be so transferred or exchanged, then the Company will issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(d), one or more Certificates that (x) each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock evidenced by such old Certificate not to be so transferred or exchanged; (y) are registered in the name of such Holder; and (z) bear each legend, if any, required by Section 3(g);

   (C) in the case of a transfer to a transferee, the Company will issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(d), one or more Certificates that (x) each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock to be so transferred; (y) are registered in the name of such transferee; and (z) bear each legend, if any, required by Section 3(g); and

   (D) in the case of an exchange, the Company will issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(d), one or more Certificates that (x) each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock to be so exchanged; (y) are registered in the name of the Person to whom such old Certificate was registered; and (z) bear each legend, if any, required by Section 3(g).
(iii) Transfers of Shares Subject to Redemption, Repurchase or Conversion. Notwithstanding anything to the contrary in this Certificate of Designations, the Company, the Transfer Agent and the Registrar will not be required to register the transfer of or exchange any share of Convertible Preferred Stock that has been called for Redemption, subject to a Repurchase upon Fundamental Change or surrendered for conversion.

(i) Exchange and Cancellation of Convertible Preferred Stock to Be Converted or to Be Repurchased Pursuant to a Repurchase Upon Fundamental Change or a Redemption.

(ii) Partial Conversions of Physical Certificates and Partial Repurchases of Physical Certificates Pursuant to a Repurchase Upon Fundamental Change or a Redemption. If fewer than all of the shares of Convertible Preferred Stock evidenced by a Physical Certificate (such Physical Certificate being referred to as the “old Physical Certificate” for purposes of this Section 3(i)(i)) are to be converted pursuant to Section 10 or repurchased pursuant to a Repurchase Upon Fundamental Change or a Redemption, then, as soon as reasonably practicable after such Physical Certificate is surrendered for such conversion or repurchase, as applicable, the Company will cause such Physical Certificate to be exchanged, pursuant and subject to Section 3(h), for (1) one or more Physical Certificates that each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock evidenced by such old Physical Certificate that are not to be so converted or repurchased, as applicable, and deliver such Physical Certificate(s) to such Holder; and (2) a Physical Certificate evidencing a whole number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock evidenced by such old Physical Certificate that are to be so converted or repurchased, as applicable, which Physical Certificate will be converted or repurchased, as applicable, pursuant to the terms of this Certificate of Designations; provided, however, that the Physical Certificate referred to in this clause (2) need not be issued at any time after which such shares subject to such conversion or repurchase, as applicable, are deemed to cease to be outstanding pursuant to Section 3(o).

(iii) Cancellation of Convertible Preferred Stock that Is Converted and Convertible Preferred Stock that Is Repurchased Pursuant to a Repurchase Upon Fundamental Change or a Redemption. If shares of Convertible Preferred Stock evidenced by a Certificate (or any portion thereof that has not theretofore been exchanged pursuant to Section 10) are to be converted pursuant to Section 10 or repurchased pursuant to a Repurchase Upon Fundamental Change or a Redemption, then, promptly after the later of the time such Convertible Preferred Stock is deemed to cease to be outstanding pursuant to Section 3(o) and the time such old Certificate is surrendered for such conversion or repurchase, as applicable, (1) such old Certificate will be cancelled pursuant to Section 3(m); and (2) in the case of a partial conversion or repurchase, the Company will issue, execute and deliver to such Holder, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(d), one or more Certificates that (x) each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock evidenced by such old Certificate that are not to be so converted or repurchased, as applicable; (y) are registered in the name of such Holder; and (z) bear each legend, if any, required by Section 3(g).
(j) **Status of Retired or Treasury Shares.** Upon any share of Convertible Preferred Stock ceasing to be outstanding, such share will be deemed, automatically and without any further action of the Board of Directors, to be retired and to resume the status of an authorized and unissued share of preferred stock of the Company, and such share cannot thereafter be reissued as Convertible Preferred Stock.

(k) **Replacement Certificates.** If a Holder of any Convertible Preferred Stock claims that the Certificate(s) evidencing such Convertible Preferred Stock have been mutilated, lost, destroyed or wrongfully taken, then the Company will issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with **Section 3(c)**, a replacement Certificate evidencing such Convertible Preferred Stock upon surrender to the Company or the Transfer Agent of such mutilated Certificate, or upon delivery to the Company or the Transfer Agent of evidence of such loss, destruction or wrongful taking reasonably satisfactory to the Transfer Agent and the Company. In the case of a lost, destroyed or wrongfully taken Certificate evidencing Convertible Preferred Stock, the Company and the Transfer Agent may require the Holder thereof to provide such security or indemnity that is reasonably satisfactory to the Company and the Transfer Agent to protect the Company and the Transfer Agent from any loss that any of them may suffer if such Certificate is replaced. Every replacement Certificate evidencing Convertible Preferred Stock issued pursuant to this **Section 3(j)** will, upon such replacement, be deemed to be evidence of outstanding Convertible Preferred Stock, entitled to all of the benefits of this Certificate of Designations equally and ratably with all other Convertible Preferred Stock then outstanding.

(l) **Registered Holders.** Only the Holder of any share of Convertible Preferred Stock will have rights under this Certificate of Designations as the owner of such share of Convertible Preferred Stock.

(m) **Cancellation.** The Company may at any time deliver Certificates evidencing Convertible Preferred Stock, if any, to the Transfer Agent for cancellation. The Registrar, the Paying Agent and the Conversion Agent will forward to the Transfer Agent each share of Convertible Preferred Stock duly surrendered to them for transfer, exchange, payment or conversion. The Company will cause the Transfer Agent to promptly cancel all Certificates evidencing shares of Convertible Preferred Stock so surrendered to it in accordance with its customary procedures.

(n) **Shares Held by the Company or its Subsidiaries.** Without limiting the generality of **Section 3(j)** and **Section 3(o)**, in determining whether the Holders of the required number of outstanding shares of Convertible Preferred Stock have concurred in any direction, waiver or consent, shares of Convertible Preferred Stock owned by the Company or any of its Subsidiaries will be deemed not to be outstanding.

(o) **Outstanding Shares.**

(i) **Generally.** The shares of Convertible Preferred Stock that are outstanding at any time will be deemed to be those shares indicated as outstanding in the Register (absent manifest error), excluding those shares of Convertible Preferred Stock that have
theretofore been (1) cancelled by the Transfer Agent or delivered to the Transfer Agent for cancellation in accordance with Section 3(m); (2) paid in full upon their conversion or upon their repurchase pursuant to a Repurchase Upon Fundamental Change or a Redemption in accordance with this Certificate of Designations; or (3) deemed to cease to be outstanding to the extent provided in, and subject to, clause (ii), (iii), (iv) or (v) of this Section 3(o).

(ii) Replaced Shares. If any Certificate evidencing any share of Convertible Preferred Stock is replaced pursuant to Section 3(k), then such share will cease to be outstanding at the time of such replacement, unless the Transfer Agent and the Company receive proof reasonably satisfactory to them that such share is held by a “bona fide purchaser” under applicable law.

(iii) Shares to Be Repurchased Pursuant to a Redemption. If, on a Redemption Date, the Paying Agent holds consideration in kind and amount that is sufficient to pay the aggregate Redemption Price due on such date, then (unless there occurs a default in the payment of the Redemption Price) (1) the Convertible Preferred Stock to be redeemed on such date will be deemed, as of such date, to cease to be outstanding (without limiting the Company’s obligations pursuant to Section 5(d)); and (2) the rights of the Holders of such Convertible Preferred Stock, as such, will terminate with respect to such Convertible Preferred Stock, other than the right to receive the Redemption Price as provided in Section 7 (and, if applicable, declared Dividends as provided in Section 5(d)).

(iv) Shares to Be Repurchased Pursuant to a Repurchase Upon Fundamental Change. If, on a Fundamental Change Repurchase Date, the Paying Agent holds consideration in kind and amount that is sufficient to pay the aggregate Fundamental Change Repurchase Price due on such date, then (unless there occurs a default in the payment of the Fundamental Change Repurchase Price) (1) the Convertible Preferred Stock to be repurchased on such date will be deemed, as of such date, to cease to be outstanding (without limiting the Company’s obligations pursuant to Section 5(d)); and (2) the rights of the Holders of such Convertible Preferred Stock, as such, will terminate with respect to such Convertible Preferred Stock, other than the right to receive the Fundamental Change Repurchase Price as provided in Section 8 (and, if applicable, declared Dividends as provided in Section 5(d)).

(v) Shares to Be Converted. If any Convertible Preferred Stock is to be converted, then, at the Close of Business on the Conversion Date for such conversion (unless there occurs a default in the delivery of the Conversion Consideration due pursuant to Section 10 upon such conversion): (1) such Convertible Preferred Stock will be deemed to cease to be outstanding (without limiting the Company’s obligations pursuant to Section 5(d)); and (2) the rights of the Holders of such Convertible Preferred Stock, as such, will terminate with respect to such Convertible Preferred Stock, other than the right to receive such Conversion Consideration as provided in Section 10 (and, if applicable, declared Dividends as provided in Section 5(d)).
Repurchases by the Company and its Subsidiaries. Without limiting the generality of Section 3(m) and the next sentence, the Company and its Subsidiaries may, from time to time, repurchase Convertible Preferred Stock in open market purchases or in negotiated transactions without delivering prior notice to Holders. The Company will promptly deliver to the Transfer Agent for cancellation all Convertible Preferred Stock that the Company or any of its Subsidiaries have purchased or otherwise acquired.

Notations and Exchanges. Without limiting any rights of Holders pursuant to Section 9, if any amendment, supplement or waiver to the Certificate of Incorporation (including this Certificate of Designations) changes the terms of any Convertible Preferred Stock, then the Company may, in its discretion, require the Holder of the Certificate evidencing such Convertible Preferred Stock to deliver such Certificate to the Transfer Agent so that the Transfer Agent may place an appropriate notation prepared by the Company on such Certificate and return such Certificate to such Holder. Alternatively, at its discretion, the Company may, in exchange for such Convertible Preferred Stock, issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(c), a new Certificate evidencing such Convertible Preferred Stock that reflects the changed terms. The failure to make any appropriate notation or issue a new Certificate evidencing any Convertible Preferred Stock pursuant to this Section 3(q) will not impair or affect the validity of such amendment, supplement or waiver.

Section 4. RANKING. The Convertible Preferred Stock will rank (a) senior to (i) Dividend Junior Stock with respect to the payment of dividends; and (ii) Liquidation Junior Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up; (b) equally with (i) Dividend Parity Stock with respect to the payment of dividends; and (ii) Liquidation Parity Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up; and (c) junior to (i) Dividend Senior Stock with respect to the payment of dividends; and (ii) Liquidation Senior Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up.

Section 5. DIVIDENDS.

(a) Regular Dividends.

(i) Accumulation and Payment of Regular Dividends. The Convertible Preferred Stock will accumulate cumulative dividends at a rate per annum equal to the Regular Dividend Rate on the Liquidation Preference plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared (and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i)) thereof (calculated in accordance with Section 5(a)(ii)), regardless of whether or not declared or funds are legally available for their payment (such dividends that accumulate on the Convertible Preferred Stock pursuant to this sentence, “Regular Dividends”). Subject to the other provisions of this Section 5 (including, for the avoidance of doubt, Section 5(b)(i)), such Regular Dividends will be payable when, as and if declared by the Board of Directors, quarterly in arrears on each Regular Dividend Payment Date, to the Holders as of the Close of Business on the immediately preceding Regular Dividend Record Date. Regular Dividends on the Convertible Preferred Stock will accumulate daily from, and including, the last date on
which Regular Dividends have been paid (or, if no Regular Dividends have been paid, from, and including, the Initial Issue Date) to, but excluding, the next Regular Dividend Payment Date.

(ii) *Computation of Accumulated Regular Dividends.* Accumulated Regular Dividends will be computed on the basis of a 360-day year comprised of twelve 30-day months. Regular Dividends on each share of Convertible Preferred Stock will accrue on the Liquidation Preference (plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared (and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i)) of such share as of immediately before the Close of Business on the preceding Regular Dividend Payment Date (or, if there is no preceding Regular Dividend Payment Date, on the Initial Issue Date of such share).

(b) *Calculation of Regular Dividends.*

(i) *Generally.* With respect to any Regular Dividend Payment Date on or prior to the three (3) year anniversary of the Initial Issue Date, dividends shall not be permitted to be paid in cash, and instead the dollar amount (expressed as an amount per share of Convertible Preferred Stock) of each Regular Dividend on the Convertible Preferred Stock (whether or not declared) that has accumulated on the Convertible Preferred Stock in respect of the Regular Dividend Period ending on, but excluding, a Regular Dividend Payment Date, will be added, effective immediately before the Close of Business on the related Regular Dividend Payment Date, to the Liquidation Preference of each share of Convertible Preferred Stock outstanding as of such time. Such addition will occur automatically, without the need for any action on the part of the Company or any other Person. With respect to any Regular Dividend Payment Date after the three (3) year anniversary of the Initial Issue Date, Regular Dividends shall only be payable in cash, out of funds legally available therefor, and only when and if declared by the Board of Directors; *provided* that, for the avoidance of doubt, the Board of Directors may elect not to declare such Regular Dividends in which case such amounts shall continue to accrue and the Board of Directors may later declare and pay any previously accrued but undeclared dividends that accrue following the three (3) year anniversary of the Initial Issue Date in cash, out of funds legally available therefor, at any time thereafter.

(ii) *Construction.* Any Regular Dividends added to the Liquidation Preference of any share of Convertible Preferred Stock pursuant to Section 5(b)(i) will be deemed to be “declared” and “paid” on such share of Convertible Preferred Stock for all purposes of this Certificate of Designations.

(c) *Participating Dividends.*

(i) *Generally.* Subject to Section 5(c)(ii), no dividend or other distribution on the Common Stock (whether in cash, securities (including rights or options) or other property, or any combination of the foregoing) will be declared or paid on the Common Stock unless, at the time of such declaration and payment, an equivalent dividend or
distribution is declared and paid, respectively, on the Convertible Preferred Stock (such a dividend or distribution on the Convertible Preferred Stock, a “Participating Dividend,” and such corresponding dividend or distribution on the Common Stock, the “Common Stock Participating Dividend”), such that (1) the Record Date and the payment date for such Participating Dividend occur on the same dates as the Record Date and payment date, respectively, for such Common Stock Participating Dividend; and (2) the kind and amount of consideration payable per share of Convertible Preferred Stock in such Participating Dividend is the same kind and amount of consideration that would be payable in the Common Stock Participating Dividend in respect of a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with Section 10 but without regard to Section 10(h)) in respect of one (1) share of Convertible Preferred Stock that is converted with a Conversion Date occurring on such Record Date (subject to the same arrangements, if any, in such Common Stock Participating Dividend not to issue or deliver a fractional portion of any security or other property, but with such arrangement applying separately to each Holder and computed based on the total number of shares of Convertible Preferred Stock held by such Holder on such Record Date).

(ii) Stockholder Rights Plans, Common Stock Change Events and Stock Splits, Dividends and Combinations. Section 5(c)(i) will not apply to, and no Participating Dividend will be required to be declared or paid in respect of, (1) a Common Stock Change Event, as to which Section 10(i) will apply; (2) an event for which an adjustment to the Conversion Price is required pursuant to Section 10(f)(i), as to which the applicable provision of Section 10(f)(i) will apply (provided, however, that the Holders may elect, by written action of the Majority Holders delivered to the Company prior to the relevant Record Date, to receive a Participating Dividend in lieu of an adjustment to the Conversion Price pursuant to Section 10(f)(i)(2) through (4)); (3) a Distribution Transaction where the Majority Holders elect to engage in a Spin-Off Exchange Offer, and such Spin-Off Exchange Offer is completed pursuant to Section 10(f)(iv), and (4) rights issued pursuant to a stockholder rights plan.

(d) Treatment of Dividends Upon Redemption, Repurchase Upon Fundamental Change or Conversion. If the Redemption Date, Fundamental Change Repurchase Date or Conversion Date of any share of Convertible Preferred Stock is after a Record Date for a declared Dividend on the Convertible Preferred Stock and on or before the next Dividend Payment Date, then the Holder of such share at the Close of Business on such Record Date will be entitled, notwithstanding the related Redemption, Repurchase Upon Fundamental Change or conversion, as applicable, to receive, on or, at the Company’s election, before such Dividend Payment Date, such declared Dividend on such share.

Section 6. RIGHTS UPON LIQUIDATION, DISSOLUTION OR WINDING UP.

(a) Generally. If the Company liquidates, dissolves or winds up, whether voluntarily or involuntarily (any such event, a “Liquidation Event”), then, subject to the rights of any of the Company’s creditors or holders of any outstanding Liquidation Senior Stock, each share of Convertible Preferred Stock will entitle the Holder thereof to receive payment for the greater of the amounts set forth in clause (i) and (ii) below out of the Company’s assets or funds legally

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available for distribution to the Company’s stockholders, before any such assets or funds are distributed to, or set aside for the benefit of, any
Liquidation Junior Stock:

(i) the product of (x) the Initial Liquidation Preference multiplied by (y) the Liquidation Multiple, plus any accrued and unpaid dividends
in respect of the Convertible Preferred Stock, whether or not declared (and including, for the avoidance of doubt, any previously accrued and
unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i),
on such shares of Convertible Preferred Stock to, but excluding, the date of such payment); and

(ii) the amount such Holder would have received in respect of the number of shares of Common Stock that would be issuable upon
conversion of such share of Convertible Preferred Stock in connection with an Optional Conversion assuming the Conversion Date of such
conversion occurs on the date of such payment.

Upon payment of such amount in full on the outstanding Convertible Preferred Stock, Holders of the Convertible Preferred Stock will have no
rights to the Company’s remaining assets or funds, if any. If such assets or funds are insufficient to fully pay such amount on all outstanding shares of
Convertible Preferred Stock and the corresponding amounts payable in respect of all outstanding shares of Liquidation Parity Stock, if any, then, subject
to the rights of any of the Company’s creditors or holders of any outstanding Liquidation Senior Stock, such assets or funds will be distributed ratably on
the outstanding shares of Convertible Preferred Stock and Liquidation Parity Stock in proportion to the full respective distributions to which such shares
would otherwise be entitled.

(b) Certain Business Combination Transactions Deemed Not to Be a Liquidation. For purposes of Section 6(a), the Company’s consolidation or
combination with, or merger with or into, or the sale, lease or other transfer of all or substantially all of the Company’s assets (other than a sale, lease or
other transfer in connection with the Company’s liquidation, dissolution or winding up) to, another Person will not, in itself, constitute the Company’s
liquidation, dissolution or winding up, even if, in connection therewith, the Convertible Preferred Stock is converted into, or is exchanged for, or
represents solely the right to receive, other securities, cash or other property, or any combination of the foregoing.

Section 7. **REDEMPTION AT THE OPTION OF THE HOLDER.**

(a) **Right to Redeem On or After the Seven Year Anniversary.** Subject to the terms of this Section 7, each Holder has the right, at its election, to
require the Company to repurchase, by irrevocable, written notice to the Company, all or any portion of such Holder’s shares of the Convertible
Preferred Stock, at any time, on a Redemption Date on or after the seven (7) year anniversary of the Initial Issue Date, out of funds legally available
therefor, for a cash purchase price equal to the Redemption Price (each such redemption, a “Redemption”).

(b) **Redemption Date.** The Redemption Date for any Redemption will be a Business Day of such Holder’s choosing that is no more than twenty
(20), nor less than ten (10), calendar days after the Redemption Notice Date for such Redemption.

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(c) **Redemption Price.** The Redemption Price for any share of Convertible Preferred Stock to be repurchased pursuant to a Redemption is an amount in cash equal to the Liquidation Preference (plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared (and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i))) of such share at the Close of Business on the Redemption Date for such Redemption.

(d) **Redemption Notice.** To require the Company to redeem any share of Convertible Preferred Stock, such Holder must send the Company a notice of such Redemption (a "Redemption Notice"), which Redemption Notice must state:

(i) that such share has been called for Redemption;

(ii) the number of such shares subject to Redemption; and

(iii) the Redemption Date for such Redemption.

(e) **Payment of the Redemption Price.** The Company will cause the Redemption Price for each share of Convertible Preferred Stock subject to Redemption to be paid to the Holder thereof on or before the applicable Redemption Date.

Section 8. **Right of Holders to Require the Company to Repurchase Convertible Preferred Stock Upon a Fundamental Change.**

(a) **Fundamental Change Repurchase Right.** Subject to the other terms of this Section 8, if a Fundamental Change occurs, then each Holder may, at its election, either (i) effective as of immediately prior to the Fundamental Change, convert all or a portion of its shares of Convertible Preferred Stock pursuant to Section 10 at the then-current Conversion Price or (ii) require the Company to repurchase (the "Fundamental Change Repurchase Right") all, or any whole number of shares that is less than all, of such Holder’s Convertible Preferred Stock that have not been converted pursuant to clause (i) on the Fundamental Change Repurchase Date for such Fundamental Change, out of funds legally available therefor, for a cash purchase price equal to the Fundamental Change Repurchase Price.

(b) **Funds Legally Available for Payment of Fundamental Change Repurchase Price; Covenant Not to Take Certain Actions.** If the Company does not have sufficient funds legally available to pay the Fundamental Change Repurchase Price of all shares of Convertible Preferred Stock that are to be repurchased pursuant to a Repurchase Upon Fundamental Change, then the Company shall (1) pay the maximum amount of such Fundamental Change Repurchase Price that can be paid out of funds legally available for payment, which payment will be made pro rata to each Holder based on the total number of shares of Convertible Preferred Stock of such Holder that were otherwise to be repurchased pursuant to such Repurchase Upon Fundamental Change; and (2) purchase any shares of Convertible Preferred Stock not purchased because of the foregoing limitations at the applicable Fundamental Change Repurchase Price as soon as practicable after the Company is able to make such purchase out of assets legally available for the purchase of such shares of Convertible Preferred Stock. The inability of the Company (or its successor) to make a
purchase payment for any reason shall not relieve the Company (or its successor) from its obligation to effect any required purchase when, as and if permitted by applicable law. If the Company fails to pay the Fundamental Change Repurchase Price in full when due in accordance with this Section 8 in respect of some or all of the shares or Convertible Preferred Stock to be repurchased pursuant to the Fundamental Change Repurchase Right, the Company will pay Dividends on such shares not repurchased at a Regular Dividend Rate of six and one half percent (6.5%) per annum until such shares are repurchased, payable quarterly in arrears, out of funds legally available, on each Dividend Payment Date, for the period from and including the first Dividend Payment Date (or the Initial Issue Date, as applicable) upon which the Company fails to pay the Fundamental Change Repurchase Price in full when due in accordance with this Section 8 through but not including the latest of the day upon which the Company pays the Fundamental Change Repurchase Price in full in accordance with this Section 8. Notwithstanding the foregoing, in the event a Holder exercises a Fundamental Change Repurchase Right pursuant to this Section 8 at a time when the Company is restricted or prohibited (contractually or otherwise) from repurchasing some or all of the Convertible Preferred Stock subject to the Fundamental Change Repurchase Right, the Company will use its commercially reasonable efforts to obtain the requisite consents to remove or obtain an exception or waiver to such restrictions or prohibition. Nothing herein shall limit a Holder’s right to pursue any other remedies available to it hereunder, at law or in equity, including, without limitation, a decree of specific performance and/or injunctive relief with respect to the Company’s failure to comply with its obligations under this Section 8. The Company will not voluntarily take any action, or voluntarily engage in any transaction, that would result in a Fundamental Change unless the Company in good faith believes that it will have sufficient funds legally available to fully pay the maximum aggregate Fundamental Change Repurchase Price that would be payable in respect of such Fundamental Change on all shares of Convertible Preferred Stock then outstanding.

(c) **Fundamental Change Repurchase Date.** The Fundamental Change Repurchase Date for any Fundamental Change will be a Business Day of the Company’s choosing that is no more than thirty (30), nor less than twenty (20), Business Days after the date the Company sends the related Final Fundamental Change Notice pursuant to Section 8(f).

(d) **Fundamental Change Repurchase Price.** The Fundamental Change Repurchase Price for any share of Convertible Preferred Stock to be repurchased upon a Repurchase Upon Fundamental Change following a Fundamental Change is an amount in cash equal to the greater of (i) the product of (x) the Liquidation Preference of such share multiplied by (y) the Liquidation Multiple, plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i) of such share at the Close of Business on the Fundamental Change Repurchase Date for such Fundamental Change (including any accumulated and unpaid Regular Dividends, whether or not declared, on such share to, but excluding, such Fundamental Change Repurchase Date) and (ii) the amount that such Holders would have received had such Holders, immediately prior to such Fundamental Change, converted such shares of Convertible Preferred Stock into Common Stock pursuant to Section 10(a), without regard to any of the limitations on convertibility contained in Section 10(h).
(e) **Initial Fundamental Change Notice.** On or before the twentieth (20th) Business Day prior to the date on which the Company anticipates consummating a Fundamental Change (or, if later, promptly after the Company discovers that a Fundamental Change may occur), a written notice shall be sent by or on behalf of the Company to the Holders as they appear in the records of the Company, which notice shall contain the date on which the Fundamental Change is anticipated to be effected (or, if applicable, the date on which a Schedule TO or other schedule, form or report disclosing a Fundamental Change was filed) (the “Initial Fundamental Change Notice”). No later than ten (10) Business Days prior to the date on which the Company anticipates consummating the Fundamental Change as set forth in the Initial Fundamental Change Notice (or, if the Fundamental Change has already occurred as provided in the Initial Fundamental Change Notice, promptly, but no later than the tenth (10th) Business Day following receipt thereof), any Holder that desires to exercise its rights pursuant to Section 8(a) shall notify the Company in writing thereof and shall specify (x) whether such Holder is electing to exercise its rights pursuant to clause (i) or (ii) of Section 8(a) and (y) the number of shares of Convertible Preferred Stock subject thereto.

(f) **Final Fundamental Change Notice.** If a Holder elects to exercise its Fundamental Change Repurchase Right pursuant to Section 8(a)(ii), on or before the second (2nd) Business Day after the effective date of a Fundamental Change, the Company will send to each Holder a notice of such Fundamental Change (a “Final Fundamental Change Notice”). Such Final Fundamental Change Notice must state:

1. briefly, the events causing such Fundamental Change;
2. the effective date of such Fundamental Change;
3. the procedures that a Holder must follow to require the Company to repurchase its Convertible Preferred Stock pursuant to this Section 8, including the deadline for exercising the Fundamental Change Repurchase Right and the procedures for submitting and withdrawing a Fundamental Change Repurchase Notice;
4. the Fundamental Change Repurchase Date for such Fundamental Change;
5. the Fundamental Change Repurchase Price per share of Convertible Preferred Stock, including reasonable detail of the calculation thereof;
6. if the Fundamental Change Repurchase Date is after a Record Date for a declared Dividend on the Convertible Preferred Stock and on or before the next Dividend Payment Date, that such Dividend will be paid in accordance with Section 5(d);
7. the name and address of the Transfer Agent and the Conversion Agent;
8. the Conversion Price in effect on the date of such Final Fundamental Change Notice and a description and quantification of any adjustments to the Conversion Price that may result from such Fundamental Change;
9. that Convertible Preferred Stock may be converted pursuant to Section 10 at any time before the Close of Business on the Business Day immediately before the
related Fundamental Change Repurchase Date (or, if the Company fails to pay the Fundamental Change Repurchase Price due on such
Fundamental Change Repurchase Date in full, at any time until such time as the Company pays such Fundamental Change Repurchase Price in
full);

(x) that shares of Convertible Preferred Stock for which a Fundamental Change Repurchase Notice has been duly tendered and not duly
withdrawn must be delivered to the Paying Agent for the Holder thereof to be entitled to receive the Fundamental Change Repurchase Price; and

(xi) that shares of Convertible Preferred Stock that are subject to a Fundamental Change Repurchase Notice that has been duly tendered
may be converted only if such Fundamental Change Repurchase Notice is withdrawn in accordance with this Certificate of Designations.

(g) Procedures to Exercise the Fundamental Change Repurchase Right.

(i) Delivery of Fundamental Change Repurchase Notice and Shares of Convertible Preferred Stock to Be Repurchased. To exercise its
Fundamental Change Repurchase Right for any share(s) of Convertible Preferred Stock following a Fundamental Change, the Holder thereof must
deliver to the Paying Agent:

(1) before the Close of Business on the Business Day immediately before the related Fundamental Change Repurchase Date (or
such later time as may be required by law), a duly completed, written Fundamental Change Repurchase Notice with respect to such
share(s); and

(2) such share(s), duly endorsed for transfer (to the extent such share(s) are evidenced by one or more Physical Certificates).

(ii) Contents of Fundamental Change Repurchase Notices. Each Fundamental Change Repurchase Notice with respect to any share(s) of
Convertible Preferred Stock must state:

(1) if such share(s) are evidenced by one or more Physical Certificates, the certificate number(s) of such Physical Certificate(s);

(2) the number of shares of Convertible Preferred Stock to be repurchased, which must be a whole number; and

(3) that such Holder is exercising its Fundamental Change Repurchase Right with respect to such share(s).

(iii) Withdrawal of Fundamental Change Repurchase Notice. A Holder that has delivered a Fundamental Change Repurchase Notice with
respect to any share(s) of Convertible Preferred Stock may withdraw such Fundamental Change Repurchase Notice by delivering a written notice
of withdrawal to the Paying Agent at any time before the Close of Business on the Business Day immediately before the related Fundamental
Change Repurchase Date. Such withdrawal notice must state:

(1) if such share(s) are evidenced by one or more Physical Certificates, the certificate number(s) of such Physical Certificate(s);

(2) the number of shares of Convertible Preferred Stock to be withdrawn, which must be a whole number; and

(3) the number of shares of Convertible Preferred Stock, if any, that remain subject to such Fundamental Change Repurchase Notice, which must be a whole number.

If any Holder delivers to the Paying Agent any such withdrawal notice withdrawing any share(s) of Convertible Preferred Stock from any Fundamental Change Repurchase Notice previously delivered to the Paying Agent, and such share(s) have been surrendered to the Paying Agent, then such share(s) will be returned to the Holder thereof.

(h) **Payment of the Fundamental Change Repurchase Price.** Subject to Section 8(b), the Company will cause the Fundamental Change Repurchase Price for each share of Convertible Preferred Stock to be repurchased pursuant to a Repurchase Upon Fundamental Change to be paid to the Holder thereof on or before the applicable Fundamental Change Repurchase Date (or, if later in the case such share is evidenced by a Physical Certificate, the date the Physical Certificate evidencing such share is delivered to the Paying Agent).

(i) **Third Party May Conduct Repurchase Offer In Lieu of the Company.** Notwithstanding anything to the contrary in this Section 8, the Company will be deemed to satisfy its obligations under this Section 8 if one or more third parties conduct any Repurchase Upon Fundamental Change and related offer to repurchase Convertible Preferred Stock otherwise required by this Section 8 in a manner that would have satisfied the requirements of this Section 8 if conducted directly by the Company.

(j) **Fundamental Change Agreements.** The Company shall not enter into any agreement for a transaction constituting a Fundamental Change unless (i) such agreement provides for, or does not interfere with or prevent (as applicable), the exercise by the Holders of their Fundamental Change Repurchase Right in a manner that is consistent with, and gives effect to, this Section 8 and (ii) the acquiring or surviving Person in such Fundamental Change represents and covenants, in form and substance reasonably satisfactory to the Board of Directors acting in good faith, that at the closing of such Fundamental Change that such Person shall have sufficient funds (which may include, without limitation, cash and cash equivalents on the Company’s balance sheet, the proceeds of any debt or equity financing, available lines of credit or uncalled capital commitments) to consummate such Fundamental Change and the payment the Fundamental Change Repurchase Price in respect of shares of Convertible Preferred Stock that have not been converted into Common Stock prior to the Fundamental Change Repurchase Date pursuant to this Section 8 or Section 10, as applicable.
Section 9. VOTING RIGHTS. The Convertible Preferred Stock will have no voting rights except as set forth in this Section 9 or as otherwise provided in the Certificate of Incorporation or required by the General Corporation Law of the State of Delaware.

(a) Voting and Consent Rights with Respect to Specified Matters.

(i) Generally. Subject to the other provisions of this Section 9(a), each following event will require, and cannot be effected without, the affirmative vote or consent of (x) while any share of the Convertible Preferred Stock is outstanding with respect to Section 9(a)(i)(1) and Section 9(a)(i)(2), and (y) while at least twenty-five percent (25%) of the Convertible Preferred Stock issued on the Initial Issue Date is outstanding with respect to Section 9(a)(i)(3), Section 9(a)(i)(4), Section 9(a)(i)(5) and Section 9(a)(i)(6). Majority Holders:

1. any amendment, modification or repeal of any provision of the Certificate of Incorporation (including this Certificate of Designations) or Bylaws that adversely affects the rights, preferences or voting powers of the Convertible Preferred Stock (other than an amendment, modification or repeal permitted by Section 9(a)(ii));

2. any issuances by the Company of shares of, or other securities convertible into, Dividend Parity Stock, Liquidation Parity Stock, Dividend Senior Stock or Liquidation Senior Stock;

3. any change in size of the Company’s Board of Directors;

4. any voluntary dissolution, liquidation, bankruptcy or winding up of the Company or any deregistration or delisting of the Common Stock of the Company;

5. any incurrence by the Company of any indebtedness for borrowed money unless the aggregate amount of Net Debt of the Company and its Subsidiaries would not exceed $350,000,000 after giving effect to such incurrence; or

6. the disposition, spin-off, split-off or other divestiture of Mandiant Solutions, or any business unit or asset within Mandiant Solutions, in each case, in any transaction with consideration in excess of $300,000,000.

provided, however, that each of the following will be deemed not to adversely affect the special rights, preferences or voting powers of the Convertible Preferred Stock and will not require any vote or consent pursuant to Section 9(a)(ii)(1) and Section 9(a)(ii)(2):

(I) any increase in the number of the authorized but unissued shares of the Company’s undesignated preferred stock;

(II) any increase in the number of authorized shares of Convertible Preferred Stock as necessary with respect to issuances of shares of Convertible Preferred Stock in respect of Convertible Preferred Stock that was issued on the Initial Issue Date;
(III) the creation and issuance, or increase in the authorized or issued number, of any shares of any class or series of stock that is both Dividend Junior Stock and Liquidation Junior Stock; and

(IV) the application of Section 10(i), including the execution and delivery of any supplemental instruments pursuant to Section 10(i)(ii) solely to give effect to such provision.

(ii) Certain Amendments Permitted Without Consent. Notwithstanding anything to the contrary in Section 9(a)(i)(1), the Company may amend, modify or repeal any of the terms of the Convertible Preferred Stock without the vote or consent of any Holder to amend or correct this Certificate of Designations to cure any ambiguity or correct any omission, defect or inconsistency.

(b) Right to Vote with Holders of Common Stock on an As-Converted Basis. Subject to the other provisions of, and without limiting the other voting rights provided in, this Section 9, and except as provided in the Certificate of Incorporation or restricted by the General Corporation Law of the State of Delaware, the Holders will have the right to vote together as a single class with the holders of the Common Stock on each matter submitted for a vote or consent by the holders of the Common Stock, and, for these purposes, (i) the Convertible Preferred Stock of each Holder will entitle such Holder to be treated as if such Holder were the holder of record, as of the record or other relevant date for such matter, of a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with Section 10(e), including Section 10(e)(ii)) upon conversion of such Convertible Preferred Stock assuming such Convertible Preferred Stock were converted with a Conversion Date occurring on such record or other relevant date; and (ii) the Holders will be entitled to notice of all stockholder meetings or proposed actions by written consent in accordance with the Certificate of Incorporation, the Bylaws of the Company, and the General Corporation Law of the State of Delaware as if the Holders were holders of Common Stock. Notwithstanding the foregoing, the aggregate voting power of the Convertible Preferred Stock when voting with the holders of the Common Stock shall be limited to the extent necessary to comply with the NASDAQ Listing Standard Rules, and any resulting limitation on the voting rights of the Convertible Preferred Stock shall apply pro rata among the Holders thereof.

(c) Procedures for Voting and Consents.

(i) Rules and Procedures Governing Votes and Consents. If any vote or consent of the Holders will be held or solicited, including at an annual meeting or a special meeting of stockholders, then (1) the Board of Directors will adopt customary rules and procedures at its discretion to govern such vote or consent, subject to the other provisions of this Section 9; and (2) such rules and procedures may include fixing a record date to determine the Holders that are entitled to vote or provide consent, as applicable, rules governing the solicitation and use of proxies or written consents and customary procedures for the nomination and designation, by Holders, of directors for election; provided, however, that with respect to any voting rights of the Holders pursuant to Section 9(b), such rules and procedures will be the same rules and procedures that apply to holders of the Common Stock with respect to the applicable matter referred to in Section 9(b).
(ii) Voting Power of the Convertible Preferred Stock. Each share of Convertible Preferred Stock outstanding as of the applicable record date will be entitled to one vote on each matter on which the Holders of the Convertible Preferred Stock are entitled to vote separately as a class and not together with the holders of any other class or series of stock.

(iii) Written Consent in Lieu of Stockholder Meeting. Notwithstanding anything to the contrary otherwise set forth in the Certificate of Incorporation, the Bylaws or otherwise, a consent or affirmative vote of the Holders pursuant to Section 9(a) may be given or obtained in writing without a meeting.

Section 10. CONVERSION.

(a) Generally. Subject to the provisions of this Section 10, the Convertible Preferred Stock may be converted only pursuant to a Mandatory Conversion or an Optional Conversion.

(b) Conversion at the Option of the Holders.

(i) Conversion Right; When Shares May Be Submitted for Optional Conversion. Holders will have the right to submit all, or any whole number of shares that is less than all, of their shares of Convertible Preferred Stock pursuant to an Optional Conversion at any time; provided, however, that, notwithstanding anything to the contrary in this Certificate of Designations,

1. if a Fundamental Change Repurchase Notice is validly delivered pursuant to Section 8(g)(i) with respect to any share of Convertible Preferred Stock, then such share may not be submitted for Optional Conversion after the Business Day prior to the consummation of the Fundamental Change, except to the extent (A) such share is not subject to such notice; (B) such notice is withdrawn in accordance with Section 8(g)(iii); or (C) the Company fails to pay the Fundamental Change Repurchase Price for such share in accordance with this Certificate of Designations;

2. no Convertible Preferred Stock may be submitted for Optional Conversion to the extent limited by Section 10(h);

3. shares of Convertible Preferred Stock that are called for Redemption may not be submitted for Optional Conversion after the Close of Business on the Business Day immediately before the related Redemption Date (or, if the Company fails to pay the Redemption Price due on such Redemption Date in full, at any time until such time as the Company pays such Redemption Price in full); and

4. shares of Convertible Preferred Stock that are subject to Mandatory Conversion may not be submitted for Optional Conversion after the Close of Business on the Business Day immediately before the related Mandatory Conversion Date.
Conversions of Fractional Shares Not Permitted. Notwithstanding anything to the contrary in this Certificate of Designations, in no event will any Holder be entitled to convert a number of shares of Convertible Preferred Stock that is not a whole number.

(c) Mandatory Conversion at the Company’s Election.

(i) Mandatory Conversion Right. Subject to the provisions of this Section 10, the Company has the right (the “Mandatory Conversion Right”), exercisable at its election, to designate any Business Day on or after the three (3) year anniversary of the Initial Issue Date as a Conversion Date for the conversion (such a conversion, a “Mandatory Conversion”) of all, but not less than all, of the outstanding shares of Convertible Preferred Stock, but only if the Last Reported Sale Price per share of Common Stock exceeds one hundred and seventy-five percent (175%) of the Conversion Price on each of at least twenty (20) Trading Days (whether or not consecutive) during the thirty (30) consecutive Trading Days ending on, and including, the Trading Day immediately before the Mandatory Conversion Notice Date for such Mandatory Conversion.

(ii) Mandatory Conversion Prohibited in Certain Circumstances. The Company will not exercise its Mandatory Conversion Right, or otherwise send a Mandatory Conversion Notice, with respect to any Convertible Preferred Stock pursuant to this Section 10(c) unless the Common Stock Liquidity Conditions are satisfied with respect to the Mandatory Conversion. Notwithstanding anything to the contrary in this Section 10(c), the Company’s exercise of its Mandatory Conversion Right, and any related Mandatory Conversion Notice, will not apply to any share of Convertible Preferred Stock as to which a Fundamental Change Repurchase Notice has been duly delivered, and not withdrawn, pursuant to Section 8(g). Notwithstanding anything to the contrary in this Section 10(c), the Company cannot exercise its Mandatory Conversion Right with respect to any shares of Convertible Preferred Stock to the extent limited by Section 10(h).

(iii) Mandatory Conversion Date. The Mandatory Conversion Date for any Mandatory Conversion will be a Business Day of the Company’s choosing that is no more than twenty (20), nor less than ten (10), Business Days after the Mandatory Conversion Notice Date for such Mandatory Conversion.

(iv) Mandatory Conversion Notice. To exercise its Mandatory Conversion Right with respect to any shares of Convertible Preferred Stock, the Company must send to each Holder of such shares a written notice of such exercise (a “Mandatory Conversion Notice”).

(v) Such Mandatory Conversion Notice must state:

1. that the Company has exercised its Mandatory Conversion Right to cause the Mandatory Conversion of the shares of Convertible Preferred Stock, briefly describing the Company’s Mandatory Conversion Right under this Certificate of Designations;
2. the Mandatory Conversion Date for such Mandatory Conversion and the date scheduled for the settlement of such Mandatory Conversion;

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(3) the name and address of the Paying Agent and the Conversion Agent, as well as instructions whereby the Holder may surrender such share to the Transfer Agent or Conversion Agent;

(4) that shares of Convertible Preferred Stock subject to Mandatory Conversion may be converted earlier at the option of the Holders thereof pursuant to an Optional Conversion at any time before the Close of Business on the Business Day immediately before the Mandatory Conversion Date; and

(5) the Conversion Price in effect on the Mandatory Conversion Notice Date for such Mandatory Conversion, the number of shares of Common Stock to be issued to such Holder upon conversion of each share of Convertible Preferred Stock held by such Holder and, if applicable, the amount of accumulated and unpaid Regular Dividends, whether or not declared, in respect of such share of Convertible Preferred Stock as of the Mandatory Conversion Date.

(d) Conversion Procedures.

(i) Mandatory Conversion. If the Company duly exercises, in accordance with Section 10(c), its Mandatory Conversion Right with respect to any share of Convertible Preferred Stock, then (1) the Mandatory Conversion of such share will occur automatically and without the need for any action on the part of the Holder(s) thereof; and (2) the shares of Common Stock due upon such Mandatory Conversion will be registered in the name of, and, if applicable, the cash due upon such Mandatory Conversion will be delivered to, the Holder(s) of such share of Convertible Preferred Stock as of the Close of Business on the related Mandatory Conversion Date.

(ii) Requirements for Holders to Exercise Optional Conversion Right.

(1) Generally. To convert any share of Convertible Preferred Stock evidenced by a Certificate pursuant to an Optional Conversion, the Holder of such share must (w) complete, sign (by manual, facsimile or electronic signature) and deliver to the Conversion Agent an Optional Conversion Notice (at which time, in the case such Certificate is an Electronic Certificate, such Optional Conversion will become irrevocable); (x) if such Certificate is a Physical Certificate, deliver such Physical Certificate to the Conversion Agent (at which time such Optional Conversion will become irrevocable); (y) furnish any endorsements and transfer documents that the Company or the Conversion Agent may require; and (z) if applicable, pay any documentary or other taxes that are required to be paid by the Company as a result of a Holder requesting that shares be registered in a name other than such Holders’ name as described in Section 11(c).

(2) Optional Conversion Permitted only During Business Hours. Convertible Preferred Stock will be deemed to be surrendered for Optional Conversion only after the Open of Business and before the Close of Business on a day that is a Business Day.
(iii) Treatment of Accumulated Dividends upon Conversion.

(1) No Adjustments for Accumulated Regular Dividends. Without limiting the operation of Section 5(b)(i) and Section 10(c)(i), the Conversion Price will not be adjusted to account for any accumulated and unpaid Regular Dividends on any Convertible Preferred Stock being converted.

(2) Conversions Between A Record Date and a Dividend Payment Date. If the Conversion Date of any share of Convertible Preferred Stock to be converted is after a Record Date for a declared Dividend on the Convertible Preferred Stock and on or before the next Dividend Payment Date, then such Dividend will be paid pursuant to Section 5(d) notwithstanding such conversion.

(iv) When Holders Become Stockholders of Record of the Shares of Common Stock Issuable Upon Conversion. The Person in whose name any share of Common Stock is issuable upon conversion of any Convertible Preferred Stock will be deemed to become the holder of record of such share as of the Close of Business on the Conversion Date for such conversion.

(e) Settlement upon Conversion.

(i) Generally. Subject to Section 10(e)(ii), Section 10(h) and Section 14(b), the consideration due upon settlement of the conversion of each share of Convertible Preferred Stock will consist of a number of shares of Common Stock equal to the quotient obtained by dividing (I) the Liquidation Preference (plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared (and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i)), on such shares of Convertible Preferred Stock to, but excluding, the Conversion Date) for such shares of Convertible Preferred Stock subject to conversion by (II) the Conversion Price, in each case, as of immediately before the Close of Business on such Conversion Date.

(ii) Payment of Cash in Lieu of any Fractional Share of Common Stock. Subject to Section 14(b), in lieu of delivering any fractional share of Common Stock otherwise due upon conversion of any Convertible Preferred Stock, the Company will, to the extent it is legally able to do so and permitted under the terms of its indebtedness for borrowed money, pay cash based on the Last Reported Sale Price per share of Common Stock on the Conversion Date for such conversion (or, if such Conversion Date is not a Trading Day, the immediately preceding Trading Day).

(iii) Delivery of Conversion Consideration. Except as provided in Sections 10(f)(i)(3)(B), 10(f)(i)(5) and 10(i), the Company will pay or deliver, as applicable, the Conversion Consideration due upon conversion of any Convertible Preferred Stock on or before the second (2nd) Business Day immediately after the Conversion Date for such conversion.
Conversion Price Adjustments.

(i) Events Requiring an Adjustment to the Conversion Price. The Conversion Price will be adjusted from time to time as follows:

(1) Stock Dividends, Splits and Combinations. If the Company issues solely shares of Common Stock as a dividend or distribution on all or substantially all shares of the Common Stock, or if the Company effects a stock split or a stock combination of the Common Stock (in each case, excluding an issuance solely pursuant to a Common Stock Change Event, as to which Section 10(i) will apply), then the Conversion Price will be adjusted based on the following formula:

\[ CP_1 = CP_0 \times \frac{OS_0}{OS_1} \]

where:

- \( CP_0 \) = the Conversion Price in effect immediately before the Close of Business on the Record Date for such dividend or distribution, or immediately before the Close of Business on the effective date of such stock split or stock combination, as applicable;
- \( CP_1 \) = the Conversion Price in effect immediately after the Close of Business on such Record Date or effective date, as applicable;
- \( OS_0 \) = the number of shares of Common Stock outstanding immediately before the Close of Business on such Record Date or effective date, as applicable, without giving effect to such dividend, distribution, stock split or stock combination; and
- \( OS_1 \) = the number of shares of Common Stock outstanding immediately after giving effect to such dividend, distribution, stock split or stock combination.

If any dividend, distribution, stock split or stock combination of the type described in this Section 10(f)(i)(1) is declared or announced, but not so paid or made, then the Conversion Price will be readjusted, effective as of the date the Board of Directors, or any Officer acting pursuant to authority conferred by the Board of Directors, determines not to pay such dividend or distribution or to effect such stock split or stock combination, to the Conversion Price that would then be in effect had such dividend, distribution, stock split or stock combination not been declared or announced.

(2) Rights, Options and Warrants. If the Company distributes, to all or substantially all holders of Common Stock, rights, options or warrants (other than rights issued or otherwise distributed pursuant to a stockholder rights plan, as to which Section 10(f)(i)(3)(A) and Section 10(f)(iii) will apply) entitling such
holders, for a period of not more than sixty (60) calendar days after the Record Date of such distribution, to subscribe for or purchase shares of Common Stock at a price per share that is less than the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date such distribution is announced, then the Conversion Price will be decreased based on the following formula:

$$CP_1 = CP_0 \times \frac{OS + Y}{OS + X}$$

where:

- $CP_0$ = the Conversion Price in effect immediately before the Close of Business on such Record Date;
- $CP_1$ = the Conversion Price in effect immediately after the Close of Business on such Record Date;
- $OS$ = the number of shares of Common Stock outstanding immediately before the Close of Business on such Record Date;
- $Y$ = a number of shares of Common Stock obtained by dividing (x) the aggregate price payable to exercise such rights, options or warrants by (y) the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date such distribution is announced; and
- $X$ = the total number of shares of Common Stock issuable pursuant to such rights, options or warrants.

To the extent such rights, options or warrants are not so distributed, the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the decrease to the Conversion Price for such distribution been made on the basis of only the rights, options or warrants, if any, actually distributed. In addition, to the extent that shares of Common Stock are not delivered after the expiration of such rights, options or warrants (including as a result of such rights, options or warrants not being exercised), the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the decrease to the Conversion Price for such distribution been made on the basis of delivery of only the number of shares of Common Stock actually delivered upon exercise of such rights, option or warrants.

For purposes of this Section 10(f)(i)(2), in determining whether any rights, options or warrants entitle holders of Common Stock to subscribe for or purchase shares of Common Stock at a price per share that is less than the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date the
distribution of such rights, options or warrants is announced, and in determining the aggregate price payable to exercise such rights, options or warrants, there will be taken into account any consideration the Company receives for such rights, options or warrants and any amount payable on exercise thereof, with the value of such consideration, if not cash, to be determined by the Board of Directors.

(3) Distribution Transactions and Other Distributed Property.

(A) Distributions Other than Distribution Transactions. If the Company distributes shares of its Capital Stock, evidences of the Company’s indebtedness or other assets or property of the Company, or rights, options or warrants to acquire the Company’s Capital Stock or other securities, to all or substantially all holders of the Common Stock, excluding:

(I) dividends, distributions, rights, options or warrants for which an adjustment to the Conversion Price is required pursuant to Section 10(f)(i)(1) or 10(f)(i)(2);

(II) dividends or distributions paid exclusively in cash for which an adjustment to the Conversion Price is required pursuant to Section 10(f)(i)(4);

(III) rights issued or otherwise distributed pursuant to a stockholder rights plan, except to the extent provided in Section 10(f)(iii);

(IV) Distribution Transactions for which an adjustment to the Conversion Price is required pursuant to Section 10(f)(i)(3)(B);

(V) a distribution solely pursuant to a tender offer or exchange offer for shares of Common Stock, as to which Section 10(f)(i)(2) will apply; and

(VI) a distribution solely pursuant to a Common Stock Change Event, as to which Section 10(i) will apply,

then the Conversion Price will be decreased based on the following formula:

\[
CP_1 = CP_0 \times \frac{SP - FMV}{SP}
\]

where:

\( CP_0 \) = the Conversion Price in effect immediately before the Close of Business on the Record Date for such distribution;

\( CP_1 \) = the Conversion Price in effect immediately after the Close of Business on such Record Date;
SP = the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the Ex-Dividend Date for such distribution; and

FMV = the fair market value (as determined by the Board of Directors), as of such Record Date, of the shares of Capital Stock, evidences of indebtedness, assets, property, rights, options or warrants distributed per share of Common Stock pursuant to such distribution;

provided, however, that, if FMV is equal to or greater than SP, then, in lieu of the foregoing adjustment to the Conversion Price, each Holder will receive, for each share of Convertible Preferred Stock held by such Holder on such Record Date, at the same time and on the same terms as holders of Common Stock, the amount and kind of shares of Capital Stock, evidences of indebtedness, assets, property, rights, options or warrants that such Holder would have received in such distribution if such Holder had owned, on such Record Date, a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with Section 10(e) but without regard to Section 10(e)(ii), 10(h) or Section 10(e)(iii)) in respect of one (1) share of Convertible Preferred Stock that is converted with a Conversion Date occurring on such Record Date (subject to the same arrangements, if any, in such distribution not to issue or deliver a fractional portion of any Capital Stock, evidences of indebtedness, assets, property, rights, options or warrants, but with such arrangement applying separately to each Holder and computed based on the total number of shares of Convertible Preferred Stock held by such Holder on such Record Date).

To the extent such distribution is not so paid or made, the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the adjustment been made on the basis of only the distribution, if any, actually made or paid.

(B) Distribution Transactions. If the Company engages in a Distribution Transaction in which it distributes or dividends shares of Capital Stock of any class or series, or similar equity interests, of or relating to an Affiliate or Subsidiary or other business unit of the Company to all or substantially all holders of the Common Stock (other than solely pursuant to (x) a Common Stock Change Event, as to which Section 10(i) will apply; or (y) a tender offer or exchange offer for shares of Common Stock, as to which Section 10(f)(i)(2) will apply), and such Capital Stock or equity interests are listed or quoted (or will be listed or quoted upon the
consummation of the transaction) on a U.S. national securities exchange, then the Conversion Price will be decreased based on the following formula:

\[ CP_1 = CP_0 \times \frac{SP}{FMV + SP} \]

where:

- \( CP_0 \) = the Conversion Price in effect immediately before the Close of Business on the Record Date for such Distribution Transaction;
- \( CP_1 \) = the Conversion Price in effect immediately after the Close of Business on such Record Date;
- \( SP \) = the average of the Last Reported Sale Prices per share of Common Stock for each Trading Day in the Distribution Transaction Valuation Period (as defined below); and
- \( FMV \) = the product of (x) the average of the Last Reported Sale Prices per share or unit of the Capital Stock or equity interests distributed in such Distribution Transaction over the ten (10) consecutive Trading Day period (the “Distribution Transaction Valuation Period”) beginning on, and including, the Ex-Dividend Date for such Distribution Transaction (such average to be determined as if references to Common Stock in the definitions of “Last Reported Sale Price,” “Trading Day” and “Market Disruption Event” were instead references to such Capital Stock or equity interests); and (y) the number of share or units of such Capital Stock or equity interests distributed per share of Common Stock in such Distribution Transaction.

provided, however, that in the event of a Distribution Transaction where the Majority Holders elect to engage in a Spin-Off Exchange Offer, and such Spin-Off Exchange Offer is completed pursuant to Section 10(f)(iv), then no adjustment to the Conversion Price shall be made pursuant to this Section 10(f)(i)(3)(B).

The adjustment to the Conversion Price pursuant to this Section 10(f)(i)(3)(B) will be calculated as of the Close of Business on the last Trading Day of the Distribution Transaction Valuation Period that will be given effect immediately after the Close of Business of the Record Date for the Distribution Transaction, with retroactive effect. If the Conversion Date for any share of Convertible Preferred Stock to be converted occurs during the Distribution Transaction Valuation Period, then, notwithstanding anything to the contrary in this Certificate of Designations, the Company
will, if necessary, delay the settlement of such conversion until the second (2nd) Business Day after the Last Trading Day of the Distribution Transaction Valuation Period.

To the extent any dividend or distribution of the type described in Section 10(f)(i)(3)(B) is declared but not made or paid, the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the adjustment been made on the basis of only the dividend or distribution, if any, actually made or paid.

(4) Cash Dividends or Distributions. If any cash dividend or distribution is made to all or substantially all holders of Common Stock, then the Conversion Price will be decreased based on the following formula:

\[
CP_1 = CP_0 \times \frac{SP - D}{SP}
\]

where:

- \( CP_0 \) = the Conversion Price in effect immediately before the Close of Business on the Record Date for such dividend or distribution;
- \( CP_1 \) = the Conversion Price in effect immediately after the Close of Business on such Record Date;
- \( SP \) = the Last Reported Sale Price per share of Common Stock on the Trading Day immediately before the Ex-Dividend Date for such dividend or distribution; and
- \( D \) = the cash amount distributed per share of Common Stock in such dividend or distribution;

provided, however, that, if \( D \) is equal to or greater than \( SP \), then, in lieu of the foregoing adjustment to the Conversion Price, each Holder will receive, for each share of Convertible Preferred Stock held by such Holder on such Record Date, at the same time and on the same terms as holders of Common Stock, the amount of cash that such Holder would have received in such dividend or distribution if such Holder had owned, on such Record Date, a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with Section 10(e) but without regard to Section 10(e)(ii), 10(h) or Section 10(e)(iii)) in respect of one (1) share of Convertible Preferred Stock that is converted with a Conversion Date occurring on such Record Date. To the extent such dividend or distribution is declared but not made or paid, the Conversion Price
will be readjusted to the Conversion Price that would then be in effect had the adjustment been made on the basis of only the dividend or
distribution, if any, actually made or paid.

(5) Tender Offers or Exchange Offers. If the Company or any of its Subsidiaries makes a payment in respect of a tender offer or
exchange offer for shares of Common Stock (other than solely pursuant to an odd-lot tender offer pursuant to Rule 13e-4(h)(5) under the
Exchange Act), and the value (determined as of the Expiration Time by the Board of Directors) of the cash and other consideration paid
per share of Common Stock in such tender or exchange offer exceeds the Last Reported Sale Price per share of Common Stock on the
Trading Day immediately after the last date (the “Expiration Date”) on which tenders or exchanges may be made pursuant to such tender
or exchange offer (as it may be amended), then the Conversion Price will be decreased based on the following formula:

\[
CP_1 = CP_0 \times \frac{SP \times OS_0}{AC + (SP \times OS_1)}
\]

where:

- \( CP_0 \) = the Conversion Price in effect immediately before the time (the “Expiration Time”) such tender or
  exchange offer expires;
- \( CP_1 \) = the Conversion Price in effect immediately after the Expiration Time;
- \( SP \) = the average of the Last Reported Sale Prices per share of Common Stock over the ten (10) consecutive
  Trading Day period (the “Tender/Exchange Offer Valuation Period”) beginning on, and including, the
  Trading Day immediately after the Expiration Date;
- \( OS_0 \) = the number of shares of Common Stock outstanding immediately before the Expiration Time (including all
  shares of Common Stock accepted for purchase or exchange in such tender or exchange offer);
- \( AC \) = the aggregate value (determined as of the Expiration Time by the Board of Directors) of all cash and other
  consideration paid for shares of Common Stock purchased or exchanged in such tender or exchange offer;
  and
- \( OS_1 \) = the number of shares of Common Stock outstanding immediately after the Expiration Time (excluding all
  shares of Common Stock accepted for purchase or exchange in such tender or exchange offer);
provided, however, that the Conversion Price will in no event be adjusted up pursuant to this Section 10(f)(i)(5), except to the extent provided in the immediately following paragraph. The adjustment to the Conversion Price pursuant to this Section 10(f)(i)(5) will be calculated as of the Close of Business on the last Trading Day of the Tender/Exchange Offer Valuation Period but will be given effect immediately after the Expiration Time, with retroactive effect. If the Conversion Date for any share of Convertible Preferred Stock to be converted occurs on the Expiration Date or during the Tender/Exchange Offer Valuation Period, then, notwithstanding anything to the contrary in this Certificate of Designations, the Company will, if necessary, delay the settlement of such conversion until the second (2nd) Business Day after the last Trading Day of the Tender/Exchange Offer Valuation Period.

To the extent such tender or exchange offer is announced but not consummated (including as a result of being precluded from consummating such tender or exchange offer under applicable law), or any purchases or exchanges of shares of Common Stock in such tender or exchange offer are rescinded, the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the adjustment been made on the basis of only the purchases or exchanges of shares of Common Stock, if any, actually made, and not rescinded, in such tender or exchange offer.

(ii) **No Adjustments in Certain Cases.** Without limiting the operation of Section 5(b)(i) and 10(e)(i), the Company will not be required to adjust the Conversion Price except pursuant to Section 10(f)(i).

(iii) **Stockholder Rights Plans.** If any shares of Common Stock are to be issued upon conversion of any Convertible Preferred Stock and, at the time of such conversion, the Company has in effect any stockholder rights plan, then the Holder of such Convertible Preferred Stock will be entitled to receive, in addition to, and concurrently with the delivery of, the consideration otherwise due upon such conversion, the rights set forth in such stockholder rights plan, unless such rights have separated from the Common Stock at such time, in which case, and only in such case, the Conversion Price will be adjusted pursuant to Section 10(f)(i)(3)(A) on account of such separation as if, at the time of such separation, the Company had made a distribution of the type referred to in such Section 10(f)(i)(3)(A) to all holders of Common Stock, subject to readjustment pursuant to Section 10(f)(i)(3)(A) if such rights expire, terminate or are redeemed.

(iv) **Distribution Transactions.**

(1) In the event the Company proposes to effect a Distribution Transaction, then, by written action of the Holders constituting at least a majority of the outstanding voting power of the Convertible Preferred Stock (the “Majority Holders”) delivered to the Company prior to the relevant Record Date, the Company will negotiate in good faith with such Majority Holders the terms and conditions of an exchange offer described herein (the “Spin-Off Exchange Offer”), and in the event the Spin-Off Exchange Offer is completed, then no adjustment to the Conversion Price shall be made pursuant to Section 10(f)(i)(3)(B).
(2) In connection with the Spin-Off Exchange Offer, each share of Convertible Preferred Stock will be exchanged by the Company for one share of Mirror Preferred Stock and one share of Exchange Preferred Stock. The Liquidation Preference of the Convertible Preferred Stock will be allocated between the shares of Mirror Preferred Stock and Exchange Preferred Stock in accordance with the relative fair market value of the assets and businesses to be held by the Distributed Entity and the assets and businesses to be retained by the Company, as determined in good faith by the Board of Directors after consultation with the Majority Holders.

(3) The Company and the Majority Holders will negotiate reasonably and in good faith and each will use its reasonable best efforts to agree on mutually agreeable terms for the Spin-Off Exchange Offer, including, without limitation, the certificate of designations with respect to the Mirror Preferred Stock and the certificate of designations with respect to the Exchange Preferred Stock, to reflect the fact that following the completion of the Spin-Off Exchange Offer the adjustments to the Conversion Price will be based upon the common stock of the Company and the common stock of the Distributed Entity, and that the rights, benefits, obligations and economic characteristics of the Series A Preferred Stock will not be expanded or diminished as a result of the exchange of shares of Convertible Preferred Stock for shares of Mirror Preferred Stock and Exchange Preferred Stock. The exchange of Convertible Preferred Stock for Exchange Preferred Stock in the Spin-Off Exchange Offer shall be structured in a manner so as to qualify as a tax-free recapitalization within the meaning of Section 368(a) of the Code to the maximum extent permitted by applicable law.

(v) Determination of the Number of Outstanding Shares of Common Stock. For purposes of Section 10(f)(i), the number of shares of Common Stock outstanding at any time will (1) include shares issuable in respect of scrip certificates issued in lieu of fractions of shares of Common Stock; and (2) exclude shares of Common Stock held in the Company’s treasury (unless the Company pays any dividend or makes any distributions on shares of Common Stock held in its treasury).

(vi) Calculations. All calculations with respect to the Conversion Price and adjustments thereto will be made to the nearest 1/100th of a cent (with 5/1,000ths rounded upward).

(vii) Notice of Conversion Price Adjustments. Upon the effectiveness of any adjustment to the Conversion Price pursuant to Section 10(f) (i), the Company will promptly send notice to the Holders containing (1) a brief description of the transaction or other event on account of which such adjustment was made; (2) the Conversion Price in effect immediately after such adjustment; and (3) the effective time of such adjustment.

(g) Voluntary Conversion Price Decreases.
(i) **Generally.** To the extent permitted by law and applicable stock exchange rules, the Company, from time to time, may (but is not required to) decrease the Conversion Price by any amount if (1) the Board of Directors determines that such decrease is in the Company’s best interest or that such decrease is advisable to avoid or diminish any income tax imposed on holders of Common Stock or rights to purchase Common Stock as a result of any dividend or distribution of shares (or rights to acquire shares) of Common Stock or any similar event; (2) such decrease is in effect for a period of at least twenty (20) Business Days; and (3) such decrease is irrevocable during such period; provided, however, that any such decrease that would be reasonably expected to result in any income tax imposed on holders of Convertible Preferred Stock shall require the affirmative vote or consent of Majority Holders.

(ii) **Notice of Voluntary Decrease.** If the Board of Directors determines to decrease the Conversion Price pursuant to Section 10(g)(i), then, no later than the first Business Day of the related twenty (20) Business Day period referred to in Section 10(g)(i), the Company will send notice to each Holder, the Transfer Agent and the Conversion Agent of such decrease to the Conversion Price, the amount thereof and the period during which such decrease will be in effect.

(h) **Restriction on Conversions.**

(i) **Equity Treatment Limitation.**

(1) **Generally.** Notwithstanding anything to the contrary in this Certificate of Designations, the Company will in no event be required to deliver any shares of Common Stock in settlement of the conversion of any Convertible Preferred Stock to the extent, but only to the extent, the Company does not then have sufficient authorized and unissued shares of Common Stock that are not reserved for other purposes (the limitation set forth in this sentence, the **"Equity Treatment Limitation,"** and any shares of Common Stock that would otherwise be deliverable in excess of the number of such authorized and unissued shares, the **"Deficit Shares"**). If any Deficit Shares are withheld pursuant to the Equity Treatment Limitation and, at any time thereafter, some or all of such Deficit Shares could be delivered without violating the Equity Treatment Limitation, then (A) the Company will deliver such Deficit Shares to the extent, but only to the extent, such delivery is permitted by the Equity Treatment Limitation; and (B) the provisions of this sentence will continue to apply until there are no remaining Deficit Shares.

(2) **Share Reserve Provisions.** On the Initial Issue Date, the Number of Reserved Shares is not less than the Initial Share Reserve Requirement. The Company shall at all times reserve and keep available a Number of Reserved Shares to be no less than the Continuing Share Reserve Requirement at any time when any Convertible Preferred Stock is outstanding (including, if applicable, by seeking the approval of its stockholders to amend the Certificate of Incorporation to increase the number of authorized shares of Common Stock).
(3) **Limitation on Certain Transactions.** The Company will not, without the prior written consent of Majority Holders, effect any transaction that would require an adjustment to the Conversion Price pursuant to Section 10(f)(i) if the settlement of the conversion of all Convertible Preferred Stock then outstanding (assuming such conversion occurred immediately after giving effect to such adjustment) would result in any Deficit Shares pursuant to the Equity Treatment Limitation.

(i) **Effect of Common Stock Change Event.**

   (i) **Generally.** If there occurs any:

   (1) recapitalization, reclassification or change of the Common Stock, other than (x) changes solely resulting from a subdivision or combination of the Common Stock, (y) a change only in par value or from par value to no par value or no par value to par value or (z) stock splits and stock combinations that do not involve the issuance of any other series or class of securities;

   (2) consolidation, merger, combination or binding or statutory share exchange involving the Company;

   (3) sale, lease or other transfer of all or substantially all of the assets of the Company and its Subsidiaries, taken as a whole, to any Person; or

   (4) other similar event,

and, as a result of which, the Common Stock is converted into, or is exchanged for, or represents solely the right to receive, other securities, cash or other property, or any combination of the foregoing (such an event, a “Common Stock Change Event,” and such other securities, cash or property, the “Reference Property,” and the amount and kind of Reference Property that a holder of one (1) share of Common Stock would be entitled to receive on account of such Common Stock Change Event (without giving effect to any arrangement not to issue or deliver a fractional portion of any security or other property), a “Reference Property Unit”), then, notwithstanding anything to the contrary in this Certificate of Designations,

   (A) from and after the effective time of such Common Stock Change Event, (I) the consideration due upon conversion of any Convertible Preferred Stock will be determined in the same manner as if each reference to any number of shares of Common Stock in this Section 10 or in Section 11, or in any related definitions, were instead a reference to the same number of Reference Property Units; (II) for purposes of Section 7 and Section 10(c), each reference to any number of shares of Common Stock in such Sections (or in any related definitions) will instead be deemed to be a reference to the same number of Reference Property Units; and (III) for purposes of the definitions of “Fundamental Change,” the terms “Common Stock” and “common equity” will be deemed to mean the common equity (including depositary receipts representing common equity), if any, forming part of such Reference Property; and
(B) if such Reference Property Unit consists entirely of cash, then the Company will pay the cash due in respect of all conversions whose Conversion Date occurs on or after the effective date of such Common Stock Change Event no later than the tenth (10th) Business Day after the relevant Conversion Date.

If the Reference Property consists of more than a single type of consideration to be determined based in part upon any form of stockholder election, then the composition of the Reference Property Unit will be deemed to be the weighted average of the types and amounts of consideration actually received, per share of Common Stock, by the holders of Common Stock. The Company will notify the Holders of such weighted average as soon as practicable after such determination is made.

(i) Compliance Covenant. The Company will not become a party to any Common Stock Change Event unless its terms are consistent with this Section 10(i).

(ii) Execution of Supplemental Instruments. On or before the date the Common Stock Change Event becomes effective, the Company and, if applicable, the resulting, surviving or transferee Person (if not the Company) of such Common Stock Change Event (the “Successor Person”) will execute and deliver such supplemental instruments, if any, as the Company reasonably determines are necessary or desirable to (1) provide for subsequent adjustments to the Conversion Price pursuant to Section 10(f)(i) in a manner consistent with this Section 10(i); and (2) give effect to such other provisions, if any, as the Company reasonably determines are appropriate to preserve the economic interests of the Holders and to give effect to Section 10(i)(i). If the Reference Property includes shares of stock or other securities or assets of a Person other than the Successor Person, then such other Person will also execute such supplemental instrument(s), if any, and such supplemental instrument(s) will contain such additional provisions, if any, that the Company reasonably determines are appropriate to preserve the economic interests of Holders.

(iii) Notice of Common Stock Change Event. The Company will provide notice of each Common Stock Change Event to Holders as promptly as possible after the effective date of the Common Stock Change Event.

Section 11. CERTAIN PROVISIONS RELATING TO THE ISSUANCE OF COMMON STOCK.

(a) Equitable Adjustments to Prices. Whenever this Certificate of Designations requires the Company to calculate the average of the Last Reported Sale Prices, or any function thereof, over a period of multiple days (including to calculate an adjustment to the Conversion Price), the Company will make appropriate adjustments, if any, to those calculations to account for any adjustment to the Conversion Price pursuant to Section 10(f)(i) that becomes effective, or any event requiring such an adjustment to the Conversion Price where the Ex-Dividend Date, effective date or Expiration Date, as applicable, of such event occurs, at any time during such period.
(b) Status of Shares of Common Stock. Each share of Common Stock delivered upon conversion of the Convertible Preferred Stock of any Holder will be a newly issued share and will be duly authorized and validly issued, fully paid, non-assessable, free from preemptive rights and free of any lien or adverse claim (except to the extent of any lien or adverse claim created by the action or inaction of such Holder or the Person to whom such share of Common Stock will be delivered). If the Common Stock is then listed on any securities exchange, or quoted on any inter-dealer quotation system, then the Company will cause each such share of Common Stock, when so delivered, to be admitted for listing on such exchange or quotation on such system.

(c) Taxes Upon Issuance of Common Stock. The Company will pay any documentary, stamp or similar issue or transfer tax or duty due on the issue of any shares of Common Stock upon conversion of the Convertible Preferred Stock of any Holder, except any tax or duty that is due because such Holder requests those shares to be registered in a name other than such Holder’s name.

Section 12. Taxes. The Company shall pay any and all stock transfer, documentary, stamp and similar taxes that may be payable in respect of any issuance or delivery of shares of Convertible Preferred Stock or shares of Common Stock or other securities issued on account of Convertible Preferred Stock pursuant hereto or certificates evidencing such shares or securities. However, in the case of conversion of Convertible Preferred Stock, the Company shall not be required to pay any such tax that may be payable in respect of any transfer involved in the issuance or delivery of shares of Convertible Preferred Stock, shares of Common Stock or other securities to a beneficial owner other than the beneficial owner of the Convertible Preferred Stock immediately prior to such conversion, and shall not be required to make any such issuance, delivery or payment unless and until the Person otherwise entitled to such issuance, delivery or payment has paid to the Company the amount of any such tax or has established, to the satisfaction of the Company, that such tax has been paid or is not payable.

Section 13. Term. Except as expressly provided in this Certificate of Designations, the shares of Convertible Preferred Stock shall not be redeemable or otherwise mature and the term of the Convertible Preferred Stock shall be perpetual.

Section 14. Calculations.

(a) Responsibility; Schedule of Calculations. Except as otherwise provided in this Certificate of Designations, the Company will be responsible for making all calculations called for under this Certificate of Designations or the Convertible Preferred Stock, including determinations of the Conversion Price, the Last Reported Sale Prices and accumulated Regular Dividends, whether or not declared, on the Convertible Preferred Stock. The Company will make all calculations in good faith, and, absent manifest error, its calculations will be final and binding on all Holders. The Company will provide a schedule of such calculations to any Holder upon written request.

(b) Calculations Aggregated for Each Holder. The composition of the Conversion Consideration due upon conversion of the Convertible Preferred Stock of any Holder will be computed based on the total number of shares of Convertible Preferred Stock of such Holder being converted with the same Conversion Date. For these purposes, any cash amounts due to such Holder in respect thereof will be rounded to the nearest cent.
Section 15. **NOTICES.** The Company will send all notices or communications to Holders pursuant to this Certificate of Designations in writing and delivered personally, by facsimile or e-mail (with confirmation of receipt requested from the recipient, in the case of e-mail), or sent by a nationally recognized overnight courier service guaranteeing next day delivery, to the Holders’ respective addresses shown on the Register. Unless otherwise specified herein, all notices and communications hereunder shall be deemed to have been given upon the earlier of receipt thereof or three (3) Business Days after the mailing thereof if sent by registered or certified mail with postage prepaid, or by private courier service.

Section 16. **FACTS ASCERTAINABLE.** When the terms of this Certificate of Designations refers to a specific agreement or other document to determine the meaning or operation of a provision hereof, the Secretary of the Company shall maintain a copy of such agreement or document at the principal executive offices of the Company and a copy thereof shall be provided free of charge to any Holder who makes a request therefor. The Secretary of the Company shall also maintain a written record of the Initial Issue Date, the number of shares of Convertible Preferred Stock issued to a Holder and the date of each such issuance, and shall furnish such written record free of charge to any Holder who makes a request therefor.

Section 17. **WAIVER.** Notwithstanding any provision in this Certificate of Designations to the contrary, any provision contained herein and any right of the Holders of Convertible Preferred Stock granted hereunder may be waived as to all shares of Convertible Preferred Stock (and the Holders thereof) upon the vote or written consent of the Majority Holders.

Section 18. **SEVERABILITY.** If any term of the Convertible Preferred Stock set forth herein is invalid, unlawful or incapable of being enforced by reason of any rule of law or public policy, all other terms set forth herein which can be given effect without the invalid, unlawful or unenforceable term will, nevertheless, remain in full force and effect, and no term herein set forth will be deemed dependent upon any other such term unless so expressed herein.

Section 19. **NO OTHER RIGHTS.** The Convertible Preferred Stock will have no rights, preferences or voting powers except as provided in this Certificate of Designations or the Certificate of Incorporation or as required by applicable law.
IN WITNESS WHEREOF, the Company has caused this Certificate of Designations to be duly executed as of the date first written above.

FIREYE, INC.

By: ________________________________
Name: ______________________________
Title: ______________________________

[Signature Page to Certificate of Designations]
FORM OF CONVERTIBLE PREFERRED STOCK CERTIFICATE

[Insert Restricted Stock Legend, if applicable]

FireEye, Inc.

4.5% Series A Convertible Preferred Stock

Certificate No. [            ]

FireEye, Inc., a Delaware corporation (the “Company”), certifies that [                ] is the registered owner of [                ] shares of the Company’s 4.5% Series A Convertible Preferred Stock (the “Convertible Preferred Stock”) evidenced by this certificate (this “Certificate”). The special rights, preferences and voting powers of the Convertible Preferred Stock are set forth in the Certificate of Designations of the Company establishing the Convertible Preferred Stock (the “Certificate of Designations”). Capitalized terms used in this Certificate without definition have the respective meanings ascribed to them in the Certificate of Designations.

Additional terms of this Certificate are set forth on the other side of this Certificate.

[The Remainder of This Page Intentionally Left Blank; Signature Page Follows]

A-1
IN WITNESS WHEREOF, FireEye, Inc. has caused this instrument to be duly executed as of the date set forth below.

Date: _____________________________
By: _____________________________
Name: ___________________________
Title: ___________________________

Date: _____________________________
By: _____________________________
Name: ___________________________
Title: ___________________________

A-2
[legal name of Transfer Agent], as Transfer Agent, certifies that this Certificate evidences shares of Convertible Preferred Stock referred to in the within-mentioned Certificate of Designations.

Date: _______________________________  By: _______________________________

Authorized Signatory

A-3
This Certificate evidences duly authorized, issued and outstanding shares of Convertible Preferred Stock. Notwithstanding anything to the contrary in this Certificate, to the extent that any provision of this Certificate conflicts with the provisions of the Certificate of Designations or the Certificate of Incorporation, the provisions of the of the Certificate of Designations or the Certificate of Incorporation, as applicable, will control.

1. **Countersignature.** This Certificate will not be valid until countersigned by the Transfer Agent.

2. **Abbreviations.** Customary abbreviations may be used in the name of a Holder or its assignee, such as TEN COM (tenants in common), TEN ENT (tenants by the entireties), JT TEN (joint tenants with right of survivorship and not as tenants in common), CUST (custodian), and U/G/M/A (Uniform Gift to Minors Act).

* * *

To request a copy of the Certificate of Designations, which the Company will provide to any Holder at no charge, please send a written request to the following address:

FireEye, Inc.
601 McCarthy Blvd.
Milpitas, CA 95035
Attention: General Counsel

A-4
OPTIONAL CONVERSION NOTICE

FireEye, Inc.

4.5% Series A Convertible Preferred Stock

Subject to the terms of the Certificate of Designations, by executing and delivering this Optional Conversion Notice, the undersigned Holder of the Convertible Preferred Stock identified below directs the Company to convert (check one):

☐ all of the shares of Convertible Preferred Stock
☐ _________ * shares of Convertible Preferred Stock

evidenced by Certificate No. _________.

Date: ________________________________

(Legal Name of Holder)

By: ________________________________
Name: ________________________________
Title: ________________________________

* Must be a whole number.
REDEMPTION NOTICE

FireEye, Inc.

4.5% Series A Convertible Preferred Stock

Subject to the terms of the Certificate of Designations, by executing and delivering this Redemption Notice, the undersigned Holder of the Convertible Preferred Stock identified below directs the Company to redeem (check one):

☐ all of the shares of Convertible Preferred Stock
☐ ______ * shares of Convertible Preferred Stock

evidenced by Certificate No. ________
on ________.

Date: ________________________________ (Legal Name of Holder)

By: ________________________________
Name: ________________________________
Title: ________________________________

* Must be a whole number.
Subject to the terms of the Certificate of Designations, by executing and delivering this Fundamental Change Repurchase Notice, the undersigned Holder of the Convertible Preferred Stock identified below is exercising its Fundamental Change Repurchase Right with respect to (check one):

☐ all of the shares of Convertible Preferred Stock
☐ _______* shares of Convertible Preferred Stock

evidenced by Certificate No. ________.

The undersigned acknowledges that Certificate identified above, duly endorsed for transfer, must be delivered to the Paying Agent before the Fundamental Change Repurchase Price will be paid.

Date: ____________________________ (Legal Name of Holder)

By: ______________________________
Name: ____________________________
Title: ____________________________

* Must be a whole number.
ASSIGNMENT FORM

FireEye, Inc.

4.5% Series A Convertible Preferred Stock

Subject to the terms of the Certificate of Designations, the undersigned Holder of the within Convertible Preferred Stock assigns to:

Name: 

Address: 

Social security or tax identification number: 

the within Convertible Preferred Stock and all rights thereunder irrevocably appoints:

as agent to transfer the within Convertible Preferred Stock on the books of the Company. The agent may substitute another to act for him/her.

Date: 

(Legal Name of Holder)

By: 

Name: 

Title: 

A-8
FORM OF RESTRICTED STOCK LEGEND

THE OFFER AND SALE OF THIS SECURITY AND THE SHARES OF COMMON STOCK ISSUABLE UPON CONVERSION OF THIS SECURITY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), AND THIS SECURITY AND SUCH SHARES MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED EXCEPT (A) PURSUANT TO A REGISTRATION STATEMENT THAT IS EFFECTIVE UNDER THE SECURITIES ACT; OR (B) PURSUANT TO AN EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

[THE SECURITIES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO RESTRICTIONS ON TRANSFER SET FORTH IN A SECURITIES PURCHASE AGREEMENT. THE COMPANY WILL GIVE TO THE HOLDER OF THIS CERTIFICATE A COPY OF SUCH SECURITIES PURCHASE AGREEMENT, AS IN EFFECT ON THE DATE OF THE GIVING OF SUCH COPY, WITHOUT CHARGE, PROMPTLY AFTER RECEIPT OF A WRITTEN REQUEST THEREFOR.]
REGISTRATION RIGHTS AGREEMENT

BY AND BETWEEN

FIREYE, INC.

AND

BTO DELTA HOLDINGS DE L.P.

Dated as of [●], 2020
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This REGISTRATION RIGHTS AGREEMENT (this “Agreement”) is entered into as of [●], 2020, by and between FireEye, Inc., a Delaware corporation (including its successors and permitted assigns, the “Company”), and BTO Delta Holdings DE L.P., a Delaware limited partnership (the “Investor”). Capitalized terms used but not defined elsewhere herein are defined in Exhibit A.

This Agreement is entered into in connection with the closing of the issuance of 370,000 shares of Series A Convertible Preferred Stock, which are convertible into shares of Common Stock, pursuant to the Securities Purchase Agreement, dated as of November 18, 2020, by and between the Company and the Investor (the “Securities Purchase Agreement”).

As a condition to each of the parties’ obligations under the Securities Purchase Agreement, the Company and the Investor are entering into this Agreement for the purpose of granting certain registration rights to the Investor.

In consideration of the promises and the mutual representations, warranties, covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

ARTICLE I
RESALE SHELF REGISTRATION

Section 1.1 Resale Shelf Registration Statement. Subject to the other applicable provisions of this Agreement, the Company shall file within ninety (90) days of the date hereof and use its commercially reasonable efforts to cause to go effective as promptly as practicable a registration statement covering the sale or distribution from time to time by the Holders, on a delayed or continuous basis pursuant to Rule 415 of the Securities Act of all of the Registrable Securities on Form S-3 (except if the Company is not then eligible to register for resale the Registrable Securities on Form S-3, then such registration shall be on another appropriate form (including Form S-1) and shall provide for the registration of such Registrable Securities for resale by such Holders in accordance with any reasonable method of distribution elected by the Holders) (the “Resale Shelf Registration Statement” and such registration, the “Resale Shelf Registration”), and if the Company is a WKSI as of the filing date, the Resale Shelf Registration Statement shall be an Automatic Shelf Registration Statement. If the Resale Shelf Registration Statement is not an Automatic Shelf Registration Statement, then the Company shall use its commercially reasonable efforts to cause such Resale Shelf Registration Statement to be declared effective by the Commission as promptly as practicable after the filing thereof.

Notwithstanding the foregoing, if the Commission prevents the Company from including any or all of the Registrable Securities on the Resale Shelf Registration Statement due to limitations on the use of Rule 415 of the Securities Act for the resale of the Registrable Securities by the Holders, the Resale Shelf Registration Statement shall register the resale of a number of shares of the Registrable Securities which is equal to the maximum number of shares as is permitted by the Commission, and, subject to the provisions of this Section 1.1, the Company shall continue to its use commercially reasonable efforts to register all remaining Registrable Securities as set forth in this Section 1.1. In such event, the number of shares of Registrable Securities to be
registered for each Holder in the Resale Shelf Registration Statement shall be reduced pro rata among all Holders, provided, however, that, prior to reducing the number of shares of Registrable Securities to be registered for any Holder in such Resale Shelf Registration Statement, the Company shall first remove any shares of Registrable Securities to be registered for any Person other than a Holder that was proposed to be included in such Resale Shelf Registration Statement. The Company shall continue to use its commercially reasonable efforts to register all remaining Registrable Securities as promptly as practicable in accordance with the applicable rules, regulations and guidance of the Commission. Notwithstanding anything herein to the contrary, if the Commission, by written comment, limits the Company’s ability to file, or prohibits or delays the filing of, a Resale Shelf Registration Statement or a Subsequent Shelf Registration with respect to any or all the Registrable Securities, the Company’s compliance with such limitation, prohibition or delay solely to the extent of such limitation, prohibition or delay shall not be a breach or default by the Company under this Agreement and shall not be deemed a failure by the Company to use “commercially reasonable efforts” or “reasonable efforts” as set forth above or elsewhere in this Agreement.

Section 1.2 Effectiveness Period. Once effective, the Company shall, subject to the other applicable provisions of this Agreement, use its commercially reasonable efforts to cause the Resale Shelf Registration Statement or a Subsequent Shelf Registration to be continuously effective and usable for so long as any Registrable Securities remain outstanding (the “Effectiveness Period”).

Section 1.3 Subsequent Shelf Registration. If any Shelf Registration ceases to be effective under the Securities Act for any reason at any time during the Effectiveness Period, the Company shall use its commercially reasonable efforts to promptly cause such Shelf Registration to again become effective under the Securities Act (including obtaining the prompt withdrawal of any order suspending the effectiveness of such Shelf Registration), and in any event shall within thirty (30) days of such cessation of effectiveness, amend such Shelf Registration in a manner reasonably expected to obtain the withdrawal of any order suspending the effectiveness of such Shelf Registration or, file an additional registration statement (a “Subsequent Shelf Registration”) for an offering to be made on a delayed or continuous basis pursuant to Rule 415 of the Securities Act registering the resale from time to time by Holders thereof of all securities that are Registrable Securities as of the time of such filing. If a Subsequent Shelf Registration is filed, the Company shall use its commercially reasonable efforts to (a) cause such Subsequent Shelf Registration to become effective under the Securities Act as promptly as is reasonably practicable after such filing, but in no event later than the date that is ninety (90) days after such Subsequent Shelf Registration is filed and (b) keep such Subsequent Shelf Registration (or another Subsequent Shelf Registration) continuously effective until the end of the Effectiveness Period. Any such Subsequent Shelf Registration shall be a Registration Statement on Form S-3 to the extent that the Company is eligible to use such form, and if the Company is a WKS1 as of the filing date, such Registration Statement shall be an Automatic Shelf Registration Statement. Otherwise, such Subsequent Shelf Registration shall be on another appropriate form (including Form S-1) and shall provide for the registration of such Registrable Securities for resale by such Holders in accordance with any reasonable method of distribution elected by the Holders.

Section 1.4 Supplements and Amendments. The Company shall supplement and amend any Shelf Registration if required by the rules, regulations or instructions applicable to the registration form used by the Company for such Shelf Registration if required by the Securities Act or as reasonably requested by the Holders covered by such Shelf Registration.
Section 1.5 Subsequent Holder Notice. If a Person becomes a Holder of Registrable Securities after a Shelf Registration becomes effective under the Securities Act, the Company shall, as promptly as is reasonably practicable following delivery of written notice to the Company of such Person becoming a Holder and requesting for its name to be included as a selling securityholder in the prospectus related to the Shelf Registration (a “Subsequent Holder Notice”):

(a) if required and permitted by applicable law, file with the Commission a supplement to the related prospectus or a post-effective amendment to the Shelf Registration so that such Holder is named as a selling securityholder in the Shelf Registration and the related prospectus in such a manner as to permit such Holder to deliver a prospectus to purchasers of the Registrable Securities in accordance with applicable law;

(b) if, pursuant to Section 1.5(a), the Company shall have filed a post-effective amendment to the Shelf Registration that is not automatically effective, use its commercially reasonable efforts to cause such post-effective amendment to become effective under the Securities Act as promptly as is reasonably practicable, but in any event by the date that is ninety (90) days after the date such post-effective amendment is required by Section 1.5(a) to be filed; and

(c) notify such Holder as promptly as is reasonably practicable after the effectiveness under the Securities Act of any post-effective amendment filed pursuant to Section 1.5(a).

Section 1.6 Underwritten Offering. The Holders of Registrable Securities may on up to four (4) occasions after the Resale Shelf Registration Statement becomes effective deliver a written notice to the Company specifying that the sale of some or all of the Registrable Securities subject to the Shelf Registration is intended to be conducted through an underwritten offering, so long as the anticipated gross proceeds of such underwritten offering is not less than twenty-five million dollars ($25,000,000) (unless the Holders are proposing to sell all of their remaining Registrable Securities in which case no such minimum gross proceeds threshold shall apply) (the “Underwritten Offering”). In the event of an Underwritten Offering:

(a) The Holder or Holders of a majority of the Registrable Securities participating in an Underwritten Offering shall select the managing underwriter or underwriters to administer the Underwritten Offering; provided that such Holder or Holders will not make the choice of such managing underwriter or underwriters without first consulting with the Company.

(b) Notwithstanding any other provision of this Section 1.6, if the managing underwriter or underwriters of a proposed Underwritten Offering advises the Board of Directors of the Company that in its or their opinion the number of Registrable Securities requested to be included in such Underwritten Offering exceeds the number which can be sold in such Underwritten Offering in light of market conditions, the Registrable Securities shall be included on a pro rata basis upon the number of securities that each Holder shall have requested to be included in such offering. If any Holder disapproves of the terms of any such underwriting, such Holder may elect to withdraw therefrom by written notice to the Company and the managing underwriter or underwriters.
(c) The Company shall agree and shall cause its executive officers and directors to sign a customary “lock-up” agreement with the underwriters in any Underwritten Offering.

Section 1.7 Take-Down Notice. Subject to the other applicable provisions of this Agreement, at any time that any Resale Shelf Registration Statement is effective, if a Holder delivers a notice to the Company (a “Take-Down Notice”) stating that it intends to effect a sale or distribution of all or part of its Registrable Securities included by it on any Resale Shelf Registration Statement (a “Shelf Offering”) and stating the number of Registrable Securities to be included in such Shelf Offering, then, subject to the other applicable provisions of this Agreement, the Company shall, as promptly as practicable, amend or supplement the Resale Shelf Registration Statement as may be necessary in order to enable such Registrable Securities to be sold and distributed pursuant to the Shelf Offering.

ARTICLE II
COMPANY REGISTRATION

Section 2.1 Notice of Registration. If at any time or from time to time the Company shall determine to file a registration statement with respect to an offering (or to make an underwritten public offering pursuant to a previously filed registration statement) of its Common Stock, whether or not for its own account (other than a registration statement on Form S-4, Form S-8 or any successor forms), the Company will:

(a) promptly give to each Holder written notice thereof, which notice shall be given, to the extent reasonably practicable, no later than five (5) business days prior to the filing or launch date (except in the case of an offering that is an “overnight offering”, in which case such notice must be given no later than two (2) business days prior to the filing or launch date); and

(b) subject to Section 2.2, include in such registration or underwritten offering (and any related qualification under blue sky laws or other compliance) all the Registrable Securities specified in a written request or requests made within three (3) business days after receipt of such written notice from the Company by any Holder (except in the case of an offering that is an “overnight offering”, in which case such request must be made no later than one (1) business day after receipt of such written notice from the Company).

Section 2.2 Underwriting. The right of any Holder to registration pursuant to Section 1.6 or this Article II shall be conditioned upon such Holder’s participation in such underwriting and the inclusion of Registrable Securities in the underwriting to the extent provided herein. Each Holder proposing to distribute its securities through such underwriting shall (together with the Company and the other holders distributing their securities through such underwriting) enter into and perform such Holder’s obligations under an underwriting agreement with the managing underwriter selected for such underwriting by the Company or by the stockholders of the Company who have the right to select the underwriters (such underwriting agreement to be in a customary form negotiated by the Company or such stockholders, as the case may be). Notwithstanding any other provision of this Article II, if the managing underwriter or underwriters
of a proposed underwritten offering with respect to which Holders of Registrable Securities have exercised their piggyback registration rights advise the Board of Directors of the Company that in its or their opinion the number of Registrable Securities requested to be included in the offering thereby and all other securities proposed to be sold in the offering exceeds the number which can be sold in such underwritten offering in light of market conditions, the Registrable Securities and such other securities to be included in such underwritten offering shall be allocated, (a) first, in the event such offering was initiated by the Company for its own account, up to the total number of securities that the Company has requested to be included in such registration, (b) second, and only if all the securities referred to in clause (a) have been included, up to the total number of securities that the Holders have requested to be included in such offering (pro rata based upon the number of securities that each of them shall have requested to be included in such offering) and (c) third, and only if all the securities referred to in clause (b) have been included, all other securities proposed to be included in such offering that, in the opinion of the managing underwriter or underwriters can be sold without having such adverse effect. If any Holder disapproves of the terms of any such underwriting, such Holder may elect to withdraw therefrom by written notice to the Company and the managing underwriter or underwriters. Any securities excluded or withdrawn from such underwriting shall be withdrawn from such registration.

Section 2.3 Right to Terminate Registration. The Company or the holders of securities who have caused a registration statement to be filed as contemplated by this Article II, as the case may be, shall have the right to have any registration initiated by it or them under this Article II terminated or withdrawn prior to the effectiveness thereof, whether or not any Holder has elected to include securities in such registration.

ARTICLE III ADDITIONAL PROVISIONS REGARDING REGISTRATION RIGHTS

Section 3.1 Registration Procedures. In the case of each registration effected by the Company pursuant to Article I or II, the Company will keep each Holder participating in such registration reasonably informed as to the status thereof and, at its expense, the Company will, as expeditiously as possible to the extent applicable:

(a) prepare and file, as promptly as reasonably practicable, with the Commission a registration statement with respect to such securities in accordance with the applicable provisions of this Agreement;

(b) prepare and file, as promptly as reasonably practicable, with the Commission such amendments, including post-effective 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 provisions of the Securities Act with respect to the disposition of all securities covered by such registration statement (including to permit the intended method of distribution thereof) and as may be necessary to keep the registration statement continuously effective for the period set forth in this Agreement;

(c) furnish to the Holders participating in such registration and to their legal counsel copies of the registration statement proposed to be filed, and provide such Holders and their legal counsel the reasonable opportunity to review and comment on such registration statement;
(d) furnish to the Holders participating in such registration and to the underwriters of the securities being registered such reasonable number of copies of the registration statement, preliminary prospectus and final prospectus as the such underwriters may reasonably request in order to facilitate the public offering of such securities;

(e) use commercially reasonable efforts to notify each Holder of Registrable Securities covered by such registration statement at any time when a prospectus relating thereto is required to be delivered under the Securities Act of the Company’s knowledge of the happening of any event as a result of which the prospectus included in such registration statement, as then in effect, includes an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading or incomplete in the light of the circumstances then existing, and, subject to Section 3.1(n), at the request of any such Holder, prepare promptly and furnish to such Holder a reasonable number of copies of a supplement to or an amendment of such prospectus as may be necessary so that, as thereafter delivered to the purchaser of such shares, such prospectus shall not include an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading or incomplete in the light of the circumstances then existing;

(f) use 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 Holders; provided, however, that the Company shall not be required in connection therewith or as a condition thereto to qualify to do business or to file a general consent to service of process in any such states or jurisdictions in which it is not already qualified;

(g) in the event that the Registrable Securities are being offered in an underwritten public offering, enter into and perform its obligations under an underwriting agreement on customary terms and in accordance with the applicable provisions of this Agreement;

(h) use commercially reasonable efforts to furnish, (i) on the date that such Registrable Securities are delivered to the underwriters for sale, if such securities are being sold through underwriters, an opinion and negative assurance letter, dated as of such date, of the legal counsel representing the Company for the purposes of such registration, in form and substance as is customarily given to underwriters in an underwritten public offering, addressed to the underwriters, if any, and (ii) on the date that the offering of such Registrable Securities is priced and on the date that such securities are being sold through underwriters, a letter dated as of such date, from the independent certified public accountants of the Company, in form and substance as is customarily given by independent certified public accountants to underwriters in an underwritten public offering, addressed to the underwriters;

(i) in connection with a customary due diligence review, make available during business hours for inspection by the Holders, any underwriter participating in any such disposition of Registrable Securities, if any, and any counsel or accountants retained by the Holders or underwriter, all relevant financial and other records, pertinent corporate documents and properties
of the Company and its subsidiaries, and cause the officers, directors and employees of the Company and its subsidiaries to supply all relevant information and participate in customary due diligence sessions in each case reasonably requested by any such representative, underwriter, counsel or accountant in connection with such registration statement, provided, however, each such underwriter shall agree in writing to hold in strict confidence and not to make any disclosure or use of any information requested above (the “Requested Information”), unless (1) the disclosure of the Requested Information is necessary to avoid or correct a misstatement or omission in such registration or is otherwise required under the Securities Act, (2) the release of the Requested Information is ordered pursuant to a final, non-appealable subpoena or order from a court or government body of competent jurisdiction, (3) the Requested Information is or has been made generally available to the public other than by disclosure in violation of this Agreement, (4) the Requested Information was within such underwriter’s possession on a non-confidential basis prior to it being furnished to such underwriter by or on behalf of the Company or any of its representatives, provided that the source of such information was not bound by a confidentiality agreement or other contractual, legal or fiduciary obligation of confidentiality with respect to such information or (5) the Requested Information becomes available to such underwriter on a non-confidential basis from a source other than the Company or any of its representatives, provided that such source is not bound by a confidentiality agreement or other contractual, legal or fiduciary obligation of confidentiality with respect to such information. Such underwriter agrees that it shall, upon learning that disclosure of the Requested Information is sought in or by a court or governmental body of competent jurisdiction or through other means, give prompt notice to the Company and allow the Company, at the Company’s expense, to undertake appropriate action to prevent disclosure of, or to obtain a protective order for, the Requested Information deemed confidential;

(j) in the event that any broker-dealer underwrites any Registrable Securities or participates as a member of an underwriting syndicate or selling group or “participates in an offering” (within the meaning of the FINRA Rules) thereof, whether as a Holder or as an underwriter, placement, sales agent or broker or dealer in respect thereof, or otherwise, the Company will, upon the reasonable request of such broker-dealer, comply with any reasonable request of such broker-dealer in complying with the FINRA Rules;

(k) notwithstanding any other provision of this Agreement, if the Board of Directors of the Company has determined in good faith that the disclosure necessary for continued use of the prospectus and registration statement by the Holders could be materially detrimental to the Company, the Company shall have the right not to file or not to cause the effectiveness of any registration covering any Registrable Securities and to suspend the use of the prospectus and the registration statement covering any Registrable Security for such period of time as its use would be materially detrimental to the Company by delivering written notice of such suspension to all Holders listed on the Company’s records; provided, however, that in any 12-month period the Company may exercise the right to such suspension not more than four times. From and after the date of a notice of suspension under this Section 3.1(k), each Holder agrees not to use the prospectus or registration statement until the earlier of (i) notice from the Company that such suspension has been lifted or (ii) the day following the sixtieth (60th) day of suspension within any 12-month period;
(l) cooperate with, and direct the Company’s transfer agent to cooperate with, the Holders and the managing underwriters, if any, to facilitate the timely settlement of any offering or sale of Registrable Securities, including the preparation and delivery of certificates or book-entry representing Registrable Securities to be sold together with any other authorizations, certificates, opinions and directions required by the transfer agent which authorize and direct the transfer agent to issue such Registrable Securities without restriction upon sale by the holder of such shares of Registrable Securities;

(m) use its reasonable best efforts to cause all shares of Registrable Securities to be listed on the national securities exchange on which the Common Stock is then listed; and

(n) cause its officers to use their reasonable best efforts to support the marketing of the Registrable Securities (including, without limitation, participation in “road shows” and other customary marketing activities, which may be virtual).

Section 3.2 Limitation on Subsequent Registration Rights. From and after the date hereof, the Company shall not enter into any agreement granting any holder or prospective holder of any securities of the Company registration rights with respect to such securities that conflict with the rights granted to the Holders herein, without the prior written consent of Holders of a majority of the Registrable Securities.

Section 3.3 Expenses of Registration. All Registration Expenses incurred in connection with any registration pursuant to this Agreement or otherwise in complying with this Agreement shall be borne by the Company. All Selling Expenses relating to securities registered on behalf of the Holders shall be borne by the Holders of the registered securities included in such registration.

Section 3.4 Information by Holders. The Holder or Holders of Registrable Securities included in any registration shall furnish to the Company such information regarding such Holder or Holders, the Registrable Securities held by them and the distribution proposed by such Holder or Holders as the Company may reasonably request in writing and as shall be required in connection with any registration, qualification or compliance referred to in this Agreement. It is understood and agreed that the obligations of the Company under Article I or II are conditioned on the timely provisions of the foregoing information by such Holder or Holders and, without limitation of the foregoing, will be conditioned on compliance by such Holder or Holders with the following:

(a) such Holder or Holders will cooperate with the Company in connection with the preparation of the applicable registration statement, and for so long as the Company is obligated to keep such registration statement effective, such Holder or Holders will provide to the Company, in writing and in a timely manner, for use in such registration statement (and expressly identified in writing as such), all information regarding themselves and such other information as may be required by applicable law to enable the Company to prepare such registration statement and the related prospectus covering the applicable Registrable Securities owned by such Holder or Holders and to maintain the currency and effectiveness thereof;
(b) during such time as such Holder or Holders may be engaged in a distribution of the Registrable Securities, such Holder or Holders will comply with all laws applicable to such distribution, including Regulation M promulgated under the Exchange Act, and, to the extent required by such laws, will, among other things: (i) not engage in any stabilization activity in connection with the securities of the Company in contravention of such laws and (ii) if required by applicable law, cause to be furnished to each agent or broker-dealer to or through whom such Registrable Securities may be offered, or to the offeree if an offer is made directly by such Holder or Holders, such copies of the applicable prospectus (as amended and supplemented to such date) and documents incorporated by reference therein as may be required by such agent, broker-dealer or offeree; and

(c) on receipt of written notice from the Company of the happening of any of the events specified in Section 3.1(k), or that requires the suspension by such Holder or Holders of the distribution of any of the Registrable Securities owned by such Holder or Holders pursuant to a registered offering, then such Holders shall cease offering or distributing the Registrable Securities owned by such Holder or Holders in a registered offering until the offering and distribution of the Registrable Securities owned by such Holder or Holders may recommence in accordance with the terms hereof and applicable law.

Section 3.5 Rule 144 Reporting. With a view to making available the benefits of Rule 144 to the Holders, the Company will use commercially reasonable efforts to:

(a) file with the Commission in a timely manner all reports and other documents required of the Company under the Exchange Act; and

(b) so long as a Holder owns any Restricted Securities, furnish to the Holder forthwith upon written request a written statement by the Company as to its compliance with the reporting requirements of the Exchange Act.

Section 3.6 “Market Stand-Off” Agreement. The Holders shall not sell, 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 with respect to, any Common Stock (or other securities of the Company) held by the Holders (other than those included in the registration) for a period specified by the representatives of the managing underwriter or underwriters of Common Stock (or other securities of the Company convertible into Common Stock) not to exceed five (5) days prior and ninety (90) days following any registered public sale of securities by the Company in which such Holder participates in accordance with Article II, subject to customary exceptions (including, without limitation, to the extent that any securities of the Company are subject to a Permitted Loan (as defined in the Securities Purchase Agreement), to permit the pledge of such securities pursuant to such Permitted Loan and any foreclosure in connection with such Permitted Loan, or transfer in lieu of a foreclosure thereunder, and subsequent sales, dispositions or other transfers). Each of the Holders also shall execute and deliver any “lock-up” agreement reasonably requested by the representatives of any underwriters of the Company in connection with an offering in which such Holder participates, subject to customary exceptions (including, without limitation, as described in the preceding sentence in respect of pledges and foreclosures).

Section 3.7 Discontinuation of Registration. Notwithstanding anything to the contrary in this Agreement, the Company may discontinue any registration of its securities which are not Registrable Securities at any time prior to the effective date of the registration statement relating thereto.
ARTICLE IV
INDEMNIFICATION

Section 4.1 Indemnification by Company. To the extent permitted by applicable law, the Company will, with respect to any Registrable Securities as to which registration or qualification or compliance under applicable “blue sky” laws has been effected pursuant to this Agreement, indemnify each Holder, each Holder’s current and former officers, directors, partners, members, managers, shareholders, accountants, attorneys, agents and employees, and each Person controlling such Holder or any of the foregoing within the meaning of Section 15 of the Securities Act, and each underwriter thereof, if any, and each Person who controls any such underwriter within the meaning of Section 15 of the Securities Act (collectively, the “Company Indemnified Parties”), against all expenses, claims, losses, damages, costs (including costs of preparation and reasonable attorney’s fees and any legal or other fees or expenses actually incurred by such party in connection with any investigation or proceeding), judgments, fines, penalties, charges, amounts paid in settlement and other liabilities, joint or several (or actions in respect thereof) arising out of or based on any untrue statement (or alleged untrue statement) of a material fact contained in any registration statement, prospectus, preliminary prospectus, offering circular or other document, or any amendment or supplement thereto incident to any such registration, qualification or compliance or based on any omission (or alleged omission) to state therein a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances in which they were made, not misleading, or any violation by the Company of, or any rule or regulation promulgated under, the Securities Act, Exchange Act or state securities laws applicable to the Company in connection with any such registration, and the Company will reimburse each of the Company Indemnified Parties for any reasonable legal and any other expenses reasonably incurred in connection with investigating, preparing or defending any such claim, loss, damage, liability or action, as such expenses are incurred. The indemnity agreement contained in this Section 4.1 shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the prior written consent of the Company (which consent shall not be unreasonably withheld or delayed), nor shall the Company be liable to a Holder in any such case for any such loss, claim, damage, liability or action (a) to the extent that
Section 4.2 Indemnification by Holders. To the extent permitted by applicable law, each Holder will, if Registrable Securities held by such Holder are included in the securities as to which such registration or qualification or compliance under applicable “blue sky” laws is being effected, indemnify, severally and not jointly, the Company, each of its directors, officers, partners, members, managers, shareholders, accountants, attorneys, agents and employees, each underwriter, if any, of the Company’s securities covered by such a registration, each Person who controls the Company or such underwriter within the meaning of Section 15 of the Securities Act, and each other Holder and each of such other Holder’s officers, directors, partners, members, managers, shareholders, accountants, attorneys, agents and employees and each Person controlling such Holder or any of the foregoing within the meaning of Section 15 of the Securities Act (collectively, the “Holder Indemnified Parties”), against all expenses, claims, losses, damages, costs (including costs of preparation and reasonable attorney’s fees and any legal or other fees or expenses actually incurred by such party in connection with any investigation or proceeding), judgments, fines, penalties, charges, amounts paid in settlement and other and liabilities (or actions in respect thereof) arising out of or based on any untrue statement (or alleged untrue statement) of a material fact contained in any registration statement, prospectus, preliminary prospectus, offering circular or other document, or any amendment or supplement thereto incident to any such registration, qualification or compliance or based on any omission (or alleged omission) to state therein a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances in which they were made, not misleading, or any violation by such Holder of, or any rule or regulation promulgated under, the Securities Act, Exchange Act or state securities law applicable to such Holder, and will reimburse each of the Holder Indemnified Parties for any reasonable legal or any other expenses reasonably incurred in connection with investigating, preparing or defending any such claim, loss, damage, liability or action, as such expenses are incurred, in each case to the extent, but only to the extent, that such untrue statement (or alleged untrue statement) or omission (or alleged omission) is made in such registration statement, prospectus, preliminary prospectus, offering circular or other document in reliance upon and in conformity with written information furnished to the Company by such Holder and stated to be specifically for use therein, provided, however, that in no event shall any indemnity under this Section 4.2 payable by a Holder exceed the amount by which the net proceeds actually received by such Holder from the sale of Registrable Securities included in such registration exceeds the amount of any other losses, expenses, settlements, damages, claims and liabilities that such Holder has been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission or violation. The indemnity agreement contained in this Section 4.2 shall not apply to amounts paid in
settlement of any loss, claim, damage, liability or action if such settlement is effected without the prior written consent of the applicable Holder (which consent shall not be unreasonably withheld or delayed), nor shall the Holder be liable for any such loss, claim, damage, liability or action where such untrue statement or alleged untrue statement or omission or alleged omission was corrected in a final or amended prospectus, and the Company or the underwriters failed to deliver a copy of the final or amended prospectus at or prior to the confirmation of the sale of the Registrable Securities to the Person asserting any such loss, claim, damage or liability in any case in which such delivery is required by the Securities Act

Section 4.3 Notification. Each party entitled to indemnification under this Article IV (the “Indemnified Party”) shall give notice to the party required to provide indemnification (the “Indemnifying Party”) promptly after such Indemnified Party has actual knowledge of any claim as to which indemnity may be sought, and shall permit the Indemnifying Party to assume the defense of any such claim or any litigation resulting therefrom, provided, however, that counsel for the Indemnifying Party, who shall conduct the defense of such claim or litigation, shall be approved by the Indemnified Party (whose approval shall not unreasonably be withheld or delayed), and the Indemnified Party may participate in such defense at such party’s expense; provided, further, however, that an Indemnified Party (together with all other Indemnified Parties) shall have the right to retain one (1) separate counsel, with the reasonable 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 conflicting interests between such Indemnified Party and any other party represented by such counsel in such proceeding. The failure of any Indemnified Party to give notice as provided herein shall relieve the Indemnifying Party of its obligations under this Article IV, only to the extent that, the failure to give such notice is materially prejudicial or harmful to an Indemnifying Party’s ability to defend such action. No Indemnifying Party, in the defense of any such claim or litigation, shall, except with the prior written consent of each Indemnified Party (which consent shall not be unreasonably withheld or delayed), consent to entry of any judgment or enter into any settlement which does not include as an unconditional term thereof the giving by the claimant or plaintiff to such Indemnified Party of a release from all liability in respect to such claim or litigation. The indemnity agreements contained in this Article IV shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the prior written consent of the Indemnifying Party, which consent shall not be unreasonably withheld or delayed. The indemnification set forth in this Article IV shall be in addition to any other indemnification rights or agreements that an Indemnified Party may have.

Section 4.4 Contribution. If the indemnification provided for in this Article IV is held by a court of competent jurisdiction to be unavailable to an Indemnified Party, other than pursuant to its terms, with respect to any claim, loss, damage, liability or action referred to therein, then, subject to the limitations contained in Article IV, the Indemnifying Party, in lieu of indemnifying such Indemnified Party hereunder, shall contribute to the amount paid or payable by such Indemnified Party as a result of such claim, loss, damage, liability or action in such proportion as is appropriate to reflect the relative fault of the Indemnifying Party on the one hand and the Indemnified Party on the other in connection with the actions that resulted in such claims, loss, damage, liability or action, as well as 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 alleged untrue statement of a material fact or the
omission to state a material fact related 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. The Company and the Holders agree that it would not be just and equitable if contribution pursuant to this Section 4.4 were based solely upon the number of entities from whom contribution was requested or by any other method of allocation which does not take account of the equitable considerations referred to above in this Section 4.4. In no event shall any Holder’s contribution obligation under this Section 4.4 exceed the amount by which the net proceeds actually received by such Holder from the sale of Registrable Securities included in such registration exceeds the amount of any other losses, expenses, settlements, damages, claims and liabilities that such Holder has been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission or violation. No Person guilty of fraudulent misrepresentation (within the meaning of the Securities Act) shall be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentation.

ARTICLE V
TRANSFER AND TERMINATION OF REGISTRATION RIGHTS

Section 5.1 Transfer of Registration Rights. The rights to cause the Company to register securities granted to a Holder under this Agreement may be assigned to any Person in connection with any Transfer (as defined in the Securities Purchase Agreement) or assignment of Registrable Securities to in a Transfer permitted by Section 4.2 of the Securities Purchase Agreement; provided, however, that (a) such transfer may otherwise be effected in accordance with applicable securities laws, (b) prior written notice of such assignment is given to the Company, and (c) such transferee agrees in writing to be bound by, and subject to, this Agreement as a “Holder” pursuant to a written instrument in form and substance reasonably acceptable to the Company.

Section 5.2 Termination of Registration Rights. The rights of any particular Holder to cause the Company to register securities under Article I and Article II shall terminate with respect to such Holder upon the date upon which such Holder no longer holds any Registrable Securities.

ARTICLE VI
MISCELLANEOUS

Section 6.1 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement, and will become effective when one or more counterparts have been signed by a party and delivered to the other parties. Copies of executed counterparts transmitted by telex, telefax or other electronic transmission service shall be considered original executed counterparts for purposes of this Section 6.1, provided that receipt of copies of such counterparts is confirmed.

Section 6.2 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, without giving effect to any choice of law or conflict of law rules or provisions (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware.
Any dispute relating hereto shall be heard in the Court of Chancery of the State of Delaware and, if applicable, in any state or federal court located in the State of Delaware in which appeal from the Court of Chancery of the State of Delaware may validly be taken under the laws of the State of Delaware (or, if the Court of Chancery of the State of Delaware declines to accept jurisdiction over such dispute, any state or federal court within the State of Delaware) (each a “Chosen Court” and collectively, the “Chosen Courts”), and the parties agree to the exclusive jurisdiction and venue of the Chosen Courts. Such Persons further agree that any proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby or by any matters related to the foregoing (the “Applicable Matters”) shall be brought exclusively in a Chosen Court, and that any proceeding arising out of this Agreement or any other Applicable Matter shall be deemed to have arisen from a transaction of business in the State of Delaware, and each of the foregoing Persons hereby irrevocably consents to the jurisdiction of such Chosen Courts in any such proceeding and irrevocably and unconditionally waives, to the fullest extent permitted by law, any objection that such Person may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such Chosen Court or that any such proceeding brought in any such Chosen Court has been brought in an inconvenient forum.

Such Persons further covenant not to bring a proceeding with respect to the Applicable Matters (or that could affect any Applicable Matter) other than in such Chosen Court and not to challenge or enforce in another jurisdiction a judgment of such Chosen Court.

Process in any such proceeding may be served on any Person with respect to such Applicable Matters anywhere in the world, whether within or without the jurisdiction of any such Chosen Court. Without limiting the foregoing, each such Person agrees that service of process on such party as provided in Section 6.5 shall be deemed effective service of process on such Person.

Waiver of Jury Trial. EACH PARTY HERETO, FOR ITSELF AND ITS AFFILIATES, HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT OR OTHER PROCEEDING (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THE ACTIONS OF THE PARTIES HERETO OR THEIR RESPECTIVE AFFILIATES PURSUANT TO THIS AGREEMENT OR IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT HEREOF.

Section 6.3 Entire Agreement; No Third Party Beneficiary. This Agreement, the Securities Purchase Agreement and the Letter Agreement between the Company and Blackstone Tactical Opportunities Fund – FD L.P. contain the entire agreement by and among the parties with respect to the subject matter hereof and all prior negotiations, writings and understandings relating to the subject matter of this Agreement. Except as provided in Article IV, this Agreement is not intended to confer upon any Person not a party hereto (or their successors and permitted assigns) any rights or remedies hereunder.
Section 6.4 Expenses. Except as provided in Section 3.3, all fees, costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby, including accounting and legal fees shall be paid by the party incurring such expenses. The fees specified in clause (b) of the definition of “Registration Expenses” incurred in connection with any Shelf Registration or Underwritten Offering pursuant to this Agreement shall, in each case, not exceed $50,000.

Section 6.5 Notices. All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed to have been duly given or made as follows: (a) if sent by registered or certified mail in the United States return receipt requested, upon receipt; (b) if sent by nationally recognized overnight air courier, one (1) business day after mailing; (c) if sent by e-mail transmission, with a copy sent on the same day in the manner provided in the foregoing clause (a) or (b), when transmitted and receipt is confirmed; and (d) if otherwise actually personally delivered, when delivered, provided, that such notices, requests, demands and other communications are delivered to the address set forth below, or to such other address as any party shall provide by like notice to the other parties to this Agreement:

If to the Company, to:

FireEye, Inc.
601 McCarthy Blvd.
Milpitas, CA 95035
Attention: Alexa King
Email: [***]

with a copy (which shall not constitute notice) to:

Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
Attention: Steven E. Bochner
Email: [***]

If to the Investor, to:

BTO Delta Holdings DE L.P.
c/o The Blackstone Group Inc.
345 Park Avenue
New York, NY 10154
Attention: Viral Patel
E-mail: [***]

with a copy (which shall not constitute notice) to:

Simpson Thacher & Bartlett LLP
425 Lexington Ave
New York, New York 10017
Attention: Anthony F. Vernace
E-mail: [***]
Section 6.6 Successors and Assigns. This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Except as provided in Section 5.1, no assignment of this Agreement or of any rights or obligations hereunder may be made by any party hereto without the prior written consent of the other parties hereto. Any purported assignment or delegation in violation of this Agreement shall be null and void ab initio.

Section 6.7 Headings. The Section, Article and other headings contained in this Agreement are inserted for convenience of reference only and will not affect the meaning or interpretation of this Agreement.

Section 6.8 Amendments and Waivers. This Agreement may not be modified or amended except by an instrument or instruments in writing signed by the Company and the Holders of a majority of the Registrable Securities outstanding at the time of such amendment. Any party hereto may, only by an instrument in writing, waive compliance by any other party or parties hereto with any term or provision hereof on the part of such other party or parties hereto to be performed or complied with. No failure or delay of any party in exercising any right or remedy hereunder shall operate as a waiver thereof, nor will any single or partial exercise of any right or power, or any abandonment or discontinuance of steps to enforce such right or power, preclude any other or further exercise thereof or the exercise of any other right or power. The waiver by any party hereto of a breach of any term or provision hereof shall not be construed as a waiver of any subsequent breach. The rights and remedies of the parties hereunder are cumulative and are not exclusive of any rights or remedies that they would otherwise have hereunder.

Section 6.9 Interpretation; Absence of Presumption.

(a) For the purposes hereof: (i) words in the singular shall be held to include the plural and vice versa and words of one gender shall be held to include the other gender as the context requires; (ii) the terms “hereof,” “herein,” and “herewith” and words of similar import shall, unless otherwise stated, be construed to refer to this Agreement as a whole and not to any particular provision of this Agreement, and Section and paragraph references are to the Sections and paragraphs in this Agreement unless otherwise specified; (iii) the word “including” and words of similar import when used in this Agreement shall mean “including, without limitation,” unless the context otherwise requires or unless otherwise specified; and (iv) the word “or”, “any” or “either” shall not be exclusive. References to a Person are also to its permitted assigns and successors. When calculating the period of time between which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded (and unless, otherwise required by law, if the last day of such period is not a business day, the period in question shall end on the next succeeding business day)

(b) With regard to each and every term and condition of this Agreement, the parties hereto understand and agree that the same have or has been mutually negotiated, prepared and drafted, and if at any time the parties hereto desire or are required to interpret or construe any such term or condition, no consideration will be given to the issue of which party hereto actually prepared, drafted or requested any term or condition of this Agreement.
Section 6.10  **Severability.** Any provision hereof that is held to be invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, shall be ineffective only to the extent of such invalidity, illegality or unenforceability, without affecting in any way the remaining provisions hereof, provided, however, that the parties will attempt in good faith to reform this Agreement in a manner consistent with the intent of any such ineffective provision for the purpose of carrying out such intent.

(The next page is the signature page)

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IN WITNESS WHEREOF, the parties have executed this Registration Rights Agreement as of the date first above written.

FIREEYE, INC.
By:
Name:
Title:

BTO DELTA HOLDINGS DE, L.P.
By: BTO Holdings Manager L.L.C., its general partner
By: Blackstone Tactical Opportunities Associates L.L.C., its managing member
By: BTOA L.L.C., its sole member
By:
Name: Christopher J. James
Title: Authorized Person

[Signature Page to Registration Rights Agreement]
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EXHIBIT A
DEFINED TERMS

1. The following capitalized terms have the meanings indicated:

   “Affiliate” of any Person means any Person, directly or indirectly, controlling, controlled by or under common control with such Person.

   “Automatic Shelf Registration Statement” means an “automatic shelf registration statement” as defined under Rule 405.

   “Certificate of Designations” means the Certificate of Designations setting forth the rights, powers, preferences and privileges of the Series A Convertible Preferred Stock.

   “Commission” means the Securities and Exchange Commission.

   “Common Stock” means the Company’s common stock, par value $0.0001 per share.

   “Exchange Act” means the Securities Exchange Act of 1934, as amended, or any similar successor federal statute, and the rules and regulations of the Commission thereunder, all as the same shall be in effect from time to time.

   “Holder” means (a) any Investor holding Registrable Securities and (b) any transferee to which the rights under this Agreement have been transferred in accordance with Section 5.1.

   “Person” means an individual, corporation, partnership, limited liability company, joint venture, association, trust, unincorporated organization, other legal entity, or any government or governmental agency or authority.

   “register”, “registered” and “registration” refer to a registration effected by preparing and filing a registration statement in compliance with the Securities Act, and the declaration or ordering of the effectiveness of such registration statement.

   “Registrable Securities” means (a) any shares of Series A Convertible Preferred Stock, (b) any shares of Common Stock issued or issuable upon conversion of the Series A Convertible Preferred Stock, and (c) any other securities actually issued in respect of the securities described
in clauses (a) through (b) above or this clause (c) upon any stock split, stock dividend, recapitalization, reclassification, merger, consolidation or similar event; provided, however, that the securities described in clauses (a) through (c) above shall only be treated as Registrable Securities until the earliest of: (i) the date on which such security has been registered under the Securities Act and disposed of in accordance with an effective Registration Statement relating thereto; (ii) the date on which such security has been sold pursuant to Rule 144 and the security is no longer a Restricted Security; or (iii) the date on which such security is transferred in a transaction pursuant to which the registration rights are not also assigned in accordance with Section 5.1.

"Registration Expenses" means (a) all expenses incurred by the Company in complying with this Agreement, including, without limitation, internal expenses, all registration, qualification, listing and filing fees, printing expenses, escrow fees, rating agency fees, fees and disbursements of the Company's independent registered public accounting firm, fees and disbursements of counsel for the Company, blue sky fees and expenses, (b) the fees and expenses of one counsel to the Holders in connection with this Agreement and (c) the fees and expenses of counsel for the underwriters and any qualified independent underwriter in connection with FINRA and blue sky qualifications; provided, however, that Registration Expenses shall not include any Selling Expenses.

"Restricted Securities" means any Common Stock required to bear the legend set forth in Section 4.3(a) of the Securities Purchase Agreement.

"Rule 144" means Rule 144 promulgated under the Securities Act and any successor provision.

"Rule 405" means Rule 405 promulgated under the Securities Act and any successor provision.

"Securities Act" means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder or any similar federal statute and the rules and regulations of the Commission thereunder, all as the same shall be in effect at the time.

"Selling Expenses" means all underwriting discounts, selling commissions and stock transfer taxes applicable to the securities registered by the Holders.

"Series A Convertible Preferred Stock" means the Company’s Series A Convertible Preferred Stock, par value $0.0001 per share.

"Shelf Registration" means the Resale Shelf Registration or a Subsequent Shelf Registration, as applicable.

"Transfer" has the meaning given to such term in the Securities Purchase Agreement.

"WKSI" means a “well known seasoned issuer” as defined under Rule 405.

2. The following terms are defined in the Sections of the Agreement indicated:

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SECURITIES PURCHASE AGREEMENT

BY AND AMONG

FIREEYE, INC.,

CLEARSKY SECURITY FUND I LLC

AND

CLEARSKY POWER & TECHNOLOGY FUND II LLC

Dated as of November 18, 2020
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ARTICLE VIII TERMINATION

Section 8.1 Termination
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EXHIBITS

Exhibit A Definitions
Exhibit B Form of Certificate of Designations
Exhibit C Form of Registration Rights Agreement
Exhibit D Disclosure Letter
Exhibit E VCOC Letter Agreement
This SECURITIES PURCHASE AGREEMENT dated as of November 18, 2020 (this “Agreement”) is by and among FireEye, Inc., a Delaware corporation (the “Company”), ClearSky Security Fund I LLC, a Delaware limited liability company (“ClearSky Security I”) and ClearSky Power & Technology Fund II LLC, a Delaware limited liability company (“ClearSky Power II”) (each of ClearSky Security I and ClearSky Power II, a “Purchaser”). Capitalized terms used but not defined herein have the meanings assigned to them in Exhibit A.

ClearSky Security I desires to purchase from the Company, and the Company desires to issue and sell to ClearSky Security I, 24,000 shares of the Company’s Series A Convertible Preferred Stock, par value $0.0001 per share (the “Series A Preferred Stock”) and ClearSky Power II desires to purchase from the Company, and the Company desires to issue and sell to ClearSky Power II, 6,000 shares of Series A Preferred Stock, on the terms and subject to the conditions hereinafter set forth.

In consideration of the premises and the mutual representations, warranties, covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

ARTICLE I

PURCHASE AND SALE OF PURCHASED SHARES

Section 1.1 Purchase and Sale. On the terms and subject to the satisfaction or waiver of the conditions set forth in this Agreement, severally and not jointly, at the Closing, (i) ClearSky Security I shall purchase, and the Company shall issue and sell to ClearSky Security I, 24,000 shares of the Company’s Series A Preferred Stock, and (ii) ClearSky Power II shall purchase, and the Company shall issue and sell to ClearSky Power II, 6,000 shares of Series A Preferred Stock, in each case with an original purchase price of $1,000 per share (all of the foregoing together, the “Purchased Shares”) for an aggregate purchase price of the Purchased Shares delivered at Closing of $30,000,000 (the “Purchase Price”). The Series A Preferred Stock shall have the rights, powers, preferences and privileges set forth in the Certificate of Designations (the “Certificate of Designations”) attached as Exhibit B.

Section 1.2 Closing. On the terms and subject to the satisfaction or waiver of the conditions set forth in this Agreement, the closing of the issuance, sale and purchase of the Purchased Shares (the “Closing”) shall take place remotely via the exchange of final documents and signature pages, on such date on which all of the conditions set forth in Article V have been satisfied or waived (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of those conditions at such time), or such other time and place as the Company and the Purchasers may agree; provided, that the Purchasers shall not be required to (but for the avoidance of doubt, shall have the right to in accordance with the foregoing) consummate the Closing prior to the date that is fifteen (15) Business Days after the date hereof. The date on which the Closing is to occur is herein referred to as the “Closing Date.” At the Closing, upon receipt by the Company of payment of the full purchase price to be paid at the Closing therefor by or on behalf of the Purchasers to the Company by wire transfer of
immediately available funds to an account designated in writing by the Company, the Company will deliver to the Purchasers evidence reasonably satisfactory to the Purchasers of the issuance of the Purchased Shares in the names of the Purchasers through the facilities of The Depository Trust Company.

ARTICLE II

REPRESENTATIONS AND WARRANTIES OF THE COMPANY

The Company represents and warrants to the Purchasers as of the date hereof and as of the Closing Date (except to the extent made only as of a specified date in which case as of such date), that, except (a) as set forth in the SEC Documents filed by the Company with the SEC since January 1, 2018 and prior to the date hereof (other than disclosures in the “Risk Factors” or “Forward-Looking Statements” sections or similarly captioned sections of any such filings) and (b) as set forth on Exhibit D (the “Disclosure Letter”) (all such exceptions disclosed in the Disclosure Letter being numbered to correspond to the applicable Section of this Article II, provided, however, that any such exception shall be deemed to be disclosed with respect to each other representation or warranty to which the relevance of such exception is reasonably apparent on the face of such disclosure):

Section 2.1 Organization and Power. The Company and each of its Subsidiaries is a corporation, limited liability company, partnership or other entity validly existing and in good standing under the laws of the jurisdiction of its incorporation or formation (as applicable) and has all requisite corporate, limited liability company, partnership or other entity power and authority to own or lease its properties and to carry on its business as presently conducted and as presently proposed to be conducted. The Company and each of its Subsidiaries is duly licensed or qualified to do business as a foreign corporation, limited liability company, partnership or other entity in each jurisdiction wherein the character of its property or the nature of the activities presently conducted by it, makes such qualification necessary, except where the failure to so qualify has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. True, correct and complete copies of the Company’s organizational documents are included in the SEC Documents filed with the SEC.

Section 2.2 Authorization; No Conflicts.

(a) The Company has all necessary corporate power and authority and has taken all necessary corporate action required for the due authorization, execution, delivery and performance by the Company of this Agreement and the Registration Rights Agreement, and the consummation by the Company of the transactions contemplated hereby and thereby, the filing of the Certificate of Designations with the Secretary of State of the State of Delaware and, following the effectiveness of such actions, for the due authorization, issuance, sale and delivery of the Purchased Shares and the reservation, issuance and delivery of the Conversion Shares. This Agreement has been, and the Registration Rights Agreement, at the Closing will be, duly executed and delivered by the Company. Assuming due execution and delivery thereof by each of the other parties hereto or thereto, this Agreement and the Registration Rights Agreement will each be a valid and binding obligation of the Company enforceable against the Company in accordance with its terms, except as such enforceability may be limited by applicable laws relating to bankruptcy,
insolvency, reorganization, moratorium or other similar legal requirement relating to or affecting creditors’ rights generally and except as such enforceability is subject to general principles of equity (regardless of whether enforceability is considered in a proceeding in equity or at law).

(b) The authorization, execution, delivery and performance by the Company of this Agreement and the Registration Rights Agreement, and the consummation by the Company of the transactions contemplated hereby and thereby, including the filing of the Certificate of Designations and the issuance of the Purchased Shares and the Conversion Shares do not and will not: (x) violate or result in the breach of any provision of the Certificate of Incorporation or Bylaws of the Company; or (y) with such exceptions that have not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect: (i) violate any provision of, constitute a breach of, or default under, any judgment, order, writ, or decree applicable to the Company or any of its Subsidiaries or any mortgage, loan or credit agreement, indenture, bond, note, deed of trust, lease, sublease, license, contract or other agreement (each, a “Contract”) to which the Company or any of its Subsidiaries is a party or accelerate the Company’s or, if applicable, any of its Subsidiaries’ obligations under any such Contract; (ii) violate any provision of, constitute a breach of, or default under, any applicable state, federal or local law, rule or regulation; or (iii) result in the creation of any lien upon any assets of the Company or any of its Subsidiaries or the suspension, revocation or forfeiture of any franchise, permit or license granted by a governmental authority to the Company or any of its Subsidiaries, other than liens under federal or state securities laws or liens created by the Purchasers.

Section 2.3 Government Approvals. No consent, approval or authorization of, or filing with, any court or governmental authority is or will be required on the part of the Company in connection with the execution, delivery and performance by the Company of this Agreement and the Registration Rights Agreement, or in connection with the issuance of the Purchased Shares or the Conversion Shares, except for (a) the filing of the Certificate of Designations with the Secretary of State of the State of Delaware; (b) those which have already been made or granted; (c) the filing of a current report on Form 8-K with the SEC; (d) filings with applicable state securities commissions; or (e) the listing of the Conversion Shares with the Nasdaq Stock Market.

Section 2.4 Authorized and Outstanding Stock.

(a) The authorized capital stock of the Company consists of 1,000,000,000 shares of common stock, par value $0.0001 per share (“Common Stock”) and 100,000,000 shares of preferred stock, par value $0.0001 per share (“Preferred Stock”). Of such Preferred Stock, upon the filing of the Certificate of Designations with the Secretary of State of the State of Delaware, 400,000 shares will be designated as the Series A Preferred Stock.

(b) As of the close of business on November 16, 2020 (the “Capitalization Date”), 229,632,046 shares of Common Stock were issued and outstanding, zero shares of Preferred Stock were issued and outstanding, 2,901,101 shares of Common Stock were reserved for issuance upon the exercise of outstanding stock options issued pursuant to the Stock Plans, 20,333,774 shares of Common Stock were reserved for issuance upon the settlement of restricted stock units and performance stock units issued pursuant to the Stock Plans and 33,856,023 shares of Common Stock were reserved for issuance upon conversion of the Convertible Senior Notes (assuming such Convertible Senior Notes were settled solely in shares
of Common Stock). Except as set forth in the foregoing sentence, there are no outstanding securities of the Company convertible into or exercisable or exchangeable for shares of capital stock of, or other equity or voting interests of any character in, the Company.

(c) All of the issued and outstanding shares of Common Stock of the Company have been duly authorized and are validly issued, fully paid and non-assessable. The Purchased Shares have been duly authorized and, when issued in accordance with the terms hereof, the Purchased Shares will be, duly authorized and validly issued and fully paid and non-assessable and will not be subject to any preemptive right or any restrictions on transfer under applicable law or any contract to which the Company is a party, other than, in the case of restrictions on transfer, those under applicable state and federal securities laws and Section 4.2 of this Agreement. The shares of Common Stock issuable upon conversion of the Purchased Shares (the “Conversion Shares”) have been duly authorized and reserved for issuance and, when issued upon conversion of the Purchased Shares in accordance with the terms thereof as set forth in the Certificate of Designations, will be validly issued and fully paid and non-assessable. No share of Common Stock has been, and none of the Purchased Shares and Conversion Shares will be when issued, issued in violation of any preemptive right arising by operation of law, under the Certificate of Incorporation, the Bylaws or any contract, or otherwise. None of the Purchased Shares and Conversion Shares will be when issued subject to any restrictions on transfer under applicable law or any contract to which the Company is a party, other than, in the case of restrictions on transfer, those under applicable state and federal securities laws, and Section 4.2 of this Agreement. When issued in accordance with the terms hereof and the terms of the Certificate of Designations (as applicable), the Purchased Shares and the Conversion Shares will be free and clear of all liens (other than liens incurred by the Purchasers or their Affiliates, restrictions arising under applicable securities laws, or restrictions imposed by this Agreement, the Certificate of Designations or the Registration Rights Agreement).

(d) (i) No subscription, warrant, option, convertible security or other right, commitment, agreement, arrangement issued by the Company or any other obligation of the Company to purchase or acquire any shares of capital stock of the Company is authorized or outstanding; (ii) there is not any commitment, agreement, arrangement or obligation of the Company to issue any subscription, warrant, option, convertible security or other such right or to issue or distribute capital stock of, or other equity or voting interest (or voting debt) in, the Company; (iii) the Company has no obligation to purchase, redeem or otherwise acquire any shares of its capital stock or to pay any dividend or make any other distribution in respect thereof; (iv) there are no obligations of the Company to grant, extend or enter into any subscription, warrant, right, convertible or exchangeable security or other similar agreement or commitment relating to any capital stock of, or other equity or voting interests (or voting debt) in, the Company; (v) there are no outstanding shares of capital stock of, or other equity or voting interests of any character in, the Company as of the date hereof other than shares that have become outstanding after the Capitalization Date which were reserved for issuance as of the Capitalization Date as set forth in Section 2.4(a) or pursuant to the exercise, after the Capitalization Date, of outstanding stock options described in Section 2.4(b); and (vi) there are no agreements, arrangements or commitments between the Company and any Person relating to the acquisition, disposition or voting of the capital stock of, or other equity or voting interest (or voting debt) in, the Company. There exists no preemptive right, whether arising by operation of law, under the Certificate of Incorporation, the Bylaws or any contract, or otherwise, with respect to the issuance of any capital stock of the Company.
Section 2.5 Subsidiaries. The Company’s Subsidiaries consist solely of all the entities listed on Exhibit 21.1 to the Company’s Form 10-K for the year ended December 31, 2019. The Company, directly or indirectly, owns of record and beneficially, free and clear of all liens, all of the issued and outstanding capital stock or equity interests of each of its Subsidiaries. All of the issued and outstanding capital stock or equity interests of the Company’s Subsidiaries has been duly authorized and validly issued, were not issued in violation of any preemptive right, right of first refusal or similar right, and in the case of corporations, is fully paid and non-assessable. Except as described in the SEC Documents, there are no outstanding rights, options, warrants, preemptive rights, conversion rights, rights of first refusal or similar rights for the purchase or acquisition from any of the Company’s Subsidiaries of any securities of such Subsidiaries nor are there any commitments to issue or execute any such rights, options, warrants, preemptive rights, conversion rights or rights of first refusal.

Section 2.6 Private Placement. Assuming the accuracy of the representations and warranties of the Purchasers set forth in Section 3.4, the offer and sale of the Purchased Shares pursuant to this Agreement will be exempt from the registration requirements of the Securities Act. Without limiting the foregoing, neither the Company nor, to the Knowledge of the Company, any other Person authorized by the Company to act on its behalf, has engaged in a general solicitation or general advertising (within the meaning of Regulation D of the Securities Act) of investors with respect to offers or sales of Series A Preferred Stock, and neither the Company nor, to the Knowledge of the Company, any Person acting on its behalf has made any offers or sales of any security or solicited any offers to buy any security, under circumstances that would cause the offering or issuance of Series A Preferred Stock under this Agreement to be integrated with prior offerings by the Company for purposes of the Securities Act that would result in none of Regulation D or any other applicable exemption from registration under the Securities Act to be available, nor will the Company take any action or steps that would cause the offering or issuance of Series A Preferred Stock under this Agreement to be integrated with other offerings by the Company.

Section 2.7 SEC Documents; Financial Information. Since January 1, 2018, the Company has timely filed (a) all annual and quarterly reports and proxy statements (including all amendments, exhibits and schedules thereto) and (b) all other reports and other documents (including all amendments, exhibits and schedules thereto), in each case required to be filed by the Company with the SEC pursuant to the Exchange Act and the Securities Act. As of their respective filing dates, such SEC Documents complied in all material respects with the requirements of the Securities Act, the Exchange Act and the rules and regulations of the SEC thereunder applicable to such SEC Documents, and as of their respective dates none of the SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. The financial statements of the Company included in the SEC Documents (the “Financial Statements”) comply as of their respective dates in all material respects with applicable accounting requirements and the rules and regulations of the SEC with respect thereto (except as may be indicated in the notes thereto or, in the case of the unaudited statements, as permitted by Form 10-Q promulgated by the SEC), have been prepared in
accordance with GAAP (except, in the case of unaudited quarterly statements, as permitted by Form 10-Q of the SEC or other rules and regulations of the SEC) applied on a consistent basis during the periods involved (except (i) as may be indicated in the notes thereto or (ii) as permitted by Regulation S-X) and present fairly in all material respects as of their respective dates the consolidated financial position of the Company and its Subsidiaries as of the dates thereof and the consolidated results of their operations and their consolidated cash flows for each of the respective periods, all in conformity with GAAP. Neither the Company nor any of its Subsidiaries has any liabilities of any nature (whether accrued, absolute, contingent or otherwise) that would be required under GAAP, to be reflected on a consolidated balance sheet of the Company (including the notes thereto) except liabilities (i) reflected or reserved against in the balance sheet (or the notes thereto) of the Company and its Subsidiaries as of September 30, 2020 (the “Balance Sheet Date”) included in the SEC Documents, (ii) incurred after the Balance Sheet Date in the ordinary course of business and that do not arise from any material breach of a Contract, (iii) as expressly contemplated by this Agreement or otherwise incurred in connection with the transactions contemplated hereby, (iv) that have been discharged or paid prior to the date of this Agreement or (v) as would not, individually or in the aggregate, have had or reasonably be expected to have, a Material Adverse Effect. There is no transaction, arrangement or other relationship between the Company and/or any of its Subsidiaries and an unconsolidated or other off-balance sheet entity that is required by applicable law to be disclosed by the Company in its SEC Documents and is not so disclosed.

Section 2.8 Internal Control Over Financial Reporting. The Company has disclosed, based on its most recent evaluation prior to the date hereof, to the Company’s outside auditors and the Audit Committee of the Board of Directors (a) any significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting (as defined in Rule 13a-15(f) under the Exchange Act) that are reasonably likely to adversely affect the Company’s ability to record, process, summarize and report financial information and (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company’s internal control over financial reporting.

Section 2.9 Disclosure Controls and Procedures. The Company has established and maintains, and at all times since January 1, 2018, has maintained, disclosure controls and procedures (as such term is defined in Rule 13a-15 and 15d-15 under the Exchange Act) that are (x) designed to provide reasonable assurance that material information relating to the Company, including its Subsidiaries, that is required to be disclosed by the Company in the reports that it furnishes or files under the Exchange Act is reported within the time periods specified in the rules and forms of the SEC and that such material information is communicated to the Company’s management to allow timely decisions regarding required disclosure, and (y) sufficient to provide reasonable assurance that (a) transactions are executed in accordance with Company management’s general or specific authorization, (b) transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP, consistently applied, and to maintain accountability for assets, (c) access to assets is permitted only in accordance with Company management’s general or specific authorization and (d) the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences. There are no “significant deficiencies” or “material weaknesses” (as defined by the Public Company Accounting Oversight Board) in the design or operation of the Company’s internal controls over, and procedures relating to, financial reporting which would reasonably be expected to adversely affect in any material respect the Company’s ability to record,
process, summarize and report financial data, in each case which has not been subsequently remediated. Since January 1, 2018, there has not been any fraud, whether or not material, that involves management or other employees of the Company or any of its Subsidiaries who have a significant role in the Company’s internal controls over financial reporting. As of the date of this Agreement, to the Knowledge of the Company, there is no reason that its outside auditors and its chief executive officer and chief financial officer will not be able to give the certifications and attestations required pursuant to the rules and regulations adopted pursuant to Section 404 of the Sarbanes-Oxley Act of 2002, without qualification, when next due.

Section 2.10 Litigation. There is no litigation or governmental proceeding, suit, arbitration or, to the Knowledge of the Company, investigation by any Governmental Entity, pending or, to the Knowledge of the Company, threatened in writing, against the Company or any of its Subsidiaries or affecting any of the business, operations, properties, rights or assets of the Company or any of its Subsidiaries which would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. Neither the Company nor any of its Subsidiaries is subject to or in default with respect to any order, writ, injunction, decree, ruling or decision of any court, commission, board or other government agency that is expressly applicable to the Company or any of its Subsidiaries or any of their respective assets which would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

Section 2.11 Compliance with Laws; Permits. The Company and its Subsidiaries are in compliance with all applicable laws, common law, statutes, ordinances, codes, rules or regulations enacted, adopted, promulgated, or applied by any governmental authority, except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. The Company and its Subsidiaries possess all permits, franchises, certificates, approvals, authorizations and licenses of governmental authorities that are required to conduct their business, except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

Section 2.12 Taxes. The Company and each of its Subsidiaries has filed all Tax Returns required to be filed within the applicable periods for such filings (with due regard to any extension) and has paid all Taxes required to be paid, except for any such failures to file or pay that have not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. Except as would not, in each case, reasonably be expected to have a Material Adverse Effect, (a) has not been advised that any of its returns, federal, state or other, are being audited as of the date hereof, (b) has not been advised of any deficiency in assessment or proposed judgment to its federal, state or other taxes, which has not been paid and (c) has no liability for any tax to be imposed upon its properties or assets as of the date of this Agreement that is not adequately provided for.

Section 2.13 Employee Matters.

(a) Except as would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, (i) the Company and its Subsidiaries are in compliance with all applicable laws relating to labor, employment, fair employment practices, terms and conditions of employment, and wages and hours, and with the terms of the Benefit Plans, and each such Benefit Plan is in compliance with all applicable laws (including, without limitation, the
applicable requirements of ERISA and the Code); (ii) with respect to the Benefit Plans, no audits, investigations, actions, liens, lawsuits, claims or complaints (other than routine claims for benefits, appeals of such claims and domestic relations order proceedings) are pending or, to the Knowledge of the Company, threatened, and, to the Knowledge of the Company, no facts or circumstances exist that would reasonably be expected to give rise to any such audits, investigations, actions, liens, lawsuits, claims or complaints; and (iii) to the Knowledge of the Company, no event has occurred with respect to any Benefit Plan which would reasonably be expected to result in a liability of the Company or any of its Subsidiaries to any governmental authority.

(b) Neither the Company, its Subsidiaries, nor any other entity which would be (i) under “common control,” with the Company or its Subsidiaries, within the meaning of Section 4001(a)(14) of ERISA or (ii) together with the Company or its Subsidiaries, treated as a “single employer” under Section 414 of the Code, has during the last six (6) years maintained, sponsored or contributed to or had any liability with respect to any defined benefit pension plan that is subject to Title IV of ERISA or any “multiemployer plan” (as defined in Section 4001(a)(3) of ERISA).

(c) Except as would not reasonably be expected, individually or in the aggregate, to result in a Material Adverse Effect, none of the execution of, or the completion of the transactions contemplated by, this Agreement (whether alone or in connection with any other event(s)), will result in (i) any compensation or benefit becoming due, or any increase in the amount of any compensation or benefit due, to any current or former employee of the Company or its Subsidiaries, or (ii) acceleration of the time of payment, vesting or funding of compensation or benefits to any current or former employee of the Company or its Subsidiaries. No Benefit Plan provides for reimbursement or gross-up of any excise tax under Section 409A or Section 4999 of the Code.

Section 2.14 Environmental Matters. The Company and its Subsidiaries are in compliance with all, and have not violated any, applicable Requirements of Environmental Law and possess and are in compliance with all, and have not violated any, required Environmental Permits, except, in each case, where the failure to comply or possess has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. The Company and its Subsidiaries have not received any written notice or claim from any Person of any violation or alleged violation of, or any liability or alleged liability under or related to, any Requirements of Environmental Law or Environmental Permit or any presence or release of any Hazardous Substance, and there is no basis for any such notice or claim, except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect. Neither the Company nor any of its Subsidiaries has assumed or retained, as a result of any contract, any liabilities under any Requirements of Environmental Law or concerning any Hazardous Substances, except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

Section 2.15 Intellectual Property; Security. Except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, (a) the Company and its Subsidiaries own their material proprietary Intellectual Property that they purport to own, free and clear of all liens of any Person (including current or former employees and contractors), (b) to the Knowledge of the Company, the conduct of the businesses of the Company and its Subsidiaries...
does not infringe or violate the Intellectual Property of any Person (and no Person has alleged the same in writing, including “cease and desist” letters or invitations to take a patent license) and no Person is infringing or violating their Intellectual Property, (c) the Company and its Subsidiaries take commercially reasonable efforts to protect the confidentiality of their trade secrets and the integrity, continuous operation and security against cyber threats of their Software and Systems (and all personal, sensitive or regulated data stored or processed therein) and there have been no breaches (or related outages) of or unauthorized accesses to same (except for those that were resolved without material cost or material liability) in the last three (3) years, (d) no software that the Company and its Subsidiaries convey, distribute, license or make available to others is subject to any open source license that requires the license or availability of the Company’s or its Subsidiaries’ material proprietary source code in such circumstances, (e) no third-party (other than the Company or its Subsidiaries, their respective personnel or other service providers working on their behalf) has current (or the contingent right to) access to any material proprietary source code of the Company or its Subsidiaries, and (f) the material Software and Systems of the Company and its Subsidiaries are reasonably sufficient to operate their businesses.

Section 2.16 Registration Rights. Except as provided in this Agreement or the Registration Rights Agreement, the Company has not granted any rights to register under the Securities Act any of its presently outstanding securities or any of its securities that may be issued subsequently.

Section 2.17 Investment Company Act. As of the Closing Date, the Company is not required to register as, and immediately after giving effect to the sale of the Purchased Shares in accordance with this Agreement and the application of the proceeds as described in this Agreement will not be required to be registered as, an “investment company,” as that term is defined in the Investment Company Act.

Section 2.18 Nasdaq. The Company’s Common Stock is listed on the Nasdaq Stock Market, and no event has occurred, and the Company is not aware of any event that is reasonably likely to occur, that would result in the Common Stock being delisted from the Nasdaq Stock Market. The Company is in compliance in all material respects with the listing and listing maintenance requirements of the Nasdaq Stock Market applicable to it for the continued trading of its Common Stock on the Nasdaq Stock Market.

Section 2.19 No Brokers or Finders. No Person has or will have, as a result of the transactions contemplated by this Agreement, any right, interest or claim against or upon the Company or any of its Subsidiaries for any commission, fee or other compensation as a finder or broker because of any act of the Company or any of its Subsidiaries, other than Goldman Sachs & Co. LLC whose fees are the sole responsibility of the Company.

Section 2.20 Illegal Payments; FCPA Violations. Except as has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, since January 1, 2015, none of the Company, any of its Subsidiaries or any of their officers, directors, employees or, to the Company’s Knowledge, any agents or representatives acting on behalf of the Company or any of its Subsidiaries has, in connection with the business of the Company: (a) unlawfully offered, paid, promised to pay, or authorized the payment of, directly or indirectly, anything of value, including money, loans, gifts, travel, or entertainment, to any
Government Official with the purpose of (i) influencing any act or decision of such Government Official in his or her official capacity; (ii) inducing such Government Official to perform or omit to perform any activity in violation of his or her legal duties; (iii) securing any improper advantage; or (iv) inducing such Government Official to influence or affect any act or decision of a Governmental Entity, in violation of the U.S. Foreign Corrupt Practices Act, the UK Bribery Act, or other applicable anti-corruption laws (collectively, “Anti-Corruption Laws”); (b) made any illegal contribution to any political party or candidate; (c) made, offered, promised to pay, or accepted any unlawful bribe, payoff, influence payment, kickback, unlawful rebate, or other similar unlawful payment of any nature, directly or indirectly, in connection with the business of the Company, to or from any person, including any supplier or customer; (d) knowingly established or maintained any unrecorded fund or asset or made any false entry on any book or record of the Company or any of its Subsidiaries for any purpose; or (e) otherwise violated any applicable Anti-Corruption Laws.

Section 2.21 Sanctions and Export Controls. Since January 1, 2015, none of the Company or its Subsidiaries or, to the Company’s Knowledge, any director, officer, employee or agent of the Company or any of its Subsidiaries, (i) is or was a Sanctioned Person, (ii) has conducted business, directly or indirectly, with any Sanctioned Person or in any Sanctioned Country on behalf of the Company or any of its Subsidiaries, except as authorized by the applicable government authority, or (iii) has violated or engaged in any conduct sanctionable under any applicable Sanctions Laws or Export Controls. The Company and each of its Subsidiaries has instituted and maintains a system of internal controls designed to provide reasonable assurance that violations of applicable Anti-Corruption Laws, Sanctions Laws, and Export Controls will be prevented, detected, and deterred.

Section 2.22 Absence of Certain Changes. (i) Since December 31, 2019, except for the execution and performance of this Agreement and any other agreements contemplated hereby and the discussions, negotiations and transactions related hereto, the business of the Company and its Subsidiaries has been conducted in all material respects in the ordinary course of business, and since December 31, 2019, there has not been any Material Adverse Effect.

Section 2.23 No Rights Agreement; Anti-Takeover Provisions.

(a) Neither the Company nor any of its Subsidiaries is party to a stockholder rights agreement, “poison pill” or similar anti-takeover agreement or plan.

(b) The Company and the Board of Directors have taken all necessary actions to ensure that no restrictions included in any Antitakeover Provision is, or will be, applicable to the Purchasers or their Affiliates, this Agreement or the Registration Rights Agreement, the Certificate of Designations or any of the transactions contemplated hereby or by the Registration Rights Agreement, including the Purchasers’ acquisition, or the Company’s issuance, of the Purchased Shares and the Conversion Shares in accordance with this Agreement and the Certificate of Designations.

Section 2.24 Government Contracts. The Company and its Subsidiaries, taken as a whole, possess all necessary security clearances required to perform their material classified
Government Contracts. The Company and its Subsidiaries have not previously received a rating of less than “satisfactory” from the Defense Counterintelligence and Security Agency with respect to any U.S. Government facility security clearance held by the Company or its Subsidiaries and used in connection with the performance of any material classified Government Contracts.

Section 2.25 No Additional Representations. Except for the representations and warranties made by the Company in this Article II (as modified by the Disclosure Letter) and in any certificate delivered to the Purchasers in connection with this Agreement, neither the Company nor any other Person makes any express or implied representation or warranty with respect to the Company or any Subsidiaries or their respective businesses, operations, assets, liabilities, employees, employee benefit plans, conditions or prospects, and the Company hereby disclaims any such other representations or warranties. In particular, without limiting the foregoing disclaimer, neither the Company nor any other Person makes or has made any representation or warranty to the Purchasers, or any of its Affiliates or representatives, with respect to (a) any financial projection, forecast, estimate, budget or prospect information relating to the Company or any of its Subsidiaries or their respective business, or (b) any oral or written information presented to the Purchasers or any of their Affiliates or representatives in the course of their due diligence investigation of the Company, the negotiation of this Agreement or in the course of the transactions contemplated hereby, or the accuracy or completeness thereof. Notwithstanding anything to the contrary herein, nothing in this Agreement shall limit the right of the Purchasers and their Affiliates to rely on the representations, warranties, covenants and agreements expressly set forth in this Agreement and in any certificate delivered to the Purchasers as may be required by this Agreement, nor will anything in this Agreement operate to limit any claim by any Purchaser or any of its respective Affiliates for fraud.

ARTICLE III

REPRESENTATIONS AND WARRANTIES OF THE PURCHASERS

Each Purchaser represents and warrants to the Company as of the date hereof and as of the Closing Date (except to the extent made only as of a specified date in which case as of such date) that:

Section 3.1 Organization and Power. The Purchaser is a Delaware limited liability company duly formed, validly existing and in good standing under the laws of the jurisdiction of its formation and has all necessary power and authority to own its properties and to carry on its business as presently conducted.

Section 3.2 Authorization, Etc. The Purchaser has all necessary power and authority and has taken all necessary entity action required for the due authorization, execution, delivery and performance by the Purchaser of this Agreement and the Registration Rights Agreement and the consummation by the Purchaser of the transactions contemplated hereby and thereby. The authorization, execution, delivery and performance by the Purchaser of this Agreement and the Registration Rights Agreement, and the consummation by the Purchaser of the transactions contemplated hereby and thereby do not and will not: (a) violate or result in the breach of any provision of the organizational documents of the Purchaser; or (b) with the exceptions that are not reasonably likely to have, individually or in the aggregate, a material adverse effect on its
ability to perform its obligations under this Agreement and the Registration Rights Agreement: (i) violate any provision of, constitute a breach of, or
default under, any judgment, order, writ, or decree applicable to the Purchaser or any material contract to which the Purchaser is a party; or (ii) violate
any provision of, constitute a breach of, or default under, any applicable state, federal or local law, rule or regulation. This Agreement has been, and the
Registration Rights Agreement will, at the Closing be, duly executed and delivered by the Purchaser. Assuming due execution and delivery thereof by
the other parties hereto or therto, this Agreement and the Registration Rights Agreement will each be a valid and binding obligation of the Purchaser
enforceable against the Purchaser in accordance with its terms, except as the enforceability may be limited by applicable laws relating to bankruptcy,
insolvency, reorganization, moratorium or other similar legal requirement relating to or affecting creditors’ rights generally and except as the
enforceability is subject to general principles of equity (regardless of whether enforceability is considered in a proceeding in equity or at law).

Section 3.3 Government Approvals. No consent, approval, license or authorization of, or filing with, any court or governmental authority is or
will be required on the part of the Purchaser in connection with the execution, delivery and performance by the Purchaser of this Agreement and the
Registration Rights Agreement, except for: (a) those which have already been made or granted; (b) the filing with the SEC of a Schedule 13D or
Schedule 13G and a Form 3 to report the Purchaser’s ownership of the Purchased Shares; or (c) those where the failure to obtain such consent, approval
or license would not have a material adverse effect on the ability of the Purchaser to perform its obligations hereunder.

Section 3.4 Investment Representations.

(a) The Purchaser is an “accredited investor” as that term is defined in Rule 501(a) of Regulation D promulgated under the Securities
Act.

(b) The Purchaser has been advised by the Company that the Purchased Shares have not been registered under the Securities Act, that the
Purchased Shares will be issued on the basis of the statutory exemption provided by Section 4(a)(2) under the Securities Act or Regulation D
promulgated hereunder, or both, relating to transactions by an issuer not involving any public offering and under similar exemptions under certain state
securities laws, that this transaction has not been reviewed by, passed on or submitted to any federal or state agency or self-regulatory organization
where an exemption is being relied upon, and that the Company’s reliance thereon is based in part upon the representations made by the Purchaser in
this Agreement and the Registration Rights Agreement. The Purchaser acknowledges that it has been informed by the Company of, or is otherwise
familiar with, the nature of the limitations imposed by the Securities Act and the rules and regulations thereunder on the transfer of securities.

(c) The Purchaser is purchasing the Purchased Shares for its own account and not with a view to, or for sale in connection with, any
distribution thereof in violation of federal or state securities laws.

(d) By reason of its business or financial experience, the Purchaser has the capacity to protect its own interest in connection with the
transactions contemplated hereunder.
Section 3.5 No Brokers or Finders. No Person has or will have, as a result of the transactions contemplated by this Agreement, any right, interest or claim against or upon the Company, any of its Subsidiaries or any Purchaser for any commission, fee or other compensation as a finder or broker because of any act by the Purchaser and for which the Company will be liable.

Section 3.6 No Additional Representations. The Purchaser acknowledges and agrees, on behalf of itself and its Affiliates, that, except for the representations and warranties contained in Article II (as modified by the Disclosure Letter) and in any certificate delivered by the Company in connection with this Agreement, neither the Company nor any other Person, makes any express or implied representation or warranty with respect to the Company, its Subsidiaries or their respective businesses, operations, assets, liabilities, employees, employee benefit plans, conditions or prospects, and the Purchaser, on behalf of itself and its Affiliates, hereby disclaims reliance upon any such other representations or warranties. In particular, without limiting the foregoing disclaimer, the Purchaser acknowledges and agrees, on behalf of itself and its Affiliates, that neither the Company nor any other Person, makes or has made any representation or warranty with respect to, and the Purchaser, on behalf of itself and its Affiliates, hereby disclaims reliance upon (a) any financial projection, forecast, estimate, budget or prospect information relating to the Company, its Subsidiaries or their respective business, or (b) without limiting the representations and warranties made by the Company in Article II, any information presented to the Purchaser or any of its Affiliates or representatives in the course of their due diligence investigation of the Company, the negotiation of this Agreement or in the course of the transactions contemplated hereby, or the accuracy or completeness thereof. To the fullest extent permitted by applicable law, without limiting the representations and warranties contained in Article II, other than in the case of fraud, neither the Company nor any of its Subsidiaries or any other Person shall have any liability to any Purchaser or its Affiliates or representatives on any basis (including in contract or tort, under federal or state securities laws or otherwise) based upon any other representation or warranty, either express or implied, included in any information or statements (or any omissions therefrom) provided or made available by the Company or its Subsidiaries or representatives to the Purchaser or its Affiliates or representatives in the course of their due diligence investigation of the Company, the negotiation of this Agreement or in the course of the transactions contemplated by this Agreement.
ARTICLE IV
COVENANTS OF THE PARTIES

Section 4.1  Board of Directors.

(a) As of the Closing, the Purchaser Representative shall have the right to designate one non-voting observer to the Board of Directors (the “Observer”), subject to Section 4.1(b). Effective as of the Closing, the Board of Directors shall appoint Jay Leek as the initial Observer and take all actions necessary or appropriate to appoint the Observer as a non-voting observer on the Board of Directors, effective as of the Closing Date.

(b) Thereafter, the Purchaser Representative shall have the right to designate, for so long as the Purchaser Parties taken together hold at least 65% of the Purchased Shares (or Conversion Shares issued upon conversion thereof) in aggregate issued to the Purchasers on the Closing, one Observer to the Board of Directors; provided, however, that the Observer shall comply with the corporate governance principles and practices of the Company as in effect from time to time and applicable to non-voting observers generally, including but not limited to the Company’s Corporate Governance Guidelines, the Company’s Code of Business Conduct & Ethics, and the Company’s Insider Trading Policy (the “Governance Principles”). If, following appointment as a non-voting observer to the Board of Directors, the Observer resigns, is removed, or is otherwise unable to serve for any reason (including as a result of death or disability) and the Purchaser Representative then has the right to designate an Observer pursuant to this Section 4.1, then, subject to compliance with the Governance Principles, the Purchaser Representative shall be entitled to designate a replacement Observer, and the Board of Directors shall cause such replacement Observer to fill such vacancy and to be appointed as a non-voting observer to the Board of Directors. In the event that the Purchaser Parties cease to hold the minimum percentage of Purchased Shares or Conversion Shares that entitles the Purchaser Representative to nominate the Observer as provided above, if requested by the Board of Directors, the Purchasers shall cause the Observer to immediately resign as a non-voting observer and the Purchasers shall no longer have any rights under this Section 4.1 with respect to the Observer.

(c) Each Observer nominee must be reasonably acceptable to the Board of Directors and meet in all material respects all of the requirements of a non-voting observer of the Company described in this Section 4.1.

(d) At the Closing, the Board of Directors shall take all necessary and appropriate action to form and maintain a special committee of the Board of Directors (the “Special Committee”), consisting of three (3) directors (one of whom shall always be either, at the election of BTO Delta Holdings DE L.P. (“Blackstone”): (i) the Series A Director designated by Blackstone pursuant to Section 4.1 of that certain Securities Purchase Agreement by and between the Company and Blackstone (the “Series A Director”) or (ii) another Board member acceptable to Blackstone), with a specific scope and mandate to be determined by the Board of Directors.

(e) For so long as the Purchaser Representative has the right to designate an Observer to the Board of Directors, such Observer shall have the right to (i) attend and participate in discussions of all meetings of the Board of Directors and of the Special
Committee (but whose presence shall not be counted towards the Board of Directors’ or the Special Committee’s quorum) in a non-voting observer capacity, (ii) receive advance notice of each meeting, including such meeting’s time and place, at the same time and in the same manner as such notice is provided to the members of the Board of Directors and of the Special Committee, and (iii) receive copies of all materials, including notices, minutes, consents and regularly compiled financial and operating data distributed to the members of the Board of Directors and the Special Committee at the same time as such materials are distributed to the Board of Directors and the Special Committee; provided, however, (A) the Company shall have the right to exclude such Observer or withhold such information to the extent such Observer’s presence or receipt of such information could reasonably be expected to result in the loss of attorney-client privilege or any other privilege or a violation of applicable laws or breach of any confidentiality agreement and (B) that such Observer shall not be entitled to attend the portion of any Board of Directors or any other committee meeting that constitutes an executive session of the Board of Directors or any other such committee thereof that is limited solely to independent directors of the Board of Directors and the Company’s independent auditors or legal counsel, as applicable.

Section 4.2 Restrictions on Transfer.

(a) For a period of one (1) year after the Closing, the Purchasers shall not Transfer any of the Purchased Shares to any Person without the consent of the Company; provided, however, that, without the consent of the Company, a Purchaser may Transfer Purchased Shares to a Permitted Transferee of the Purchaser that agrees to be bound by the terms of this Agreement pursuant to a written agreement (and upon such Transfer the Permitted Transferee shall become a “Purchaser” for purposes of this Agreement (including this Section 4.2)); pursuant to a tender or exchange offer, merger, consolidation, division, acquisition, reorganization or recapitalization involving the Company; or following the date the Company commences a voluntary case under Title 11 of the United States Bankruptcy Code or any other similar insolvency laws.

(b) At no time shall a Purchaser knowingly Transfer any Purchased Shares or Conversion Shares to (i) any Company Competitor, or (ii) any Person who is known to have engaged in activist campaigns in the three years prior to the date of any such proposed Transfer by stating an intention to or actually attempting to (pursuant to proxy solicitation, tender or exchange offer or other means) obtain a seat on the board of directors of a company or effecting a significant change within such company, in each case, that was publicly opposed by the board of directors of such company; provided, that the restrictions set forth in this Section 4.2(b) shall not apply to Transfers into the public market pursuant to a bona fide, broadly distributed public offering, in each case made pursuant to the Registration Rights Agreement or through a bona fide sale to the public without registration effectuated pursuant to Rule 144 under the Securities Act or in connection with a merger, tender offer or exchange offer or other business combination, acquisition of assets or similar transaction or any change of control transaction involving the Company or any Subsidiary thereof.

(c) Notwithstanding anything to the contrary contained herein, the restrictions set forth in this Section 4.2 shall not apply to any Transfer of shares of Series A Preferred Stock, Common Stock issued upon conversion of the Series A Preferred Stock or other Common Stock in connection with any Permitted Loan; provided, however, the Foreclosure
Limitations shall be applicable in connection with any foreclosure or exercise of remedies pursuant to a Permitted Loan. “Permitted Loan” means any total return swap or bona fide loan or other financing arrangement, in each case entered into with a nationally recognized financial institution, including a pledge to such a financial institution to secure a bona fide debt financing and any foreclosure by such financial institution or transfer to such financial institution in lieu of foreclosure and subsequent sale of the securities, as long as such financial institution agrees with the relevant Purchaser Party and the Company that following such foreclosure or in connection with such Transfer it shall not knowingly directly or indirectly Transfer (other than pursuant to Transfers (x) into the public market pursuant to a bona fide, broadly distributed public offering, in each case made pursuant to a registration statement; (y) through a bona fide sale into the public market without registration effectuated pursuant to Rule 144 under the Securities Act or (z) in connection with a merger, tender offer or exchange offer or other business combination, acquisition of assets or similar transaction or any change of control transaction involving the Company or any Subsidiary thereof) such foreclosed or Transferred, as the case may be, Common Stock or Series A Preferred Stock to a Company Competitor without the Company’s consent (such agreement by the relevant financial institution, the “Foreclosure Limitations”). Any Permitted Loan entered into by a Purchaser Party or its Affiliates shall be with one or more financial institutions reasonably acceptable to the Company and, except as specified above, nothing contained in this Agreement or the Registration Rights Agreement shall prohibit or otherwise restrict the ability of any lender (or its securities’ affiliate) or collateral agent to foreclose upon, or accept a Transfer in lieu of foreclosure, and sell, dispose of or otherwise Transfer the Common Stock, the Series A Preferred Stock and/or shares of Common Stock issued upon conversion of Series A Preferred Stock (including shares of Common Stock received upon conversion or redemption of the Series A Preferred Stock or Transfer in lieu of foreclosure on a Permitted Loan) mortgaged, hypothecated and/or pledged to secure the obligations of the borrower following an event of default under a Permitted Loan. Subject to the preceding provisions of this clause (c), in the event that any lender or other creditor under a Permitted Loan transaction (including any agent or trustee on their behalf) or any Affiliate of the foregoing exercises any rights or remedies in respect of the Series A Preferred Stock or the shares of Common Stock issuable or issued upon conversion of the Series A Preferred Stock or any other collateral for any Permitted Loan, no lender, creditor, agent or trustee on their behalf or affiliate of any of the foregoing (other than, for the avoidance of doubt, a Purchaser Party or its Affiliates) shall be entitled to any rights or have any obligations or be subject to any transfer restrictions or limitations hereunder except and to the extent for those expressly provided for in the Registration Rights Agreement.

(d) In any event, Restricted Securities shall not be Transferred except upon the conditions specified in this Section 4.2, which conditions are intended to ensure compliance with the provisions of the Securities Act. Any attempted Transfer in violation of this Section 4.2 shall be void ab initio.

(e) At the Closing, each Purchaser shall deliver to the Company a duly executed, valid, accurate and properly completed Internal Revenue Service (“IRS”) Form W-9 certifying that the Purchaser is a U.S. person and with the effect that the Company can make dividend payments to the Purchaser (or its nominee) without deduction or withholding for any U.S. federal withholding taxes. The Purchaser agrees that if the information provided on any IRS Form W-9 previously delivered by the Purchaser changes, or if a lapse in time or change in
circumstances renders the information on such IRS Form W-9 obsolete, expired or inaccurate in any material respect, the Purchaser shall promptly inform the Company and deliver promptly an updated IRS Form W-9.

Section 4.3 Restrictive Legends.

(a) Each certificate representing the Purchased Shares or Conversion Shares (unless otherwise permitted by the provisions of Section 4.2(b) or Section 4.3(d)) shall be stamped or otherwise imprinted with a legend in substantially the following form (in addition to any legend required under applicable state securities laws):

"THE OFFER AND SALE OF THIS SECURITY AND THE SHARES OF COMMON STOCK ISSUABLE UPON CONVERSION OF THIS SECURITY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND THIS SECURITY AND SUCH SHARES MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED EXCEPT (A) PURSUANT TO A REGISTRATION STATEMENT THAT IS EFFECTIVE UNDER THE SECURITIES ACT; OR (B) PURSUANT TO AN EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT."

(b) In addition, for so long as the Purchased Shares or Conversion Shares are subject to the restrictions set forth in Section 4.2, each certificate representing the Purchased Shares or Conversion Shares shall be stamped or otherwise imprinted with a legend in substantially the following form:

"THE SECURITIES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO RESTRICTIONS ON TRANSFER SET FORTH IN A SECURITIES PURCHASE AGREEMENT. THE COMPANY WILL GIVE TO THE HOLDER OF THIS CERTIFICATE A COPY OF SUCH SECURITIES PURCHASE AGREEMENT, AS IN EFFECT ON THE DATE OF THE GIVING OF SUCH COPY, WITHOUT CHARGE, PROMPTLY AFTER RECEIPT OF A WRITTEN REQUEST THEREFOR."

(c) Each Purchaser consents to the Company making a notation on its records and giving instructions to any transfer agent of the Purchased Shares or the Conversion Shares in order to implement the restrictions on transfer set forth in this Section 4.3.

(d) Prior to any proposed Transfer of any Restricted Securities, unless there is in effect a registration statement under the Securities Act covering the proposed Transfer, a Purchaser shall give written notice to the Company of such Purchaser’s intention to effect such Transfer. Each such notice shall describe the manner and circumstances of the proposed Transfer in sufficient detail, and shall be accompanied by either (i) an opinion of legal counsel reasonably satisfactory to the Company to the effect that the proposed Transfer of the Restricted Securities may be effected without registration under the Securities Act, or (ii) any other evidence reasonably satisfactory to counsel to the Company, whereupon such Purchaser shall be entitled to Transfer
such Restricted Securities in accordance with the terms of the notice delivered by such Purchaser to the Company. Notwithstanding the foregoing (1) in the event a Purchaser shall give the Company a representation letter containing such representations as the Company shall reasonably request, the Company will not require such legal opinion or such other evidence (A) in a routine sales transaction in compliance with Rule 144 under the Securities Act, (B) in any transaction in which a Purchaser that is a corporation distributes Restricted Securities solely to its majority owned subsidiaries or Affiliates for no consideration or (C) in any transaction in which a Purchaser that is a partnership or limited liability company distributes Restricted Securities solely to its Affiliates (including affiliated fund partnerships), or partners or members of the Purchaser or its Affiliates for no consideration and (2) the requirements of the preceding sentence shall not apply to (x) any pledge of Series A Preferred Stock, Conversion Shares or Common Stock pursuant to a Permitted Loan, or (y) any foreclosure upon, or acceptance of a Transfer in lieu of foreclosure, or any sale, disposition of or other Transfer of Common Stock, the Series A Preferred Stock and/or shares of Common Stock issued upon conversion of Series A Preferred Stock (including shares of Common Stock received upon conversion or redemption of the Series A Preferred Stock following foreclosure or Transfer in lieu of foreclosure on a Permitted Loan) by any lender (or its securities’ affiliate) or collateral agent under a Permitted Loan (which shall instead be governed by the terms of any applicable Issuer Agreements). Each certificate evidencing the Restricted Securities transferred shall bear the appropriate restrictive legend set forth in this Section 4.3, except that such certificate shall not bear the first such restrictive legend if such legend is not required in order to establish compliance with any provisions of the Securities Act. Upon the request of a Purchaser of a certificate bearing the first such restrictive legend and, if necessary, the appropriate evidence as required by clause (i) or (ii) above, the Company shall promptly remove the first such restrictive legend from such certificate and from the certificate to be issued to the applicable transferee if such legend is not required in order to establish compliance with any provisions of the Securities Act. If a Purchaser holds a certificate bearing the second restrictive legend, the Company shall promptly remove such restrictive legend from such certificate when the provisions of Section 4.2 are no longer applicable to the applicable Purchased Shares or Conversion Shares.

Section 4.4 Standstill. Except as otherwise provided in this Agreement or the Certificate of Designations, until the later of (i) one (1) year after the Closing and (ii) the date the Purchasers are no longer entitled to designate one non-voting observer to the Board of Directors pursuant to Section 4.1, without the prior written consent of the Company, the Purchasers will not at any time, nor will it cause any of its Affiliates to: (a) effect or seek, offer or publicly propose to effect, or publicly announce any intention to effect or cause or participate in or in any way assist, facilitate or encourage any other person to effect or seek, offer or propose (whether publicly or otherwise) to effect or participate in, (i) any acquisition of any equity securities (or beneficial ownership thereof) or rights or options to acquire any equity securities (or beneficial ownership thereof), or any securities convertible into or exchangeable for any such equity securities (or beneficial ownership thereof) of the Company, other than by the Purchasers and their Affiliates in a transaction pursuant to which the Purchaser and their Affiliates would beneficially own no more than five percent (5%) in the aggregate of the outstanding shares of the Company’s Common Stock (excluding conversion of the shares of Series A Preferred Stock and any Conversion Shares then held by the Purchasers or such Affiliates) after such transaction or any exercise of the Purchasers’ rights to acquire New Securities pursuant to Article VI; (ii) any tender or exchange offer, merger or other business combination involving the Company or its Subsidiaries or assets of the Company
or its Subsidiaries constituting a significant portion of the consolidated assets of the Company and its Subsidiaries; (b) make, participate in or encourage any “solicitation” (as such term is used in the proxy rules of SEC) of proxies or consents with respect to the election or removal of directors or any other matter or proposal; (ii) become a “participant” (as such term is used in the proxy rules of the SEC) in any such solicitation of proxies or consents; (iii) seek to advise, encourage or influence any Person with respect to the voting or disposition of any of the securities of the Company; or (iv) initiate, encourage or participate, directly or indirectly, in any “vote no,” “withhold” or similar campaign; (c) otherwise act to seek representation on or to control or influence the management or policies of the Company or to obtain representation on the Board of Directors of the Company; (d) publicly submit any shareholder proposal to the Company, or (e) publicly propose any change of control or other material transaction involving the Company, (w) restrict or prohibit the making or submission to the Company and/or the Board of Directors any proposal by the Purchaser Parties that would not reasonably be expected to result in the Company being obligated to publicly disclose such proposal, (x) restrict or prohibit participation in rights offerings made by the Company to all holders of Common Stock, (y) restrict or prohibit the Purchasers’ acquisition, disposition, sale or Transfer of the Purchased Shares (including the accretion of dividends thereon and any dividends payable in any other security) or Conversion Shares issuable upon conversion of the Purchased Shares, in each case, in accordance with the terms of this Agreement and the Certificate of Designations or (z) limit or restrict any Transfer pursuant to a Permitted Loan or any foreclosure thereunder or Transfer in lieu of a foreclosure thereunder.

Section 4.5  Confidentiality.

(a) The Purchasers shall keep all Confidential Information confidential and shall not, without the Company’s prior written consent, disclose any Confidential Information in any manner whatsoever, in whole or in part, and the Purchasers shall not use any Confidential Information, other than in connection with the performance of its obligations hereunder or for purposes of monitoring, administering or managing the Purchaser Parties’ investment in the Company. The Purchasers may disclose the Confidential Information (i) to such of their Representatives who need to know the Confidential Information for such purpose, who are informed by the Purchasers of the confidential nature of the Confidential Information and directed to keep such Confidential Information confidential, (ii) to any prospective purchaser of Purchased Shares (and Conversion Shares) from a Purchaser Party or prospective financing sources in connection with effecting any Permitted Loan (including any syndication and marketing thereof), as long as such prospective purchaser or lender agrees to be bound by a customary confidentiality or non-disclosure agreement with terms substantially similar to the terms contained in this Agreement (with the Company as an express third party beneficiary of such agreement) or (iii) as may be reasonably necessary in connection with such Purchaser Party’s enforcement of its rights in connection with this Agreement or its investment in the Company. The Purchasers shall be responsible for any non-compliance with this Section 4.5 by its Representatives or any such prospective purchaser.

(b) In the event that the Purchasers or any Representative is required or requested by applicable law (including oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or other process) to disclose any of the Confidential Information, the Purchasers will provide the Company with prompt notice (unless
such notification is prohibited by applicable law and other than in connection with a routine audit or examination by, or a blanket document request from, a regulatory or governmental entity that does not reference the Company or this Agreement) so that the Company may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Section 4.5. In the event that such a protective order or other remedy is not obtained, that no such notice is required to be provided to the Company or that the Company waives compliance with the provisions of this Section 4.5, the Purchasers may disclose such Confidential Information without liability hereunder.

Section 4.6 Financial Statements and Other Information.

(a) For so long as the Purchaser Parties collectively hold record and beneficial ownership (within the meaning of Rule 13d-3 under the Exchange Act) of more than five percent (5%) of the outstanding shares of the Company’s Common Stock (which shall be determined assuming the conversion of all of the shares of Series A Preferred Stock), the Company shall deliver to the Purchaser Parties:

(i) within 90 days after the end of each fiscal year of the Company, (A) an audited, consolidated balance sheet of the Company and its Subsidiaries as of the end of such fiscal year, (B) an audited, consolidated income statement of the Company and its Subsidiaries for such fiscal year and (C) an audited, consolidated statement of cash flows of the Company and its Subsidiaries for such fiscal year;

(ii) within 45 days after the end of each of the first three quarters of each fiscal year of the Company, (A) an unaudited, consolidated balance sheet of the Company and its Subsidiaries as of the end of such fiscal quarter, (B) an unaudited, consolidated income statement of the Company and its Subsidiaries for such fiscal quarter and (C) an unaudited, consolidated statement of cash flows of the Company and its Subsidiaries for such fiscal quarter; and

(iii) reasonable access, to the extent reasonably requested by the Purchaser Parties, to the Company and its Subsidiaries’ office properties, books and records, and to discuss their affairs, finances and matters related to capital structure and financing with its and their officers, all upon reasonable notice and at reasonable times at the Company’s principal place of business; provided that any access pursuant to this Section 4.6 shall be conducted in a manner as not to interfere unreasonably with the conduct of the business of the Company and its Subsidiaries.

(b) Notwithstanding the foregoing, financial statements and other reports required to be delivered pursuant to this Section 4.6 filed by the Company with the SEC and available on EDGAR (or such other free, publicly-accessible internet database that may be established and maintained by the SEC as a substitute for or successor to EDGAR) shall be deemed to have been delivered to the Purchaser Parties on the date on which the Company posts such documents to EDGAR (or such other free, publicly-accessible internet database that may be established and maintained by the SEC as a substitute for or successor to EDGAR).
(c) For so long as the Purchasers have the right, pursuant to Section 4.1(b), to nominate the Observer, the Company shall deliver to the Observer copies of all material, substantive materials provided to the Board of Directors at substantially the same time as provided to the directors of the Company.

(d) Notwithstanding anything to the contrary contained in this Section 4.6, the Company shall not be required to furnish information, board materials or reports or provide access to their books and records pursuant to this Section 4.6 if the Company determines in good faith that declining to furnish such information or reports or provide such access is reasonably necessary to preserve the attorney-client privilege or to protect highly confidential or proprietary information.

Section 4.7 Antitakeover Provisions; Other Actions.

(a) Antitakeover Provisions. The Company and the Board of Directors shall (i) take all actions necessary so that no Antitakeover Provision becomes applicable to this Agreement or the Purchasers’ acquisition, or the Company’s issuance, of the Purchased Shares and the Conversion Shares in accordance with this Agreement and the Certificate of Designations, and (ii) if any such Antitakeover Provision becomes applicable thereto to any extent or in any regard, to take all actions necessary so that such transactions may be consummated as promptly as practicable on the terms required by, or provided for, in this Agreement, the Registration Rights Agreement and the Certificate of Designations, and otherwise to take all such other actions as are reasonably necessary to eliminate or minimize to the greatest extent possible the effects of any such Antitakeover Provision thereupon or upon the transactions contemplated thereby.

(b) Notwithstanding anything in this Agreement to the contrary, nothing in this Agreement shall require or obligate the Purchasers or their respective Affiliates and any investment funds or investment vehicles affiliated with, or managed or advised thereby, or any portfolio company (as such term is commonly understood in the private equity industry) to propose, negotiation, commit to, and/or effect, by consent decree, holder separate order, or otherwise, the sale, divestiture, transfer, license, disposition, or hold separate (through the establishment of a trust or otherwise) of such assets, properties, or businesses of the Purchasers or any of their respective Affiliates, Subsidiaries, investment funds, or portfolio companies, in order to avoid the entry of any decree, judgment, injunction (permanent or preliminary), or any other order that would make the transactions contemplated by this Agreement unlawful or would otherwise materially delay or prevent the consummation of the transactions contemplated hereby.

Section 4.8 Tax Matters.

(a) USRPHC Status. At the Purchasers’ written request from time to time while the Purchasers own an equity interest in the Company, the Company shall use commercially reasonable efforts to determine as promptly as practicable whether it is a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code (a “USRPHC”) and shall, within a reasonable period after receipt of such request, notify the Purchasers in writing of its determination of its status as a USRPHC (and if in connection with a sale of an interest in the Company, shall promptly provide to the Purchasers a statement in accordance with Treasury Regulations Section 1.897-2(h)(1) where it determines the interest being sold is not a United States real property interest within the meaning of Section 897 of the Code).
(b) **Tax Treatment.** The Company and the Purchasers acknowledge and agree that the Purchased Shares are not intended to be “preferred stock” for purposes of Section 305 of the Code, and neither the Company nor the Purchasers shall take an inconsistent position with respect to the Purchased Shares for U.S. federal income tax purposes, unless otherwise required by a “determination” within the meaning of Section 1313(a) of the Code. The Company and the Purchasers further agree that the Purchasers shall not be required to include in income as a dividend for U.S. federal income tax purposes any income or gain in respect of the Preferred Stock on account of the accrual of a Dividend (as defined in the Certificate of Designations) in respect of the Series A Preferred Stock, unless and until such dividends are declared and paid in cash unless otherwise required by a “determination” within the meaning of Section 1313(a) of the Code. For the avoidance of doubt, in no event shall the Company be liable to the Purchasers or to any other party for any damages arising from either of the foregoing “determinations.”

Section 4.9 **Nasdaq Listing.** To the extent the Company has not done so prior to the execution of this Agreement, the Company shall apply to cause the Conversion Shares to be approved for listing prior to Closing on the Nasdaq Stock Market, subject to official notice of issuance. The Company shall use its reasonable best efforts to maintain the listing of all of the Conversion Shares upon each national securities exchange and automated quotation system, if any, upon which shares of Common Stock are then listed (subject to official notice of issuance) and shall maintain, so long as any other shares of Common Stock shall be so listed, such listing of the Conversion Shares. In accordance with the Certificate of Designations, the Company shall cause a number of shares of Common Stock equal to the total number of Conversion Shares to be authorized, reserved, and kept available at all times, free and clear of preemptive rights and all liens, to allow for full conversion of the Series A Preferred Stock in accordance with the terms thereof. From time to time following the Closing Date, the Company shall cause the number of shares of Common Stock issuable upon conversion or redemption of the then outstanding shares of Series A Preferred Stock to be approved for listing on the Nasdaq Stock Market. The Company shall pay all fees and expenses in connection with satisfying the obligations under this Section 4.9.

Section 4.10 **State Securities Laws.** The Company shall use its reasonable best efforts to (a) obtain all necessary permits and qualifications, if any, or secure an exemption therefrom, required by any state or country prior to the offer and sale of Common Stock and/or Series A Preferred Stock and (b) cause such authorization, approval, permit or qualification to be effective as of the Closing and as of any conversion of Series A Preferred Stock.

Section 4.11 **Negative Covenants.** Except as set forth on Section 4.11 of the Disclosure Letter, from the date of this Agreement through the Closing, the Company and its Subsidiaries shall use their reasonable best efforts to operate their businesses in the ordinary course, and, without the prior written consent of the Purchaser Parties (which consent shall not be unreasonably withheld, conditioned or delayed), the Company shall not and shall cause its Subsidiaries not to:
(a) take any action that would require the consent of the Holders (as defined in the Certificate of Designations) pursuant to Section 9(a) of the Certificate of Designations;

(b) redeem, purchase, repurchase or otherwise acquire any of its outstanding shares of capital stock or other equity or voting interests, or any rights, warrants or options to acquire any shares of its capital stock or other equity or voting interests, except in the ordinary course of business, consistent with past practice pursuant to the terms of the Stock Plans or Benefit Plans;

(c) establish a record date for, declare, set aside for payment or pay any dividend on, or make any other distribution in respect of, any shares of its capital stock or other equity or voting interests;

(d) split, combine, subdivide, recapitalize, reclassify or make like change to any shares of its capital stock or other equity or voting interests;

(e) amend, supplement or otherwise change, or waive any provision of, the Company’s Certificate of Incorporation, Bylaws or other organizational documents or make any material amendments or changes to the organizational documents of any of the Company’s Subsidiaries or take or authorize any action to wind up its affairs or dissolve (in each case except as and to the extent contemplated by Section 2.23(b) or Section 4.7(a) or in connection with the filing of the Certificate of Designations);

(f) enter into any new, or amend, terminate or renew in any material respect, any material Benefit Plan, other than in the ordinary course of business and consistent with past practice;

(g) enter into any new, or amend, terminate or renew in any material respect, any material Contract between the Company or one of its Subsidiaries, on the one hand, and any other Person (other than the Company’s Subsidiaries) including officer or director of the Company or any of its Subsidiaries, on the other hand, outside the ordinary course of business;

(h) make any material change in the Company’s or its Subsidiaries’ financial accounting principles, except as required by changes in GAAP (or any interpretation thereof) or in applicable Law; or

(i) agree, authorize or commit to do any of the foregoing.

Section 4.12 No Fiduciary Duties.

(a) The Purchaser Parties and the Company hereby agree, notwithstanding anything to the contrary in any other agreement or at law or in equity, that, to the maximum extent permitted by law, when the Purchaser Parties take any action under this Agreement to give or withhold their consent, the Purchaser Parties shall have no duty (fiduciary or other) to consider the interests of the Company or the other stockholders of the Company and may act exclusively in their own interest; provided, however, that the foregoing shall in no way affect the obligations of the parties hereto to comply with the provisions of this Agreement.
Section 4.13 Use of Proceeds. The Company shall use the proceeds from the issuance and sale of the Purchased Shares for stock buy backs, general corporate purposes and, potentially, acquisitions with strategic impact.

Section 4.14 Corporate Actions.

(a) If any occurrence since the date of this Agreement until the Closing would have resulted in an adjustment to the Conversion Price (as defined in the Certificate of Designations) pursuant to the Certificate of Designations if the Series A Preferred Stock had been issued and outstanding since the date of this Agreement, the Company shall adjust the Conversion Price, effective as of the Closing, in the same manner as would have been required by the Certificate of Designations if the Series A Preferred Stock had been issued and outstanding since the date of this Agreement.

(b) The Company shall not adopt any stockholder rights agreement, “poison pill” or similar anti-takeover agreement or plan that prohibits the Purchaser Parties from taking any of the actions permitted by this Agreement under Section 4.2 or the Certificate of Designations.

Section 4.15 Corporate Opportunities. In recognition and anticipation that (1) certain directors, principals, officers, employees and/or other representatives of the Purchaser Parties and their Affiliates may serve as directors, officers or agents of the Company, (2) the Purchaser Parties and their Affiliates may now engage and may continue to engage in the same or similar activities or related lines of business as those in which the Company, directly or indirectly, may engage and/or other business activities that overlap with or compete with those in which the Company, directly or indirectly, may engage or proposes to engage, and (3) members of the Board who are not employees of the Company or its subsidiaries (the “Non-Employee Directors”) and their respective Affiliates may now engage and may continue to engage in the same or similar activities or related lines of business as those in which the Company, directly or indirectly, may engage and/or other business activities that overlap with or compete with those in which the Company, directly or indirectly, may engage or proposes to engage, the provisions of this Section 4.15 are set forth to regulate and define the conduct of certain affairs of the Company with respect to certain classes or categories of business opportunities as they may involve the Purchaser Parties, the Non-Employee Directors or their respective Affiliates, as applicable, and the powers, rights, duties and liabilities of the Company and its directors, officers and stockholders in connection therewith. None of (1) the Purchaser Parties or any of their Affiliates, or (2) any Non-Employee Director or his or her Affiliates (the Persons identified in (1) and (2) above being referred to, collectively, as “Identified Persons” and, individually, as an “Identified Person”) shall, to the fullest extent permitted by law, have any duty to refrain from, directly or indirectly, (A) engaging in the same or similar business activities or lines of business in which the Company or any of its Affiliates now engages or proposes to engage or (B) otherwise competing with the Company or any of its Affiliates, and, to the fullest extent permitted by law, no Identified Person shall be liable to the Company or its stockholders or to any Affiliate of the Company for breach of any fiduciary duty solely by reason of the fact that such Identified Person engages in any such activities. To the fullest extent permitted by law, the Company hereby renounces any interest or expectancy in, or right to be offered an opportunity to participate in, any business opportunity that may be a corporate opportunity for an Identified Person and the Company or any of its Affiliates.
Subject to the following sentence, in the event that any Identified Person acquires knowledge of a potential transaction or other business opportunity that may be a corporate opportunity for itself, herself or himself and the Company or any of its Affiliates, such Identified Person shall, to the fullest extent permitted by law, have no duty to communicate or offer such transaction or other business opportunity to the Company or any of its Affiliates and, to the fullest extent permitted by law, shall not be liable to the Company or its stockholders or to any Affiliate of the Company for breach of any fiduciary duty as a stockholder, director or officer of the Company solely by reason of the fact that such Identified Person pursues or acquires such corporate opportunity for itself, herself or himself, or offers or directs such corporate opportunity to another Person or does not communicate information regarding such corporate opportunity to the Company. Notwithstanding the foregoing, the Company does not renounce its interest in any corporate opportunity offered to any Non-Employee Director (including any Non-Employee Director who serves as an officer of this Company) if such opportunity is offered to such person solely in his or her capacity as a director or officer of the Company, and this section shall not apply to any such corporate opportunity. In addition to and notwithstanding the foregoing provisions of this Agreement or anything to the contrary in the Certificate of Designations, to the fullest extent permitted by law, a potential corporate opportunity shall not be deemed to be a corporate opportunity for the Company if it is a business opportunity that (1) the Company is neither financially or legally able, nor contractually permitted to undertake, (2) from its nature, is not in the line of the Company’s business or is of no practical advantage to the Company, or (3) is one in which the Company has no interest or reasonable expectancy.

Section 4.16 Financing Cooperation. If requested by the Purchaser Parties, the Company will provide the following cooperation in connection with the Purchaser Parties obtaining any Permitted Loan following the Closing: (i) using good faith and commercially reasonable efforts to enter into an issuer agreement (an “Issuer Agreement”) with each lender in customary form in connection with such transactions (which agreement may include, without limitation, agreements and obligations of the Company relating to procedures and specified time periods for effecting Transfers and/or conversions upon foreclosure, agreements to not intentionally hinder or delay exercises of remedies on foreclosure, acknowledgments regarding corporate policy, if applicable, certain acknowledgments regarding securities law status of the pledge arrangements and a specified list of Company Competitors) and subject to the consent of the Company (which will not be unreasonably withheld or delayed), with such changes thereto as are requested by such lender and customary for similar financings, (ii) using commercially reasonable efforts to (A) remove any restrictive legends on certificates representing pledged Series A Preferred Stock, Conversion Shares or Common Stock and depositing such pledged Series A Preferred Stock, Conversion Shares or Common Stock in book entry form on the books of The Depository Trust Company, when eligible to do so (for the avoidance of doubt, shares of Common Stock will not be considered so eligible prior to the date the lender has a valid one year “holding period” (as defined in Rule 144) in such shares of Common Stock) or (B) without limiting the generality of clause (A), if such Series A Preferred Stock is eligible for resale under Rule 144A, depositing such pledged Series A Preferred Stock in book entry form on the books of The Depository Trust Company or other depository with customary Rule 144A restrictive legends in lieu of the legends specified in Section 4.3 above, (iii) if so requested by such lender or counterparty, as applicable, (x) re-issuing the pledged Series A Preferred Stock, Conversion Shares or Common Stock in certificated form in the name of a Purchaser Party or its Affiliates and/or (y) re-registering the pledged Series A Preferred Stock, Conversion Shares or Common Stock in
certificated form or in book-entry form, as so requested, in the name of the relevant lender, counterparty, custodian or similar party to a Permitted Loan, with respect to Permitted Loans solely as securities intermediary and only to the extent a Purchaser Party or its Affiliates continues to beneficially own such pledged Series A Preferred Stock, Conversion Shares or Common Stock, (iv) entering into customary triparty agreements with each lender and the Purchaser Parties relating to the delivery of the Series A Preferred Stock, Conversion Shares or Common Stock to the relevant lender for crediting to the relevant collateral accounts upon funding of the loan and payment of the purchase price including a right for such lender as a third party beneficiary of the Company’s obligations hereunder to issue the Series A Preferred Stock, Conversion Shares or Common Stock upon payment of the purchase price therefor in accordance with the terms of this Agreement and (v) such other cooperation and assistance as the Purchaser Parties may reasonably request (which cooperation and assistance, for the avoidance of doubt, shall not include any requirements that the Company deliver information, compliance certificates or any other materials typically provided by borrowers to lenders) that will not unreasonably disrupt the operation of the Company’s business, in the cases of clauses (ii) and (iii), subject to receipt of customary legal opinions and certificates and the satisfaction of any relevant requirements of the Company’s transfer agent. Notwithstanding anything to the contrary in the preceding sentence, the Company’s obligation to deliver an Issuer Agreement is conditioned on (i) the relevant Purchaser Party certifying to the Company in writing that (A) the loan agreement with respect to which the Issuer Agreement is being delivered constitutes a Permitted Loan being entered into in accordance with this Agreement, such Purchaser Party has pledged Common Stock or the Series A Preferred Stock and/or the underlying shares of Common Stock as collateral to the lenders under such Permitted Loan and that the execution of such Permitted Loan and the terms thereof do not violate the terms of this Agreement, (B) to the extent applicable, whether the registration rights under the Registration Rights Agreement are being assigned to the lenders under that Permitted Loan and (C) such Purchaser Party acknowledges and agrees that the Company will be relying on such certificate when entering into the Issuer Agreement and any inaccuracy in such certificate will be deemed a breach of this Agreement and (ii) the Issuer Agreement containing customary representations, warranties and covenants for the benefit of the Company from the relevant Purchaser Party and the lender reasonably satisfactory to the Company (including, for the avoidance of doubt, an undertaking of the lender to sell any pledged Series A Preferred Stock and/or common stock in compliance with the Foreclosure Limitations). The Purchaser Parties acknowledge and agree that the statements and agreements of the Company in an Issuer Agreement are solely for the benefit of the applicable lenders party thereto and that in any dispute between the Company and the Purchaser Parties under this Agreement the Purchaser Parties shall not be entitled to use the statements and agreements of the Company in an Issuer Agreement against the Company.

Section 4.17 Voting Agreement. For so long as the Purchasers have the right to designate the Observer to the Board of Directors pursuant to Section 4.1, at each meeting of the stockholders of the Company and at every postponement or adjournment thereof, the Purchasers shall take such action as may be required so that all of the Purchased Shares, owned, directly or indirectly, of record or beneficially by the Purchasers and entitled to vote at such meeting of stockholders are voted (a) in favor of the Company’s “say-on-pay” proposal and any proposal by the Company relating to equity compensation that has been approved by the Board of Directors or the Compensation Committee of the Board of Directors (or any successor committee, however denominated), (b) in favor of the Company’s proposal for ratification of the appointment of the
Company’s independent registered public accounting firm and (c) in favor of the Company’s proposal for amendment of its organizational documents in a manner that does not have an adverse effect on the holders of Series A Preferred Stock to increase number of authorized shares of capital stock of the Company, but the Purchasers shall not be under any obligation to vote in the same manner as recommended by the Board of Directors or in any other manner, other than in its sole discretion, with respect to any other matter. In furtherance of the foregoing, for so long as the Purchasers have the right to designate the Observer to the Board of Directors pursuant to Section 4.1, the Purchasers shall take such action as may be required so that the Purchasers are present, in person or by proxy, at each meeting of the stockholders of the Company and at every postponement or adjournment thereof so that all of the Purchased Shares, owned, directly or indirectly, of record or beneficially by the Purchasers may be counted for the purposes of determining the presence of a quorum and voted in accordance with the terms and conditions of this Section 4.17.

ARTICLE V

CONDITIONS TO THE PARTIES’ OBLIGATIONS

Section 5.1 Conditions of the Purchasers. The obligations of the Purchasers to consummate the transactions contemplated hereby to be consummated at the Closing are subject to the satisfaction or written waiver (to the extent any such waiver is permitted by applicable Law) by the Purchasers, on or prior to the Closing Date, of each of the following conditions precedent:

(a) Representations and Warranties. (i) Each of the representations and warranties of the Company contained in Article II of this Agreement (other than Sections 2.1 (Organization and Power), 2.2(a) (Authorization), 2.4(a) and (b) (Authorized and Outstanding Stock), 2.6 (Private Placement), 2.18 (Nasdaq Listing), 2.19 (No Brokers or Finders), 2.22(ii) (Absence of Certain Changes) and 2.23 (No Rights Agreement; Anti-Takeover Provisions) of this Agreement) shall be true and correct on and as of the date hereof and on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of the Closing Date, except for representations and warranties that speak as of a specific date or time other than the Closing Date (which need only be true and correct as of such date or time), except where the failure of such representations and warranties to be so true and correct, without giving effect to any qualification or limitation as to “materiality,” “Material Adverse Effect” or similar qualifier set forth therein, has not had, and would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, (ii) each of the representations and warranties of the Company contained in Sections 2.1 (Organization and Power), 2.2(a) (Authorization), 2.4(a) and (b) (Authorized and Outstanding Stock), 2.6 (Private Placement), 2.18 (Nasdaq Listing), 2.19 (No Brokers or Finders) and 2.23 (No Rights Agreement; Anti-Takeover Provisions) of this Agreement shall be true and correct in all material respects on and as of the date hereof and on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of the Closing Date, except for representations and warranties that speak as of a specific date or time other than the Closing Date (which need only be true and correct in all material respects as of such date or time) and (iii) the representations and warranties of the Company contained in 2.22(ii) (Absence of Certain Changes) of this Agreement shall be true and correct on and as of the date hereof and on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of the Closing Date.
(b) **Covenants.** The Company shall have performed and complied in all material respects with all covenants and agreements required by this Agreement to be performed or complied with by it at or prior to the Closing.

(c) **Certificate of Designations.** The Certificate of Designations shall have been duly filed with the Secretary of State of the State of Delaware and a certified copy shall have been delivered to the Purchasers.

(d) **VCOC Letter Agreement.** The Purchasers (or at the Purchasers’ election, any Purchaser Party) shall have received a duly executed VCOC Letter Agreement, in the form of Exhibit E hereto.

(e) **Officer’s Certificate.** The Purchasers shall have received a certificate signed on behalf of the Company by a duly authorized officer certifying to the effect that the conditions set forth in Section 5.1(a) and (b) have been satisfied.

(f) **No Order.** There shall be no injunction, order or decree of any nature of any governmental authority in effect that restrains, prohibits or makes illegal the consummation of the transactions contemplated hereby.

Section 5.2 **Conditions of the Company.** The obligations of the Company to consummate the transactions contemplated hereby are subject to the satisfaction or written waiver (to the extent any such waiver is permitted by applicable Law) by the Purchasers, on or prior to the Closing Date, of each of the following conditions precedent:

(a) **Representations and Warranties; Performance.** (i) Each of the representations and warranties of the Purchasers contained in Article III of this Agreement shall be true and correct on and as of the date hereof and on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of the Closing Date, except for representations and warranties that speak as of a specific date or time other than the Closing Date (which need only be true and correct as of such date or time), except where the failure of such representations and warranties to be so true and correct, without giving effect to any qualification or limitation as to “materiality,” “material adverse effect” or similar qualifier set forth therein, has not had, and would not reasonably be expected to have, individually or in the aggregate, a material adverse effect on Purchasers’ ability to consummate the transactions contemplated by this Agreement.

(b) **Covenants.** The Purchasers shall have performed and complied in all material respects with all covenants and agreements required by this Agreement to be performed or complied with by the Purchasers at or prior to the Closing.

(c) **Consideration for the Securities.** The Purchasers shall have paid the purchase price of the Purchased Shares to be purchased by such Purchasers in full at the Closing by wire transfer of immediately available funds to an account designated in writing by the Company.
(d) **Certificate of Designations.** The Certificate of Designations shall have been duly filed with the Secretary of State of the State of Delaware.

(e) **Officer’s Certificate.** The Company shall have received a certificate signed on behalf of the Purchasers by a duly authorized officer certifying to the effect that the conditions set forth in Sections 5.2(a) and (b) have been satisfied.

(f) **No Order.** There shall be no injunction, order or decree of any nature of any governmental authority in effect that restrains, prohibits or makes illegal the consummation of the transactions contemplated hereby.

ARTICLE VI

PREEMPTIVE RIGHTS

Section 6.1 **Generally.** So long as the Purchasers own beneficially and of record at least 25% of the Purchased Shares, if the Company makes any public or non-public offering of any capital stock of, other equity or voting interests in, or equity-linked securities of, the Company or any securities that are convertible or exchangeable into (or exercisable for) capital stock of, other equity or voting interests in, or equity-linked securities of, the Company (collectively “Preemptive Securities”), including, for the purposes of this Article VI, warrants, options or other such rights (any such security, a “New Security”) (other than (1) issuances of any securities to directors, officers, employees, consultants or other agents of the Company, (2) issuances of any securities pursuant to an employee stock option plan, management incentive plan, restricted stock plan, stock purchase plan or stock ownership plan or similar benefit plan, program or agreement, (3) issuances made as consideration for any acquisition (by sale, merger in which the Company is the surviving corporation, or otherwise) by the Company of equity in, or assets of, another Person, business unit, division or business, (4) issuances of any securities issued as a result of a stock split, stock dividend, spin-off, reclassification or reorganization or similar event, (5) securities issued pursuant to the conversion, exercise or exchange of Series A Preferred Stock issued to the Purchasers and (6) shares of a Subsidiary of the Company issued to the Company or a wholly owned Subsidiary of the Company), the Purchasers shall be afforded the opportunity to acquire from the Company its Preemptive Rights Portion of such New Securities for the same price and on the same terms as that offered to the other purchasers of such New Securities; provided, that the Purchasers shall not be entitled to acquire any New Securities pursuant to this Article VI to the extent the issuance of such New Securities to the Purchasers would require approval of the stockholders of the Company as a result of any Purchaser’s status, if applicable, as an Affiliate of the Company or pursuant to the rules and listing standards of Nasdaq until the Company obtains such approval, and the Company shall use reasonable best efforts to obtain such approval as promptly as practicable.

Section 6.2 **Calculation of Preemptive Rights Portion.** Subject to the foregoing proviso in Section 6.1, the amount of New Securities that each Purchaser shall be entitled to purchase in the aggregate shall be determined by multiplying (1) the total number of such offered shares of New Securities by (2) a fraction, the numerator of which is the number of shares of Series A Preferred Stock and/or shares of Common Stock (in the aggregate and on an as converted basis)
Section 6.3  Preemptive Rights Notices and Procedures. If the Company proposes to offer New Securities, it shall give the Purchasers written notice of its intention, describing the anticipated price (or range of anticipated prices), anticipated amount of New Securities and other material terms and timing upon which the Company proposes to offer the same (including, in the case of a registered public offering and to the extent possible, a copy of the prospectus included in the registration statement filed with respect to such offering) at least seven (7) Business Days prior to such issuance (or, in the case of a registered public offering, at least seven (7) Business Days prior to the commencement of such registered public offering) (provided that, to the extent the terms of such offering cannot reasonably be provided seven (7) Business Days prior to such issuance, notice of such terms may be given as promptly as reasonably practicable but in any event prior to such issuance). The Company may provide such notice to the Purchasers on a confidential basis prior to public disclosure of such offering. Other than in the case of a registered public offering, the Purchasers may notify the Company in writing at any time on or prior to the second (2nd) Business Day immediately preceding the date of such issuance (or, if notice of all such terms has not been given prior to the second (2nd) Business Day immediately preceding the date of such issuance, at any time prior to such issuance) whether the Purchasers will exercise such preemptive rights and as to the amount of New Securities the Purchasers desire to purchase, up to the maximum amount calculated pursuant to Section 6.2. In the case of a registered public offering, the Purchasers shall notify the Company in writing at any time prior to the second (2nd) Business Day immediately preceding the date of commencement of such registered public offering (or, if notice of all such terms has not been given prior to the second (2nd) Business Day immediately preceding the date of commencement of such registered public offering, at any time prior to the date of commencement of such registered public offering) whether the Purchasers will exercise such preemptive rights and as to the amount of New Securities the Purchasers desire to purchase, up to the maximum amount calculated pursuant to Section 6.2. Such notice to the Company shall constitute a binding commitment by the Purchasers to purchase the amount of New Securities so specified at the price and other terms set forth in the Company’s notice to it. Subject to receipt of the requisite notice of such issuance by the Company, the failure of a Purchaser to respond prior to the time a response is required pursuant to this Article VI shall be deemed to be a waiver of the Purchaser’s purchase rights under this Article VI only with respect to the offering described in the applicable notice.

Section 6.4  Purchase of New Securities. Each Purchaser shall purchase the New Securities that it has elected to purchase under this Article VI concurrently with the related issuance of such New Securities by the Company (subject to the receipt of any required approvals); provided, that if such related issuance is prior to the twentieth (20th) Business Day following the date on which the Purchaser has notified the Company that it has elected to purchase New Securities pursuant to this Article VI, then the Purchaser shall purchase such New Securities within twenty (20) Business Days following the date of the related issuance. If the proposed issuance by the Company of securities which gave rise to the exercise by the Purchaser of its preemptive rights pursuant to this Article VI shall be terminated or abandoned by the Company without the issuance of any New Securities, then the purchase rights of the Purchaser pursuant to this Article VI shall also terminate as to such proposed issuance by the Company (but not any subsequent or future issuance), and any funds in respect thereof paid to the Company by the Purchaser in respect thereof shall be promptly refunded in full.
Section 6.5 Consideration Other than Cash. In the case of the offering of securities for consideration in whole or in part other than cash, including securities acquired in exchange therefor (other than securities by their terms so exchangeable), the consideration other than cash shall be deemed to be the fair value thereof as reasonably determined by the Board of Directors; provided, however, that such fair value as determined by the Board of Directors shall not exceed the aggregate market price of the securities being offered as of the date the Board of Directors authorizes the offering of such securities.

Section 6.6 Miscellaneous. The election by a Purchaser to not exercise its subscription rights under this Article VI in any one instance shall not affect its rights as to any subsequent proposed issuance. The Company and the Purchaser shall cooperate in good faith to facilitate the exercise of the Purchaser’s rights pursuant to this Article VI, including securing any required approvals or consents.

ARTICLE VII
MISCELLANEOUS

Section 7.1 Survival. Except for the representations and warranties of the Company contained in Sections 2.1 (Organization and Power), 2.2(a) (Authorization), 2.4(a) and (b) (Authorized and Outstanding Stock), and 2.6 (Private Placement), which shall survive indefinitely, the representations and warranties contained in Article II and Article III hereof shall survive for six (6) months following the Closing Date and then expire; provided that nothing herein shall relieve any party of liability for any inaccuracy or breach of such representations and warranties in the case of fraud. All other covenants and agreements of the parties contained herein shall survive the Closing in accordance with their terms.

Section 7.2 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement, and will become effective when one or more counterparts have been signed by a party and delivered to the other parties. Copies of executed counterparts of signature pages to this Agreement may be transmitted by PDF (portable document format) or facsimile and such PDFs or facsimiles will be deemed as sufficient as if actual signature pages had been delivered.

Section 7.3 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, without giving effect to any choice of law or conflict of law rules or provisions (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware.
(b) Any dispute relating hereto shall be heard in the Court of Chancery of the State of Delaware, and, if applicable, in any state or federal court located in the State of Delaware in which appeal from the Court of Chancery of the State of Delaware may validly be taken under the laws of the State of Delaware (or, if the Court of Chancery of the State of Delaware declines to accept jurisdiction over such dispute, any state or federal court within the State of Delaware) (each a "Chosen Court" and collectively, the "Chosen Courts"), and the parties hereto agree to the exclusive jurisdiction and venue of the Chosen Courts. Such Persons further agree that any proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby or by any matters related to the foregoing (the "Applicable Matters") shall be brought exclusively in a Chosen Court, and that any proceeding arising out of this Agreement or any other Applicable Matter shall be deemed to have arisen from a transaction of business in the State of Delaware and each of the foregoing Persons hereby irrevocably consents to the jurisdiction of such Chosen Courts in any such proceeding and irrevocably and unconditionally waives, to the fullest extent permitted by law, any objection that such Person may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such Chosen Court or that any such proceeding brought in any such Chosen Court has been brought in an inconvenient forum.

(c) Such Persons further covenant not to bring a proceeding with respect to the Applicable Matters (or that could affect any Applicable Matter) other than in such Chosen Court and not to challenge or enforce in another jurisdiction a judgment of such Chosen Court.

(d) Process in any such proceeding may be served on any Person with respect to such Applicable Matters anywhere in the world, whether within or without the jurisdiction of any such Chosen Court. Without limiting the foregoing, each such Person agrees that service of process on such party as provided in Section 7.6 shall be deemed effective service of process on such Person.

(e) Waiver of Jury Trial. EACH PARTY HERETO, FOR ITSELF AND ITS AFFILIATES, HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT OR OTHER PROCEEDING (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THE ACTIONS OF THE PARTIES HERETO OR THEIR RESPECTIVE AFFILIATES PURSUANT TO THIS AGREEMENT OR IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT HEREOF.

Section 7.4 Entire Agreement; No Third Party Beneficiary. This Agreement and the Registration Rights Agreement contain the entire agreement by and among the parties with respect to the subject matter hereof and all prior negotiations, writings and understandings relating to the subject matter of this Agreement. This Agreement is not intended to confer upon any Person not a party hereto (or their successors and permitted assigns) any rights or remedies hereunder.

Section 7.5 Notices. All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed to have been duly given or made as follows: (a) if sent by registered or certified mail in the United States return receipt requested, upon receipt; (b) if sent by nationally recognized overnight air courier, one (1) Business Day after mailing; (c) if sent by e-mail transmission, with a copy sent on the same day in the manner provided in the foregoing clause (a) or (b), when transmitted and receipt is confirmed; and (d) if
otherwise actually personally delivered, when delivered, provided, that such notices, requests, demands and other communications are delivered to the address set forth below, or to such other address as any party shall provide by like notice to the other parties to this Agreement:

If to the Company, to:
FireEye, Inc.
601 McCarthy Blvd.
Milpitas, CA 95035
Attention: Alexa King
Email: [***]

with a copy (which shall not constitute notice) to:
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
Attention: Steven E. Bochner
Email: [***]

If to a Purchasers or to the Purchaser Representative, to:
ClearSky Security Fund I LLC
ClearSky Power & Technology Fund II LLC
700 Universe Boulevard
Juno Beach, FL 33408
Attention: Managing Directors
E-mail: [***]

with a copy (which shall not constitute notice) to:
ClearSky Security Fund I LLC
ClearSky Power & Technology Fund II LLC
700 Universe Boulevard
Juno Beach, FL 33408
Attention: General Counsel
E-mail: [***]

Section 7.6 Successors and Assigns. This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. This Agreement may be assigned (a) in connection with a Transfer to a Permitted Transferee permitted by Section 4.2(a)(i) and (b) as collateral security to any lender to the Purchasers; provided, however, that a Purchaser Party may assign its rights, interests and obligations under this Agreement in whole or in part (including, without limitation, solely the right to purchase Series A Preferred Stock at the Closing in accordance with Section 1.2) to one or more Permitted Transferees, including as contemplated in Section 4.2(a)(i) and in the event of such assignment, the assignee shall agree in writing to be bound by the provisions of this Agreement, including the rights, interests and obligations so assigned. No other assignment of this Agreement or of any
rights or obligations hereunder may be made by any party hereto without the prior written consent of the other parties hereto. Any purported assignment or delegation in violation of this Agreement shall be null and void ab initio.

Section 7.7  **Headings.** The Section, Article and other headings contained in this Agreement are inserted for convenience of reference only and will not affect the meaning or interpretation of this Agreement.

Section 7.8  **Amendments and Waivers.** This Agreement may not be modified or amended except by an instrument or instruments in writing signed by each party hereto. Any party hereto may, only by an instrument in writing, waive compliance by any other party or parties hereto with any term or provision hereof on the part of such other party or parties hereto to be performed or complied with. No failure or delay of any party in exercising any right or remedy hereunder shall operate as a waiver thereof, nor will any single or partial exercise of any right or power, or any abandonment or discontinuance of steps to enforce such right or power, preclude any other or further exercise thereof or the exercise of any other right or power. The waiver by any party hereto of a breach of any term or provision hereof shall not be construed as a waiver of any subsequent breach. The rights and remedies of the parties hereunder are cumulative and are not exclusive of any rights or remedies that they would otherwise have hereunder.

Section 7.9  **Interpretation; Absence of Presumption.**

(a)  For the purposes hereof: (i) words in the singular shall be held to include the plural and vice versa and words of one gender shall be held to include the other gender as the context requires; (ii) the terms “hereof,” “herein,” and “herewith” and words of similar import shall, unless otherwise stated, be construed to refer to this Agreement as a whole (including all of the Schedules and Exhibits) and not to any particular provision of this Agreement, and Article, Section, paragraph, Exhibit and Schedule references are to the Articles, Sections, paragraphs, Exhibits, and Schedules to this Agreement unless otherwise specified; (iii) the word “including” and words of similar import when used in this Agreement shall mean “including, without limitation,” unless the context otherwise requires or unless otherwise specified; and (iv) the word “or”, “any” or “either” shall not be exclusive. References to a Person are also to its permitted assigns and successors. When calculating the period of time between which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded (and unless, otherwise required by Law, if the last day of such period is not a Business Day, the period in question shall end on the next succeeding Business Day).

(b)  With regard to each and every term and condition of this Agreement and any and all agreements and instruments subject to the terms hereof, the parties hereto understand and agree that the same have or has been mutually negotiated, prepared and drafted, and if at any time the parties hereto desire or are required to interpret or construe any such term or condition or any agreement or instrument subject hereto, no consideration will be given to the issue of which party hereto actually prepared, drafted or requested any term or condition of this Agreement or any agreement or instrument subject hereto.
Section 7.10  **Severability.** Any provision hereof that is held to be invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, shall be ineffective only to the extent of such invalidity, illegality or unenforceability, without affecting in any way the remaining provisions hereof, provided, however, that the parties will attempt in good faith to reform this Agreement in a manner consistent with the intent of any such ineffective provision for the purpose of carrying out such intent.

Section 7.11  **Specific Performance.** The parties hereto agree that irreparable damage could occur and that a party may not have any adequate remedy at law in the event that any of the provisions of this Agreement are not performed in accordance with their terms or were otherwise breached. Accordingly, each party shall without the necessity of proving the inadequacy of money damages or posting a bond be entitled to seek an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms, provisions and covenants contained therein (including, for the avoidance of doubt, the right of the Company to specifically enforce the obligation of the Purchasers to cause the Equity Financing to be funded and the purchase of the Purchased Shares to be consummated on the terms and subject to the conditions set forth in this Agreement), this being in addition to any other remedy to which they are entitled at law or in equity. Under no circumstances will the Company be permitted or entitled to receive both (i) a grant of specific performance resulting in the consummation of the issuance of the Purchased Shares in exchange for receipt in full by the Company of the Purchase Price therefor, and (ii) the payment of monetary damages at any time.

Section 7.12  **Public Announcement.** Subject to each party’s disclosure obligations imposed by applicable law or the rules of any stock exchange upon which its securities are listed, each of the parties hereto will cooperate with each other in the development and distribution of all news releases and other public information disclosures with respect to this Agreement and any of the transactions contemplated by this Agreement, and neither the Company nor any Purchaser will make any such news release or public disclosure without first consulting with the other, and, in each case, also receiving the other’s consent (which shall not be unreasonably withheld or delayed) and each party shall coordinate with the party whose consent is required with respect to any such news release or public disclosure. Notwithstanding the foregoing, this Section 7.12 shall not apply to any press release or other public statement made by the Company or a Purchaser (a) that is consistent with prior disclosure and does not contain any information relating to the transactions that has not been previously announced or made public in accordance with the terms of this Agreement or (b) is made to its auditors, attorneys, accountants, financial advisors, limited partners or other Permitted Transferees. Notwithstanding anything to the contrary in this Agreement or the Confidentiality Agreement, in no event shall either this Section 7.12 or any provision of the Confidentiality Agreement limit disclosure by any Purchaser Party and their respective Affiliates of ordinary course communications regarding this Agreement and the transactions contemplated by this Agreement to its existing or prospective general and limited partners, equityholders, financing sources, members, managers and investors of any Affiliates of such Person, including disclosing information about the transactions contemplated by this Agreement on their websites in the ordinary course of business consistent with past practice.

Section 7.13  **Purchaser Representative.** Each Purchaser Party hereby consents to and authorizes (a) the appointment of ClearSky Security Fund I LLC as the Purchaser Representative hereunder (the “Purchaser Representative”) and as the attorney-in-fact for and on
behalf of the Purchaser Party, and (b) the taking by the Purchaser Representative of any and all actions and the making of any decisions required or permitted by, or with respect to, this Agreement and the transactions contemplated hereby, including (i) the exercise of the power to agree to execute any consents under this Agreement and (ii) to take all actions necessary in the judgment of the Purchaser Representative for the accomplishment of the foregoing and all of the other terms, conditions and limitations of this Agreement and the transactions contemplated hereby. Each Purchaser Party shall be bound by the actions taken by the Purchaser Representative exercising the rights granted to it by this Agreement, and the Company shall be entitled to rely on any such action or decision of the Purchaser Representative. If the Purchaser Representative shall resign or otherwise be unable to fulfill its responsibilities hereunder, the Purchaser Parties shall appoint a new Purchaser Representative as soon as reasonably practicable by written consent of holders of a majority of the then outstanding Series A Preferred Stock and/or shares of Common Stock that were issued upon conversion of shares of Series A Preferred Stock beneficially owned by the Purchaser or Purchaser Parties that are successors or assigns of the Purchasers by sending notice and a copy of the duly executed written consent appointing such new Purchaser Representative to the Company.

Section 7.14 Non-Recourse. Any claim or cause of action based upon, arising out of, or related to this Agreement may only be brought against the entities that are expressly named as parties hereto or thereto (the “Contract Parties”) and then only with respect to the specific obligations of such party and subject to the terms, conditions and limitations set forth herein or therein. No Person other than the Contract Parties, including no member, partner, stockholder, unitholder, Affiliate or Representative thereof, nor any member, partner, stockholder, unitholder, Affiliate or Representative of any of the foregoing, shall have any liability (whether in contract or in tort, in law or in equity, or granted by statute) for any claims, causes of action, obligations, or liabilities arising under, out of, in connection with, or related in any manner to this Agreement or based on, in respect of, or by reason of this Agreement or its negotiation, execution, performance, or breach; and, to the maximum extent permitted by law, each of the Contract Parties hereby waives and releases all such liabilities, claims, causes of action, and obligations against any such third Person.

Section 7.15 Further Assurances. From the date hereof until the Closing, without further consideration, the Company and the Purchasers shall use their respective reasonable best efforts to take, or cause to be taken, all actions necessary, appropriate or advisable to consummate the transactions contemplated by this Agreement, the Registration Rights Agreement, the Certificate of Designations and any and all other agreements or instruments executed and delivered to the Purchasers by the Company hereunder or thereunder, as applicable.

ARTICLE VIII
TERMINATION

Section 8.1 Termination. This Agreement may be terminated at any time prior to Closing:

(a) by mutual written consent of the Company and Purchasers;
(b) by either the Company or Purchasers, if any Governmental Entity with lawful jurisdiction shall have issued a final order, decree or ruling or taken any other final action restraining, enjoining or otherwise prohibiting the transactions contemplated by this Agreement and such order, decree, ruling or other action is or shall have become final and nonappealable;

(c) by notice given by the Company to the Purchasers if there have been one or more inaccuracies in or breaches of one or more representations, warranties, covenants or agreements made by any Purchaser in this Agreement such that the conditions in Section 5.2(a) or Section 5.2(b) would not be satisfied and, if capable of being cured, which have not been cured by the Purchaser thirty (30) days after receipt by the Purchaser of written notice from the Company requesting such inaccuracies or breaches to be cured; provided, however, that the Company is not then in breach of any of its obligations hereunder; or

(d) by notice given by the Purchasers to the Company, if there have been one or more inaccuracies in or breaches of one or more representations, warranties, covenants or agreements made by the Company in this Agreement such that the conditions in Section 5.1(a) or Section 5.1(b) would not be satisfied and, if capable of being cured, which have not been cured by the Company within thirty (30) days after receipt by the Company of written notice from the Purchasers requesting such inaccuracies or breaches to be cured; provided, however, that no Purchaser is then in breach of any of its obligations hereunder.

Section 8.2 Certain Effects of Termination. In the event that this Agreement is terminated in accordance with Section 8.1, neither party (nor any of its Affiliates) shall have any liability or obligation to the other (or any of its Affiliates) under or in respect of this Agreement, except to the extent of (a) any liability arising from any breach by such party of its obligations pursuant to this Agreement arising prior to such termination, and (b) any actual and intentional fraud or intentional or willful breach of this Agreement; provided that, notwithstanding any other provision set forth in this Agreement, neither the Purchasers, on the one hand, nor the Company, on the other hand, shall have any such liability in excess of the Purchase Price. In the event of any such termination, this Agreement shall become void and have no effect, and the transactions contemplated hereby shall be abandoned without further action by the parties, in each case, except (x) as set forth in the preceding sentence and (y) that the provisions of Section 4.5 (Confidentiality), Sections 7.2 to 7.4 (Counterparts, Governing Law, Entire Agreement) and Sections 7.6 through 7.15 (Notices, Successors and Assigns, Headings, Amendments and Waivers, Interpretations; Absence of Presumption, Severability, Specific Performance and Public Announcement, Purchaser Representative, Non-Recourse) shall survive the termination of this Agreement.

(Signature page follows)
The parties have caused this Securities Purchase Agreement to be executed as of the date first written above.

FIREYE, INC.

By: /s/ Alexa King
Name: Alexa King
Title: Executive Vice President, General Counsel and Secretary

[Signature page to Securities Purchase Agreement]
Purchasers

CLEARSKY SECURITY FUND I LLC

By: /s/ Jay Leek
Name: Jay Leek
Title: Managing Director
Address: ClearSky Security Fund I LLC
Attn. Managing Directors
700 Universe Boulevard
Juno Beach, FL 33408
Facsimile: [***]

CLEARSKY POWER & TECHNOLOGY FUND II LLC

By: /s/ Jay Leek
Name: Jay Leek
Title: Managing Director
Address: ClearSky Power & Technology Fund II LLC
Attn. Managing Directors
700 Universe Boulevard
Juno Beach, FL 33408
Facsimile: [***]

[Signature page to Securities Purchase Agreement]
1. The following capitalized terms have the meanings indicated:

“Affiliate” of any Person means any Person, directly or indirectly, Controlling, Controlled by or under common Control with such Person; provided, however, that (i) the Company and its Subsidiaries, on the one hand, and any Purchaser Party or any of its Affiliates, on the other hand, shall not be deemed to be Affiliates, and (ii) “portfolio companies” (as such term is customarily used among institutional investors) in which any Purchaser Party or any of its Affiliates has an investment (whether as debt or equity) shall not be deemed an Affiliate of such Purchaser Party.

“Antitakeover Provisions” means the provisions of any rights plan or agreement, poison pill (including any distribution under a rights plan or agreement), or any control share acquisition, business combination, interested stockholder, fair price, moratorium or similar anti-takeover provision under the Certificate of Incorporation, the Bylaws, or applicable law (including Section 203 of the Delaware General Corporation Law).

“Benefit Plans” means all “employment benefit plans” as defined in Section 3(3) of ERISA, including the Stock Plans and any retirement, pension, profit sharing, deferred compensation, equity or equity-based, bonus, incentive, severance, change-in-control, welfare, fringe benefit and each other similar employee benefit plan, policy, program, employment agreement, contract, or arrangement, whether written or oral, qualified or nonqualified, or funded or unfunded, that are maintained or sponsored by the Company or its Subsidiaries for the benefit of their respective current or former employees or with respect to which the Company or its Subsidiaries have any liability.

“Board of Directors” means the Company’s board of directors.

“Business Day” means any day other than a Saturday, a Sunday or any day on which the Federal Reserve Bank of New York is authorized or required by law or executive order to close or be closed.

“Bylaws” means the Amended and Restated Bylaws of the Company, as amended and restated on August 2, 2016, as the same may be further amended or restated.

“Certificate of Incorporation” means the Company’s Amended and Restated Certificate of Incorporation, as the same has been and may be further amended or restated.


“Company Competitor” means, as of any date of determination, a Person directly engaged in the business of cybersecurity products, threat intelligence and/or incident response, together with such Person’s Affiliates; provided, however, that for the avoidance of doubt, a private equity fund, financial institution, asset management firm or similar firm shall not be considered a “Company Competitor” but its portfolio companies, if any, that are directly engaged in the business of cybersecurity products, threat intelligence and/or incident response would be considered a “Company Competitor”.

A-1
“Confidential Information” means information regarding the Company or its Subsidiaries furnished by or on behalf of the Company, directly or indirectly, to the Purchasers or their Representatives, together with all analyses, compilations, forecasts, studies or other documents prepared by the Purchasers or their representatives which contain or otherwise reflect such information. “Confidential Information” shall not include such portions of the Confidential Information that (a) are or become generally available to the public other than as a result of the Purchasers’ or their Affiliates’ disclosure in violation of this Agreement, (b) become available to the Purchasers or their Affiliates on a non-confidential basis from a source other than the Company or its Subsidiaries, (c) was already in the Purchasers’ or their Affiliates’ possession prior to the date of this Agreement and which was not obtained from the Company or its Subsidiaries or (d) are independently developed by the Purchaser Parties or their respective Affiliates or Representatives without reference to the Confidential Information.

“Control” (including its correlative meanings “under common Control with” and “Controlled by”) means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through ownership of securities or partnership or other interests, by contract or otherwise.

“Convertible Senior Notes” means the Company’s (i) 1.000% convertible senior notes due in 2035, (ii) 1.625% convertible senior notes due in 2035 and (iii) 0.875% convertible senior notes due in 2024.

“Environmental Permit” means any permit, license, certificate, approval or other authorization under any applicable Requirements of Environmental Law.


“Export Controls” means all laws, regulations, and restrictive measures relating to the import, export, re-export, transfer of information, data, goods, and technology (including the Export Administration Regulations administered by the U.S. Department of Commerce, the International Traffic in Arms Regulations administered by the U.S. Department of State, and customs and import Laws administered by U.S. Customs and Border Protection).

“GAAP” means generally accepted accounting principles as in effect in the United States, consistently applied.

“Government Contract” means a Contract with a U.S. Governmental Entity, any prime contractor of a U.S. Governmental Entity in its capacity as a prime contractor or any subcontractor with respect to any such Contract.

“Governmental Entity” means any supranational, national, state, municipal, local or foreign government, any court, tribunal, arbitrator, administrative agency, commission or other governmental official, authority or instrumentality (including any legislature, commission, regulatory administrative authority, governmental agency, bureau, branch or department).
“Government Official” means any officer or employee of a foreign governmental authority or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such foreign governmental authority or agency, or instrumentality, or for or on behalf of any such public international organization, or any political party, party official, or candidate thereof, excluding officials of the governments of the United States, the several states thereof, any local subdivision of any of them or any agency, department or unit of any of the foregoing.

“Hazardous Substance” means any waste, substance, product or material defined or regulated as “hazardous” or “toxic” or as a “pollutant” or “contaminant”, or words of similar meaning, by any applicable Requirements of Environmental Law, including petroleum and any fraction thereof, and any biomedical or radioactive materials and waste.

“Intellectual Property” means all intellectual property and proprietary rights, including (i) patents, trade secrets, know-how, inventions, algorithms, methods and processes; (ii) copyrights; (iii) trademarks, service marks, trade names, trade dress, logos, domain names, social and mobile media identifiers and other source indicators and all associated goodwill; and (iv) all registrations, applications, renewals, continuations, continuations-in-part, divisions, re-issues, re-examinations, foreign counterparts and equivalents of the foregoing.

“Investment Company Act” mean the Investment Company Act of 1940, as amended.

“Knowledge” means the actual knowledge of Kevin Mandia, Frank Verdecanna, Alexa King and Peter Bailey, in each case after due inquiry.

“Material Adverse Effect” means any event, change, development, circumstance, condition, state of facts or occurrence that individually or in the aggregate is, or would reasonably be expected to be, materially adverse to (x) the condition (financial or otherwise), assets, properties, or liabilities of the Company and its Subsidiaries (taken as a whole) or results of operations of the Company and its Subsidiaries (taken as a whole), or (y) the ability of the Company to perform its obligations or consummate the transactions contemplated hereby, but shall exclude any prospects and shall also exclude any event, change, development, circumstance, condition, state of facts or occurrence to the extent resulting or arising from: (a) any change or prospective change in any applicable law or GAAP or interpretation thereof; (b) any change in general economic conditions in the industries or markets in which the Company and its Subsidiaries operate or affecting the United States of America or any foreign economies in general; (c) any change made by any Governmental Entity that is generally applicable to the industries or markets in which the Company and its Subsidiaries operate; (d) the announcement of this Agreement and/or the consummation of the transactions contemplated hereby; (e) any action that is consented to or requested by the Purchasers in writing; (f) any action expressly required by, or the failure to take any action expressly prohibited by this Agreement; (g) any national or international political or social conditions, including the engagement by the United States of America or any foreign government in hostilities, whether or not pursuant to the declaration of a
national emergency or war, or the occurrence of any military or terrorist attack upon the United States of America or any foreign government or any of their respective territories, possessions, or diplomatic or consular offices or upon any military installation, equipment or personnel of the United States of America or any foreign government; (h) any acts of God, including any earthquakes, hurricanes, tornados, floods, tsunamis or other natural disasters, or any other damage to or destruction of assets caused by casualty; (i) any epidemic, pandemic, disease outbreak (including, for the avoidance of doubt, COVID-19) or other health crisis or public health event; and (j) any failure of the Company and its Subsidiaries to meet internal or published projections, estimates or forecasts of revenues, earnings or other measures of financial or operating performance for any period; provided, that the underlying causes of such failure (subject to the other provisions of this definition of “Material Adverse Effect”) shall not be excluded; provided, however, that in the case of each of clauses (a), (b), (c) and (g) of the foregoing, any such event, change, circumstance or occurrence shall not be excluded to the extent that it has or would reasonably be expected to have a disproportionate adverse effect on the condition (financial or otherwise), assets, properties, or liabilities of the Company and its Subsidiaries (taken as a whole), or results of operations of the Company and its Subsidiaries (taken as a whole) relative to other companies operating in the same industry in which the Company and its Subsidiaries operates.

“Permitted Transferee” means, with respect to any Person, (i) any Affiliate of such Person, (ii) any successor entity of such Person and (iii) with respect to any Person that is an investment fund, vehicle or similar entity, any other investment fund, vehicle or similar entity of which such Person or an Affiliate, advisor or manager of such Person serves as the general partner, managing member, manager or advisor.

“Person” means an individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or a government or other agency or political subdivision thereof.

“Purchaser Parties” means each Purchaser and each Permitted Transferee of the Purchaser to whom shares of Preferred Stock or Common Stock issued upon conversion of shares of Preferred Stock are transferred pursuant to Section 4.2 (the “Purchaser Parties”).

“Registration Rights Agreement” means the Registration Rights Agreement between the Company and the Purchasers in the form attached to the Agreement as Exhibit C, as it may be amended or modified in accordance with the terms thereof.

“Representatives” means a Persons’ Affiliates, employees, agents, consultants, accountants, attorneys or financial advisors.

“Requirements of Environmental Law” means all laws (including the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Clean Water Act, the Clean Air Act, and any state analogues of any of the foregoing), common law, statutes, ordinances, codes, rules, regulations, orders or similar requirements of any Governmental Entity which relate to (a) pollution, protection or clean-up of the environment, including air, surface water, ground water or land; (b) solid, gaseous or liquid waste or the generation, recycling, reclamation, release, threatened release, treatment, storage, disposal or transportation of harmful or deleterious substances; (c) exposure of Persons or property.
to harmful or deleterious substances; or (d) the manufacture, presence, processing, distribution in commerce, use, discharge, releases, threatened releases, emissions or storage of harmful or deleterious substances into the environment.

“Restricted Securities” means Purchased Shares or Conversion Shares required to bear the legend set forth in Section 4.3(a) under the applicable provisions of the Securities Act.

“Sanctioned Country” means any of the Crimea region of Ukraine, Cuba, Iran, North Korea, and Syria.

“Sanctioned Person” means any Person with whom dealings are restricted or prohibited under the Sanctions Laws of the United States, the United Kingdom, the European Union, or the United Nations, including (i) any Person identified in any list of sanctioned person maintained by (A) the United States Department of Treasury, Office of Foreign Assets Control, the United States Department of Commerce, Bureau of Industry and Security, or the United States Department of State; (B) Her Majesty’s Treasury of the United Kingdom; (C) any committee of the United Nations Security Council; or (D) the European Union; (ii) any Person located, organized, or resident in, organized in, or a Governmental Entity or government instrumentality of, any Sanctioned Country; and (iii) any Person directly or indirectly 50% or more owned or controlled by, or acting for the benefit or on behalf of, a Person described in clause (i) or (ii).

“Sanctions Laws” means those trade, economic and financial sanctions laws, regulations, embargoes, and restrictive measures (in each case having the force of law) administered, enacted or enforced from time to time by (a) the United States (including without limitation the Department of Treasury, Office of Foreign Assets Control), (b) the European Union and enforced by its member states, (c) the United Nations, (d) Her Majesty’s Treasury, or (e) other similar governmental bodies from time to time.

“SEC” means the Securities and Exchange Commission.

“SEC Documents” means all reports, schedules, registration statements, proxy statements and other documents (including all amendments, exhibits and schedules thereto) filed by the Company with the SEC.

“Securities Act” means the Securities Act of 1933, as amended.

“Software and Systems” means all computers, hardware, software, systems, networks, websites, databases, applications and other information technology assets and equipment.

“Stock Plans” means the FireEye, Inc. 2013 Equity Incentive Plan, FireEye, Inc. 2013 Employee Stock Purchase Plan and all other equity-based compensation plans maintained or sponsored by the Company or its Subsidiaries for the benefit of their respective current or former employees.

“Subsidiary” means, when used with reference to a party, any corporation or other organization, whether incorporated or unincorporated, of which such party or any other Subsidiary of such party is a general partner or serves in a similar capacity, or, with respect to such corporation...
or other organization, at least a majority of the securities or other interests having by their terms ordinary voting power to elect a majority of the board of
directors or others performing similar functions is directly or indirectly owned or controlled by such party or by any one or more of its Subsidiaries, or
by such party and one or more of its Subsidiaries.

“Tax” and “Taxes” means all federal, state, local and foreign taxes (including, without limitation, income, franchise, property, sales, withholding,
payroll and employment taxes), assessments, fees or other charges imposed by any Governmental Entity, including any interest, additions to tax or
penalties applicable thereto.

“Tax Return” means any return, report or similar filing (including the attached schedules) filed or required to be filed with respect to Taxes (and
any amendments thereto), including any information return, claim for refund or declaration of estimated Taxes.

“Transfer” means any direct or indirect (a) sale, transfer, hypothecation, assignment, gift, bequest or disposition by any other means, whether for
value or no value and whether voluntary or involuntary (including, without limitation, by realization upon any lien or by operation of law or by
judgment, levy, attachment, garnishment, bankruptcy or other legal or equitable proceedings) or (b) grant of any option, warrant or other right to
purchase or the entry into any hedge, swap or any other agreement or any transaction that transfers, in whole or in part, directly or indirectly, the
economic consequence of ownership of Common Stock; provided, however, that, notwithstanding anything to the contrary in this Agreement, a Transfer
shall not include (i) the conversion of one or more shares of Series A Preferred Stock into shares of Common Stock pursuant to the Certificate of
Designations, (ii) the redemption, repurchase or other acquisition of Common Stock or Series A Preferred Stock by the Company, or (iii) the direct or
indirect transfer of any limited partnership interests or other equity interests in a Purchaser Party (or any direct or indirect parent entity of such Purchaser
Party) (provided that if any transferor or transferee referred to in this clause (iii) ceases to be controlled (directly or indirectly) by the Person (directly or
indirectly) controlling such Person immediately prior to such transfer, such event shall be deemed to constitute a “Transfer”). The term “Transferred”
shall have a correlative meaning.

“Treasury Regulations” means the U.S. Treasury regulations promulgated under the Code, as amended.

“VCOC Letter Agreement” means that certain letter agreement, the form of which is attached as Exhibit E.
2. The following terms are defined in the Sections of the Agreement indicated:

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EXHIBIT B

FORM OF CERTIFICATE OF DESIGNATIONS

Form of

FireEye, Inc.

Certificate of Designations

4.5% Series A Convertible Preferred Stock
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On [date], the Board of Directors of FireEye, Inc., a Delaware corporation (the "Company"), adopted the following resolution designating and creating, out of the authorized and unissued shares of preferred stock of the Company, 400,000 authorized shares of a series of preferred stock of the Company titled the “4.5% Series A Convertible Preferred Stock”:

RESOLVED that, pursuant to the authority of the Board of Directors pursuant to the Certificate of Incorporation, the Bylaws and applicable law, a series of preferred stock of the Company titled the “4.5% Series A Convertible Preferred Stock,” and having a par value of $0.0001 per share and an initial number of authorized shares equal to four hundred thousand (400,000), is hereby designated and created out of the authorized and unissued shares of preferred stock of the Company, which series has the rights, designations, preferences, voting powers and other provisions set forth below:

Section 1. DEFINITIONS.

“Affiliate” of any Person means any Person, directly or indirectly, Controlling, Controlled by or under common Control with such Person; provided, however, that (i) the Company and its Subsidiaries, on the one hand, and any Purchaser Party or any of its Affiliates, on the other hand, shall not be deemed to be Affiliates, (ii) “portfolio companies” (as such term is customarily used among institutional investors) in which any Purchaser Party or any of its Affiliates has an investment (whether as debt or equity) shall not be deemed an Affiliate of such Purchaser Party and (iii) the Excluded Sponsor Parties (as defined in each Purchase Agreement) shall not be deemed to be Affiliates of any Purchaser Party, the Company or any of the Company’s Subsidiaries.

“Board of Directors” means the Company’s board of directors or a committee of such board duly authorized to act with the authority of such board.

“Business Day” means any day other than a Saturday, a Sunday or any day on which the Federal Reserve Bank of New York is authorized or required by law or executive order to close or be closed.

“Bylaws” means the Amended and Restated Bylaws of the Company, as amended and restated on August 2, 2016, as the same may be further amended or restated.

“Capital Stock” of any Person means any and all shares of, interests in, rights to purchase, warrants or options for, participations in, or other equivalents of, in each case, however designated, the equity of such Person, but excluding any debt securities convertible into such equity.

“Certificate” means a Physical Certificate or an Electronic Certificate.

“Certificate of Designations” means this Certificate of Designations, as amended from time to time.
“Certificate of Incorporation” means the Company’s Amended and Restated Certificate of Incorporation, as the same has been and may be further amended or restated.

“Close of Business” means 5:00 p.m., New York City time.

“Common Stock” means the common stock, $0.0001 par value per share, of the Company, subject to Section 10(i).

“Common Stock Change Event” has the meaning set forth in Section 10(i)(i).

“Common Stock Liquidity Conditions” will be satisfied with respect to a Mandatory Conversion or Redemption if:

(a) the offer and sale of such share of Common Stock by such Holder are registered pursuant to an effective registration statement under the Securities Act and such registration statement is reasonably expected by the Company to remain effective and usable, by the Holder to sell such share of Common Stock, continuously during the period from, and including, the date the related Mandatory Conversion Notice or Redemption Notice Date, as applicable, is sent to, and including, the one (1) year anniversary after the date such share of Common Stock is issued;

(b) each share of Common Stock referred to in clause (a) above (i) will, when issued and when sold or otherwise transferred pursuant to the registration statement referred to in such clause (a) (1) be admitted for book-entry settlement through The Depository Trust Company with an “unrestricted” CUSIP number; and (2) unless sold to the Company or an Affiliate of the Company, not be evidenced by any Certificate that bears a legend referring to transfer restrictions under the Securities Act or other securities laws; and (ii) will, when issued, be listed and admitted for trading, without suspension or material limitation on trading, on any of The New York Stock Exchange, The NYSE American, The NASDAQ Capital Market, The NASDAQ Global Market or The NASDAQ Global Select Market (or any of their respective successors);

(c) (i) the Company has not received any written threat or notice of delisting or suspension by the applicable exchange referred to in clause (b)(ii) above with a reasonable prospect of delisting, after giving effect to all applicable notice and appeal periods; and (ii) no such delisting or suspension is reasonably likely to occur or is pending based on the Company falling below the minimum listing maintenance requirements of such exchange; and

(d) the conversion of all shares of Convertible Preferred Stock pursuant to such Mandatory Conversion or that are subject to such Redemption, as applicable, would not be limited or otherwise restricted by Section 10(h).

“Common Stock Participating Dividend” has the meaning set forth in Section 5(c)(i).

“Company” has the meaning set forth in the preliminary paragraph hereto.
“Continuing Share Reserve Requirement” means, as of any time, a number of shares of Common Stock equal to the product of (a) two (2); and (b) the number of shares of Common Stock that would be issuable (without regard to Section 10(h)) upon conversion of all Convertible Preferred Stock outstanding as of such time (assuming such conversion occurred as of such time).  

“Control” (including its correlative meanings “under common Control with” and “Controlled by”) means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through ownership of securities or partnership or other interests, by contract or otherwise.  

“Conversion Agent” has the meaning set forth in Section 3(f)(i).  

“Conversion Share” means any share of Common Stock issued or issuable upon conversion of any Convertible Preferred Stock.  

“Conversion Consideration” means, with respect to the conversion of any Convertible Preferred Stock, the type and amount of consideration payable to settle such conversion, determined in accordance with Section 10.  

“Conversion Date” means an Optional Conversion Date or a Mandatory Conversion Date.  

“Conversion Price” initially means $18.00 per share of Common Stock; provided, however, that the Conversion Price is subject to adjustment pursuant to Sections 10(f) and 10(g). Each reference in this Certificate of Designations to the Conversion Price as of a particular date without setting forth a particular time on such date will be deemed to be a reference to the Conversion Price immediately before the Close of Business on such date.  

“Convertible Preferred Stock” has the meaning set forth in Section 3(a).  

“Deficit Shares” has the meaning set forth in Section 10(h)(i)(1).  

“Distributed Entity” means any Subsidiary of the Company distributed in a Distribution Transaction.  

“Distribution Transaction” means any transaction by which an Affiliate or Subsidiary of the Company ceases to be an Affiliate or Subsidiary of the Company by reason of the distribution of such Affiliate’s or Subsidiary’s equity securities to holders of Common Stock, whether by means of a spin-off, split-off, redemption, reclassification, exchange, stock dividend, share distribution, rights offering or similar transaction.  


“Dividend” means any Regular Dividend or Participating Dividend.
“Dividend Junior Stock” means any class or series of the Company’s stock, the terms of which would result in such class or series ranking junior to the Convertible Preferred Stock with respect to the payment of dividends (without regard to whether or not dividends accumulate cumulatively). Dividend Junior Stock includes the Common Stock. For the avoidance of doubt, Dividend Junior Stock will not include any securities of the Company’s Subsidiaries.

“Dividend Parity Stock” means any class or series of the Company’s stock (other than the Convertible Preferred Stock), the terms of which would result in such class or series ranking equally with the Convertible Preferred Stock with respect to the payment of dividends (without regard to whether or not dividends accumulate cumulatively). For the avoidance of doubt, Dividend Parity Stock will not include any securities of the Company’s Subsidiaries.

“Dividend Payment Date” means each Regular Dividend Payment Date with respect to a Regular Dividend and each date on which any declared Participating Dividend is scheduled to be paid on the Convertible Preferred Stock with respect to a Participating Dividend.

“Dividend Senior Stock” means any class or series of the Company’s stock, the terms of which would result in such class or series ranking senior to the Convertible Preferred Stock with respect to the payment of dividends (without regard to whether or not dividends accumulate cumulatively). For the avoidance of doubt, Dividend Senior Stock will not include any securities of the Company’s Subsidiaries.

“Electronic Certificate” means any electronic book entry maintained by the Transfer Agent that evidences any share(s) of Convertible Preferred Stock.

“Equity Treatment Limitation” has the meaning set forth in Section 10(h)(i)(1).


“Exchange Preferred Stock” means a series of convertible preferred stock issued by the Company and having terms, conditions, designations, dividend rights, voting powers, rights on liquidation and other preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof that are identical, or as nearly so as is practicable in the good faith judgment of the Board of Directors, to those of the Convertible Preferred Stock, except that the Liquidation Preference and the Conversion Price thereof will be determined as provided herein.

“Expiration Date” has the meaning set forth in Section 10(f)(i)(5).
“Expiration Time” has the meaning set forth in Section 10(f)(i)(5).

“Final Fundamental Change Notice” has the meaning set forth in Section 8(f).

“Fundamental Change” means any of the following events, whether in a single transaction or a series of related transactions:

(a) a “person” or “group” (within the meaning of Section 13(d) and 14(d) of the Exchange Act), other than the Company or its Wholly Owned Subsidiaries, or their respective employee benefit plans, files any report with the SEC indicating that such person or group, has become the direct or indirect “beneficial owner” (as defined below) of shares of the Common Stock representing more than fifty percent (50%) of the voting power of all of the Company’s Common Stock in a transaction or series of related transactions approved by the Board of Directors;

(b) the consummation of (i) any sale, lease or other transfer, in one transaction or a series of transactions, of all or substantially all of the assets of the Company and its Subsidiaries, taken as a whole, to any Person other than one of the Company’s Wholly Owned Subsidiaries; or (ii) any transaction or series of related transactions in connection with which (whether by means of merger, consolidation, share exchange, combination, reclassification, recapitalization, acquisition, liquidation or otherwise) all of the Common Stock is exchanged for, converted into, acquired for, or constitutes solely the right to receive, other securities, cash or other property; provided, however, that any merger, consolidation, share exchange, combination, reclassification or recapitalization of the Company pursuant to which the Persons that directly or indirectly “beneficially owned” (as defined below) all classes of the Company’s common equity immediately before such transaction directly or indirectly “beneficially own,” immediately after such transaction, more than fifty percent (50%) of all classes of common equity of the surviving, continuing or acquiring company or other transferee, as applicable, or the parent thereof, in substantially the same proportions vis-à-vis each other as immediately before such transaction, will be deemed not to be a Fundamental Change pursuant to this clause (b); or

(c) neither shares of Common Stock nor shares of any other Capital Stock into which the Convertible Preferred Stock is convertible are listed for trading on any United States national securities exchange or all such shares cease to be traded in contemplation of a de-listing (other than as a result of a transaction described in clause (b) above).

For the purposes of this definition, (x) any transaction or event described in both clause (a) and in clause (b)(i) or (ii) above (without regard to the proviso in clause (b)) will be deemed to occur solely pursuant to clause (b) above (subject to such proviso); and (y) whether a Person is a “beneficial owner”, whether shares are “beneficially owned”, and percentage beneficial ownership, will be determined in accordance with Rules 13d-3 and 13d-5 under the Exchange Act.

“Fundamental Change Repurchase Date” means the date fixed, pursuant to Section 8(c), for the repurchase of any Convertible Preferred Stock by the Company pursuant to a Repurchase Upon Fundamental Change.
“Fundamental Change Repurchase Notice” means a notice (including a notice substantially in the form of the “Fundamental Change Repurchase Notice” set forth in Exhibit A) containing the information, or otherwise complying with the requirements, set forth in Section 8(g)(i) and Section 8(g)(ii).

“Fundamental Change Repurchase Price” means the cash price payable by the Company to repurchase any share of Convertible Preferred Stock upon its Repurchase Upon Fundamental Change, calculated pursuant to Section 8(d).

“Fundamental Change Repurchase Right” has the meaning set forth in Section 8(a).

“Holder” means a person in whose name any Convertible Preferred Stock is registered on the Registrar’s books.

“Initial Issue Date” means the Closing Date (as defined in each Purchase Agreement).

“Initial Fundamental Change Notice” has the meaning set forth in Section 8(e).

“Initial Liquidation Preference” means one thousand dollars ($1,000.00) per share of Convertible Preferred Stock.

“Initial Share Reserve Requirement” means a number of shares of Common Stock equal to the product of (a) two (2); and (b) the number of shares of Common Stock that would be issuable (without regard to Section 10(h)) upon conversion of all Convertible Preferred Stock outstanding as of the Initial Issue Date (assuming such conversion occurred on the Initial Issue Date).

“Last Reported Sale Price” of the Common Stock for any Trading Day means the closing sale price per share (or, if no closing sale price is reported, the average of the last bid price and the last ask price per share or, if more than one in either case, the average of the average last bid prices and the average last ask prices per share) of the Common Stock on such Trading Day as reported in composite transactions for the principal U.S. national or regional securities exchange on which the Common Stock is then listed. If the Common Stock is not listed on a U.S. national or regional securities exchange on such Trading Day, then the Last Reported Sale Price will be the last quoted bid price per share of Common Stock on such Trading Day in the over-the-counter market as reported by OTC Markets Group Inc. or a similar organization. If the Common Stock is not so quoted on such Trading Day, then the Last Reported Sale Price will be the average of the mid-point of the last bid price and the last ask price per share of Common Stock on such Trading Day from a nationally recognized independent investment banking firm the Company selects.

“Liquidation Event” has the meaning set forth in Section 6(a).

“Liquidation Junior Stock” means any class or series of the Company’s stock, the terms of which would result in such class or series ranking junior to the Convertible Preferred Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up. Liquidation Junior Stock includes the Common Stock. For the avoidance of doubt, Liquidation Junior Stock will not include any securities of the Company’s Subsidiaries.
“Liquidation Multiple” means, if the Fundamental Change or Liquidation Event, as applicable, occurs (i) on or prior to the second anniversary of the Initial Issue Date, 105%, (ii) after the second anniversary but on or prior to the fifth anniversary of the Initial Issue Date, 103%, and (iii) after the fifth anniversary of the Initial Issue Date, 100%.

“Liquidation Parity Stock” means any class or series of the Company’s stock (other than the Convertible Preferred Stock), the terms of which would result in such class or series ranking equally with the Convertible Preferred Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up. For the avoidance of doubt, Liquidation Parity Stock will include any Mirror Preferred Stock issued in accordance with the terms hereof, but does not include any securities of the Company’s Subsidiaries.

“Liquidation Preference” means, with respect to the Convertible Preferred Stock, an amount initially equal to the Initial Liquidation Preference per share of Convertible Preferred Stock; provided, however, that the Liquidation Preference is subject to adjustment pursuant to Section 5(b)(i).

“Liquidation Senior Stock” means any class or series of the Company’s stock, the terms of which would result in such class or series ranking senior to the Convertible Preferred Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up. For the avoidance of doubt, Liquidation Senior Stock will not include any securities of the Company’s Subsidiaries.

“Majority Holders” has the meaning set forth in Section 10(f)(iv)(1).

“Mandatory Conversion” has the meaning set forth in Section 10(c)(i).

“Mandatory Conversion Date” means a Conversion Date designated with respect to any Convertible Preferred Stock pursuant to Section 10(c)(i) and 10(c)(iii).

“Mandatory Conversion Notice” has the meaning set forth in Section 10(c)(iv).

“Mandatory Conversion Notice Date” means, with respect to a Mandatory Conversion, the date on which the Company sends the Mandatory Conversion Notice for such Mandatory Conversion pursuant to Section 10(c)(iv).

“Mandatory Conversion Right” has the meaning set forth in Section 10(c)(i).

“Mandiant Solutions” means the operating division of the Company comprising Mandiant Consulting, Threat Intelligence, Security Validation, Managed Defense and Mandiant Advantage and any other business units that become part of the Mandiant Solutions operating segment.

“Market Disruption Event” means, with respect to any date, the occurrence or existence, during the one-half hour period ending at the scheduled close of trading on such date on the principal U.S. national or regional securities exchange or other market on which the Common
Stock is listed for trading or trades, of any material suspension or limitation imposed on trading (by reason of movements in price exceeding limits permitted by the relevant exchange or otherwise) in the Common Stock or in any options contracts or futures contracts relating to the Common Stock.

"Mirror Preferred Stock" means a series of convertible preferred stock issued by the Distributed Entity and having terms, conditions, designations, dividend rights, voting powers, rights on liquidation and other preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof that are identical, or as nearly so as is practicable in the good faith judgment of the Board of Directors, to those of the Convertible Preferred Stock, except that the Liquidation Preference and the Conversion Price thereof will be determined as provided herein.

"Net Debt" means indebtedness for borrowed money minus cash, cash equivalents and short-term investments; provided that, unless such cash proceeds are used to retire or refinance existing indebtedness substantially concurrently with the incurrence of any indebtedness, such determination shall exclude the proceeds of any such debt incurrence. For the avoidance of doubt, “Net Debt” shall exclude any Convertible Preferred Stock.

"Number of Reserved Shares" means, as of any time, the number of shares of Common Stock that, at such time, the Company has reserved (out of its authorized but unissued shares of Common Stock that are not reserved for any other purpose) for delivery upon conversion of the Convertible Preferred Stock.

"Officer" means the Chairman of the Board of Directors, the Chief Executive Officer, the President, the Chief Operating Officer, the Chief Financial Officer, the Treasurer, any Assistant Treasurer, the Controller, the Secretary or any Vice-President of the Company.

"Open of Business" means 9:00 a.m., New York City time.

"Optional Conversion" means the conversion of any Convertible Preferred Stock other than pursuant to a Mandatory Conversion.

"Optional Conversion Date” means, with respect to the Optional Conversion of any Convertible Preferred Stock, the first Business Day on which the requirements set forth in Section 10(d)(ii) for such conversion are satisfied.

"Optional Conversion Notice” means a notice substantially in the form of the “Optional Conversion Notice” set forth in Exhibit A.

"Participating Dividend" has the meaning set forth in Section 5(c)(i).

"Paying Agent" has the meaning set forth in Section 3(f)(i).
“Person” or “person” means any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or government or other agency or political subdivision thereof. Any division or series of a limited liability company, limited partnership or trust will constitute a separate “person” under this Certificate of Designations.

“Physical Certificate” means any certificate (other than an Electronic Certificate) evidencing any share(s) of Convertible Preferred Stock, which certificate is substantially in the form set forth in Exhibit A, registered in the name of the Holder of such share(s) and duly executed by the Company and countersigned by the Transfer Agent.

“Purchase Agreements” mean (i) that certain Securities Purchase Agreement by and between the Company and BTO Delta Holdings DE L.P. dated as of November 18, 2020, and (ii) that certain Securities Purchase Agreement by and among the Company and ClearSky Security Fund I LLC and ClearSky Power & Technology Fund II LLC dated as of November 18, 2020, each as may be amended, supplemented or otherwise modified from time to time, with respect to certain terms and conditions concerning, among other things, the rights of and restrictions on the Holders.

“Purchasers” has the meaning set forth in each Purchase Agreement.

“Purchaser Parties” means the Purchasers and each Permitted Transferee (as defined in each Purchase Agreement) of a Purchaser to whom shares of Convertible Preferred Stock or Common Stock issued upon conversion of shares of Convertible Preferred Stock are transferred pursuant to Section 4.2 of each Purchase Agreement or Common Stock issued under each Purchase Agreement.

“Record Date” means, with respect to any dividend or distribution on, or issuance to holders of, Convertible Preferred Stock or Common Stock, the date fixed (whether by law, contract or the Board of Directors or otherwise) to determine the Holders or the holders of Common Stock, as applicable, that are entitled to such dividend, distribution or issuance.

“Redemption” has the meaning set forth in Section 7(a).

“Redemption Date” means the date fixed, pursuant to Section 7(b), for the settlement of the repurchase of the Convertible Preferred Stock by the Holder pursuant to a Redemption.

“Redemption Notice” has the meaning set forth in Section 7(d).

“Redemption Notice Date” means, with respect to a Redemption, the date on which the Holder sends the Redemption Notice for such Redemption pursuant to Section 7(d).

“Redemption Price” means the consideration payable by the Company to repurchase any Convertible Preferred Stock upon its Redemption, calculated pursuant to Section 7(c).

“Reference Property” has the meaning set forth in Section 10(i)(i).

“Reference Property Unit” has the meaning set forth in Section 10(i)(i).

“Register” has the meaning set forth in Section 3(f)(ii).
“Registrar” has the meaning set forth in Section 3(f)(i).

“Regular Dividend Payment Date” means, with respect to any share of Convertible Preferred Stock, each March 31, June 30, September 30 and December 31 of each year, beginning on December 31, 2020 (or beginning on such other date specified in the Certificate evidencing such share).

“Regular Dividend Period” means each period from, and including, a Regular Dividend Payment Date (or, in the case of the first Regular Dividend Period, from, and including, the Initial Issue Date) to, but excluding, the next Regular Dividend Payment Date.

“Regular Dividend Rate” means four and one-half percent (4.5%) per annum or, to the extent and during the period with respect to which such rate has been adjusted as provided in Section 8(b), such adjusted rate.

“Regular Dividend Record Date” has the following meaning: (a) March 15th, in the case of a Regular Dividend Payment Date occurring on March 31st; (b) June 15th, in the case of a Regular Dividend Payment Date occurring on June 30th; (c) September 15th, in the case of a Regular Dividend Payment Date occurring on September 30th; and (d) December 15th, in the case of a Regular Dividend Payment Date occurring on December 31st.

“Regular Dividends” has the meaning set forth in Section 5(a)(i).

“Repurchase Upon Fundamental Change” means the repurchase of any Convertible Preferred Stock by the Company pursuant to Section 8.

“Restricted Stock Legend” means a legend substantially in the form set forth in Exhibit B.

“Rule 144” means Rule 144 under the Securities Act (or any successor rule thereto), as the same may be amended from time to time.

“SEC” means the U.S. Securities and Exchange Commission.

“Securities Act” means the U.S. Securities Act of 1933, as amended.

“Security” means any Convertible Preferred Stock or Conversion Share.

“Share Agent” means the Transfer Agent or any Registrar, Paying Agent or Conversion Agent.

“Spin-Off Exchange Offer” has the meaning set forth in Section 10(f)(iv)(I).
“Subsidiary” means, with respect to any Person, (a) any corporation, association or other business entity (other than a partnership or limited liability company) of which more than 50% of the total voting power of the Capital Stock entitled (without regard to the occurrence of any contingency, but after giving effect to any voting agreement or stockholders’ agreement that effectively transfers voting power) to vote in the election of directors, managers or trustees, as applicable, of such corporation, association or other business entity is owned or controlled, directly or indirectly, by such Person or one or more of the other Subsidiaries of such Person; and (b) any partnership or limited liability company where (x) more than fifty percent (50%) of the capital accounts, distribution rights, equity and voting interests, or of the general and limited partnership interests, as applicable, of such partnership or limited liability company are owned or controlled, directly or indirectly, by such Person or one or more of the other Subsidiaries of such Person, whether in the form of membership, general, special or limited partnership or limited liability company interests or otherwise; and (y) such Person or any one or more of the other Subsidiaries of such Person is a controlling general partner of, or otherwise controls, such partnership or limited liability company.

“Successor Person” has the meaning set forth in Section 10(i)(ii).

“Tender/Exchange Offer Valuation Period” has the meaning set forth in Section 10(f)(i)(5).

“Trading Day” means any day on which (a) trading in the Common Stock generally occurs on the principal U.S. national or regional securities exchange on which the Common Stock is then listed or, if the Common Stock is not then listed on a U.S. national or regional securities exchange, on the principal other market on which the Common Stock is then traded; and (b) there is no Market Disruption Event. If the Common Stock is not so listed or traded, then “Trading Day” means a Business Day.

“Transfer Agent” means American Stock Transfer & Trust Company, LLC or its successor.

“Transfer-Restricted Security” means any Security that constitutes a “restricted security” (as defined in Rule 144); provided, however, that such Security will cease to be a Transfer-Restricted Security upon the earliest to occur of the following events:

(a) such Security is sold or otherwise transferred to a Person (other than the Company or an Affiliate of the Company) pursuant to a registration statement that was effective under the Securities Act at the time of such sale or transfer;

(b) such Security is sold or otherwise transferred to a Person (other than the Company or an Affiliate of the Company) pursuant to an available exemption (including Rule 144) from the registration and prospectus-delivery requirements of, or in a transaction not subject to, the Securities Act and, immediately after such sale or transfer, such Security ceases to constitute a “restricted security” (as defined in Rule 144); and

(c) (i) such Security is eligible for resale, by a Person that is not an Affiliate of the Company and that has not been an Affiliate of the Company during the immediately preceding three (3) months, pursuant to Rule 144 without any limitations thereunder as to volume, manner
of sale, availability of current public information or notice; and (ii) the Company has received such certificates or other documentation or evidence as the Company may reasonably require to determine that the Holder, holder or beneficial owner of such Security is not, and has not been during the immediately preceding three (3) months, an Affiliate of the Company.

“Wholly Owned Subsidiary” of a Person means any Subsidiary of such Person all of the outstanding Capital Stock or other ownership interests of which (other than directors’ qualifying shares) are owned by such Person or one or more Wholly Owned Subsidiaries of such Person.

Section 2. RULES OF CONSTRUCTION. For purposes of this Certificate of Designations:

(a) “or” is not exclusive;

(b) “including” means “including without limitation”;

(c) “will” expresses a command;

(d) the “average” of a set of numerical values refers to the arithmetic average of such numerical values;

(e) a merger involving, or a transfer of assets by, a limited liability company, limited partnership or trust will be deemed to include any division of or by, or an allocation of assets to a series of, such limited liability company, limited partnership or trust, or any unwinding of any such division or allocation;

(f) words in the singular include the plural and in the plural include the singular, unless the context requires otherwise;

(g) “herein,” “hereof” and other words of similar import refer to this Certificate of Designations as a whole and not to any particular Section or other subdivision of this Certificate of Designations, unless the context requires otherwise;

(h) references to currency mean the lawful currency of the United States of America, unless the context requires otherwise; and

(i) the exhibits, schedules and other attachments to this Certificate of Designations are deemed to form part of this Certificate of Designations.

Section 3. THE CONVERTIBLE PREFERRED STOCK.

(a) Designation; Par Value. A series of stock of the Company titled the “4.5% Series A Convertible Preferred Stock” (the “Convertible Preferred Stock”) is hereby designated and created out of the authorized and unissued shares of preferred stock of the Company. The par value of the Convertible Preferred Stock is $0.0001 per share.

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(b) **Number of Authorized Shares.** The total authorized number of shares of Convertible Preferred Stock is four hundred thousand (400,000); provided, however that, by resolution of the Board of Directors, the total number of authorized shares of Convertible Preferred Stock may be increased or reduced to a number that is not less than the number of shares of Convertible Preferred Stock then outstanding.

(c) **Form, Dating and Denominations.**

(i) **Form and Date of Certificates Evidencing Convertible Preferred Stock.** Each Certificate evidencing any Convertible Preferred Stock will (1) be substantially in the form set forth in Exhibit A and (2) bear the legends required by Section 3(g) and may bear notations, legends or endorsements required by law, stock exchange rule or usage or the depositary.

(ii) **Electronic Certificates; Physical Certificates.** The Convertible Preferred Stock will be originally issued initially in the form of one or more Electronic Certificates. Electronic Certificates may be exchanged for Physical Certificates, and Physical Certificates may be exchanged for Electronic Certificates, upon request by the Holder thereof pursuant to customary procedures, subject to Section 3(h).

(iii) **Electronic Certificates; Interpretation.** For purposes of this Certificate of Designations, (1) each Electronic Certificate will be deemed to include the text of the stock certificate set forth in Exhibit A; (2) any legend or other notation that is required to be included on a Certificate will be deemed to be affixed to any Electronic Certificate notwithstanding that such Electronic Certificate may be in a form that does not permit affixing legends thereto; (3) any reference in this Certificate of Designations to the “delivery” of any Electronic Certificate will be deemed to be satisfied upon the registration of the electronic book entry representing such Electronic Certificate in the name of the applicable Holder; (4) upon satisfaction of any applicable requirements of the General Corporation Law of the State of Delaware, the Certificate of Incorporation and the Bylaws of the Company, and any related requirements of the Transfer Agent, in each case, for the issuance of Convertible Preferred Stock in the form of one or more Electronic Certificates, such Electronic Certificates will be deemed to be executed by the Company and countersigned by the Transfer Agent.

(iv) **Appointment of Depositary.** If any Convertible Preferred Stock is admitted to the book-entry clearance and settlement facilities of any electronic depositary, then, notwithstanding anything to the contrary in this Certificate of Designations, each reference in this Certificate of Designation to the delivery of, or payment on, any such Convertible Preferred Stock, or the delivery of any related notice or demand, will be deemed to be satisfied to the extent the applicable procedures of such depositary governing such delivery or payment, as applicable, are satisfied.

(v) **No Bearer Certificates; Denominations.** The Convertible Preferred Stock will be issued only in registered form and only in whole numbers of shares.
(vi) Registration Numbers. Each Certificate evidencing any share of Convertible Preferred Stock will bear a unique registration number that is not affixed to any other Certificate evidencing any other then-outstanding shares of Convertible Preferred Stock.

(d) Execution, Countersignature and Delivery.

Due Execution by the Company. At least two (2) duly authorized Officers will sign each Certificate evidencing any Convertible Preferred Stock on behalf of the Company by manual, facsimile or electronic signature. The validity of any Convertible Preferred Stock will not be affected by the failure of any Officer whose signature is on any Certificate evidencing such Convertible Preferred Stock to hold, at the time such Certificate is countersigned by the Transfer Agent, the same or any other office at the Company.

(i) Countersignature by Transfer Agent. No Certificate evidencing any share of Convertible Preferred Stock is valid until such Certificate is countersigned by the Transfer Agent. Each Certificate will be deemed to be duly countersigned only when an authorized signatory of the Transfer Agent (or a duly appointed agent thereof) signs (by manual, facsimile or electronic signature) the countersignature block set forth in such Certificate.

(e) Method of Payment; Delay When Payment Date is Not a Business Day.

(i) Method of Payment.

(1) Electronic Certificates. The Company will pay (or cause the Paying Agent to pay) all cash amounts due on any Convertible Preferred Stock evidenced by an Electronic Certificate, out of funds legally available therefor, by wire transfer of immediately available funds.

(2) Physical Certificates. The Company will pay (or cause the Paying Agent to pay) all cash amounts due on any Convertible Preferred Stock evidenced by a Physical Certificate, out of funds legally available therefor, as follows:

(A) if the aggregate Liquidation Preference of the Convertible Preferred Stock evidenced by such Physical Certificate is at least five million dollars ($5,000,000.00) (or such lower amount as the Company may choose in its sole and absolute discretion) and the Holder of such Convertible Preferred Stock entitled to such cash Dividend or amount has delivered to the Paying Agent, no later than the time set forth in the next sentence, a written request to receive payment by wire transfer to an account of such Holder within the United States, by wire transfer of immediately available funds to such account; and

(B) in all other cases, by check mailed to the address of such Holder set forth in the Register.
To be timely, such written request must be delivered no later than the Close of Business on the following date: (x) with respect to the payment of any declared cash Dividend due on a Dividend Payment Date for the Convertible Preferred Stock, the related Record Date; and (y) with respect to any other payment, the date that is fifteen (15) calendar days immediately before the date such payment is due.

(ii) Delay of Payment when Payment Date is Not a Business Day. If the due date for a payment on any Convertible Preferred Stock as provided in this Certificate of Designations is not a Business Day, then, notwithstanding anything to the contrary in this Certificate of Designations, such payment may be made on the immediately following Business Day and no interest, dividend or other amount will accrue or accumulate on such payment as a result of the related delay. Solely for purposes of the immediately preceding sentence, a day on which the applicable place of payment is authorized or required by law or executive order to close or be closed will be deemed not to be a “Business Day.”

(f) Transfer Agent, Registrar, Paying Agent and Conversion Agent.

(i) Generally. The Company designates its principal U.S. executive offices, and any office of the Transfer Agent in the continental United States, as an office or agency where Convertible Preferred Stock may be presented for (1) registration of transfer or for exchange (the “Registrar”); (2) payment (the “Paying Agent”); and (3) conversion (the “Conversion Agent”). At all times when any Convertible Preferred Stock is outstanding, the Company will maintain an office in the continental United States constituting the Registrar, Paying Agent and Conversion Agent.

(ii) Maintenance of the Register. The Company will keep, or cause there to be kept, a record (the “Register”) of the names and addresses of the Holders, the number of shares of Convertible Preferred Stock held by each Holder and the transfer, exchange, repurchase, Redemption and conversion of the Convertible Preferred Stock. Absent manifest error, the entries in the Register will be conclusive and the Company and the Transfer Agent may treat each Person whose name is recorded as a Holder in the Register as a Holder for all purposes. The Register will be in written form or in any form capable of being converted into written form reasonably promptly. The Company will promptly provide a copy of the Register to any Holder upon its request.

(iii) Subsequent Appointments. By notice to each Holder, the Company may, at any time, appoint any Person (including any Subsidiary of the Company) to act as Registrar, Paying Agent or Conversion Agent.

(iv) If the Company or any of its Subsidiaries acts as Paying Agent or Conversion Agent, then (1) it will segregate for the benefit of the Holders all money and other property held by it as Paying Agent or Conversion Agent; and (2) references in this Certificate of Designations to the Paying Agent or Conversion Agent holding cash or other property, or to the delivery of cash or other property to the Paying Agent or Conversion Agent, in each case, for payment or delivery to any Holders or with respect to the Convertible Preferred Stock, will be deemed to refer to cash or other property so segregated, or to the segregation of such cash or other property, respectively.
(g) **Legends.**

(i) **Restricted Stock Legend.**

  (1) Each Certificate evidencing any share of Convertible Preferred Stock that is a Transfer-Restricted Security will bear the Restricted Stock Legend.

  (2) If any share of Convertible Preferred Stock is issued in exchange for, in substitution of, or to effect a partial conversion of, any other share(s) of Convertible Preferred Stock (such other share(s) being referred to as the “old share(s)” for purposes of this Section 3(g)(i)(2)), including pursuant to Section 3(i) or 3(k), then the Certificate evidencing such share will bear the Restricted Stock Legend if the Certificate evidencing such old share(s) bore the Restricted Stock Legend at the time of such exchange or substitution, or on the related Conversion Date with respect to such conversion, as applicable; *provided, however*, that the Certificate evidencing such share need not bear the Restricted Stock Legend if such share does not constitute a Transfer-Restricted Security immediately after such exchange or substitution, or as of such Conversion Date, as applicable.

(ii) **Other Legends.** The Certificate evidencing any Convertible Preferred Stock may bear any other legend or text, not inconsistent with this Certificate of Designations, as may be required by applicable law, by the rules of any applicable depositary for the Convertible Preferred Stock or by any securities exchange or automated quotation system on which such Convertible Preferred Stock is traded or quoted or as may be otherwise reasonably determined by the Company to be appropriate.

(iii) **Acknowledgement and Agreement by the Holders.** A Holder’s acceptance of any Convertible Preferred Stock evidencing by a Certificate bearing any legend required by this Section 3(g) will constitute such Holder’s acknowledgement of, and agreement to comply with, the restrictions set forth in such legend.

(iv) **Legends on Conversion Shares.**

  (1) Each Conversion Share will bear a legend substantially to the same effect as the Restricted Stock Legend if the Convertible Preferred Stock upon the conversion of which such Conversion Share was issued was (or would have been had it not been converted) a Transfer-Restricted Security at the time such Conversion Share was issued; *provided, however*, that such Conversion Share need not bear such a legend if the Company determines, in its reasonable discretion, that such Conversion Share need not bear such a legend.

  (2) Notwithstanding anything to the contrary in Section 3(g)(iv)(1), a Conversion Share need not bear a legend pursuant to Section 3(g)(iv)(1) if such Conversion Share is issued in an uncertificated form that does not permit affixing legends thereto, *provided* the Company takes measures (including the assignment thereto of a “restricted” CUSIP number) that it reasonably deems appropriate to enforce the transfer restrictions referred to in such legend.
(h) Transfers and Exchanges; Transfer Taxes; Certain Transfer Restrictions.

(i) Provisions Applicable to All Transfers and Exchanges.

(1) Generally. Subject to this Section 3(h), Convertible Preferred Stock evidenced by any Certificate may be transferred or exchanged from time to time and the Company will cause the Registrar to record each such transfer or exchange in the Register.

(2) No Services Charge; Transfer Taxes. The Company and the Share Agents will not impose any service charge on any Holder for any transfer, exchange or conversion of any Convertible Preferred Stock, but the Company, the Transfer Agent, the Registrar and the Conversion Agent may require payment of a sum sufficient to cover any transfer tax or similar governmental charge that may be imposed in connection with any transfer, exchange or conversion of Convertible Preferred Stock, other than exchanges pursuant to Section 3(i) or Section 3(q) not involving any transfer (and; provided, that (A) any such taxes or charges incurred in connection with the original issuance of the Convertible Preferred Stock shall be paid and borne by the Company; and (B) any such taxes or charges incurred in connection with a conversion of the Convertible Preferred Stock pursuant to Section 10 shall be paid and borne as provided in Section 11(c)).

(3) No Transfers or Exchanges of Fractional Shares. Notwithstanding anything to the contrary in this Certificate of Designations, all transfers or exchanges of Convertible Preferred Stock must be in an amount representing a whole number of shares of Convertible Preferred Stock, and no fractional share of Convertible Preferred Stock may be transferred or exchanged.

(4) Legends. Each Certificate evidencing any share of Convertible Preferred Stock that is issued upon transfer of, or in exchange for, another share of Convertible Preferred Stock will bear each legend, if any, required by Section 3(g).

(5) Settlement of Transfers and Exchanges. Upon satisfaction of the requirements of this Certificate of Designations to effect a transfer or exchange of any Convertible Preferred Stock, the Company will cause such transfer or exchange to be effected as soon as reasonably practicable but in no event later than the second (2nd) Business Day after the date of such satisfaction.

(6) Exchanges to Remove Transfer Restrictions. For the avoidance of doubt, and subject to the terms of this Certificate of Designations, as used in this Section 3(h), an “exchange” of a Certificate includes an exchange effected for the sole purpose of removing any Restricted Stock Legend affixed to such Certificate.

(ii) Transfers and Exchanges of Convertible Preferred Stock.

(1) Subject to this Section 3(h), a Holder of any Convertible Preferred Stock evidenced by a Certificate may (x) transfer any whole number of shares of such Convertible Preferred Stock to one or more other Person(s); and (y) exchange any whole number of shares of such Convertible Preferred Stock for an equal
number of shares of Convertible Preferred Stock evidenced by one or more other Certificates; provided, however, that, to effect any such transfer or exchange, such Holder must, if such Certificate is a Physical Certificate, surrender such Physical Certificate to the office of the Transfer Agent or the Registrar, together with any endorsements or transfer instruments reasonably required by the Company, the Transfer Agent or the Registrar.

(2) Upon the satisfaction of the requirements of this Certificate of Designations to effect a transfer or exchange of any whole number of shares of a Holder’s Convertible Preferred Stock evidenced by a Certificate (such Certificate being referred to as the “old Certificate” for purposes of this Section 3(h)(ii)(2)):

(A) such old Certificate will be promptly cancelled pursuant to Section 3(m);

(B) if fewer than all of the shares of Convertible Preferred Stock evidenced by such old Certificate are to be so transferred or exchanged, then the Company will issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(d), one or more Certificates that (x) each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock evidenced by such old Certificate not to be so transferred or exchanged; (y) are registered in the name of such Holder; and (z) bear each legend, if any, required by Section 3(g);

(C) in the case of a transfer to a transferee, the Company will issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(d), one or more Certificates that (x) each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock to be so transferred; (y) are registered in the name of such transferee; and (z) bear each legend, if any, required by Section 3(g); and

(D) in the case of an exchange, the Company will issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(d), one or more Certificates that (x) each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock to be so exchanged; (y) are registered in the name of the Person to whom such old Certificate was registered; and (z) bear each legend, if any, required by Section 3(g).
Transfers of Shares Subject to Redemption, Repurchase or Conversion. Notwithstanding anything to the contrary in this Certificate of Designations, the Company, the Transfer Agent and the Registrar will not be required to register the transfer of or exchange any share of Convertible Preferred Stock that has been called for Redemption, subject to a Repurchase upon Fundamental Change or surrendered for conversion.

(i) Exchange and Cancellation of Convertible Preferred Stock to Be Converted or to Be Repurchased Pursuant to a Repurchase Upon Fundamental Change or a Redemption.

(ii) Partial Conversions of Physical Certificates and Partial Repurchases of Physical Certificates Pursuant to a Repurchase Upon Fundamental Change or a Redemption. If fewer than all of the shares of Convertible Preferred Stock evidenced by a Physical Certificate (such Physical Certificate being referred to as the “old Physical Certificate” for purposes of this Section 3(i)(i)) are to be converted pursuant to Section 10 or repurchased pursuant to a Repurchase Upon Fundamental Change or a Redemption, then, as soon as reasonably practicable after such Physical Certificate is surrendered for such conversion or repurchase, as applicable, the Company will cause such Physical Certificate to be exchanged, pursuant and subject to Section 3(h), for (1) one or more Physical Certificates that each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock evidenced by such old Physical Certificate that are not to be so converted or repurchased, as applicable, and deliver such Physical Certificate(s) to such Holder; and (2) a Physical Certificate evidencing a whole number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock evidenced by such old Physical Certificate that are to be so converted or repurchased, as applicable, which Physical Certificate will be converted or repurchased, as applicable, pursuant to the terms of this Certificate of Designations; provided, however, that the Physical Certificate referred to in this clause (2) need not be issued at any time after which such shares subject to such conversion or repurchase, as applicable, are deemed to cease to be outstanding pursuant to Section 3(o).

(ii) Cancellation of Convertible Preferred Stock that Is Converted and Convertible Preferred Stock that Is Repurchased Pursuant to a Repurchase Upon Fundamental Change or a Redemption. If shares of Convertible Preferred Stock evidenced by a Certificate (or any portion thereof that has not theretofore been exchanged pursuant to Section 3(i)(i)) (such Certificate being referred to as the “old Certificate” for purposes of this Section 3(i)(ii)) are to be converted pursuant to Section 10 or repurchased pursuant to a Repurchase Upon Fundamental Change or a Redemption, then, promptly after the later of the time such Convertible Preferred Stock is deemed to cease to be outstanding pursuant to Section 3(o) and the time such old Certificate is surrendered for such conversion or repurchase, as applicable, (1) such old Certificate will be cancelled pursuant to Section 3(m); and (2) in the case of a partial conversion or repurchase, the Company will issue, execute and deliver to such Holder, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(d), one or more Certificates that (x) each evidence a whole number of shares of Convertible Preferred Stock and, in the aggregate, evidence a total number of shares of Convertible Preferred Stock equal to the number of shares of Convertible Preferred Stock evidenced by such old Certificate that are not to be so converted or repurchased, as applicable; (y) are registered in the name of such Holder; and (z) bear each legend, if any, required by Section 3(g).
(j) **Status of Retired or Treasury Shares.** Upon any share of Convertible Preferred Stock ceasing to be outstanding, such share will be deemed, automatically and without any further action of the Board of Directors, to be retired and to resume the status of an authorized and unissued share of preferred stock of the Company, and such share cannot thereafter be reissued as Convertible Preferred Stock.

(k) **Replacement Certificates.** If a Holder of any Convertible Preferred Stock claims that the Certificate(s) evidencing such Convertible Preferred Stock have been mutilated, lost, destroyed or wrongfully taken, then the Company will issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(c), a replacement Certificate evidencing such Convertible Preferred Stock upon surrender to the Company or the Transfer Agent of such mutilated Certificate, or upon delivery to the Company or the Transfer Agent of evidence of such loss, destruction or wrongful taking reasonably satisfactory to the Transfer Agent and the Company. In the case of a lost, destroyed or wrongfully taken Certificate evidencing Convertible Preferred Stock, the Company and the Transfer Agent may require the Holder thereof to provide such security or indemnity that is reasonably satisfactory to the Company and the Transfer Agent to protect the Company and the Transfer Agent from any loss that any of them may suffer if such Certificate is replaced. Every replacement Certificate evidencing Convertible Preferred Stock issued pursuant to this Section 3(j) will, upon such replacement, be deemed to be evidence of outstanding Convertible Preferred Stock, entitled to all of the benefits of this Certificate of Designations equally and ratably with all other Convertible Preferred Stock then outstanding.

(l) **Registered Holders.** Only the Holder of any share of Convertible Preferred Stock will have rights under this Certificate of Designations as the owner of such share of Convertible Preferred Stock.

(m) **Cancellation.** The Company may at any time deliver Certificates evidencing Convertible Preferred Stock, if any, to the Transfer Agent for cancellation. The Registrar, the Paying Agent and the Conversion Agent will forward to the Transfer Agent each share of Convertible Preferred Stock duly surrendered to them for transfer, exchange, payment or conversion. The Company will cause the Transfer Agent to promptly cancel all Certificates evidencing shares of Convertible Preferred Stock so surrendered to it in accordance with its customary procedures.

(n) **Shares Held by the Company or its Subsidiaries.** Without limiting the generality of Section 3(j) and Section 3(o), in determining whether the Holders of the required number of outstanding shares of Convertible Preferred Stock have concurred in any direction, waiver or consent, shares of Convertible Preferred Stock owned by the Company or any of its Subsidiaries will be deemed not to be outstanding.

(o) **Outstanding Shares.**

   (i) **Generally.** The shares of Convertible Preferred Stock that are outstanding at any time will be deemed to be those shares indicated as outstanding in the Register (absent manifest error), excluding those shares of Convertible Preferred Stock that have
theretofore been (1) cancelled by the Transfer Agent or delivered to the Transfer Agent for cancellation in accordance with Section 3(m); (2) paid in full upon their conversion or upon their repurchase pursuant to a Repurchase Upon Fundamental Change or a Redemption in accordance with this Certificate of Designations; or (3) deemed to cease to be outstanding to the extent provided in, and subject to, clause (ii), (iii), (iv) or (v) of this Section 3(o).

(i) Replaced Shares. If any Certificate evidencing any share of Convertible Preferred Stock is replaced pursuant to Section 3(k), then such share will cease to be outstanding at the time of such replacement, unless the Transfer Agent and the Company receive proof reasonably satisfactory to them that such share is held by a “bona fide purchaser” under applicable law.

(iii) Shares to Be Repurchased Pursuant to a Redemption. If, on a Redemption Date, the Paying Agent holds consideration in kind and amount that is sufficient to pay the aggregate Redemption Price due on such date, then (unless there occurs a default in the payment of the Redemption Price) (1) the Convertible Preferred Stock to be redeemed on such date will be deemed, as of such date, to cease to be outstanding (without limiting the Company’s obligations pursuant to Section 5(d)); and (2) the rights of the Holders of such Convertible Preferred Stock, as such, will terminate with respect to such Convertible Preferred Stock, other than the right to receive the Redemption Price as provided in Section 7 (and, if applicable, declared Dividends as provided in Section 5(d)).

(iv) Shares to Be Repurchased Pursuant to a Repurchase Upon Fundamental Change. If, on a Fundamental Change Repurchase Date, the Paying Agent holds consideration in kind and amount that is sufficient to pay the aggregate Fundamental Change Repurchase Price due on such date, then (unless there occurs a default in the payment of the Fundamental Change Repurchase Price) (1) the Convertible Preferred Stock to be repurchased on such date will be deemed, as of such date, to cease to be outstanding (without limiting the Company’s obligations pursuant to Section 5(d)); and (2) the rights of the Holders of such Convertible Preferred Stock, as such, will terminate with respect to such Convertible Preferred Stock, other than the right to receive the Fundamental Change Repurchase Price as provided in Section 8 (and, if applicable, declared Dividends as provided in Section 5(d)).

(v) Shares to Be Converted. If any Convertible Preferred Stock is to be converted, then, at the Close of Business on the Conversion Date for such conversion (unless there occurs a default in the delivery of the Conversion Consideration due pursuant to Section 10 upon such conversion): (1) such Convertible Preferred Stock will be deemed to cease to be outstanding (without limiting the Company’s obligations pursuant to Section 5(d)); and (2) the rights of the Holders of such Convertible Preferred Stock, as such, will terminate with respect to such Convertible Preferred Stock, other than the right to receive such Conversion Consideration as provided in Section 10 (and, if applicable, declared Dividends as provided in Section 5(d)).
Repurchases by the Company and its Subsidiaries. Without limiting the generality of Section 3(m) and the next sentence, the Company and its Subsidiaries may, from time to time, repurchase Convertible Preferred Stock in open market purchases or in negotiated transactions without delivering prior notice to Holders. The Company will promptly deliver to the Transfer Agent for cancellation all Convertible Preferred Stock that the Company or any of its Subsidiaries have purchased or otherwise acquired.

Notations and Exchanges. Without limiting any rights of Holders pursuant to Section 9, if any amendment, supplement or waiver to the Certificate of Incorporation (including this Certificate of Designations) changes the terms of any Convertible Preferred Stock, then the Company may, in its discretion, require the Holder of the Certificate evidencing such Convertible Preferred Stock to deliver such Certificate to the Transfer Agent so that the Transfer Agent may place an appropriate notation prepared by the Company on such Certificate and return such Certificate to such Holder. Alternatively, at its discretion, the Company may, in exchange for such Convertible Preferred Stock, issue, execute and deliver, and cause the Transfer Agent to countersign, in each case, in accordance with Section 3(c), a new Certificate evidencing such Convertible Preferred Stock that reflects the changed terms. The failure to make any appropriate notation or issue a new Certificate evidencing any Convertible Preferred Stock pursuant to this Section 3(q) will not impair or affect the validity of such amendment, supplement or waiver.

Section 4. RANKING. The Convertible Preferred Stock will rank (a) senior to (i) Dividend Junior Stock with respect to the payment of dividends; and (ii) Liquidation Junior Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up; (b) equally with (i) Dividend Parity Stock with respect to the payment of dividends; and (ii) Liquidation Parity Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up; and (c) junior to (i) Dividend Senior Stock with respect to the payment of dividends; and (ii) Liquidation Senior Stock with respect to the distribution of assets upon the Company’s liquidation, dissolution or winding up.

Section 5. DIVIDENDS.

(a) Regular Dividends.

(i) Accumulation and Payment of Regular Dividends. The Convertible Preferred Stock will accumulate cumulative dividends at a rate per annum equal to the Regular Dividend Rate on the Liquidation Preference plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared (and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i)) thereof (calculated in accordance with Section 5(a)(ii)), regardless of whether or not declared or funds are legally available for their payment (such dividends that accumulate on the Convertible Preferred Stock pursuant to this sentence, “Regular Dividends”). Subject to the other provisions of this Section 5 (including, for the avoidance of doubt, Section 5(b)(ii)), such Regular Dividends will be payable when, as and if declared by the Board of Directors, quarterly in arrears on each Regular Dividend Payment Date, to the Holders as of the Close of Business on the immediately preceding Regular Dividend Record Date. Regular Dividends on the Convertible Preferred Stock will accumulate daily from, and including, the last date on
which Regular Dividends have been paid (or, if no Regular Dividends have been paid, from, and including, the Initial Issue Date) to, but excluding, the next Regular Dividend Payment Date.

(ii) **Computation of Accumulated Regular Dividends.** Accumulated Regular Dividends will be computed on the basis of a 360-day year comprised of twelve 30-day months. Regular Dividends on each share of Convertible Preferred Stock will accrue on the Liquidation Preference (plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared (and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i)) of such share as of immediately before the Close of Business on the preceding Regular Dividend Payment Date (or, if there is no preceding Regular Dividend Payment Date, on the Initial Issue Date of such share).

(b) **Calculation of Regular Dividends.**

(i) **Generally.** With respect to any Regular Dividend Payment Date on or prior to the three (3) year anniversary of the Initial Issue Date, dividends shall not be permitted to be paid in cash, and instead the dollar amount (expressed as an amount per share of Convertible Preferred Stock) of each Regular Dividend on the Convertible Preferred Stock (whether or not declared) that has accumulated on the Convertible Preferred Stock in respect of the Regular Dividend Period ending on, but excluding, a Regular Dividend Payment Date, will be added, effective immediately before the Close of Business on the related Regular Dividend Payment Date, to the Liquidation Preference of each share of Convertible Preferred Stock outstanding as of such time. Such addition will occur automatically, without the need for any action on the part of the Company or any other Person. With respect to any Regular Dividend Payment Date after the three (3) year anniversary of the Initial Issue Date, Regular Dividends shall only be payable in cash, out of funds legally available therefor, and only when and if declared by the Board of Directors; provided that, for the avoidance of doubt, the Board of Directors may elect not to declare such Regular Dividends in which case such amounts shall continue to accrue and the Board of Directors may later declare and pay any previously accrued but undeclared dividends that accrue following the three (3) year anniversary of the Initial Issue Date in cash, out of funds legally available therefor, at any time thereafter.

(ii) **Construction.** Any Regular Dividends added to the Liquidation Preference of any share of Convertible Preferred Stock pursuant to Section 5(b)(i) will be deemed to be “declared” and “paid” on such share of Convertible Preferred Stock for all purposes of this Certificate of Designations.

(c) **Participating Dividends.**

(i) **Generally.** Subject to Section 5(c)(ii), no dividend or other distribution on the Common Stock (whether in cash, securities (including rights or options) or other property, or any combination of the foregoing) will be declared or paid on the Common Stock unless, at the time of such declaration and payment, an equivalent dividend or
distribution is declared and paid, respectively, on the Convertible Preferred Stock (such a dividend or distribution on the Convertible Preferred Stock, a “Participating Dividend,” and such corresponding dividend or distribution on the Common Stock, the “Common Stock Participating Dividend”), such that (1) the Record Date and the payment date for such Participating Dividend occur on the same dates as the Record Date and payment date, respectively, for such Common Stock Participating Dividend; and (2) the kind and amount of consideration payable per share of Convertible Preferred Stock in such Participating Dividend is the same kind and amount of consideration that would be payable in the Common Stock Participating Dividend in respect of a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with Section 10 but without regard to Section 10(h)) in respect of one (1) share of Convertible Preferred Stock that is converted with a Conversion Date occurring on such Record Date (subject to the same arrangements, if any, in such Common Stock Participating Dividend not to issue or deliver a fractional portion of any security or other property, but with such arrangement applying separately to each Holder and computed based on the total number of shares of Convertible Preferred Stock held by such Holder on such Record Date).

(ii) Stockholder Rights Plans, Common Stock Change Events and Stock Splits, Dividends and Combinations. Section 5(c)(i) will not apply to, and no Participating Dividend will be required to be declared or paid in respect of, (1) a Common Stock Change Event, as to which Section 10(i) will apply; (2) an event for which an adjustment to the Conversion Price is required pursuant to Section 10(f)(i), as to which the applicable provision of Section 10(f)(i) will apply (provided, however, that the Holders may elect, by written action of the Majority Holders delivered to the Company prior to the relevant Record Date, to receive a Participating Dividend in lieu of an adjustment to the Conversion Price pursuant to Section 10(f)(i)(2) through (4)); (3) a Distribution Transaction where the Majority Holders elect to engage in a Spin-Off Exchange Offer, and such Spin-Off Exchange Offer is completed pursuant to Section 10(f)(iv), and (4) rights issued pursuant to a stockholder rights plan.

(d) Treatment of Dividends Upon Redemption, Repurchase Upon Fundamental Change or Conversion. If the Redemption Date, Fundamental Change Repurchase Date or Conversion Date of any share of Convertible Preferred Stock is after a Record Date for a declared Dividend on the Convertible Preferred Stock and on or before the next Dividend Payment Date, then the Holder of such share at the Close of Business on such Record Date will be entitled, notwithstanding the related Redemption, Repurchase Upon Fundamental Change or conversion, as applicable, to receive, on or, at the Company’s election, before such Dividend Payment Date, such declared Dividend on such share.

Section 6. RIGHTS UPON LIQUIDATION, DISSOLUTION OR WINDING UP.

(a) Generally. If the Company liquidates, dissolves or winds up, whether voluntarily or involuntarily (any such event, a “Liquidation Event”), then, subject to the rights of any of the Company’s creditors or holders of any outstanding Liquidation Senior Stock, each share of Convertible Preferred Stock will entitle the Holder thereof to receive payment for the greater of the amounts set forth in clause (i) and (ii) below out of the Company’s assets or funds legally
available for distribution to the Company’s stockholders, before any such assets or funds are distributed to, or set aside for the benefit of, any Liquidation Junior Stock:

(i) the product of (x) the Initial Liquidation Preference multiplied by (y) the Liquidation Multiple, plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared (and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i), on such shares of Convertible Preferred Stock to, but excluding, the date of such payment); and

(ii) the amount such Holder would have received in respect of the number of shares of Common Stock that would be issuable upon conversion of such share of Convertible Preferred Stock in connection with an Optional Conversion assuming the Conversion Date of such conversion occurs on the date of such payment.

Upon payment of such amount in full on the outstanding Convertible Preferred Stock, Holders of the Convertible Preferred Stock will have no rights to the Company’s remaining assets or funds, if any. If such assets or funds are insufficient to fully pay such amount on all outstanding shares of Convertible Preferred Stock and the corresponding amounts payable in respect of all outstanding shares of Liquidation Parity Stock, if any, then, subject to the rights of any of the Company’s creditors or holders of any outstanding Liquidation Senior Stock, such assets or funds will be distributed ratably on the outstanding shares of Convertible Preferred Stock and Liquidation Parity Stock in proportion to the full respective distributions to which such shares would otherwise be entitled.

(b) Certain Business Combination Transactions Deemed Not to Be a Liquidation. For purposes of Section 6(a), the Company’s consolidation or combination with, or merger with or into, or the sale, lease or other transfer of all or substantially all of the Company’s assets (other than a sale, lease or other transfer in connection with the Company’s liquidation, dissolution or winding up) to, another Person will not, in itself, constitute the Company’s liquidation, dissolution or winding up, even if, in connection therewith, the Convertible Preferred Stock is converted into, or is exchanged for, or represents solely the right to receive, other securities, cash or other property, or any combination of the foregoing.

Section 7. REDemption AT THE OPTION OF THE Holder.

(a) Right to Redeem On or After the Seven Year Anniversary. Subject to the terms of this Section 7, each Holder has the right, at its election, to require the Company to repurchase, by irrevocable, written notice to the Company, all or any portion of such Holder’s shares of the Convertible Preferred Stock, at any time, on a Redemption Date on or after the seven (7) year anniversary of the Initial Issue Date, out of funds legally available therefor, for a cash purchase price equal to the Redemption Price (each such redemption, a “Redemption”).

(b) Redemption Date. The Redemption Date for any Redemption will be a Business Day of such Holder’s choosing that is no more than twenty (20), nor less than ten (10), calendar days after the Redemption Notice Date for such Redemption.

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(c) **Redemption Price.** The Redemption Price for any share of Convertible Preferred Stock to be repurchased pursuant to a Redemption is an amount in cash equal to the Liquidation Preference (plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i)) of such share at the Close of Business on the Redemption Date for such Redemption.

(d) **Redemption Notice.** To require the Company to redeem any share of Convertible Preferred Stock, such Holder must send the Company a notice of such Redemption (a "Redemption Notice"), which Redemption Notice must state:

1. that such share has been called for Redemption;
2. the number of such shares subject to Redemption; and
3. the Redemption Date for such Redemption.

(e) **Payment of the Redemption Price.** The Company will cause the Redemption Price for each share of Convertible Preferred Stock subject to Redemption to be paid to the Holder thereof on or before the applicable Redemption Date.

Section 8. **RIGHT OF HOLDERS TO REQUIRE THE COMPANY TO REPURCHASE CONVERTIBLE PREFERRED STOCK UPON A FUNDAMENTAL CHANGE.**

(a) **Fundamental Change Repurchase Right.** Subject to the other terms of this Section 8, if a Fundamental Change occurs, then each Holder may, at its election, either (i) effective as of immediately prior to the Fundamental Change, convert all or a portion of its shares of Convertible Preferred Stock pursuant to Section 10 at the then-current Conversion Price or (ii) require the Company to repurchase (the "Fundamental Change Repurchase Right") all, or any whole number of shares that is less than all, of such Holder’s Convertible Preferred Stock that have not been converted pursuant to clause (i) on the Fundamental Change Repurchase Date for such Fundamental Change, out of funds legally available therefor, for a cash purchase price equal to the Fundamental Change Repurchase Price.

(b) **Funds Legally Available for Payment of Fundamental Change Repurchase Price; Covenant Not to Take Certain Actions.** If the Company does not have sufficient funds legally available to pay the Fundamental Change Repurchase Price of all shares of Convertible Preferred Stock that are to be repurchased pursuant to a Repurchase Upon Fundamental Change, then the Company shall (1) pay the maximum amount of such Fundamental Change Repurchase Price that can be paid out of funds legally available for payment, which payment will be made pro rata to each Holder based on the total number of shares of Convertible Preferred Stock of such Holder that were otherwise to be repurchased pursuant to such Repurchase Upon Fundamental Change; and (2) purchase any shares of Convertible Preferred Stock not purchased because of the foregoing limitations at the applicable Fundamental Change Repurchase Price as soon as practicable after the Company is able to make such purchase out of assets legally available for the purchase of such shares of Convertible Preferred Stock. The inability of the Company (or its successor) to make a
purchase payment for any reason shall not relieve the Company (or its successor) from its obligation to effect any required purchase when, as and if permitted by applicable law. If the Company fails to pay the Fundamental Change Repurchase Price in full when due in accordance with this Section 8 in respect of some or all of the shares or Convertible Preferred Stock to be repurchased pursuant to the Fundamental Change Repurchase Right, the Company will pay Dividends on such shares not repurchased at a Regular Dividend Rate of six and one half percent (6.5%) per annum until such shares are repurchased, payable quarterly in arrears, out of funds legally available, on each Dividend Payment Date, for the period from and including the first Dividend Payment Date (or the Initial Issue Date, as applicable) upon which the Company fails to pay the Fundamental Change Repurchase Price in full when due in accordance with this Section 8 through but not including the latest of the day upon which the Company pays the Fundamental Change Repurchase Price in full in accordance with this Section 8. Notwithstanding the foregoing, in the event a Holder exercises a Fundamental Change Repurchase Right pursuant to this Section 8 at a time when the Company is restricted or prohibited (contractually or otherwise) from repurchasing some or all of the Convertible Preferred Stock subject to the Fundamental Change Repurchase Right, the Company will use its commercially reasonable efforts to obtain the requisite consents to remove or obtain an exception or waiver to such restrictions or prohibition. Nothing herein shall limit a Holder’s right to pursue any other remedies available to it hereunder, at law or in equity, including, without limitation, a decree of specific performance and/or injunctive relief with respect to the Company’s failure to comply with its obligations under this Section 8. The Company will not voluntarily take any action, or voluntarily engage in any transaction, that would result in a Fundamental Change unless the Company in good faith believes that it will have sufficient funds legally available to fully pay the maximum aggregate Fundamental Change Repurchase Price that would be payable in respect of such Fundamental Change on all shares of Convertible Preferred Stock then outstanding.

(c) **Fundamental Change Repurchase Date.** The Fundamental Change Repurchase Date for any Fundamental Change will be a Business Day of the Company’s choosing that is no more than thirty (30), nor less than twenty (20), Business Days after the date the Company sends the related Final Fundamental Change Notice pursuant to Section 8(f).

(d) **Fundamental Change Repurchase Price.** The Fundamental Change Repurchase Price for any share of Convertible Preferred Stock to be repurchased upon a Repurchase Upon Fundamental Change following a Fundamental Change is an amount in cash equal to the greater of (i) the product of (x) the Liquidation Preference of such share multiplied by (y) the Liquidation Multiple, plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i) of such share at the Close of Business on the Fundamental Change Repurchase Date for such Fundamental Change (including any accumulated and unpaid Regular Dividends, whether or not declared, on such share to, but excluding, such Fundamental Change Repurchase Date) and (ii) the amount that such Holders would have received had such Holders, immediately prior to such Fundamental Change, converted such shares of Convertible Preferred Stock into Common Stock pursuant to Section 10(a), without regard to any of the limitations on convertibility contained in Section 10(h).
(e) Initial Fundamental Change Notice. On or before the twentieth (20th) Business Day prior to the date on which the Company anticipates consummating a Fundamental Change (or, if later, promptly after the Company discovers that a Fundamental Change may occur), a written notice shall be sent by or on behalf of the Company to the Holders as they appear in the records of the Company, which notice shall contain the date on which the Fundamental Change is anticipated to be effected (or, if applicable, the date on which a Schedule TO or other schedule, form or report disclosing a Fundamental Change was filed) (the “Initial Fundamental Change Notice”). No later than ten (10) Business Days prior to the date on which the Company anticipates consummating the Fundamental Change as set forth in the Initial Fundamental Change Notice (or, if the Fundamental Change has already occurred as provided in the Initial Fundamental Change Notice, promptly, but no later than the tenth (10th) Business Day following receipt thereof), any Holder that desires to exercise its rights pursuant to Section 8(a) shall notify the Company in writing thereof and shall specify (x) whether such Holder is electing to exercise its rights pursuant to clause (i) or (ii) of Section 8(a) and (y) the number of shares of Convertible Preferred Stock subject thereto.

(f) Final Fundamental Change Notice. If a Holder elects to exercise its Fundamental Change Repurchase Right pursuant to Section 8(a)(ii), on or before the second (2nd) Business Day after the effective date of a Fundamental Change, the Company will send to each Holder a notice of such Fundamental Change (a “Final Fundamental Change Notice”). Such Final Fundamental Change Notice must state:

(i) briefly, the events causing such Fundamental Change;

(ii) the effective date of such Fundamental Change;

(iii) the procedures that a Holder must follow to require the Company to repurchase its Convertible Preferred Stock pursuant to this Section 8, including the deadline for exercising the Fundamental Change Repurchase Right and the procedures for submitting and withdrawing a Fundamental Change Repurchase Notice;

(iv) the Fundamental Change Repurchase Date for such Fundamental Change;

(v) the Fundamental Change Repurchase Price per share of Convertible Preferred Stock, including reasonable detail of the calculation thereof;

(vi) if the Fundamental Change Repurchase Date is after a Record Date for a declared Dividend on the Convertible Preferred Stock and on or before the next Dividend Payment Date, that such Dividend will be paid in accordance with Section 5(d);

(vii) the name and address of the Transfer Agent and the Conversion Agent;

(viii) the Conversion Price in effect on the date of such Final Fundamental Change Notice and a description and quantification of any adjustments to the Conversion Price that may result from such Fundamental Change;

(ix) that Convertible Preferred Stock may be converted pursuant to Section 10 at any time before the Close of Business on the Business Day immediately before the
related Fundamental Change Repurchase Date (or, if the Company fails to pay the Fundamental Change Repurchase Price due on such Fundamental Change Repurchase Date in full, at any time until such time as the Company pays such Fundamental Change Repurchase Price in full);

(x) that shares of Convertible Preferred Stock for which a Fundamental Change Repurchase Notice has been duly tendered and not duly withdrawn must be delivered to the Paying Agent for the Holder thereof to be entitled to receive the Fundamental Change Repurchase Price; and

(xi) that shares of Convertible Preferred Stock that are subject to a Fundamental Change Repurchase Notice that has been duly tendered may be converted only if such Fundamental Change Repurchase Notice is withdrawn in accordance with this Certificate of Designations.

(g) Procedures to Exercise the Fundamental Change Repurchase Right.

(i) Delivery of Fundamental Change Repurchase Notice and Shares of Convertible Preferred Stock to Be Repurchased. To exercise its Fundamental Change Repurchase Right for any share(s) of Convertible Preferred Stock following a Fundamental Change, the Holder thereof must deliver to the Paying Agent:

1. before the Close of Business on the Business Day immediately before the related Fundamental Change Repurchase Date (or such later time as may be required by law), a duly completed, written Fundamental Change Repurchase Notice with respect to such share(s); and

2. such share(s), duly endorsed for transfer (to the extent such share(s) are evidenced by one or more Physical Certificates).

(ii) Contents of Fundamental Change Repurchase Notices. Each Fundamental Change Repurchase Notice with respect to any share(s) of Convertible Preferred Stock must state:

1. if such share(s) are evidenced by one or more Physical Certificates, the certificate number(s) of such Physical Certificate(s);

2. the number of shares of Convertible Preferred Stock to be repurchased, which must be a whole number; and

3. that such Holder is exercising its Fundamental Change Repurchase Right with respect to such share(s).

(iii) Withdrawal of Fundamental Change Repurchase Notice. A Holder that has delivered a Fundamental Change Repurchase Notice with respect to any share(s) of Convertible Preferred Stock may withdraw such Fundamental Change Repurchase Notice by delivering a written notice of withdrawal to the Paying Agent at any time before the Close of Business on the Business Day immediately before the related Fundamental
Change Repurchase Date. Such withdrawal notice must state:

1. if such share(s) are evidenced by one or more Physical Certificates, the certificate number(s) of such Physical Certificate(s);
2. the number of shares of Convertible Preferred Stock to be withdrawn, which must be a whole number; and
3. the number of shares of Convertible Preferred Stock, if any, that remain subject to such Fundamental Change Repurchase Notice, which must be a whole number.

If any Holder delivers to the Paying Agent any such withdrawal notice withdrawing any share(s) of Convertible Preferred Stock from any Fundamental Change Repurchase Notice previously delivered to the Paying Agent, and such share(s) have been surrendered to the Paying Agent, then such share(s) will be returned to the Holder thereof.

(h) **Payment of the Fundamental Change Repurchase Price.** Subject to Section 8(b), the Company will cause the Fundamental Change Repurchase Price for each share of Convertible Preferred Stock to be repurchased pursuant to a Repurchase Upon Fundamental Change to be paid to the Holder thereof on or before the applicable Fundamental Change Repurchase Date (or, if later in the case such share is evidenced by a Physical Certificate, the date the Physical Certificate evidencing such share is delivered to the Paying Agent).

(i) **Third Party May Conduct Repurchase Offer In Lieu of the Company.** Notwithstanding anything to the contrary in this Section 8, the Company will be deemed to satisfy its obligations under this Section 8 if one or more third parties conduct any Repurchase Upon Fundamental Change and related offer to repurchase Convertible Preferred Stock otherwise required by this Section 8 in a manner that would have satisfied the requirements of this Section 8 if conducted directly by the Company.

(j) **Fundamental Change Agreements.** The Company shall not enter into any agreement for a transaction constituting a Fundamental Change unless (i) such agreement provides for, or does not interfere with or prevent (as applicable), the exercise by the Holders of their Fundamental Change Repurchase Right in a manner that is consistent with, and gives effect to, this Section 8 and (ii) the acquiring or surviving Person in such Fundamental Change represents and covenants, in form and substance reasonably satisfactory to the Board of Directors acting in good faith, that at the closing of such Fundamental Change that such Person shall have sufficient funds (which may include, without limitation, cash and cash equivalents on the Company’s balance sheet, the proceeds of any debt or equity financing, available lines of credit or uncalled capital commitments) to consummate such Fundamental Change and the payment the Fundamental Change Repurchase Price in respect of shares of Convertible Preferred Stock that have not been converted into Common Stock prior to the Fundamental Change Repurchase Date pursuant to this Section 8 or Section 10, as applicable.
Section 9. VOTING RIGHTS. The Convertible Preferred Stock will have no voting rights except as set forth in this Section 9 or as otherwise provided in the Certificate of Incorporation or required by the General Corporation Law of the State of Delaware.

(a) Voting and Consent Rights with Respect to Specified Matters.

(i) Generally. Subject to the other provisions of this Section 9(a), each following event will require, and cannot be effected without, the affirmative vote or consent of (x) while any share of the Convertible Preferred Stock is outstanding with respect to Section 9(a)(i)(1) and Section 9(a)(i)(2), and (y) while at least twenty-five percent (25%) of the Convertible Preferred Stock issued on the Initial Issue Date is outstanding with respect to Section 9(a)(i)(3), Section 9(a)(i)(4), Section 9(a)(i)(5) and Section 9(a)(i)(6), Majority Holders:

(1) any amendment, modification or repeal of any provision of the Certificate of Incorporation (including this Certificate of Designations) or Bylaws that adversely affects the rights, preferences or voting powers of the Convertible Preferred Stock (other than an amendment, modification or repeal permitted by Section 9(a)(ii));

(2) any issuances by the Company of shares of, or other securities convertible into, Dividend Parity Stock, Liquidation Parity Stock, Dividend Senior Stock or Liquidation Senior Stock;

(3) any change in size of the Company’s Board of Directors;

(4) any voluntary dissolution, liquidation, bankruptcy or winding up of the Company or any deregistration or delisting of the Common Stock of the Company;

(5) any incurrence by the Company of any indebtedness for borrowed money unless the aggregate amount of Net Debt of the Company and its Subsidiaries would not exceed $350,000,000 after giving effect to such incurrence; or

(6) the disposition, spin-off, split-off or other divestiture of Mandiant Solutions, or any business unit or asset within Mandiant Solutions, in each case, in any transaction with consideration in excess of $300,000,000.

provided, however, that each of the following will be deemed not to adversely affect the special rights, preferences or voting powers of the Convertible Preferred Stock and will not require any vote or consent pursuant to Section 9(a)(i)(1) and Section 9(a)(i)(2):

(I) any increase in the number of the authorized but unissued shares of the Company’s undesignated preferred stock;

(II) any increase in the number of authorized shares of Convertible Preferred Stock as necessary with respect to issuances of shares of Convertible Preferred Stock in respect of Convertible Preferred Stock that was issued on the Initial Issue Date;
(III) the creation and issuance, or increase in the authorized or issued number, of any shares of any class or series of stock that is both Dividend Junior Stock and Liquidation Junior Stock; and

(IV) the application of Section 10(i), including the execution and delivery of any supplemental instruments pursuant to Section 10(i)(ii) solely to give effect to such provision.

(ii) Certain Amendments Permitted Without Consent. Notwithstanding anything to the contrary in Section 9(a)(i)(1), the Company may amend, modify or repeal any of the terms of the Convertible Preferred Stock without the vote or consent of any Holder to amend or correct this Certificate of Designations to cure any ambiguity or correct any omission, defect or inconsistency.

(b) Right to Vote with Holders of Common Stock on an As-Converted Basis. Subject to the other provisions of, and without limiting the other voting rights provided in, this Section 9, and except as provided in the Certificate of Incorporation or restricted by the General Corporation Law of the State of Delaware, the Holders will have the right to vote together as a single class with the holders of the Common Stock on each matter submitted for a vote or consent by the holders of the Common Stock, and, for these purposes, (i) the Convertible Preferred Stock of each Holder will entitle such Holder to be treated as if such Holder were the holder of record, as of the record or other relevant date for such matter, of a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with Section 10(e), including Section 10(e)(ii)) upon conversion of such Convertible Preferred Stock assuming such Convertible Preferred Stock were converted with a Conversion Date occurring on such record or other relevant date; and (ii) the Holders will be entitled to notice of all stockholder meetings or proposed actions by written consent in accordance with the Certificate of Incorporation, the Bylaws of the Company, and the General Corporation Law of the State of Delaware as if the Holders were holders of Common Stock. Notwithstanding the foregoing, the aggregate voting power of the Convertible Preferred Stock when voting with the holders of the Common Stock shall be limited to the extent necessary to comply with the NASDAQ Listing Standard Rules, and any resulting limitation on the voting rights of the Convertible Preferred Stock shall apply pro rata among the Holders thereof.

(c) Procedures for Voting and Consents.

(i) Rules and Procedures Governing Votes and Consents. If any vote or consent of the Holders will be held or solicited, including at an annual meeting or a special meeting of stockholders, then (1) the Board of Directors will adopt customary rules and procedures at its discretion to govern such vote or consent, subject to the other provisions of this Section 9; and (2) such rules and procedures may include fixing a record date to determine the Holders that are entitled to vote or provide consent, as applicable, rules governing the solicitation and use of proxies or written consents and customary procedures for the nomination and designation, by Holders, of directors for election; provided, however, that with respect to any voting rights of the Holders pursuant to Section 9(b), such rules and procedures will be the same rules and procedures that apply to holders of the Common Stock with respect to the applicable matter referred to in Section 9(b).
(ii) Voting Power of the Convertible Preferred Stock. Each share of Convertible Preferred Stock outstanding as of the applicable record date will be entitled to one vote on each matter on which the Holders of the Convertible Preferred Stock are entitled to vote separately as a class and not together with the holders of any other class or series of stock.

(iii) Written Consent in Lieu of Stockholder Meeting. Notwithstanding anything to the contrary otherwise set forth in the Certificate of Incorporation, the Bylaws or otherwise, a consent or affirmative vote of the Holders pursuant to Section 9(a) may be given or obtained in writing without a meeting.

Section 10. CONVERSION.

(a) Generally. Subject to the provisions of this Section 10, the Convertible Preferred Stock may be converted only pursuant to a Mandatory Conversion or an Optional Conversion.

(b) Conversion at the Option of the Holders.

(i) Conversion Right; When Shares May Be Submitted for Optional Conversion. Holders will have the right to submit all, or any whole number of shares that is less than all, of their shares of Convertible Preferred Stock pursuant to an Optional Conversion at any time; provided, however, that, notwithstanding anything to the contrary in this Certificate of Designations,

(1) if a Fundamental Change Repurchase Notice is validly delivered pursuant to Section 8(g)(i) with respect to any share of Convertible Preferred Stock, then such share may not be submitted for Optional Conversion after the Business Day prior to the consummation of the Fundamental Change, except to the extent (A) such share is not subject to such notice; (B) such notice is withdrawn in accordance with Section 8(g)(iii); or (C) the Company fails to pay the Fundamental Change Repurchase Price for such share in accordance with this Certificate of Designations;

(2) no Convertible Preferred Stock may be submitted for Optional Conversion to the extent limited by Section 10(h);

(3) shares of Convertible Preferred Stock that are called for Redemption may not be submitted for Optional Conversion after the Close of Business on the Business Day immediately before the related Redemption Date (or, if the Company fails to pay the Redemption Price due on such Redemption Date in full, at any time until such time as the Company pays such Redemption Price in full); and

(4) shares of Convertible Preferred Stock that are subject to Mandatory Conversion may not be submitted for Optional Conversion after the Close of Business on the Business Day immediately before the related Mandatory Conversion Date.
(ii) **Conversions of Fractional Shares Not Permitted.** Notwithstanding anything to the contrary in this Certificate of Designations, in no event will any Holder be entitled to convert a number of shares of Convertible Preferred Stock that is not a whole number.

(c) **Mandatory Conversion at the Company’s Election.**

(i) **Mandatory Conversion Right.** Subject to the provisions of this Section 10, the Company has the right (the "Mandatory Conversion Right"), exercisable at its election, to designate any Business Day on or after the three (3) year anniversary of the Initial Issue Date as a Conversion Date for the conversion (such a conversion, a "Mandatory Conversion") of all, but not less than all, of the outstanding shares of Convertible Preferred Stock, but only if the Last Reported Sale Price per share of Common Stock exceeds one hundred and seventy-five percent (175%) of the Conversion Price on each of at least twenty (20) Trading Days (whether or not consecutive) during the thirty (30) consecutive Trading Days ending on, and including, the Trading Day immediately before the Mandatory Conversion Notice Date for such Mandatory Conversion.

(ii) **Mandatory Conversion Prohibited in Certain Circumstances.** The Company will not exercise its Mandatory Conversion Right, or otherwise send a Mandatory Conversion Notice, with respect to any Convertible Preferred Stock pursuant to this Section 10(c) unless the Common Stock Liquidity Conditions are satisfied with respect to the Mandatory Conversion. Notwithstanding anything to the contrary in this Section 10(c), the Company’s exercise of its Mandatory Conversion Right, and any related Mandatory Conversion Notice, will not apply to any share of Convertible Preferred Stock as to which a Fundamental Change Repurchase Notice has been duly delivered, and not withdrawn, pursuant to Section 8(g). Notwithstanding anything to the contrary in this Section 10(c), the Company cannot exercise its Mandatory Conversion Right with respect to any shares of Convertible Preferred Stock to the extent limited by Section 10(h).

(iii) **Mandatory Conversion Date.** The Mandatory Conversion Date for any Mandatory Conversion will be a Business Day of the Company’s choosing that is no more than twenty (20), nor less than ten (10), Business Days after the Mandatory Conversion Notice Date for such Mandatory Conversion.

(iv) **Mandatory Conversion Notice.** To exercise its Mandatory Conversion Right with respect to any shares of Convertible Preferred Stock, the Company must send to each Holder of such shares a written notice of such exercise (a "Mandatory Conversion Notice").

(v) Such Mandatory Conversion Notice must state:

1. that the Company has exercised its Mandatory Conversion Right to cause the Mandatory Conversion of the shares of Convertible Preferred Stock, briefly describing the Company’s Mandatory Conversion Right under this Certificate of Designations;

2. the Mandatory Conversion Date for such Mandatory Conversion and the date scheduled for the settlement of such Mandatory Conversion;

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(d) Conversion Procedures.

(i) Mandatory Conversion. If the Company duly exercises, in accordance with Section 10(c), its Mandatory Conversion Right with respect to any share of Convertible Preferred Stock, then (1) the Mandatory Conversion of such share will occur automatically and without the need for any action on the part of the Holder(s) thereof; and (2) the shares of Common Stock due upon such Mandatory Conversion will be registered in the name of, and, if applicable, the cash due upon such Mandatory Conversion will be delivered to, the Holder(s) of such share of Convertible Preferred Stock as of the Close of Business on the related Mandatory Conversion Date.

(ii) Requirements for Holders to Exercise Optional Conversion Right.

(1) Generally. To convert any share of Convertible Preferred Stock evidenced by a Certificate pursuant to an Optional Conversion, the Holder of such share must (w) complete, sign (by manual, facsimile or electronic signature) and deliver to the Conversion Agent an Optional Conversion Notice (at which time, in the case such Certificate is an Electronic Certificate, such Optional Conversion will become irrevocable); (x) if such Certificate is a Physical Certificate, deliver such Physical Certificate to the Conversion Agent (at which time such Optional Conversion will become irrevocable); (y) furnish any endorsements and transfer documents that the Company or the Conversion Agent may require; and (z) if applicable, pay any documentary or other taxes that are required to be paid by the Company as a result of a Holder requesting that shares be registered in a name other than such Holders’ name as described in Section 11(c).

(2) Optional Conversion Permitted only During Business Hours. Convertible Preferred Stock will be deemed to be surrendered for Optional Conversion only after the Open of Business and before the Close of Business on a day that is a Business Day.
Treatment of Accumulated Dividends upon Conversion.

(1) No Adjustments for Accumulated Regular Dividends. Without limiting the operation of Section 5(b)(i) and Section 10(c)(i), the Conversion Price will not be adjusted to account for any accumulated and unpaid Regular Dividends on any Convertible Preferred Stock being converted.

(2) Conversions Between A Record Date and a Dividend Payment Date. If the Conversion Date of any share of Convertible Preferred Stock to be converted is after a Record Date for a declared Dividend on the Convertible Preferred Stock and on or before the next Dividend Payment Date, then such Dividend will be paid pursuant to Section 5(d) notwithstanding such conversion.

(iv) When Holders Become Stockholders of Record of the Shares of Common Stock Issuable Upon Conversion. The Person in whose name any share of Common Stock is issuable upon conversion of any Convertible Preferred Stock will be deemed to become the holder of record of such share as of the Close of Business on the Conversion Date for such conversion.

(e) Settlement upon Conversion.

(i) Generally. Subject to Section 10(e)(ii), Section 10(h) and Section 14(b), the consideration due upon settlement of the conversion of each share of Convertible Preferred Stock will consist of a number of shares of Common Stock equal to the quotient obtained by dividing (I) the Liquidation Preference (plus any accrued and unpaid dividends in respect of the Convertible Preferred Stock, whether or not declared (and including, for the avoidance of doubt, any previously accrued and unpaid dividends in respect of the Convertible Preferred Stock which have been added to the Liquidation Preference pursuant to Section 5(b)(i)), on such shares of Convertible Preferred Stock to, but excluding, the Conversion Date) for such shares of Convertible Preferred Stock subject to conversion by (II) the Conversion Price, in each case, as of immediately before the Close of Business on such Conversion Date.

(ii) Payment of Cash in Lieu of any Fractional Share of Common Stock. Subject to Section 14(b), in lieu of delivering any fractional share of Common Stock otherwise due upon conversion of any Convertible Preferred Stock, the Company will, to the extent it is legally able to do so and permitted under the terms of its indebtedness for borrowed money, pay cash based on the Last Reported Sale Price per share of Common Stock on the Conversion Date for such conversion (or, if such Conversion Date is not a Trading Day, the immediately preceding Trading Day).

(iii) Delivery of Conversion Consideration. Except as provided in Sections 10(f)(ii)(5) and 10(i), the Company will pay or deliver, as applicable, the Conversion Consideration due upon conversion of any Convertible Preferred Stock on or before the second (2nd) Business Day immediately after the Conversion Date for such conversion.
Conversion Price Adjustments.

(i) Events Requiring an Adjustment to the Conversion Price. The Conversion Price will be adjusted from time to time as follows:

(1) Stock Dividends, Splits and Combinations. If the Company issues solely shares of Common Stock as a dividend or distribution on all or substantially all shares of the Common Stock, or if the Company effects a stock split or a stock combination of the Common Stock (in each case, excluding an issuance solely pursuant to a Common Stock Change Event, as to which Section 10(i) will apply), then the Conversion Price will be adjusted based on the following formula:

\[ CP_1 = CP_0 \times \frac{OS_1}{OS_0} \]

where:

\[ CP_0 = \text{the Conversion Price in effect immediately before the Close of Business on the Record Date for such dividend or distribution, or immediately before the Close of Business on the effective date of such stock split or stock combination, as applicable;} \]

\[ CP_1 = \text{the Conversion Price in effect immediately after the Close of Business on such Record Date or effective date, as applicable;} \]

\[ OS_0 = \text{the number of shares of Common Stock outstanding immediately before the Close of Business on such Record Date or effective date, as applicable, without giving effect to such dividend, distribution, stock split or stock combination; and} \]

\[ OS_1 = \text{the number of shares of Common Stock outstanding immediately after giving effect to such dividend, distribution, stock split or stock combination.} \]

If any dividend, distribution, stock split or stock combination of the type described in this Section 10(f)(i)(1) is declared or announced, but not so paid or made, then the Conversion Price will be readjusted, effective as of the date the Board of Directors, or any Officer acting pursuant to authority conferred by the Board of Directors, determines not to pay such dividend or distribution or to effect such stock split or stock combination, to the Conversion Price that would then be in effect had such dividend, distribution, stock split or stock combination not been declared or announced.

(2) Rights, Options and Warrants. If the Company distributes, to all or substantially all holders of Common Stock, rights, options or warrants (other than rights issued or otherwise distributed pursuant to a stockholder rights plan, as to which Section 10(f)(i)(3)(A) and Section 10(f)(iii) will apply) entitling such
holders, for a period of not more than sixty (60) calendar days after the Record Date of such distribution, to subscribe for or purchase shares of Common Stock at a price per share that is less than the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date such distribution is announced, then the Conversion Price will be decreased based on the following formula:

\[ CP_1 = CP_0 \times \frac{OS + Y}{OS + X} \]

where:

- \( CP_0 \) = the Conversion Price in effect immediately before the Close of Business on such Record Date;
- \( CP_1 \) = the Conversion Price in effect immediately after the Close of Business on such Record Date;
- \( OS \) = the number of shares of Common Stock outstanding immediately before the Close of Business on such Record Date;
- \( Y \) = a number of shares of Common Stock obtained by dividing (x) the aggregate price payable to exercise such rights, options or warrants by (y) the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date such distribution is announced; and
- \( X \) = the total number of shares of Common Stock issuable pursuant to such rights, options or warrants.

To the extent such rights, options or warrants are not so distributed, the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the decrease to the Conversion Price for such distribution been made on the basis of only the rights, options or warrants, if any, actually distributed. In addition, to the extent that shares of Common Stock are not delivered after the expiration of such rights, options or warrants (including as a result of such rights, options or warrants not being exercised), the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the decrease to the Conversion Price for such distribution been made on the basis of delivery of only the number of shares of Common Stock actually delivered upon exercise of such rights, option or warrants.

For purposes of this Section 10(f)(i)(2), in determining whether any rights, options or warrants entitle holders of Common Stock to subscribe for or purchase shares of Common Stock at a price per share that is less than the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date the
distribution of such rights, options or warrants is announced, and in determining the aggregate price payable to exercise such rights, options or warrants, there will be taken into account any consideration the Company receives for such rights, options or warrants and any amount payable on exercise thereof, with the value of such consideration, if not cash, to be determined by the Board of Directors.

(3) Distribution Transactions and Other Distributed Property.

(A) Distributions Other than Distribution Transactions. If the Company distributes shares of its Capital Stock, evidences of the Company’s indebtedness or other assets or property of the Company, or rights, options or warrants to acquire the Company’s Capital Stock or other securities, to all or substantially all holders of the Common Stock, excluding:

(I) dividends, distributions, rights, options or warrants for which an adjustment to the Conversion Price is required pursuant to Section 10(f)(i)(1) or 10(f)(i)(2);

(II) dividends or distributions paid exclusively in cash for which an adjustment to the Conversion Price is required pursuant to Section 10(f)(i)(4);

(III) rights issued or otherwise distributed pursuant to a stockholder rights plan, except to the extent provided in Section 10(f)(iii);

(IV) Distribution Transactions for which an adjustment to the Conversion Price is required pursuant to Section 10(f)(i)(3)(B);

(V) a distribution solely pursuant to a tender offer or exchange offer for shares of Common Stock, as to which Section 10(f)(i)(2) will apply; and

(VI) a distribution solely pursuant to a Common Stock Change Event, as to which Section 10(i) will apply, then the Conversion Price will be decreased based on the following formula:

\[ CP_1 = CP_0 \times \frac{SP - FMV}{SP} \]

where:

\[ CP_0 = \text{the Conversion Price in effect immediately before the Close of Business on the Record Date for such distribution;} \]

\[ CP_1 = \text{the Conversion Price in effect immediately after the Close of Business on such Record Date;} \]
\[ SP = \text{the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the Ex-Dividend Date for such distribution; and} \]

\[ FMV = \text{the fair market value (as determined by the Board of Directors), as of such Record Date, of the shares of Capital Stock, evidences of indebtedness, assets, property, rights, options or warrants distributed per share of Common Stock pursuant to such distribution;} \]

provided, however, that, if \( FMV \) is equal to or greater than \( SP \), then, in lieu of the foregoing adjustment to the Conversion Price, each Holder will receive, for each share of Convertible Preferred Stock held by such Holder on such Record Date, at the same time and on the same terms as holders of Common Stock, the amount and kind of shares of Capital Stock, evidences of indebtedness, assets, property, rights, options or warrants that such Holder would have received in such distribution if such Holder had owned, on such Record Date, a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with Section 10(e) but without regard to Section 10(e)(ii), 10(h) or Section 10(e)(iii)) in respect of one (1) share of Convertible Preferred Stock that is converted with a Conversion Date occurring on such Record Date (subject to the same arrangements, if any, in such distribution not to issue or deliver a fractional portion of any Capital Stock, evidences of indebtedness, assets, property, rights, options or warrants, but with such arrangement applying separately to each Holder and computed based on the total number of shares of Convertible Preferred Stock held by such Holder on such Record Date).

To the extent such distribution is not so paid or made, the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the adjustment been made on the basis of only the distribution, if any, actually made or paid.

\( \text{(B) Distribution Transactions. If the Company engages in a Distribution Transaction in which it distributes or dividends shares of Capital Stock of any class or series, or similar equity interests, of or relating to an Affiliate or Subsidiary or other business unit of the Company to all or substantially all holders of the Common Stock (other than solely pursuant to (x) a Common Stock Change Event, as to which Section 10(i) will apply; or (y) a tender offer or exchange offer for shares of Common Stock, as to which Section 10(f)(i)(2) will apply), and such Capital Stock or equity interests are listed or quoted (or will be listed or quoted upon the} \)
consummation of the transaction) on a U.S. national securities exchange, then the Conversion Price will be decreased based on the following formula:

\[ CP_1 = CP_0 \times \frac{SP}{FMV + SP} \]

where:

- \( CP_0 \) = the Conversion Price in effect immediately before the Close of Business on the Record Date for such Distribution Transaction;
- \( CP_1 \) = the Conversion Price in effect immediately after the Close of Business on such Record Date;
- \( SP \) = the average of the Last Reported Sale Prices per share of Common Stock for each Trading Day in the Distribution Transaction Valuation Period (as defined below); and
- \( FMV \) = the product of (x) the average of the Last Reported Sale Prices per share or unit of the Capital Stock or equity interests distributed in such Distribution Transaction over the ten (10) consecutive Trading Day period (the “Distribution Transaction Valuation Period”) beginning on, and including, the Ex-Dividend Date for such Distribution Transaction (such average to be determined as if references to Common Stock in the definitions of “Last Reported Sale Price,” “Trading Day” and “Market Disruption Event” were instead references to such Capital Stock or equity interests); and (y) the number of share or units of such Capital Stock or equity interests distributed per share of Common Stock in such Distribution Transaction.

provided, however, that in the event of a Distribution Transaction where the Majority Holders elect to engage in a Spin-Off Exchange Offer, and such Spin-Off Exchange Offer is completed pursuant to Section 10(f)(iv), then no adjustment to the Conversion Price shall be made pursuant to this Section 10(f)(i)(3)(B).

The adjustment to the Conversion Price pursuant to this Section 10(f)(i)(3)(B) will be calculated as of the Close of Business on the last Trading Day of the Distribution Transaction Valuation Period that will be given effect immediately after the Close of Business of the Record Date for the Distribution Transaction, with retroactive effect. If the Conversion Date for any share of Convertible Preferred Stock to be converted occurs during the Distribution Transaction Valuation Period, then, notwithstanding anything to the contrary in this Certificate of Designations, the Company
will, if necessary, delay the settlement of such conversion until the second (2nd) Business Day after the Last Trading Day of the Distribution Transaction Valuation Period.

To the extent any dividend or distribution of the type described in Section 10(f)(i)(3)(B) is declared but not made or paid, the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the adjustment been made on the basis of only the dividend or distribution, if any, actually made or paid.

(4) **Cash Dividends or Distributions.** If any cash dividend or distribution is made to all or substantially all holders of Common Stock, then the Conversion Price will be decreased based on the following formula:

\[ CP_1 = CP_0 \times \frac{SP - D}{SP} \]

where:

- \( CP_0 \) = the Conversion Price in effect immediately before the Close of Business on the Record Date for such dividend or distribution;
- \( CP_1 \) = the Conversion Price in effect immediately after the Close of Business on such Record Date;
- \( SP \) = the Last Reported Sale Price per share of Common Stock on the Trading Day immediately before the Ex-Dividend Date for such dividend or distribution; and
- \( D \) = the cash amount distributed per share of Common Stock in such dividend or distribution;

provided, however, that, if \( D \) is equal to or greater than \( SP \), then, in lieu of the foregoing adjustment to the Conversion Price, each Holder will receive, for each share of Convertible Preferred Stock held by such Holder on such Record Date, at the same time and on the same terms as holders of Common Stock, the amount of cash that such Holder would have received in such dividend or distribution if such Holder had owned, on such Record Date, a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with Section 10(e) but without regard to Section 10(e)(ii), 10(h) or Section 10(e)(iii)) in respect of one (1) share of Convertible Preferred Stock that is converted with a Conversion Date occurring on such Record Date. To the extent such dividend or distribution is declared but not made or paid, the Conversion Price
will be readjusted to the Conversion Price that would then be in effect had the adjustment been made on the basis of only the dividend or distribution, if any, actually made or paid.

(5) Tender Offers or Exchange Offers. If the Company or any of its Subsidiaries makes a payment in respect of a tender offer or exchange offer for shares of Common Stock (other than solely pursuant to an odd-lot tender offer pursuant to Rule 13e-4(h)(5) under the Exchange Act), and the value (determined as of the Expiration Time by the Board of Directors) of the cash and other consideration paid per share of Common Stock in such tender or exchange offer exceeds the Last Reported Sale Price per share of Common Stock on the Trading Day immediately after the last date (the "Expiration Date") on which tenders or exchanges may be made pursuant to such tender or exchange offer (as it may be amended), then the Conversion Price will be decreased based on the following formula:

\[
CP_1 = CP_0 \times \frac{SP \times OS_0}{AC + (SP \times OS_1)}
\]

where:

- \(CP_0\) = the Conversion Price in effect immediately before the time (the "Expiration Time") such tender or exchange offer expires;
- \(CP_1\) = the Conversion Price in effect immediately after the Expiration Time;
- \(SP\) = the average of the Last Reported Sale Prices per share of Common Stock over the ten (10) consecutive Trading Day period (the "Tender/Exchange Offer Valuation Period") beginning on, and including, the Trading Day immediately after the Expiration Date;
- \(OS_0\) = the number of shares of Common Stock outstanding immediately before the Expiration Time (including all shares of Common Stock accepted for purchase or exchange in such tender or exchange offer);
- \(AC\) = the aggregate value (determined as of the Expiration Time by the Board of Directors) of all cash and other consideration paid for shares of Common Stock purchased or exchanged in such tender or exchange offer; and
- \(OS_1\) = the number of shares of Common Stock outstanding immediately after the Expiration Time (excluding all shares of Common Stock accepted for purchase or exchange in such tender or exchange offer);
provided, however, that the Conversion Price will in no event be adjusted up pursuant to this Section 10(f)(i)(5), except to the extent provided in the immediately following paragraph. The adjustment to the Conversion Price pursuant to this Section 10(f)(i)(5) will be calculated as of the Close of Business on the last Trading Day of the Tender/Exchange Offer Valuation Period but will be given effect immediately after the Expiration Time, with retroactive effect. If the Conversion Date for any share of Convertible Preferred Stock to be converted occurs on the Expiration Date or during the Tender/Exchange Offer Valuation Period, then, notwithstanding anything to the contrary in this Certificate of Designations, the Company will, if necessary, delay the settlement of such conversion until the second (2nd) Business Day after the last Trading Day of the Tender/Exchange Offer Valuation Period.

To the extent such tender or exchange offer is announced but not consummated (including as a result of being precluded from consummating such tender or exchange offer under applicable law), or any purchases or exchanges of shares of Common Stock in such tender or exchange offer are rescinded, the Conversion Price will be readjusted to the Conversion Price that would then be in effect had the adjustment been made on the basis of only the purchases or exchanges of shares of Common Stock, if any, actually made, and not rescinded, in such tender or exchange offer.

(ii) No Adjustments in Certain Cases. Without limiting the operation of Section 5(b)(i) and 10(e)(i), the Company will not be required to adjust the Conversion Price except pursuant to Section 10(f)(i).

(iii) Stockholder Rights Plans. If any shares of Common Stock are to be issued upon conversion of any Convertible Preferred Stock and, at the time of such conversion, the Company has in effect any stockholder rights plan, then the Holder of such Convertible Preferred Stock will be entitled to receive, in addition to, and concurrently with the delivery of, the consideration otherwise due upon such conversion, the rights set forth in such stockholder rights plan, unless such rights have separated from the Common Stock at such time, in which case, and only in such case, the Conversion Price will be adjusted pursuant to Section 10(f)(i)(3)(A) on account of such separation as if, at the time of such separation, the Company had made a distribution of the type referred to in such Section 10(f)(i)(3)(A) to all holders of Common Stock, subject to readjustment pursuant to Section 10(f)(i)(3)(A) if such rights expire, terminate or are redeemed.

(iv) Distribution Transactions.

(1) In the event the Company proposes to effect a Distribution Transaction, then, by written action of the Holders constituting at least a majority of the outstanding voting power of the Convertible Preferred Stock (the “Majority Holders”) delivered to the Company prior to the relevant Record Date, the Company will negotiate in good faith with such Majority Holders the terms and conditions of an exchange offer described herein (the “Spin-Off Exchange Offer”), and in the event the Spin-Off Exchange Offer is completed, then no adjustment to the Conversion Price shall be made pursuant to Section 10(f)(i)(3)(B).
In connection with the Spin-Off Exchange Offer, each share of Convertible Preferred Stock will be exchanged by the Company for one share of Mirror Preferred Stock and one share of Exchange Preferred Stock. The Liquidation Preference of the Convertible Preferred Stock will be allocated between the shares of Mirror Preferred Stock and Exchange Preferred Stock in accordance with the relative fair market value of the assets and businesses to be held by the Distributed Entity and the assets and businesses to be retained by the Company, as determined in good faith by the Board of Directors after consultation with the Majority Holders.

The Company and the Majority Holders will negotiate reasonably and in good faith and each will use its reasonable best efforts to agree on mutually agreeable terms for the Spin-Off Exchange Offer, including, without limitation, the certificate of designations with respect to the Mirror Preferred Stock and the certificate of designations with respect to the Exchange Preferred Stock, to reflect the fact that following the completion of the Spin-Off Exchange Offer the adjustments to the Conversion Price will be based upon the common stock of the Company and the common stock of the Distributed Entity, and that the rights, benefits, obligations and economic characteristics of the Series A Preferred Stock will not be expanded or diminished as a result of the exchange of shares of Convertible Preferred Stock for shares of Mirror Preferred Stock and Exchange Preferred Stock. The exchange of Convertible Preferred Stock for Exchange Preferred Stock in the Spin-Off Exchange Offer shall be structured in a manner so as to qualify as a tax-free recapitalization within the meaning of Section 368(a) of the Code to the maximum extent permitted by applicable law.

Determination of the Number of Outstanding Shares of Common Stock. For purposes of Section 10(f)(i), the number of shares of Common Stock outstanding at any time will (1) include shares issuable in respect of scrip certificates issued in lieu of fractions of shares of Common Stock; and (2) exclude shares of Common Stock held in the Company’s treasury (unless the Company pays any dividend or makes any distributions on shares of Common Stock held in its treasury).

Calculations. All calculations with respect to the Conversion Price and adjustments thereto will be made to the nearest 1/100th of a cent (with 5/1,000ths rounded upward).

Notice of Conversion Price Adjustments. Upon the effectiveness of any adjustment to the Conversion Price pursuant to Section 10(f)(i), the Company will promptly send notice to the Holders containing (1) a brief description of the transaction or other event on account of which such adjustment was made; (2) the Conversion Price in effect immediately after such adjustment; and (3) the effective time of such adjustment.

Voluntary Conversion Price Decreases.
Generally. To the extent permitted by law and applicable stock exchange rules, the Company, from time to time, may (but is not required to) decrease the Conversion Price by any amount if (1) the Board of Directors determines that such decrease is in the Company’s best interest or that such decrease is advisable to avoid or diminish any income tax imposed on holders of Common Stock or rights to purchase Common Stock as a result of any dividend or distribution of shares (or rights to acquire shares) of Common Stock or any similar event; (2) such decrease is in effect for a period of at least twenty (20) Business Days; and (3) such decrease is irrevocable during such period; provided, however, that any such decrease that would be reasonably expected to result in any income tax imposed on holders of Convertible Preferred Stock shall require the affirmative vote or consent of Majority Holders.

(ii) Notice of Voluntary Decrease. If the Board of Directors determines to decrease the Conversion Price pursuant to Section 10(g)(i), then, no later than the first Business Day of the related twenty (20) Business Day period referred to in Section 10(g)(i), the Company will send notice to each Holder, the Transfer Agent and the Conversion Agent of such decrease to the Conversion Price, the amount thereof and the period during which such decrease will be in effect.

(h) Restriction on Conversions.

(i) Equity Treatment Limitation.

(1) Generally. Notwithstanding anything to the contrary in this Certificate of Designations, the Company will in no event be required to deliver any shares of Common Stock in settlement of the conversion of any Convertible Preferred Stock to the extent, but only to the extent, the Company does not then have sufficient authorized and unissued shares of Common Stock that are not reserved for other purposes (the limitation set forth in this sentence, the “Equity Treatment Limitation,” and any shares of Common Stock that would otherwise be deliverable in excess of the number of such authorized and unissued shares, the “Deficit Shares”). If any Deficit Shares are withheld pursuant to the Equity Treatment Limitation and, at any time thereafter, some or all of such Deficit Shares could be delivered without violating the Equity Treatment Limitation, then (A) the Company will deliver such Deficit Shares to the extent, but only to the extent, such delivery is permitted by the Equity Treatment Limitation; and (B) the provisions of this sentence will continue to apply until there are no remaining Deficit Shares.

(2) Share Reserve Provisions. On the Initial Issue Date, the Number of Reserved Shares is not less than the Initial Share Reserve Requirement. The Company shall at all times reserve and keep available a Number of Reserved Shares to be no less than the Continuing Share Reserve Requirement at any time when any Convertible Preferred Stock is outstanding (including, if applicable, by seeking the approval of its stockholders to amend the Certificate of Incorporation to increase the number of authorized shares of Common Stock).
Limitation on Certain Transactions. The Company will not, without the prior written consent of Majority Holders, effect any transaction that would require an adjustment to the Conversion Price pursuant to Section 10(f)(i) if the settlement of the conversion of all Convertible Preferred Stock then outstanding (assuming such conversion occurred immediately after giving effect to such adjustment) would result in any Deficit Shares pursuant to the Equity Treatment Limitation.

(i) Effect of Common Stock Change Event.

(i) Generally. If there occurs any:

(1) recapitalization, reclassification or change of the Common Stock, other than (x) changes solely resulting from a subdivision or combination of the Common Stock, (y) a change only in par value or from par value to no par value or no par value to par value or (z) stock splits and stock combinations that do not involve the issuance of any other series or class of securities;

(2) consolidation, merger, combination or binding or statutory share exchange involving the Company;

(3) sale, lease or other transfer of all or substantially all of the assets of the Company and its Subsidiaries, taken as a whole, to any Person; or

(4) other similar event,

and, as a result of which, the Common Stock is converted into, or is exchanged for, or represents solely the right to receive, other securities, cash or other property, or any combination of the foregoing (such an event, a “Common Stock Change Event,” and such other securities, cash or property, the “Reference Property,” and the amount and kind of Reference Property that a holder of one (1) share of Common Stock would be entitled to receive on account of such Common Stock Change Event (without giving effect to any arrangement not to issue or deliver a fractional portion of any security or other property), a “Reference Property Unit”), then, notwithstanding anything to the contrary in this Certificate of Designations,

(A) from and after the effective time of such Common Stock Change Event, (I) the consideration due upon conversion of any Convertible Preferred Stock will be determined in the same manner as if each reference to any number of shares of Common Stock in this Section 10 or in Section 11, or in any related definitions, were instead a reference to the same number of Reference Property Units; (II) for purposes of Section 7 and Section 10(c), each reference to any number of shares of Common Stock in such Sections (or in any related definitions) will instead be deemed to be a reference to the same number of Reference Property Units; and (III) for purposes of the definitions of “Fundamental Change,” the terms “Common Stock” and “common equity” will be deemed to mean the common equity (including depositary receipts representing common equity), if any, forming part of such Reference Property; and
If the Reference Property consists of more than a single type of consideration to be determined based in part upon any form of stockholder election, then the composition of the Reference Property Unit will be deemed to be the weighted average of the types and amounts of consideration actually received, per share of Common Stock, by the holders of Common Stock. The Company will notify the Holders of such weighted average as soon as practicable after such determination is made.

(i) Compliance Covenant. The Company will not become a party to any Common Stock Change Event unless its terms are consistent with this Section 10(i).

(ii) Execution of Supplemental Instruments. On or before the date the Common Stock Change Event becomes effective, the Company and, if applicable, the resulting, surviving or transferee Person (if not the Company) of such Common Stock Change Event (the “Successor Person”) will execute and deliver such supplemental instruments, if any, as the Company reasonably determines are necessary or desirable to (1) provide for subsequent adjustments to the Conversion Price pursuant to Section 10(f)(i) in a manner consistent with this Section 10(i); and (2) give effect to such other provisions, if any, as the Company reasonably determines are appropriate to preserve the economic interests of the Holders and to give effect to Section 10(i)(i). If the Reference Property includes shares of stock or other securities or assets of a Person other than the Successor Person, then such other Person will also execute such supplemental instrument(s), if any, and such supplemental instrument(s) will contain such additional provisions, if any, that the Company reasonably determines are appropriate to preserve the economic interests of Holders.

(iii) Notice of Common Stock Change Event. The Company will provide notice of each Common Stock Change Event to Holders as promptly as possible after the effective date of the Common Stock Change Event.

Section 11. CERTAIN PROVISIONS RELATING TO THE ISSUANCE OF COMMON STOCK.

(a) Equitable Adjustments to Prices. Whenever this Certificate of Designations requires the Company to calculate the average of the Last Reported Sale Prices, or any function thereof, over a period of multiple days (including to calculate an adjustment to the Conversion Price), the Company will make appropriate adjustments, if any, to those calculations to account for any adjustment to the Conversion Price pursuant to Section 10(f)(i) that becomes effective, or any event requiring such an adjustment to the Conversion Price where the Ex-Dividend Date, effective date or Expiration Date, as applicable, of such event occurs, at any time during such period.
(b) Status of Shares of Common Stock. Each share of Common Stock delivered upon conversion of the Convertible Preferred Stock of any Holder will be a newly issued share and will be duly authorized and validly issued, fully paid, non-assessable, free from preemptive rights and free of any lien or adverse claim (except to the extent of any lien or adverse claim created by the action or inaction of such Holder or the Person to whom such share of Common Stock will be delivered). If the Common Stock is then listed on any securities exchange, or quoted on any inter-dealer quotation system, then the Company will cause each such share of Common Stock, when so delivered, to be admitted for listing on such exchange or quotation on such system.

(c) Taxes Upon Issuance of Common Stock. The Company will pay any documentary, stamp or similar issue or transfer tax or duty due on the issue of any shares of Common Stock upon conversion of the Convertible Preferred Stock of any Holder, except any tax or duty that is due because such Holder requests those shares to be registered in a name other than such Holder’s name.

Section 12. TAXES. The Company shall pay any and all stock transfer, documentary, stamp and similar taxes that may be payable in respect of any issuance or delivery of shares of Convertible Preferred Stock or shares of Common Stock or other securities issued on account of Convertible Preferred Stock pursuant hereto or certificates evidencing such shares or securities. However, in the case of conversion of Convertible Preferred Stock, the Company shall not be required to pay any such tax that may be payable in respect of any transfer involved in the issuance or delivery of shares of Convertible Preferred Stock, shares of Common Stock or other securities to a beneficial owner other than the beneficial owner of the Convertible Preferred Stock immediately prior to such conversion, and shall not be required to make any such issuance, delivery or payment unless and until the Person otherwise entitled to such issuance, delivery or payment has paid to the Company the amount of any such tax or has established, to the satisfaction of the Company, that such tax has been paid or is not payable.

Section 13. TERM. Except as expressly provided in this Certificate of Designations, the shares of Convertible Preferred Stock shall not be redeemable or otherwise mature and the term of the Convertible Preferred Stock shall be perpetual.

Section 14. CALCULATIONS.

(a) Responsibility; Schedule of Calculations. Except as otherwise provided in this Certificate of Designations, the Company will be responsible for making all calculations called for under this Certificate of Designations or the Convertible Preferred Stock, including determinations of the Conversion Price, the Last Reported Sale Prices and accumulated Regular Dividends, whether or not declared, on the Convertible Preferred Stock. The Company will make all calculations in good faith, and, absent manifest error, its calculations will be final and binding on all Holders. The Company will provide a schedule of such calculations to any Holder upon written request.

(b) Calculations Aggregated for Each Holder. The composition of the Conversion Consideration due upon conversion of the Convertible Preferred Stock of any Holder will be computed based on the total number of shares of Convertible Preferred Stock of such Holder being converted with the same Conversion Date. For these purposes, any cash amounts due to such Holder in respect thereof will be rounded to the nearest cent.

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Section 15. NOTICES. The Company will send all notices or communications to Holders pursuant to this Certificate of Designations in writing and delivered personally, by facsimile or e-mail (with confirmation of receipt requested from the recipient, in the case of e-mail), or sent by a nationally recognized overnight courier service guaranteeing next day delivery, to the Holders' respective addresses shown on the Register. Unless otherwise specified herein, all notices and communications hereunder shall be deemed to have been given upon the earlier of receipt thereof or three (3) Business Days after the mailing thereof if sent by registered or certified mail with postage prepaid, or by private courier service.

Section 16. FACTS ASCERTAINABLE. When the terms of this Certificate of Designations refers to a specific agreement or other document to determine the meaning or operation of a provision hereof, the Secretary of the Company shall maintain a copy of such agreement or document at the principal executive offices of the Company and a copy thereof shall be provided free of charge to any Holder who makes a request therefor. The Secretary of the Company shall also maintain a written record of the Initial Issue Date, the number of shares of Convertible Preferred Stock issued to a Holder and the date of each such issuance, and shall furnish such written record free of charge to any Holder who makes a request therefor.

Section 17. WAIVER. Notwithstanding any provision in this Certificate of Designations to the contrary, any provision contained herein and any right of the Holders of Convertible Preferred Stock granted hereunder may be waived as to all shares of Convertible Preferred Stock (and the Holders thereof) upon the vote or written consent of the Majority Holders.

Section 18. SEVERABILITY. If any term of the Convertible Preferred Stock set forth herein is invalid, unlawful or incapable of being enforced by reason of any rule of law or public policy, all other terms set forth herein which can be given effect without the invalid, unlawful or unenforceable term will, nevertheless, remain in full force and effect, and no term herein set forth will be deemed dependent upon any other such term unless so expressed herein.

Section 19. NO OTHER RIGHTS. The Convertible Preferred Stock will have no rights, preferences or voting powers except as provided in this Certificate of Designations or the Certificate of Incorporation or as required by applicable law.
IN WITNESS WHEREOF, the Company has caused this Certificate of Designations to be duly executed as of the date first written above.

FIREYE, INC.

By:
Name: ____________________________
Title: ____________________________

[Signature Page to Certificate of Designations]
FORM OF CONVERTIBLE PREFERRED STOCK CERTIFICATE

[Insert Restricted Stock Legend, if applicable]

FireEye, Inc.

4.5% Series A Convertible Preferred Stock

Certificate No. [            ]

FireEye, Inc., a Delaware corporation (the “Company”), certifies that [                ] is the registered owner of [                ] shares of the Company’s 4.5% Series A Convertible Preferred Stock (the “Convertible Preferred Stock”) evidenced by this certificate (this “Certificate”). The special rights, preferences and voting powers of the Convertible Preferred Stock are set forth in the Certificate of Designations of the Company establishing the Convertible Preferred Stock (the “Certificate of Designations”). Capitalized terms used in this Certificate without definition have the respective meanings ascribed to them in the Certificate of Designations.

Additional terms of this Certificate are set forth on the other side of this Certificate.

[The Remainder of This Page Intentionally Left Blank; Signature Page Follows]

A-1
IN WITNESS WHEREOF, FireEye, Inc. has caused this instrument to be duly executed as of the date set forth below.

FIRE EYE, INC.

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A-2
[legal name of Transfer Agent], as Transfer Agent, certifies that this Certificate evidences shares of Convertible Preferred Stock referred to in the within-mentioned Certificate of Designations.

Date: ________________________________ By: ________________________________

Authorized Signatory

A-3
4.5% Series A Convertible Preferred Stock

This Certificate evidences duly authorized, issued and outstanding shares of Convertible Preferred Stock. Notwithstanding anything to the contrary in this Certificate, to the extent that any provision of this Certificate conflicts with the provisions of the Certificate of Designations or the Certificate of Incorporation, the provisions of the Certificate of Designations or the Certificate of Incorporation, as applicable, will control.

1. **Countersignature.** This Certificate will not be valid until countersigned by the Transfer Agent.

2. **Abbreviations.** Customary abbreviations may be used in the name of a Holder or its assignee, such as TEN COM (tenants in common), TEN ENT (tenants by the entireties), JT TEN (joint tenants with right of survivorship and not as tenants in common), CUST (custodian), and U/G/M/A (Uniform Gift to Minors Act).

* * *

To request a copy of the Certificate of Designations, which the Company will provide to any Holder at no charge, please send a written request to the following address:

FireEye, Inc.
601 McCarthy Blvd.
Milpitas, CA 95035
Attention: General Counsel

A-4
OPTIONAL CONVERSION NOTICE

FireEye, Inc.

4.5% Series A Convertible Preferred Stock

Subject to the terms of the Certificate of Designations, by executing and delivering this Optional Conversion Notice, the undersigned Holder of the Convertible Preferred Stock identified below directs the Company to convert (check one):

☐ all of the shares of Convertible Preferred Stock
☐ ________ * shares of Convertible Preferred Stock

evidenced by Certificate No. ________.

Date: ____________________________

__________________________________________
(Legal Name of Holder)

By: ________________________________

Name: ______________________________

Title: ______________________________

* Must be a whole number.

A-5
REDEMPTION NOTICE

FireEye, Inc.

4.5% Series A Convertible Preferred Stock

Subject to the terms of the Certificate of Designations, by executing and delivering this Redemption Notice, the undersigned Holder of the Convertible Preferred Stock identified below directs the Company to redeem (check one):

☐ all of the shares of Convertible Preferred Stock
☐ ______ * shares of Convertible Preferred Stock

evidenced by Certificate No. __________
on __________.

Date: ______________________________________________________________________ (Legal Name of Holder)

By: ______________________________________________________________________
Name: _____________________________________________________________________
Title: _____________________________________________________________________

* Must be a whole number.

A-6
FUNDAMENTAL CHANGE REPURCHASE NOTICE

FireEye, Inc.

4.5% Series A Convertible Preferred Stock

Subject to the terms of the Certificate of Designations, by executing and delivering this Fundamental Change Repurchase Notice, the undersigned Holder of the Convertible Preferred Stock identified below is exercising its Fundamental Change Repurchase Right with respect to (check one):

☐ all of the shares of Convertible Preferred Stock
☐ ________ * shares of Convertible Preferred Stock
evidenced by Certificate No. ________.

The undersigned acknowledges that Certificate identified above, duly endorsed for transfer, must be delivered to the Paying Agent before the Fundamental Change Repurchase Price will be paid.

Date: ______________________________________ (Legal Name of Holder)

By: ______________________________________
Name: ____________________________________
Title: _____________________________________

* Must be a whole number.
ASSIGNMENT FORM

FireEye, Inc.

4.5% Series A Convertible Preferred Stock

Subject to the terms of the Certificate of Designations, the undersigned Holder of the within Convertible Preferred Stock assigns to:

Name: ________________________________

Address: ________________________________

Social security or tax identification number: ________________________________

the within Convertible Preferred Stock and all rights thereunder irrevocably appoints:

as agent to transfer the within Convertible Preferred Stock on the books of the Company. The agent may substitute another to act for him/her.

Date: ________________________________ (Legal Name of Holder)

By: ________________________________

Name: ________________________________
Title: ________________________________

A-8
FORM OF RESTRICTED STOCK LEGEND

THE OFFER AND SALE OF THIS SECURITY AND THE SHARES OF COMMON STOCK ISSUABLE UPON CONVERSION OF THIS SECURITY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), AND THIS SECURITY AND SUCH SHARES MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED EXCEPT (A) PURSUANT TO A REGISTRATION STATEMENT THAT IS EFFECTIVE UNDER THE SECURITIES ACT; OR (B) PURSUANT TO AN EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

[THE SECURITIES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO RESTRICTIONS ON TRANSFER SET FORTH IN A SECURITIES PURCHASE AGREEMENT. THE COMPANY WILL GIVE TO THE HOLDER OF THIS CERTIFICATE A COPY OF SUCH SECURITIES PURCHASE AGREEMENT, AS IN EFFECT ON THE DATE OF THE GIVING OF SUCH COPY, WITHOUT CHARGE, PROMPTLY AFTER RECEIPT OF A WRITTEN REQUEST THEREFOR.]

B-1
EXHIBIT C

FORM OF REGISTRATION RIGHTS

REGISTRATION RIGHTS AGREEMENT

BY AND AMONG

FIREYE, INC.,

CLEARSKY SECURITY FUND I LLC

AND

CLEARSKY POWER & TECHNOLOGY FUND II LLC

Dated as of [●], 2020
This REGISTRATION RIGHTS AGREEMENT (this “Agreement”) is entered into as of [●], 2020, by and among FireEye, Inc., a Delaware corporation (including its successors and permitted assigns, the “Company”), ClearSky Security Fund I LLC, a Delaware limited liability company (“ClearSky Security I”) and ClearSky Power & Technology Fund II LLC, a Delaware limited liability company (“ClearSky Power II”, and together with ClearSky Security I, the “Investors”). Capitalized terms used but not defined elsewhere herein are defined in Exhibit A.

This Agreement is entered into in connection with the closing of the issuance of 30,000 shares of Series A Convertible Preferred Stock, which are convertible into shares of Common Stock, pursuant to the Securities Purchase Agreement, dated as of November 18, 2020, by and among the Company and the Investors (the “Securities Purchase Agreement”).

As a condition to each of the parties’ obligations under the Securities Purchase Agreement, the Company and the Investors are entering into this Agreement for the purpose of granting certain registration rights to the Investors.

In consideration of the promises and the mutual representations, warranties, covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

ARTICLE I
RESALE SHELF REGISTRATION

Section 1.1 Resale Shelf Registration Statement. Subject to the other applicable provisions of this Agreement, the Company shall file within ninety (90) days of the date hereof and use its commercially reasonable efforts to cause to go effective as promptly as practicable a registration statement covering the sale or distribution from time to time by the Holders, on a delayed or continuous basis pursuant to Rule 415 of the Securities Act of all of the Registrable Securities on Form S-3 (except if the Company is not then eligible to register for resale the Registrable Securities on Form S-3, then such registration shall be on another appropriate form (including Form S-1) and shall provide for the registration of such Registrable Securities for resale by such Holders in accordance with any reasonable method of distribution elected by the Holders) (the “Resale Shelf Registration Statement” and such registration, the “Resale Shelf Registration”). If the Resale Shelf Registration Statement is not an Automatic Shelf Registration Statement, then the Company shall use its commercially reasonable efforts to cause such Resale Shelf Registration Statement to be declared effective by the Commission as promptly as practicable after the filing thereof.

Notwithstanding the foregoing, if the Commission prevents the Company from including any or all of the Registrable Securities on the Resale Shelf Registration Statement due to limitations on the use of Rule 415 of the Securities Act for the resale of the Registrable Securities by the Holders, the Resale Shelf Registration Statement shall register the resale of a number of shares of the Registrable Securities which is equal to the maximum number of shares as is
permitted by the Commission, and, subject to the provisions of this Section 1.1, the Company shall continue to its use commercially reasonable efforts to register all remaining Registrable Securities as set forth in this Section 1.1. In such event, the number of shares of Registrable Securities to be registered for each Holder in the Resale Shelf Registration Statement shall be reduced pro rata among all Holders, provided, however, that, prior to reducing the number of shares of Registrable Securities to be registered for any Holder in such Resale Shelf Registration Statement, the Company shall first remove any shares of Registrable Securities to be registered for any Person other than a Holder that was proposed to be included in such Resale Shelf Registration Statement. The Company shall continue to use its commercially reasonable efforts to register all remaining Registrable Securities as promptly as practicable in accordance with the applicable rules, regulations and guidance of the Commission. Notwithstanding anything herein to the contrary, if the Commission, by written comment, limits the Company’s ability to file, or prohibits or delays the filing of, a Resale Shelf Registration Statement or a Subsequent Shelf Registration with respect to any or all the Registrable Securities, the Company’s compliance with such limitation, prohibition or delay solely to the extent of such limitation, prohibition or delay shall not be a breach or default by the Company under this Agreement and shall not be deemed a failure by the Company to use “commercially reasonable efforts” or “reasonable efforts” as set forth above or elsewhere in this Agreement.

Section 1.2 Effectiveness Period. Once effective, the Company shall, subject to the other applicable provisions of this Agreement, use its commercially reasonable efforts to cause the Resale Shelf Registration Statement or a Subsequent Shelf Registration to be continuously effective and usable for so long as any Registrable Securities remain outstanding (the “Effectiveness Period”).

Section 1.3 Subsequent Shelf Registration. If any Shelf Registration ceases to be effective under the Securities Act for any reason at any time during the Effectiveness Period, the Company shall use its commercially reasonable efforts to promptly cause such Shelf Registration to again become effective under the Securities Act (including obtaining the prompt withdrawal of any order suspending the effectiveness of such Shelf Registration), and in any event shall within thirty (30) days of such cessation of effectiveness, amend such Shelf Registration in a manner reasonably expected to obtain the withdrawal of any order suspending the effectiveness of such Shelf Registration or, file an additional registration statement (a “Subsequent Shelf Registration”) for an offering to be made on a delayed or continuous basis pursuant to Rule 415 of the Securities Act registering the resale from time to time by Holders thereof of all securities that are Registrable Securities as of the time of such filing. If a Subsequent Shelf Registration is filed, the Company shall use its commercially reasonable efforts to (a) cause such Subsequent Shelf Registration to become effective under the Securities Act as promptly as is reasonably practicable after such filing, but in no event later than the date that is ninety (90) days after such Subsequent Shelf Registration is filed and (b) keep such Subsequent Shelf Registration (or another Subsequent Shelf Registration) continuously effective until the end of the Effectiveness Period. Any such Subsequent Shelf Registration shall be a Registration Statement on Form S-3 to the extent that the Company is eligible to use such form, and if the Company is a WKSI as of the filing date, such Registration Statement shall be an Automatic Shelf Registration Statement. Otherwise, such Subsequent Shelf Registration shall be on another appropriate form (including Form S-1) and shall provide for the registration of such Registrable Securities for resale by such Holders in accordance with any reasonable method of distribution elected by the Holders.
Section 1.4 **Supplements and Amendments.** The Company shall supplement and amend any Shelf Registration if required by the rules, regulations or instructions applicable to the registration form used by the Company for such Shelf Registration if required by the Securities Act or as reasonably requested by the Holders covered by such Shelf Registration.

Section 1.5 **Subsequent Holder Notice.** If a Person becomes a Holder of Registrable Securities after a Shelf Registration becomes effective under the Securities Act, the Company shall, as promptly as is reasonably practicable following delivery of written notice to the Company of such Person becoming a Holder and requesting for its name to be included as a selling securityholder in the prospectus related to the Shelf Registration (a "**Subsequent Holder Notice**"): 

(a) if required and permitted by applicable law, file with the Commission a supplement to the related prospectus or a post-effective amendment to the Shelf Registration so that such Holder is named as a selling securityholder in the Shelf Registration and the related prospectus in such a manner as to permit such Holder to deliver a prospectus to purchasers of the Registrable Securities in accordance with applicable law;

(b) if, pursuant to Section 1.5(a), the Company shall have filed a post-effective amendment to the Shelf Registration that is not automatically effective, use its commercially reasonable efforts to cause such post-effective amendment to become effective under the Securities Act as promptly as is reasonably practicable, but in any event by the date that is ninety (90) days after the date such post-effective amendment is required by Section 1.5(a) to be filed; and

(c) notify such Holder as promptly as is reasonably practicable after the effectiveness under the Securities Act of any post-effective amendment filed pursuant to Section 1.5(a).

Section 1.6 **Underwritten Offering.** The Holders of Registrable Securities may on up to four (4) occasions after the Resale Shelf Registration Statement becomes effective deliver a written notice to the Company specifying that the sale of some or all of the Registrable Securities subject to the Shelf Registration is intended to be conducted through an underwritten offering, so long as the anticipated gross proceeds of such underwritten offering is not less than twenty-five million dollars ($25,000,000) (unless the Holders are proposing to sell all of their remaining Registrable Securities in which case no such minimum gross proceeds threshold shall apply) (the "**Underwritten Offering**"). In the event of an Underwritten Offering:

(a) The Holder or Holders of a majority of the Registrable Securities participating in an Underwritten Offering shall select the managing underwriter or underwriters to administer the Underwritten Offering; provided that such Holder or Holders will not make the choice of such managing underwriter or underwriters without first consulting with the Company.

(b) Notwithstanding any other provision of this Section 1.6, if the managing underwriter or underwriters of a proposed Underwritten Offering advises the Board of Directors of the Company that in its or their opinion the number of Registrable Securities requested to be included in such Underwritten Offering exceeds the number which can be sold in such Underwritten Offering in light of market conditions, the Registrable Securities shall be included on a pro rata basis upon the number of securities that each Holder shall have requested to be
included in such offering. If any Holder disapproves of the terms of any such underwriting, such Holder may elect to withdraw therefrom by written notice to the Company and the managing underwriter or underwriters.

(c) The Company shall agree and shall cause its executive officers and directors to sign a customary “lock-up” agreement with the underwriters in any Underwritten Offering.

Section 1.7 Take-Down Notice. Subject to the other applicable provisions of this Agreement, at any time that any Resale Shelf Registration Statement is effective, if a Holder delivers a notice to the Company (a “Take-Down Notice”) stating that it intends to effect a sale or distribution of all or part of its Registrable Securities included by it on any Resale Shelf Registration Statement (a “Shelf Offering”) and stating the number of Registrable Securities to be included in such Shelf Offering, then, subject to the other applicable provisions of this Agreement, the Company shall, as promptly as practicable, amend or supplement the Resale Shelf Registration Statement as may be necessary in order to enable such Registrable Securities to be sold and distributed pursuant to the Shelf Offering.

ARTICLE II
COMPANY REGISTRATION

Section 2.1 Notice of Registration. If at any time or from time to time the Company shall determine to file a registration statement with respect to an offering (or to make an underwritten public offering pursuant to a previously filed registration statement) of its Common Stock, whether or not for its own account (other than a registration statement on Form S-4, Form S-8 or any successor forms), the Company will:

(a) promptly give to each Holder written notice thereof, which notice shall be given, to the extent reasonably practicable, no later than five (5) business days prior to the filing or launch date (except in the case of an offering that is an “overnight offering”, in which case such notice must be given no later than two (2) business days prior to the filing or launch date); and

(b) subject to Section 2.2, include in such registration or underwritten offering (and any related qualification under blue sky laws or other compliance) all the Registrable Securities specified in a written request or requests made within three (3) business days after receipt of such written notice from the Company by any Holder (except in the case of an offering that is an “overnight offering”, in which case such request must be made no later than one (1) business day after receipt of such written notice from the Company).

Section 2.2 Underwriting. The right of any Holder to registration pursuant to Section 1.6 or this Article II shall be conditioned upon such Holder’s participation in such underwriting and the inclusion of Registrable Securities in the underwriting to the extent provided herein. Each Holder proposing to distribute its securities through such underwriting shall (together with the Company and the other holders distributing their securities through such underwriting) enter into and perform such Holder’s obligations under an underwriting agreement with the managing underwriter selected for such underwriting by the Company or by the stockholders of the Company who have the right to select the underwriters (such underwriting agreement to be in a customary form negotiated by the Company or such stockholders, as the case may be).
Notwithstanding any other provision of this Article II, if the managing underwriter or underwriters of a proposed underwritten offering with respect to which Holders of Registrable Securities have exercised their piggyback registration rights advise the Board of Directors of the Company that in its or their opinion the number of Registrable Securities requested to be included in the offering thereby and all other securities proposed to be sold in the offering exceeds the number which can be sold in such underwritten offering in light of market conditions, the Registrable Securities and such other securities to be included in such underwritten offering shall be allocated, (a) first, in the event such offering was initiated by the Company for its own account, up to the total number of securities that the Company has requested to be included in such registration, (b) second, and only if all the securities referred to in clause (a) have been included, up to the total number of securities that the Holders have requested to be included in such offering (pro rata based upon the number of securities that each of them shall have requested to be included in such offering) and (c) third, and only if all the securities referred to in clause (b) have been included, all other securities proposed to be included in such offering that, in the opinion of the managing underwriter or underwriters can be sold without having such adverse effect. If any Holder disapproves of the terms of any such underwriting, such Holder may elect to withdraw therefrom by written notice to the Company and the managing underwriter or underwriters. Any securities excluded or withdrawn from such underwriting shall be withdrawn from such registration.

Section 2.3  Right to Terminate Registration. The Company or the holders of securities who have caused a registration statement to be filed as contemplated by this Article II, as the case may be, shall have the right to have any registration initiated by it or them under this Article II terminated or withdrawn prior to the effectiveness thereof, whether or not any Holder has elected to include securities in such registration.

ARTICLE III
ADDITIONAL PROVISIONS REGARDING REGISTRATION RIGHTS

Section 3.1  Registration Procedures. In the case of each registration effected by the Company pursuant to Article I or II, the Company will keep each Holder participating in such registration reasonably informed as to the status thereof and, at its expense, the Company will, as expeditiously as possible to the extent applicable:

(a)  prepare and file, as promptly as reasonably practicable, with the Commission a registration statement with respect to such securities in accordance with the applicable provisions of this Agreement;

(b)  prepare and file, as promptly as reasonably practicable, with the Commission such amendments, including post-effective 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 provisions of the Securities Act with respect to the disposition of all securities covered by such registration statement (including to permit the intended method of distribution thereof) and as may be necessary to keep the registration statement continuously effective for the period set forth in this Agreement;

(c)  furnish to the Holders participating in such registration and to their legal counsel copies of the registration statement proposed to be filed, and provide such Holders and their legal counsel the reasonable opportunity to review and comment on such registration statement;
(d) furnish to the Holders participating in such registration and to the underwriters of the securities being registered such reasonable number of copies of the registration statement, preliminary prospectus and final prospectus as the such underwriters may reasonably request in order to facilitate the public offering of such securities;

(e) use commercially reasonable efforts to notify each Holder of Registrable Securities covered by such registration statement at any time when a prospectus relating thereto is required to be delivered under the Securities Act of the Company’s knowledge of the happening of any event as a result of which the prospectus included in such registration statement, as then in effect, includes an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading or incomplete in the light of the circumstances then existing, and, subject to Section 3.1(n), at the request of any such Holder, prepare promptly and furnish to such Holder a reasonable number of copies of a supplement to or an amendment of such prospectus as may be necessary so that, as thereafter delivered to the purchaser of such shares, such prospectus shall not include an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading or incomplete in the light of the circumstances then existing;

(f) use 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 Holders; provided, however, that the Company shall not be required in connection therewith or as a condition thereto to qualify to do business or to file a general consent to service of process in any such states or jurisdictions in which it is not already qualified;

(g) in the event that the Registrable Securities are being offered in an underwritten public offering, enter into and perform its obligations under an underwriting agreement on customary terms and in accordance with the applicable provisions of this Agreement;

(h) use commercially reasonable efforts to furnish, (i) on the date that such Registrable Securities are delivered to the underwriters for sale, if such securities are being sold through underwriters, an opinion and negative assurance letter, dated as of such date, of the legal counsel representing the Company for the purposes of such registration, in form and substance as is customarily given to underwriters in an underwritten public offering, addressed to the underwriters, if any, and (ii) on the date that the offering of such Registrable Securities is priced and on the date that such securities are being sold through underwriters, a letter dated as of such date, from the independent certified public accountants of the Company, in form and substance as is customarily given by independent certified public accountants to underwriters in an underwritten public offering, addressed to the underwriters;

(i) in connection with a customary due diligence review, make available during business hours for inspection by the Holders, any underwriter participating in any such disposition of Registrable Securities, if any, and any counsel or accountants retained by the Holders or underwriter, all relevant financial and other records, pertinent corporate documents and properties
of the Company and its subsidiaries, and cause the officers, directors and employees of the Company and its subsidiaries to supply all relevant information and participate in customary due diligence sessions in each case reasonably requested by any such representative, underwriter, counsel or accountant in connection with such registration statement, provided, however, each such underwriter shall agree in writing to hold in strict confidence and not to make any disclosure or use of any information requested above (the “Requested Information”), unless (1) the disclosure of the Requested Information is necessary to avoid or correct a misstatement or omission in such registration or is otherwise required under the Securities Act, (2) the release of the Requested Information is ordered pursuant to a final, non-appealable subpoena or order from a court or government body of competent jurisdiction, (3) the Requested Information is or has been made generally available to the public other than by disclosure in violation of this Agreement, (4) the Requested Information was within such underwriter’s possession on a non-confidential basis prior to it being furnished to such underwriter by or on behalf of the Company or any of its representatives, provided that the source of such information was not bound by a confidentiality agreement or other contractual, legal or fiduciary obligation of confidentiality with respect to such information or (5) the Requested Information becomes available to such underwriter on a non-confidential basis from a source other than the Company or any of its representatives, provided that such source is not bound by a confidentiality agreement or other contractual, legal or fiduciary obligation of confidentiality with respect to such information. Such underwriter agrees that it shall, upon learning that disclosure of the Requested Information is sought in or by a court or governmental body of competent jurisdiction or through other means, give prompt notice to the Company and allow the Company, at the Company’s expense, to undertake appropriate action to prevent disclosure of, or to obtain a protective order for, the Requested Information deemed confidential;

(j) in the event that any broker-dealer underwrites any Registrable Securities or participates as a member of an underwriting syndicate or selling group or “participates in an offering” (within the meaning of the FINRA Rules) thereof, whether as a Holder or as an underwriter, placement, sales agent or broker or dealer in respect thereof, or otherwise, the Company will, upon the reasonable request of such broker-dealer, comply with any reasonable request of such broker-dealer in complying with the FINRA Rules;

(k) notwithstanding any other provision of this Agreement, if the Board of Directors of the Company has determined in good faith that the disclosure necessary for continued use of the prospectus and registration statement by the Holders could be materially detrimental to the Company, the Company shall have the right not to file or not to cause the effectiveness of any registration covering any Registrable Securities and to suspend the use of the prospectus and the registration statement covering any Registrable Security for such period of time as its use would be materially detrimental to the Company by delivering written notice of such suspension to all Holders listed on the Company’s records; provided, however, that in any 12-month period the Company may exercise the right to such suspension not more than four times. From and after the date of a notice of suspension under this Section 3.1(k), each Holder agrees not to use the prospectus or registration statement until the earlier of (i) notice from the Company that such suspension has been lifted or (ii) the day following the sixtieth (60th) day of suspension within any 12-month period;
(l) cooperate with, and direct the Company’s transfer agent to cooperate with, the Holders and the managing underwriters, if any, to facilitate the timely settlement of any offering or sale of Registrable Securities, including the preparation and delivery of certificates or book-entry representing Registrable Securities to be sold together with any other authorizations, certificates, opinions and directions required by the transfer agent which authorize and direct the transfer agent to issue such Registrable Securities without restriction upon sale by the holder of such shares of Registrable Securities;

(m) use its reasonable best efforts to cause all shares of Registrable Securities to be listed on the national securities exchange on which the Common Stock is then listed; and

(n) cause its officers to use their reasonable best efforts to support the marketing of the Registrable Securities (including, without limitation, participation in “road shows” and other customary marketing activities, which may be virtual).

Section 3.2 Limitation on Subsequent Registration Rights. From and after the date hereof, the Company shall not enter into any agreement granting any holder or prospective holder of any securities of the Company registration rights with respect to such securities that conflict with the rights granted to the Holders herein, without the prior written consent of Holders of a majority of the Registrable Securities.

Section 3.3 Expenses of Registration. All Registration Expenses incurred in connection with any registration pursuant to this Agreement or otherwise in complying with this Agreement shall be borne by the Company. All Selling Expenses relating to securities registered on behalf of the Holders shall be borne by the Holders of the registered securities included in such registration.

Section 3.4 Information by Holders. The Holder or Holders of Registrable Securities included in any registration shall furnish to the Company such information regarding such Holder or Holders, the Registrable Securities held by them and the distribution proposed by such Holder or Holders as the Company may reasonably request in writing and as shall be required in connection with any registration, qualification or compliance referred to in this Agreement. It is understood and agreed that the obligations of the Company under Article I or II are conditioned on the timely provisions of the foregoing information by such Holder or Holders and, without limitation of the foregoing, will be conditioned on compliance by such Holder or Holders with the following:

(a) such Holder or Holders will cooperate with the Company in connection with the preparation of the applicable registration statement, and for so long as the Company is obligated to keep such registration statement effective, such Holder or Holders will provide to the Company, in writing and in a timely manner, for use in such registration statement (and expressly identified in writing as such), all information regarding themselves and such other information as may be required by applicable law to enable the Company to prepare such registration statement and the related prospectus covering the applicable Registrable Securities owned by such Holder or Holders and to maintain the currency and effectiveness thereof;
(b) during such time as such Holder or Holders may be engaged in a distribution of the Registrable Securities, such Holder or Holders will comply with all laws applicable to such distribution, including Regulation M promulgated under the Exchange Act, and, to the extent required by such laws, will, among other things: (i) not engage in any stabilization activity in connection with the securities of the Company in contravention of such laws and (ii) if required by applicable law, cause to be furnished to each agent or broker-dealer to or through whom such Registrable Securities may be offered, or to the offeree if an offer is made directly by such Holder or Holders, such copies of the applicable prospectus (as amended and supplemented to such date) and documents incorporated by reference therein as may be required by such agent, broker-dealer or offeree; and

(c) on receipt of written notice from the Company of the happening of any of the events specified in Section 3.1(k), or that requires the suspension by such Holder or Holders of the distribution of any of the Registrable Securities owned by such Holder or Holders pursuant to a registered offering, then such Holders shall cease offering or distributing the Registrable Securities owned by such Holder or Holders in a registered offering until the offering and distribution of the Registrable Securities owned by such Holder or Holders may recommence in accordance with the terms hereof and applicable law.

Section 3.5 Rule 144 Reporting. With a view to making available the benefits of Rule 144 to the Holders, the Company will use commercially reasonable efforts to:

(a) file with the Commission in a timely manner all reports and other documents required of the Company under the Exchange Act; and

(b) so long as a Holder owns any Restricted Securities, furnish to the Holder forthwith upon written request a written statement by the Company as to its compliance with the reporting requirements of the Exchange Act.

Section 3.6 “Market Stand-Off” Agreement. The Holders shall not sell, 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 with respect to, any Common Stock (or other securities of the Company) held by the Holders (other than those included in the registration) for a period specified by the representatives of the managing underwriter or underwriters of Common Stock (or other securities of the Company convertible into Common Stock) not to exceed five (5) days prior and ninety (90) days following any registered public sale of securities by the Company in which such Holder participates in accordance with Article II, subject to customary exceptions (including, without limitation, to the extent that any securities of the Company are subject to a Permitted Loan (as defined in the Securities Purchase Agreement), to permit the pledge of such securities pursuant to such Permitted Loan and any foreclosure in connection with such Permitted Loan, or transfer in lieu of a foreclosure thereunder, and subsequent sales, disposals or other transfers). Each of the Holders also shall execute and deliver any “lock-up” agreement reasonably requested by the representatives of any underwriters of the Company in connection with an offering in which such Holder participates, subject to customary exceptions (including, without limitation, as described in the preceding sentence in respect of pledges and foreclosures).

Section 3.7 Discontinuation of Registration. Notwithstanding anything to the contrary in this Agreement, the Company may discontinue any registration of its securities which are not Registrable Securities at any time prior to the effective date of the registration statement relating thereto.
ARTICLE IV
INDEMNIFICATION

Section 4.1 Indemnification by Company. To the extent permitted by applicable law, the Company will, with respect to any Registrable Securities as to which registration or qualification or compliance under applicable “blue sky” laws has been effected pursuant to this Agreement, indemnify each Holder, each Holder’s current and former officers, directors, partners, members, managers, shareholders, accountants, attorneys, agents and employees, and each Person controlling such Holder or any of the foregoing within the meaning of Section 15 of the Securities Act, and each underwriter thereof, if any, and each Person who controls any such underwriter within the meaning of Section 15 of the Securities Act (collectively, the “Company Indemnified Parties”), against all expenses, claims, losses, damages, costs (including costs of preparation and reasonable attorney’s fees and any legal or other fees or expenses actually incurred by such party in connection with any investigation or proceeding), judgments, fines, penalties, charges, amounts paid in settlement and other liabilities, joint or several (or actions in respect thereof) arising out of or based on any untrue statement (or alleged untrue statement) of a material fact contained in any registration statement, prospectus, preliminary prospectus, offering circular or other document, or any amendment or supplement thereto incident to any such registration, qualification or compliance or based on any omission (or alleged omission) to state therein a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances in which they were made, not misleading, or any violation by the Company of, or any rule or regulation promulgated under, the Securities Act, Exchange Act or state securities laws applicable to the Company in connection with any such registration, and the Company will reimburse each of the Company Indemnified Parties for any reasonable legal and any other expenses reasonably incurred in connection with investigating, preparing or defending any such claim, loss, damage, liability or action, as such expenses are incurred. The indemnity agreement contained in this Section 4.1 shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the prior written consent of the Company (which consent shall not be unreasonably withheld or delayed), nor shall the Company be liable to a Holder in any such case for any such loss, claim, damage, liability or action (a) to the extent that it arises out of or is based upon a violation or alleged violation of any state or federal law (including any claim arising out of or based on any untrue statement or alleged untrue statement or omission or alleged omission in the registration statement or prospectus) which occurs in reliance upon and in conformity with written information furnished expressly for use in connection with such registration by or on behalf of any Holder or (b) in the case of a sale directly by a Holder of Registrable Securities (including a sale of such Registrable Securities through any underwriter retained by such Holder engaging in a distribution solely on behalf of such Holder), such untrue statement or alleged untrue statement or omission or alleged omission was corrected in a final or amended prospectus, and such Holder failed to deliver a copy of the final or amended prospectus at or prior to the confirmation of the sale of the Registrable Securities to the Person asserting any such loss, claim, damage or liability in any case in which such delivery is required by the Securities Act.
Section 4.2  **Indemnification by Holders.** To the extent permitted by applicable law, each Holder will, if Registrable Securities held by such Holder are included in the securities as to which such registration or qualification or compliance under applicable “blue sky” laws is being effected, indemnify, severally and not jointly, the Company, each of its directors, officers, partners, members, managers, shareholders, accountants, attorneys, agents and employees, each underwriter, if any, of the Company’s securities covered by such a registration, each Person who controls the Company or such underwriter within the meaning of Section 15 of the Securities Act, and each other Holder and each of such other Holder’s officers, directors, partners, members, managers, shareholders, accountants, attorneys, agents and employees and each Person controlling such Holder or any of the foregoing within the meaning of Section 15 of the Securities Act (collectively, the "**Holder Indemnified Parties**"), against all expenses, claims, losses, damages, costs (including costs of preparation and reasonable attorney’s fees and any legal or other fees or expenses actually incurred by such party in connection with any investigation or proceeding), judgments, fines, penalties, charges, amounts paid in settlement and other and liabilities (or actions in respect thereof) arising out of or based on any untrue statement (or alleged untrue statement) of a material fact contained in any registration statement, prospectus, preliminary prospectus, offering circular or other document, or any amendment or supplement thereto incident to any such registration, qualification or compliance or based on any omission (or alleged omission) to state therein a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances in which they were made, not misleading, or any violation by such Holder of, or any rule or regulation promulgated under, the Securities Act, Exchange Act or state securities law applicable to such Holder, and will reimburse each of the Holder Indemnified Parties for any reasonable legal or any other expenses reasonably incurred in connection with investigating, preparing or defending any such claim, loss, damage, liability or action, as such expenses are incurred, in each case to the extent, but only to the extent, that such untrue statement (or alleged untrue statement) or omission (or alleged omission) is made in such registration statement, prospectus, offering circular or other document in reliance upon and in conformity with written information furnished to the Company by such Holder and stated to be specifically for use therein, provided, however, that in no event shall any indemnity under this Section 4.2 payable by a Holder exceed the amount by which the net proceeds actually received by such Holder from the sale of Registrable Securities included in such registration exceeds the amount of any other losses, expenses, settlements, damages, claims and liabilities that such Holder has been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission or violation. The indemnity agreement contained in this Section 4.2 shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the prior written consent of the applicable Holder (which consent shall not be unreasonably withheld or delayed), nor shall the Holder be liable for any such loss, claim, damage, liability or action where such untrue statement (or alleged untrue statement) or omission (or alleged omission) was corrected in a final or amended prospectus, and the Company or the underwriters failed to deliver a copy of the final or amended prospectus at or prior to the confirmation of the sale of the Registrable Securities to the Person asserting any such loss, claim, damage or liability in any case in which such delivery is required by the Securities Act.

Section 4.3  **Notification.** Each party entitled to indemnification under this Article IV (the "**Indemnified Party**") shall give notice to the party required to provide indemnification (the "**Indemnifying Party**") promptly after such Indemnified Party has actual knowledge of any claim as to which indemnity may be sought, and shall permit the Indemnifying Party to assume the
defense of any such claim or any litigation resulting therefrom, provided, however, that counsel for the Indemnifying Party, who shall conduct the defense of such claim or litigation, shall be approved by the Indemnified Party (whose approval shall not unreasonably be withheld or delayed), and the Indemnified Party may participate in such defense at such party’s expense; provided, further, however, that an Indemnified Party (together with all other Indemnified Parties) shall have the right to retain one (1) separate counsel, with the reasonable 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 conflicting interests between such Indemnified Party and any other party represented by such counsel in such proceeding. The failure of any Indemnified Party to give notice as provided herein shall relieve the Indemnifying Party of its obligations under this Article IV, only to the extent that, the failure to give such notice is materially prejudicial or harmful to an Indemnifying Party’s ability to defend such action. No Indemnifying Party, in the defense of any such claim or litigation, shall, except with the prior written consent of each Indemnified Party (which consent shall not be unreasonably withheld or delayed), consent to entry of any judgment or enter into any settlement which does not include as an unconditional term thereof the giving by the claimant or plaintiff to such Indemnified Party of a release from all liability in respect to such claim or litigation. The indemnity agreements contained in this Article IV shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the prior written consent of the Indemnifying Party, which consent shall not be unreasonably withheld or delayed. The indemnification set forth in this Article IV shall be in addition to any other indemnification rights or agreements that an Indemnified Party may have.

Section 4.4 Contribution. If the indemnification provided for in this Article IV is held by a court of competent jurisdiction to be unavailable to an Indemnified Party, other than pursuant to its terms, with respect to any claim, loss, damage, liability or action referred to therein, then, subject to the limitations contained in Article IV, the Indemnifying Party, in lieu of indemnifying such Indemnified Party hereunder, shall contribute to the amount paid or payable by such Indemnified Party as a result of such claim, loss, damage, liability or action in such proportion as is appropriate to reflect the relative fault of the Indemnifying Party on the one hand and the Indemnified Party on the other in connection with the actions that resulted in such claims, loss, damage, liability or action, as well as 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 alleged untrue statement of a material fact or the omission to state a material fact related 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. The Company and the Holders agree that it would not be just and equitable if contribution pursuant to this Section 4.4 were based solely upon the number of entities from whom contribution was requested or by any other method of allocation which does not take account of the equitable considerations referred to above in this Section 4.4. In no event shall any Holder’s contribution obligation under this Section 4.4 exceed the amount by which the net proceeds actually received by such Holder from the sale of Registrable Securities included in such registration exceeds the amount of any other losses, expenses, settlements, damages, claims and liabilities that such Holder has been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission or violation. No Person guilty of fraudulent misrepresentation (within the meaning of the Securities Act) shall be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentation.
ARTICLE V
TRANSFER AND TERMINATION OF REGISTRATION RIGHTS

Section 5.1 Transfer of Registration Rights. The rights to cause the Company to register securities granted to a Holder under this Agreement may be assigned to any Person in connection with any Transfer (as defined in the Securities Purchase Agreement) or assignment of Registrable Securities to in a Transfer permitted by Section 4.2 of the Securities Purchase Agreement; provided, however, that (a) such transfer may otherwise be effected in accordance with applicable securities laws, (b) prior written notice of such assignment is given to the Company, and (c) such transferee agrees in writing to be bound by, and subject to, this Agreement as a “Holder” pursuant to a written instrument in form and substance reasonably acceptable to the Company.

Section 5.2 Termination of Registration Rights. The rights of any particular Holder to cause the Company to register securities under Article I and Article II shall terminate with respect to such Holder upon the date upon which such Holder no longer holds any Registrable Securities.

ARTICLE VI
MISCELLANEOUS.

Section 6.1 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement, and will become effective when one or more counterparts have been signed by a party and delivered to the other parties. Copies of executed counterparts transmitted by telecopy, telefax or other electronic transmission service shall be considered original executed counterparts for purposes of this Section 6.1, provided that receipt of copies of such counterparts is confirmed.

Section 6.2 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, without giving effect to any choice of law or conflict of law rules or provisions (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware.

(b) Any dispute relating hereto shall be heard in the Court of Chancery of the State of Delaware and, if applicable, in any state or federal court located in the State of Delaware in which appeal from the Court of Chancery of the State of Delaware may validly be taken under the laws of the State of Delaware (or, if the Court of Chancery of the State of Delaware declines to accept jurisdiction over such dispute, any state or federal court within the State of Delaware) (each a “Chosen Court” and collectively, the “Chosen Courts”), and the parties agree to the exclusive jurisdiction and venue of the Chosen Courts. Such Persons further agree that any proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby or by any matters related to the foregoing (the “Applicable Matters”) shall be brought exclusively in a Chosen Court, and that any proceeding arising out of this Agreement or any other Applicable Matter shall be deemed to have arisen from a transaction of business in the State of Delaware, and each of the foregoing Persons hereby irrevocably consents to the jurisdiction of such Chosen Courts in any such proceeding and irrevocably and unconditionally waives, to the fullest extent permitted
by law, any objection that such Person may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such Chosen Court or that any such proceeding brought in any such Chosen Court has been brought in an inconvenient forum.

(c) Such Persons further covenant not to bring a proceeding with respect to the Applicable Matters (or that could affect any Applicable Matter) other than in such Chosen Court and not to challenge or enforce in another jurisdiction a judgment of such Chosen Court.

(d) Process in any such proceeding may be served on any Person with respect to such Applicable Matters anywhere in the world, whether within or without the jurisdiction of any such Chosen Court. Without limiting the foregoing, each such Person agrees that service of process on such party as provided in Section 6.5 shall be deemed effective service of process on such Person.

(e) **Waiver of Jury Trial.** EACH PARTY HERETO, FOR ITSELF AND ITS AFFILIATES, HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT OR OTHER PROCEEDING (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THE ACTIONS OF THE PARTIES HERETO OR THEIR RESPECTIVE AFFILIATES PURSUANT TO THIS AGREEMENT OR IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT HEREOF.

Section 6.3 **Entire Agreement; No Third Party Beneficiary.** This Agreement and the Securities Purchase Agreement and the Letter Agreement between the Company and the Investors contain the entire agreement by and among the parties with respect to the subject matter hereof and all prior negotiations, writings and understandings relating to the subject matter of this Agreement. Except as provided in Article IV, this Agreement is not intended to confer upon any Person not a party hereto (or their successors and permitted assigns) any rights or remedies hereunder.

Section 6.4 **Expenses.** Except as provided in Section 3.3, all fees, costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby, including accounting and legal fees shall be paid by the party incurring such expenses. The fees specified in clause (b) of the definition of “Registration Expenses” incurred in connection with any Shelf Registration or Underwritten Offering pursuant to this Agreement shall, in each case, not exceed $50,000.

Section 6.5 **Notices.** All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed to have been duly given or made as follows: (a) if sent by registered or certified mail in the United States return receipt requested, upon receipt; (b) if sent by nationally recognized overnight air courier, one (1) business day after mailing; (c) if sent by e-mail transmission, with a copy sent on the same day in the manner provided in the foregoing clause (a) or (b), when transmitted and receipt is confirmed; and (d) if otherwise actually personally delivered, when delivered, provided, that such notices, requests, demands and other communications are delivered to the address set forth below, or to such other address as any party shall provide by like notice to the other parties to this Agreement:
Section 6.6 Successors and Assigns. This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Except as provided in Section 5.1, no assignment of this Agreement or of any rights or obligations hereunder may be made by any party hereto without the prior written consent of the other parties hereto. Any purported assignment or delegation in violation of this Agreement shall be null and void ab initio.

Section 6.7 Headings. The Section, Article and other headings contained in this Agreement are inserted for convenience of reference only and will not affect the meaning or interpretation of this Agreement.

Section 6.8 Amendments and Waivers. This Agreement may not be modified or amended except by an instrument or instruments in writing signed by the Company and the Holders.
of a majority of the Registrable Securities outstanding at the time of such amendment. Any party hereto may, only by an instrument in writing, waive compliance by any other party or parties hereto with any term or provision hereof on the part of such other party or parties hereto to be performed or complied with. No failure or delay of any party in exercising any right or remedy hereunder shall operate as a waiver thereof, nor will any single or partial exercise of any right or power, or any abandonment or discontinuance of steps to enforce such right or power, preclude any other or further exercise thereof or the exercise of any other right or power. The waiver by any party hereto of a breach of any term or provision hereof shall not be construed as a waiver of any subsequent breach. The rights and remedies of the parties hereunder are cumulative and are not exclusive of any rights or remedies that they would otherwise have hereunder.

Section 6.9 Interpretation; Absence of Presumption.

(a) For the purposes hereof: (i) words in the singular shall be held to include the plural and vice versa and words of one gender shall be held to include the other gender as the context requires; (ii) the terms “hereof,” “herein,” and “herewith” and words of similar import shall, unless otherwise stated, be construed to refer to this Agreement as a whole and not to any particular provision of this Agreement, and Section and paragraph references are to the Sections and paragraphs in this Agreement unless otherwise specified; (iii) the word “including” and words of similar import when used in this Agreement shall mean “including, without limitation,” unless the context otherwise requires or unless otherwise specified; and (iv) the word “or”, “any” or “either” shall not be exclusive. References to a Person are also to its permitted assigns and successors. When calculating the period of time between which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded (and unless, otherwise required by law, if the last day of such period is not a business day, the period in question shall end on the next succeeding business day).

(b) With regard to each and every term and condition of this Agreement, the parties hereto understand and agree that the same have or has been mutually negotiated, prepared and drafted, and if at any time the parties hereto desire or are required to interpret or construe any such term or condition, no consideration will be given to the issue of which party hereto actually prepared, drafted or requested any term or condition of this Agreement.

Section 6.10 Severability. Any provision hereof that is held to be invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, shall be ineffective only to the extent of such invalidity, illegality or unenforceability, without affecting in any way the remaining provisions hereof, provided, however, that the parties will attempt in good faith to reform this Agreement in a manner consistent with the intent of any such ineffective provision for the purpose of carrying out such intent.

(The next page is the signature page)
IN WITNESS WHEREOF, the parties have executed this Registration Rights Agreement as of the date first above written.

FIREYE, INC.

By: ____________________________________________
   Name: 
   Title: 

CLEARSKY SECURITY FUND I LLC

By: ____________________________________________
   Name: Jay Leek
   Title: Managing Director

CLEARSKY POWER & TECHNOLOGY FUND II LLC

By: ____________________________________________
   Name: Jay Leek
   Title: Managing Director

[Signature Page to Registration Rights Agreement]

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EXHIBIT A
DEFINED TERMS

1. The following capitalized terms have the meanings indicated:

“Affiliate” of any Person means any Person, directly or indirectly, controlling, controlled by or under common control with such Person.

“Automatic Shelf Registration Statement” means an “automatic shelf registration statement” as defined under Rule 405.

“Certificate of Designations” means the Certificate of Designations setting forth the rights, powers, preferences and privileges of the Series A Convertible Preferred Stock.

“Commission” means the Securities and Exchange Commission.

“Common Stock” means the Company’s common stock, par value $0.0001 per share.

“Exchange Act” means the Securities Exchange Act of 1934, as amended, or any similar successor federal statute, and the rules and regulations of the Commission thereunder, all as the same shall be in effect from time to time.

“Holder” means (a) any Investor holding Registrable Securities and (b) any transferee to which the rights under this Agreement have been transferred in accordance with Section 5.1.

“Person” means an individual, corporation, partnership, limited liability company, joint venture, association, trust, unincorporated organization, other legal entity, or any government or governmental agency or authority.

“register”, “registered” and “registration” refer to a registration effected by preparing and filing a registration statement in compliance with the Securities Act, and the declaration or ordering of the effectiveness of such registration statement.

“Registrable Securities” means (a) any shares of Series A Convertible Preferred Stock, (b) any shares of Common Stock issued or issuable upon conversion of the Series A Convertible Preferred Stock, and (c) any other securities actually issued in respect of the securities described in clauses (a) through (b) above or this clause (c) upon any stock split, stock dividend, recapitalization, reclassification, merger, consolidation or similar event; provided, however, that the securities described in clauses (a) through (c) above shall only be treated as Registrable Securities until the earliest of: (i) the date on which such security has been registered under the Securities Act and disposed of in accordance with an effective Registration Statement relating thereto; (ii) the date on which such security has been sold pursuant to Rule 144 and the security is no longer a Restricted Security; or (iii) the date on which such security is transferred in a transaction pursuant to which the registration rights are not also assigned in accordance with Section 5.1.
“Registration Expenses” means (a) all expenses incurred by the Company in complying with this Agreement, including, without limitation, internal expenses, all registration, qualification, listing and filing fees, printing expenses, escrow fees, rating agency fees, fees and disbursements of the Company’s independent registered public accounting firm, fees and disbursements of counsel for the Company, blue sky fees and expenses, (b) the fees and expenses of one counsel to the Holders in connection with this Agreement and (c) the fees and expenses of counsel for the underwriters and any qualified independent underwriter in connection with FINRA and blue sky qualifications; provided, however, that Registration Expenses shall not include any Selling Expenses.

“Restricted Securities” means any Common Stock required to bear the legend set forth in Section 4.3(a) of the Securities Purchase Agreement.

“Rule 144” means Rule 144 promulgated under the Securities Act and any successor provision.

“Rule 405” means Rule 405 promulgated under the Securities Act and any successor provision.

“Securities Act” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder or any similar federal statute and the rules and regulations of the Commission thereunder, all as the same shall be in effect at the time.

“Selling Expenses” means all underwriting discounts, selling commissions and stock transfer taxes applicable to the securities registered by the Holders.

“Series A Convertible Preferred Stock” means the Company’s Series A Convertible Preferred Stock, par value $0.0001 per share.

“Shelf Registration” means the Resale Shelf Registration or a Subsequent Shelf Registration, as applicable.

“Transfer” has the meaning given to such term in the Securities Purchase Agreement.

“WKSI” means a “well known seasoned issuer” as defined under Rule 405.

2. The following terms are defined in the Sections of the Agreement indicated:

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FireEye Announces $400 Million Strategic Investment Led by Blackstone

Investment Supports Vision to Create Industry’s Leading Intelligence-led Cyber Security Platform and Services Company

MILPITAS, Calif. – November 19, 2020 – FireEye, Inc. (NASDAQ: FEYE), the intelligence-led security company, today announced a $400 million strategic investment led by Blackstone Tactical Opportunities to support the company’s vision to create the industry’s leading intelligence-led cyber security platform and services company. Blackstone will be joined by ClearSky a cyber security-focused investment firm, as a co-investor in the transaction. FireEye intends to use the proceeds to support strategic growth initiatives, including the acquisition of Respond Software announced today, as well as increased investment to accelerate the growth of the company’s cloud, platform and managed services portfolio.

Under the terms of its investment, Blackstone and ClearSky will purchase $400 million in shares of a newly designated 4.5% Series A Convertible Preferred Stock of FireEye (the “Series A Preferred”), with a purchase price of $1,000 per share. The Series A Preferred will be convertible into shares of FireEye’s common stock at a conversion price of $18.00 per share. The investment by Blackstone and ClearSky is subject to customary closing conditions. In conjunction with Blackstone’s investment in FireEye, FireEye will appoint Viral Patel, Senior Managing Director at Blackstone, to its Board of Directors upon the closing of the transaction. Additional information regarding the investment and the Series A Preferred will be included in a Form 8-K to be filed by FireEye with the Securities and Exchange Commission.

“Blackstone and ClearSky have a track record of developing and supporting industry-leading cyber security companies. Their investment validates our vision and provides financial, operational and leadership resources to accelerate our strategy,” said Kevin Mandia, FireEye chief executive officer.

Viral Patel, a Senior Managing Director at Blackstone, said: “Blackstone and FireEye have a shared vision of the unique role FireEye can play in addressing the increasingly sophisticated cyber security challenges their customers face. Intelligence and expertise are critical in delivering effective cyber security solutions, and FireEye is an industry leader in both. We are excited to partner with the company’s board and management to accelerate execution on their vision.”

FireEye Announces Acquisition of Respond Software and Conference Call

In a separate release issued today, FireEye announced the acquisition of Respond Software, the cyber security investigation automation company. Respond Analyst, Respond Software’s extended detection and response (XDR) engine, is a cloud-native, AI-based XDR engine that automates alert investigation at machine speed. Respond Analyst will be integrated into the Mandiant Advantage platform and leverage Mandiant breach intelligence and front-line expertise in its data science models.

FireEye will host a conference call today, November 19, 2020, at 5 p.m. Eastern time (2 p.m. Pacific time) to discuss today’s announcements. Interested parties may access the conference call by dialing 877-312-5521 (domestic) or 678-894-3048 (international). A live audio webcast of the call can be accessed from the Investor Relations section of the company’s website at https://investors.fireeye.com. An archived version of the webcast will be available at the same website shortly after the conclusion of the live event.
Forward Looking Statements

This press release contains forward-looking statements, including statements related to the investment by Blackstone and ClearSky in FireEye as described herein, including FireEye’s plans for the use of the proceeds and the timing thereof, as well as any expected benefits thereof on FireEye’s financial, operational and leadership resources; the expected appointment of a new director to FireEye’s Board of Directors, including the timing and benefits thereof; the acquisition of Respond Software and the integration of Respond Software’s products with FireEye’s products (including the integration of Respond Analyst into FireEye’s Mandiant Advantage platform) and any expected synergies and benefits from the acquisition; and FireEye’s business plans, initiatives, objectives and expectations.

These forward-looking statements involve risks and uncertainties, as well as assumptions which, if they do not fully materialize or prove incorrect, could cause FireEye’s results to differ materially from those expressed or implied by such forward-looking statements. The risks and uncertainties that could cause FireEye’s results to differ materially from those expressed or implied by such forward-looking statements include customer demand and adoption of FireEye’s products, solutions and services; real or perceived defects, errors or vulnerabilities in FireEye’s products, solutions or services; any delay in the release of FireEye’s new products, solutions or services; the potential disruption or perception of disruption to FireEye’s business due to the restructuring plans; the impact of the COVID-19 pandemic on FireEye’s business, results of operations, liquidity and capital resources; FireEye’s ability to react to trends and challenges in its business and the markets in which it operates; FireEye’s ability to anticipate market needs or develop new or enhanced products, solutions and services to meet those needs; FireEye’s ability to hire and retain key executives and employees; FireEye’s ability to attract new and retain existing customers and train its sales force; the budgeting cycles, seasonal buying patterns and length of FireEye’s sales cycle; risks associated with new offerings; sales and marketing execution risks; the failure to achieve expected synergies and efficiencies of operations between FireEye and its acquired companies; the ability of FireEye and its acquired companies to successfully integrate their respective market opportunities, technologies, products, personnel and operations; the ability of FireEye and its partners to execute their strategies, plans, objectives and expected investments with respect to FireEye’s partnerships; and general market, political, economic, and business conditions, as well as those risks and uncertainties included under the captions “Risk Factors” and “Management’s Discussion and Analysis of Financial Condition and Results of Operations” in FireEye’s Form 10-Q filed with the Securities and Exchange Commission on October 30, 2020, which should be read in conjunction with these financial results and is available on the Investor Relations section of FireEye’s website at investors.fireeye.com and on the SEC website at www.sec.gov.

All forward-looking statements in this press release are based on information available to FireEye as of the date hereof, and FireEye does not assume any obligation to update the forward-looking statements provided to reflect events that occur or circumstances that exist after the date on which they were made, except as required by law. Any future product, service, feature, or related specification that may be referenced in this release is for informational purposes only and is not a commitment to deliver any offering, technology or enhancement. FireEye reserves the right to modify future product or service plans at any time.
About Blackstone

Blackstone is one of the world’s leading investment firms. Blackstone seeks to create positive economic impact and long-term value for our investors, the companies we invest in, and the communities in which we work. Blackstone does this by using extraordinary people and flexible capital to help companies solve problems. Blackstone’s $584 billion in assets under management include investment vehicles focused on private equity, real estate, public debt and equity, life sciences, growth equity, opportunistic, non-investment grade credit, real assets and secondary funds, all on a global basis. Further information is available at www.blackstone.com. Follow Blackstone on Twitter @Blackstone.

About ClearSky

ClearSky is a venture capital and growth equity firm that has been operating since 2012 with offices across the United States. ClearSky invests in companies that offer transformative security solutions with a specific focus on cybersecurity, critical infrastructure security, privacy, data governance and compliance. The firm’s world-class dedicated security team has a proven track record with decades of security investing and practitioner experience. ClearSky also has a highly distinguished advisory board consisting of diverse business leaders and a Fortune 500 Chief Information Security Officer Board of Advisors that is unmatched in the industry.

About FireEye, Inc.

FireEye is the intelligence-led security company. Working as a seamless, scalable extension of customer security operations, FireEye offers a single platform that blends innovative security technologies, nation-state grade threat intelligence, and world-renowned Mandiant® consulting. With this approach, FireEye eliminates the complexity and burden of cyber security for organizations struggling to prepare for, prevent, and respond to cyber attacks. FireEye has over 9,600 customers across 103 countries, including more than 50 percent of the Forbes Global 2000.

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Source: FireEye
FireEye Announces Acquisition of Respond Software

The Respond Software XDR engine to be integrated into Mandiant Advantage, bringing cloud-native AI together with Mandiant intelligence and expertise to automate the investigation of alerts

MILPITAS, Calif. – November 18, 2020 – FireEye, Inc. (NASDAQ: FEYE), the intelligence-led security company, today announced the acquisition of Respond Software, the cybersecurity investigation automation company and creator of the Respond Analyst. The acquisition of Respond Software opens new market opportunities to deliver eXtended Detection and Response (XDR) capabilities to a broad set of customers. Additionally, it enables Mandiant® Solutions to further productize and scale its expertise and front-line intelligence as part of the Mandiant Advantage platform. The transaction closed on November 18, 2020 and is valued at approximately $186 million in cash and stock, exclusive of assumed unvested stock options.

The Respond Analyst is an XDR Engine that accelerates cyber investigation and response by automating the correlation of multi-sourced attack evidence using cloud-based data science models that ingest data from a comprehensive set of security technologies. This technology will become a key part of the Mandiant Advantage platform, bringing vendor-agnostic XDR and investigation capabilities that integrates with any customer environment. Further, the combination of cloud-based correlation and intelligent data science models will be used in the delivery of Mandiant Managed Defense, speeding response times and providing better security outcomes for customers while scaling existing Managed Defense resources to protect more customers.

"With Mandiant’s position on the front lines, we know what to look for in an attack, and Respond’s cloud-based machine learning productizes our expertise to deliver faster outcomes and protect more customers," said Kevin Mandia, FireEye chief executive officer. "This creates a learning system with new capabilities that will enable us to expand our Mandiant portfolio and drive new XDR revenue through our Mandiant Advantage platform."

FireEye Announces Strategic Investment Led by Blackstone and Conference Call

In a separate release issued today, FireEye announced a $400 million strategic investment led by Blackstone Tactical Opportunities to support the company’s vision to create the industry’s leading intelligence-led cyber security platform and services company.

FireEye will host a conference call today, November 19, 2020, at 5 p.m. Eastern time (2 p.m. Pacific time) to discuss today’s announcements. Interested parties may access the conference call by dialing 877-312-5521 (domestic) or 678-894-3048 (international). A live audio webcast of the call can be accessed from the Investor Relations section of the company’s website at https://investors.fireeye.com. An archived version of the webcast will be available at the same website shortly after the conclusion of the live event.
For more information:

- Learn more about Respond Software and the future of technology agnostic XDR here: https://respond-software.com/xdr-what-it-is-game-changer/
- Video Overview: https://www.youtube.com/watch?v=gSa-Pj7gebI
- Announcement blog on FireEye.com

Forward-Looking Statements

This press release contains forward-looking statements, including statements regarding the expectations, beliefs, plans, intentions and strategies of FireEye relating to FireEye’s acquisition of Respond Software; the capabilities and benefits of Respond Software solutions; expected benefits to FireEye, Respond Software and their respective customers; future offerings; and the financial impact of the acquisition on FireEye.

These forward-looking statements involve risks and uncertainties, as well as assumptions which, if they do not fully materialize or prove incorrect, could cause FireEye’s results to differ materially from those expressed or implied by such forward-looking statements. The risks and uncertainties that could cause FireEye’s results to differ materially from those expressed or implied by such forward-looking statements include the failure to achieve expected synergies and efficiencies of operations between FireEye and Respond Software; the ability of FireEye and Respond Software to successfully integrate their respective market opportunities, technology, products, personnel and operations; the failure to timely develop and achieve market acceptance of combined products and services; the potential impact on the business of Respond Software as a result of the acquisition; the loss of any Respond Software customers; the ability to coordinate strategy and resources between FireEye and Respond Software; the ability of FireEye and Respond Software to retain and motivate key employees of Respond Software; customer demand and adoption of FireEye’s products and services; real or perceived defects, errors or vulnerabilities in FireEye’s or Respond Software’s products or services; any delay in the release of FireEye’s or Respond Software’s new products or services; FireEye’s ability to react to trends and challenges in its business and the markets in which it operates; FireEye’s ability to anticipate market needs or develop new or enhanced products and services to meet those needs; FireEye’s ability to hire and retain key executives and employees; FireEye’s ability to attract new and retain existing customers and train its sales force; the impact of the COVID-19 pandemic on FireEye’s business, results of operations, liquidity and capital resources; the budgeting cycles, seasonal buying patterns and length of FireEye’s sales cycle; risks associated with new offerings; sales and marketing execution risks; the ability of FireEye and its partners to execute their strategies, plans, objectives and expected investments with respect to FireEye’s partnerships; and general market, political, economic, and business conditions, as well as those risks and uncertainties included under the captions “Risk Factors” and “Management’s Discussion and Analysis of Financial Condition and Results of Operations” in FireEye’s Form 10-Q filed with the Securities and Exchange Commission on October 30, 2020, which should be read in conjunction with these financial results and is available on the Investor Relations section of FireEye’s website at investors.fireeye.com and on the SEC website at www.sec.gov.

All forward-looking statements in this press release are based on information available to the company as of the date hereof, and FireEye does not assume any obligation to update the forward-looking statements provided to reflect events that occur or circumstances that exist after the date on which they were made, except as required by law. Any future product, service, feature, or related specification that may be referenced in this release is for informational purposes only and is not a commitment to deliver any offering, technology or enhancement. FireEye reserves the right to modify future product or service plans at any time.

About Mandiant Solutions and the Mandiant Advantage Platform

Mandiant Solutions, a part of FireEye, brings together the world’s leading threat intelligence and frontline expertise with continuous security validation to arm organizations with the tools needed to increase security effectiveness and reduce organizational risk, regardless of the security technologies deployed.
FireEye is the intelligence-led security company. Working as a seamless, scalable extension of customer security operations, FireEye offers a single platform that blends innovative security technologies, nation-state grade threat intelligence, and world-renowned Mandiant consulting. With this approach, FireEye eliminates the complexity and burden of cyber security for organizations struggling to prepare for, prevent, and respond to cyber attacks. FireEye has over 9,600 customers across 103 countries, including more than 50 percent of the Forbes Global 2000.

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Source: FireEye
FireEye Expands Market Opportunity and Accelerates Growth Initiatives with Acquisition and Strategic Investment

Investor Conference Call
November 19, 2020
Safe Harbor

This presentation contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended. These forward-looking statements are based on management’s beliefs and assumptions and on information currently available to management. Forward-looking statements include information concerning: the strategic investment by Blackstone and Clessidra, including our plans for the use of the proceeds and the timing thereof, as well as any expected benefits thereof on our financial, operational and leadership resources; the expected appointment of a new director to our Board of Directors; including the timing and benefits thereof; our expectations, beliefs, plans, intentions and strategies relating to our acquisition of Respond Software, possible or assumed future results of operations, financial metrics and goals; business strategies and our ability to execute those strategies successfully; competitive position; threat landscapes; industry environment; strategic and enterprise opportunities and partnerships; potential growth opportunities; potential market opportunities; and future or announced offerings.

Forward-looking statements include all statements that are not historical facts and can be identified by terms such as “anticipates,” “believes,” “could,” “estimates,” “expects,” “may,” “plans,” “potential,” “predicts,” “projects,” “should,” “will,” “would” or similar expressions and the negatives of those terms; forward-looking statements involve known and unknown risks, uncertainties and other factors that may cause our actual results, performance or achievements to be materially different from any future results, performance or achievements, expressed or implied by the forward-looking statements. These risks and uncertainties include, but are not limited to, the failure to achieve expected synergies and efficiencies of operations between FireEye and Respond Software; the ability of FireEye and Respond Software to successfully integrate their respective market opportunities; technology, products, personnel and operations; the failure to timely develop and achieve market acceptance of combined products and services; the potential impact on the business of Respond Software as a result of the acquisition; the loss of any Respond Software customer; any delay in the release of FireEye’s new products, solutions or services; the ability to coordinate strategy and resources between FireEye and Respond Software; the ability of FireEye and Respond Software to retain and motivate key employees of Respond Software; customer demand and adoption of FireEye’s products and services; real or perceived defects, errors or vulnerabilities in FireEye’s or Respond Software’s products or services; any delay in the release of FireEye’s or Respond Software’s new products or services; FireEye’s ability to react to trends and challenges in its business and the markets in which it operates; FireEye’s ability to anticipate market needs or develop new or enhanced products and services to meet those needs; the impact of the COVID-19 pandemic on FireEye’s business, results of operations, liquidity and capital resources; FireEye’s ability to hire and retain key executives and employees; FireEye’s ability to attract new and retain existing customers and retain its sales force; the budgeting cycles, seasonal buying patterns and length of FireEye’s sales cycle; risks associated with new offerings, sales and marketing execution risks; the ability of FireEye and its partners to execute their strategies, plans, objectives and expected investments; with respect to FireEye’s partnerships, and general market, political, economic, and business conditions, as well as those risks and uncertainties included under the captions “Risk Factors” and “Management’s Discussion and Analysis of Financial Condition and Results of Operations” in our Form 10-Q filed with the Securities and Exchange Commission on October 30, 2020, which could be read in conjunction with these financial results and is available on the Investor Relations section of FireEye’s website at investors.fireeye.com and on the SEC website at www.sec.gov.

All forward-looking statements are based on information available to us as of the date thereof, and we do not assume any obligation to update the forward-looking statements provided to reflect events that occur or circumstances that exist after the date on which they were made. Any future offering, feature, or related specification that may be referenced in this presentation is for information purposes only and is not a commitment to deliver any offering, technology or enhancement. We reserve the right to modify future product and service plans at any time.

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WHAT WE ARE DOING

CREATING A SECURITY AS A SERVICE COMPANY STRONGLY ROOTED IN OUR CORE DIFFERENTIATORS
Two Announcements

- **Acquisition of Respond Software**
  - Innovator in AI-based extended detection and response (XDR)
  - Adds cloud-native XDR engine to Mandiant Advantage platform to automate investigations at machine-speed

- **$400 Million Strategic Investment led by Blackstone**
  - Supports vision to create industry’s leading intelligence-led cyber security platform and services company
Strategic Investment led by Blackstone

ENABLES INCREASED INVESTMENT IN GROWTH INITIATIVES TO ACCELERATE TRANSFORMATION

TERMS:

- Purchase of $400 million in Convertible Preferred Equity by Blackstone and co-investor, ClearSky
- Initial conversion price of $18 per share, representing a 26% premium to 30-day volume weighted average share price on 11/18/20
- 4.5% dividend, payable in-kind in Years 1 through 3; thereafter, payable in cash, or if not, will accrue and accumulate at Company’s election
- Expected to close in 15 business days
- One Board seat
Acquisition of Respond Software

- Adds AI-based cloud-native XDR engine that automates investigation of security alerts at machine-speed, using data science models bolstered by Mandiant frontline intel and expertise

- Transaction valued at ~$186 million, exclusive of assumed options
- Combination of cash (~58.5%) and equity (~41.5%)
- No material impact to Q4’20 or full year 2020 results
- Accretive to billings, revenue and ARR in 2021; neutral to non-GAAP operating income in 2021
- Closed November 18, 2020
Respond Software Company Overview

- Founded 2016
- 43 employees with deep expertise in data science, security operations, and SaaS software
- >150 Customers in financial services, energy, retail and government
- HQ in Silicon Valley
Respond + FireEye Accelerates Key Initiatives

1. Expands technologies in Mandiant Advantage platform
   - Adds controls-agnostic AI-driven XDR capabilities, bolstered by front-line intelligence
   - Immediately increases third-party technology integrations
   - Accelerates 2-4 years of R&D

2. Enables Managed Defense
   - Used by Managed Defense teams to offer Managed Defense with 3rd Party products
   - Creates opportunities for new managed services

3. Consulting
   - Technology-enables consultants in engagements for greater productivity
   - Demonstrates technology in real-time to potential customers

4. FireEye Products
   - Delivers XDR Engine capability for Helix and FireEye security control products
Respond XDR Engine (SIEM/Control Agnostic)

MANAGED XDR (Future)

RESPOND ANALYST XDR ENGINE

SIEM / SOAR / REPOSITORY

- 3rd Party Endpoint
- 3rd Party Network
- 3rd Party Email
- 3rd Party Cloud Workloads
- 3rd Party Data
Respond XDR Engine with FireEye Products
Learn more…

- FireEye blog: www.fireeye.com/blog
- Respond Software and the future of technology agnostic XDR: https://respond-software.com/xdr-what-it-is-game-changer/
- Video Overview: https://www.youtube.com/watch?v=gSa-Pj7gebl