



Convertible Note (Seed-Stage Start-Up)

A Lexis Practice Advisor® Form by
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FORM SUMMARY

This form is a convertible note to be used in connection with the seed-stage financing of a startup company. Startups use seed-stage financing to raise operational capital for a period of 12-24 months in which they attempt to build their product and test the market for that product. This form includes practical guidance, drafting notes, alternate clauses, and optional clauses.

This form assumes that the seed-stage financing is made through the issuance of a convertible note, which is the most common instrument to implement seed-stage financings. A convertible note is a loan from the investor to the company that converts to equity in the company upon a preferred stock financing that meets certain conditions. This form also assumes that the borrower is a Delaware corporation. Its terms are generally market, with preference given to be borrower-friendly in instances where provisions are fluid in the marketplace.

For a further discussion of convertible notes as well as other forms of start-up financing, see [Seed Financing Overview](#). For a form of term sheet to be used in this context, see [Convertible Note Financing Term Sheet \(Seed-Stage Start-up\)](#).

NEITHER THIS NOTE NOR THE SECURITIES ISSUABLE UPON CONVERSION OF THIS NOTE HAVE BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), OR UNDER THE SECURITIES LAWS OF APPLICABLE STATES. THIS NOTE AND SUCH SECURITIES ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED UNDER THE ACT AND THE APPLICABLE STATE SECURITIES LAWS, PURSUANT TO REGISTRATION UNDER SUCH LAWS OR AN EXEMPTION FROM SUCH REGISTRATION REQUIREMENTS. INVESTORS SHOULD BE AWARE THAT THEY MAY BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME. THE ISSUER OF THIS NOTE AND ANY SECURITIES ISSUABLE UPON CONVERSION OF THIS NOTE MAY REQUIRE AN OPINION OF COUNSEL IN FORM AND SUBSTANCE SATISFACTORY TO THE ISSUER TO THE EFFECT THAT ANY PROPOSED TRANSFER OR RESALE IS IN COMPLIANCE WITH THE ACT AND ALL APPLICABLE STATE SECURITIES LAWS.

Drafting Note to Securities Act Legend: Typical seed-stage start-up financings, including an issuance of convertible notes, are private offerings. A private offering requires an exemption from registration under the Securities Act of 1933, as amended (the Securities Act).

The two most commonly used federal exemptions for seed financings are:

- Section 4(a)(2) (15 U.S.C.S. § 77d) of the Securities Act, which exempts “transactions by an issuer not involving any public offering”
- Rule 506(b) (17 C.F.R. § 230.506) of Regulation D

This legend is included at the top of a convertible note to alert an investor to the fact that the note has been issued in a private offering, is not registered under the Securities Act, and so is subject to restrictions on transfer. For further information on private offerings, see [An Overview of Private Offering Exemptions](#) and [Comparison of Types of Equity Offerings Chart](#).

The legend also advises an investor that the company may require a legal opinion that any transfer by the investor is in compliance with federal securities laws as well as state securities (blue sky) laws. For further information, see [Legal Opinions for Securities Offerings — No Registration Opinions](#).

[NAME OF COMPANY]

CONVERTIBLE PROMISSORY NOTE

Drafting Note to Convertible Promissory Note: This note is neither secured nor subordinated to senior debt, as neither of these terms are typical in convertible promissory notes issued in seed financings. This means that in a liquidation of the company, the note would receive payment prior to any payments to other types of equity investors (including any employees or other investors holding company stock), but the note investors cannot foreclose on the company’s assets since the note is unsecured.

[\$[PRINCIPAL AMOUNT]]

Made as of [ISSUE DATE]

Subject to the terms and conditions of this Note, for value received, [NAME OF COMPANY], a Delaware corporation (“**Borrower**”), with principal offices at [STREET ADDRESS], [CITY], [STATE] [ZIP CODE], hereby promises to pay to [HOLDER] or his/her/its registered assigns (“**Holder**”), the principal sum of [PRINCIPAL AMOUNT] (\$[PRINCIPAL AMOUNT]), or such lesser amount as shall then equal the outstanding principal amount hereunder, together with all interest accrued on unpaid principal at the Applicable Rate (as defined below). Interest shall begin to accrue on the date of this Note and shall continue to accrue on the outstanding principal until the entire Balance is paid (or converted, as provided in Section 6 hereof), and shall be computed based on the actual number of days elapsed and on a year of three hundred sixty-five (365) days.

The following is a statement of the rights of Holder and the terms and conditions to which this Note is subject, and to which Holder hereof, by the acceptance of this Note, agrees:

1. **DEFINITIONS.** The following definitions shall apply for all purposes of this Note:

“**Affiliate**” has the meaning ascribed to it in Rule 144.

Drafting Note to Affiliate: The definition of affiliate in Rule 144 (17 C.F.R. § 230.144) is “a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.”

“**Applicable Rate**” means a rate equal to the lower of: (a) the Highest Lawful Rate and (b) [INTEREST RATE]% per annum.

Drafting Note to Applicable Rate: The interest rate on this type of note is usually nominal.

“**Balance**” means, at the applicable time, the sum of the Principal Balance, all then accrued but unpaid interest and all other amounts (including fees and expenses) then accrued but unpaid under this Note.

“**Borrower**” shall include, in addition to Borrower identified in the opening paragraph of this Note, any person or entity which succeeds to Borrower’s obligations under this Note, whether by permitted assignment, by merger or consolidation, operation of law or otherwise.

“**Business Day**” means a weekday on which banks are open for general banking business in San Francisco, California.

Drafting Note to Business Day: Since most start-up seed financings are for companies that are doing business in Silicon Valley (which is in the San Francisco Bay area), Business Day is commonly defined with respect to that area.

Alternate Clause to Business Day: “*Business Day*” means a weekday on which banks are open for general banking business in [Insert City and State in which the company is located.]

Optional Clause to be added after Business Day: “*Change of Control*” means (i) a consolidation or merger involving Borrower if the holders of the voting securities of Borrower that are outstanding immediately prior to the consummation of such consolidation or merger do not, immediately after the consummation of such consolidation or merger, hold voting securities that collectively possess at least a majority of the voting power of all the outstanding securities of the surviving entity of such consolidation or merger or such surviving entity’s parent entity; (ii) a transfer (in a single transaction or series of related transactions) by one or more stockholders to one Person or to any group of Persons acting in concert, of outstanding shares of Borrower’s capital stock then collectively possessing a majority of the voting power of all then outstanding shares of Borrower’s capital stock (computed on an as-converted to common stock basis); or (iii) any sale or other disposition of all or substantially all of the assets of Borrower.

Drafting Note to Optional Clause on Change of Control: Payments upon a change of control benefits the note holder, rather than the borrower. For this reason, it is optional to include when the company is drafting the note. It is, however, common in convertible notes. Section 2.3 of the note provides an optional clause for prepayment of the note upon a change of control prior to maturity and an additional change of control premium.

“*Common Stock*” means the common stock issued or to be issued by the Borrower.

Optional Clause to be added after Common Stock: “*Common Stock Equivalents*” means all shares of Common Stock issued and outstanding at the applicable time, assuming full conversion or exercise of all then issued and outstanding securities of the Borrower that are exercisable for or convertible into Common Stock of the Borrower, plus all shares of Common Stock reserved for issuance upon exercise of stock options or stock awards to be granted in the future under any stock option or equity incentive plan of the Borrower (including any increase thereto contemplated by the Next Financing or Nonqualified Financing, as applicable), but excluding any securities issued or issuable upon conversion of the Notes.

Drafting Note to Optional Clause to be added after Common Stock: Include if you include Section 6.3 regarding conversion upon a Change of Control.

“*Conversion Price*” means an amount equal to the lower of (i) the product obtained by multiplying (A) [__]% by (B) the lowest per-share selling price at which shares of Conversion Stock are or have been issued in the Next Financing as of the date of the conversion of this Note into such Conversion Stock and (ii) the quotient obtained by dividing (A) \$[VALUATION CAP] by (B) the number of shares of Common Stock of Borrower outstanding immediately prior to the Next Financing Closing (assuming conversion of all then outstanding securities

convertible into Common Stock of Borrower and exercise of all then outstanding options and warrants to purchase securities of Borrower, but excluding the shares of Conversion Stock issuable upon conversion of the Notes).

Drafting Note to Conversion Price: This definition is to be used when the conversion price is based on the lower of an agreed cap upon the company prior to the new financing (i.e., a valuation cap) and a discount to the new issuance price (usually 15-25% of the share price in the next financing). A conversion price that is the lower of discount or valuation cap is the most typical formulation of conversion price. The next financing is usually a preferred stock financing made within 12-24 months after the seed financing. The conversion price is the price at which the note converts to equity upon a qualified financing as set forth in Section 6.1 of the note.

Alternate Clause to Conversion Price (if using a conversion price that is at a discount to the next financing price): “**Conversion Price**” means an amount equal to the product obtained by multiplying (i) []% by (ii) the lowest per-share selling price at which shares of Conversion Stock are or have been issued in the Next Financing as of the date of the conversion of this Note into such Conversion Stock.

Alternate Clause to Conversion Price (if using a conversion price that is at a valuation cap): “**Conversion Price**” means an amount equal to the lower of (i) the lowest per-share selling price at which shares of Conversion Stock are or have been issued in the Next Financing as of the date of the conversion of this Note into such Conversion Stock and (ii) the quotient obtained by dividing (A) \$[VALUATION CAP] by (B) the number of shares of Common Stock of Borrower outstanding immediately prior to the Next Financing Closing (assuming conversion of all then outstanding securities convertible into Common Stock of Borrower and exercise of all then outstanding options and warrants to purchase securities of Borrower, but excluding the shares of Conversion Stock issuable upon conversion of the Notes).

Alternate Clause to Conversion Price (if using a conversion price that is the price of the next financing): “**Conversion Price**” means an amount equal to the lowest per-share selling price at which shares of Conversion Stock are or have been issued in the Next Financing as of the date of the conversion of this Note into such Conversion Stock.

Drafting Note to Alternate Clauses to Conversion Price: Each of these alternate clauses expresses a different formulation for the conversion price. Any of these definitions may be used to define the conversion price in convertible note issuances and you should insert the definition that applies to the terms of your issuance. The formulation of the conversion price based only on the price of the next financing is rarely seen, since it provides no incentive for the note holders to invest their capital earlier in the company’s life cycle.

“**Conversion Stock**” means the class or series of Borrower’s capital stock that is sold by Borrower in the Next Financing. The term “**Conversion Stock**” shall include the stock and other securities and property that are receivable or issuable upon such conversion of this Note in accordance with its terms.

“**Event of Default**” has the meaning set forth in Section 5 hereof.

“**Financing Document**” means each of this Note, the other Notes, and any document entered into, executed or delivered under or in connection with, or for the purpose of amending, any of such documents.

“**Highest Lawful Rate**” means the maximum non-usurious rate of interest, as in effect from time to time, which may be charged, contracted for, reserved, received or collected by Holder in connection with this Note under applicable law.

“**Initial Offering**” means Borrower’s first firm commitment underwritten public offering of its Common Stock under the Act.

“**Lost Note Documentation**” means documentation satisfactory to Borrower with regard to a lost or stolen Note, including, if required by Borrower, an affidavit of lost note and an indemnification agreement by Holder in favor of Borrower with respect to such lost or stolen Note.

“**Majority Holders**” mean the holders of Notes representing at least a majority of the aggregate principal amount of the Notes then outstanding.

“**Maturity Date**” means [NUMBER OF MONTHS] from the issue date of this Note.

Drafting Note to Maturity Date: The maturity date is usually 12-24 months from the time of issuance.

Alternate Clause to Maturity Date: “**Maturity Date**” means the earlier of (i) [DATE] or (ii) the time at which the Balance is made due and payable upon an Event of Default; *provided, however,* that if the Event of Default is cured as permitted in this Note, then the Maturity Date shall not thereafter be deemed to have occurred with regard to such Event of Default under this clause (ii).

Drafting Note to Alternate Clause to Maturity Date: Instead of a fixed maturity date, a note may have a maturity date that is the earlier of a fixed date (again, usually 12-24 months from issuance) and the acceleration date under an event of default.

“**Next Financing**” means Borrower’s next sale of its Preferred Stock in a single transaction or in a series of related transactions in each case occurring on or before the Maturity Date, for an aggregate gross purchase price paid to Borrower of no less than [One Million Dollars (\$1,000,000)] (excluding the principal amount of and accrued interest or any other amounts owing on all Notes converted into Conversion Stock in such sale).

Drafting Note to Next Financing: Two million dollars is also often used as the threshold, but one million dollars provides the borrower with more flexibility.

“**Next Financing Closing**” means the initial closing of the Next Financing.

“**Note**” means this Convertible Promissory Note.

“**Notes**” means a series of convertible promissory notes before, on, or after the date hereof issued by

Borrower, of which this Note is one, each such note containing substantially identical terms and conditions as this Note.

Drafting Note to Notes: Convertible notes are often issued together pursuant to a separate Note Purchase Agreement, which allows for a clearer definition of the group of outstanding notes. Grouping the outstanding notes together in a series provides for an easier amendment process (i.e., just consent from the majority of the outstanding principal and the borrower) if the maturity date needs to be extended or the terms of the conversion changed in connection with a financing.

“**Person**” means any individual, partnership, corporation, trust, estate, cooperative association, government or governmental subdivision or agency or other entity.

“**Preferred Stock**” means the preferred stock to be issued by the Borrower.

“**Principal Balance**” means, at the applicable time, all then outstanding principal of this Note.

“**Restricted Period**” means the period commencing on the date of the final prospectus relating to the Initial Offering and ending on the date specified by Borrower and the managing underwriter (such period not to exceed one hundred eighty (180) days).

“**Rule 144**” has the meaning set forth in Section 10.7 hereof.

2. PAYMENT AT MATURITY DATE; INTEREST [; Change of Control Payment].

2.1 Payment at Maturity Date. If this Note has not been previously converted (as provided in Section 6 hereof), then the Balance shall be due and payable in full upon the written demand of the Majority Holders at any time on or after the Maturity Date. Payment on this Note shall be made, at the election of Borrower, at the chief executive offices of Borrower or by mail to the address of Holder of this Note in lawful money of the United States.

Drafting Note to Section 2.1: Unlike notes which are automatically due on the maturity date, this note becomes payable only if the majority of holders demand it. This is partly for practical reasons, since the start-up company may not have the cash to pay the note if it has not done a subsequent financing by the maturity date. Holders usually decide to give the company more time to work on its business in the hopes of a successful next financing, rather than demand payment on the note at maturity.

2.2 Interest. Anything herein to the contrary notwithstanding, if during any period for which interest is computed hereunder, the amount of interest computed on the basis provided for in this Note, together with all fees, charges and other payments which are treated as interest under applicable law, as provided for herein or in any other document executed in connection herewith, would exceed the amount of such interest computed on the basis of the Highest Lawful Rate, then Borrower shall not be obligated to pay, and Holder shall not be entitled to charge, collect, receive, reserve or take, interest in excess of the Highest Lawful Rate, and during any such period the interest payable hereunder shall be computed on the basis of the Highest Lawful Rate.

Optional Clause to be added after Section 2.2: 2.3 Change of Control Payment. If Borrower completes a Change of Control before the payment or conversion of the entire Balance of this Note under Section 6 and prior to the Maturity Date, then upon the closing of such Change of Control, Holder shall be entitled to be repaid: (a) the Principal Balance, all accrued and unpaid interest and all other amounts then outstanding under this Note plus (b) an amount equal to [one (1)] times the original Principal Balance of this Note.

Drafting Note to Optional Clause to be added after Section 2.2: This additional payment (kicker) in (b) of the clause is optional, but common in convertible note terms. A 50-100% extra payment is typical.

3. NO PREPAYMENT. Except with regard to conversion of this Note under Section 6 hereof or with the prior approval of the Majority Holders, Borrower may not pay any portion of the Balance before it becomes due.

Drafting Note to Section 3: This form does not provide for prepayment, as investors in convertible note financings generally will not permit prepayment, since a prepayment could prevent them from converting the note in a financing, merger, or asset sale. Additionally, please note that if the company or the investors are located in California, under California law, for the borrower to have the right to prepay, the note must specifically permit prepayment or the note cannot be prepaid without the noteholder's permission.

4. Note PARI PASSU; APPLICATION OF PAYMENTS. Each of the Notes shall rank equally without preference or priority of any kind over one another, and all payments and recoveries under any other Financing Document payable on account of principal and interest on the Notes shall be paid and applied ratably and proportionately on the Balances of all outstanding Notes on the basis of their original principal amount. Subject to Section 6 hereof and the foregoing provisions of this Section 4, all payments will be applied first to the repayment of accrued fees and expenses under this Note, then to accrued interest until all then outstanding accrued interest has been paid in full, and then to the repayment of principal until all principal has been paid in full. After all applications of such payments have been made as provided in this Section 4, then the remaining amount of such payments that are in excess of the aggregate Balance of all outstanding Notes shall be returned to Borrower.

5. EVENTS OF DEFAULT. Each of the following events shall constitute an “*Event of Default*” hereunder:

(a) Borrower fails to make any payment when due under this Note on the applicable due date;

(b) A receiver is appointed for any material part of Borrower's property, Borrower makes a general assignment for the benefit of creditors, or Borrower becomes a debtor or alleged debtor in a case under the U.S. Bankruptcy Code or becomes the subject of any other bankruptcy or similar proceeding for the general adjustment of its debts or for its liquidation;

(c) Borrower breaches any material obligation, or materially breaches any representation or warranty, to Holder under this Note or under any other Financing Document and does not cure such breach within 20 days after written notice thereof has been given by or on behalf of Holder to Borrower; or

(d) Borrower's board of directors or shareholders adopt a resolution for the liquidation, dissolution or winding up of Borrower.

Optional Clause to be added after Section 5(d): (e) Borrower consummates a Change of Control;

Drafting Note to optional clause: Include if you have included a change of control definition and provision in Section 6.

Upon the occurrence of any Event of Default, all accrued but unpaid expenses, accrued but unpaid interest, all principal and any other amounts outstanding under this Note shall (i) in the case of any Event of Default under Section 5(b), become immediately due and payable in full without further notice or demand by Holder and (ii) in the case of any Event of Default other than under Section 5(b), become immediately due and payable upon written notice by or on behalf of the affected Holder(s) to Borrower but only if such notice is given with the prior written consent of the Majority Holders. Notwithstanding any other provision of this Note, or of the other Financing Documents, Holder agrees that Holder will exercise Holder's rights and remedies under this Note and the other Financing Documents only in concert with all other holders of outstanding Notes as provided in the Financing Documents and will not take any action, including commencement or prosecution of litigation or any other proceeding to collect this Note, except as agreed by the Majority Holders.

Drafting Note to Occurrence of Event of Default: A receivership or bankruptcy should always immediately accelerate the note (as it does in Section 5(b)), whereas other defaults in the section require a majority of holders to agree to accelerate the note. In the case of borrower breaches, the borrower should have a period to cure, as is indicated here. Twenty days is typical.

6. Conversion.

6.1. Conversion in Next Financing. If Borrower has not paid the entire Balance before the Next Financing Closing, then, at the Next Financing Closing, the entire Balance then outstanding shall automatically be cancelled and converted into that number of shares of Conversion Stock obtained by dividing (a) the entire Balance by (b) the Conversion Price then in effect, rounded down to the nearest whole number (the "**Total Number of Shares**"); provided, however, that the Total Number of Shares shall consist of (i) that number of shares of Preferred Stock issued in the Next Financing obtained by dividing (A) the entire Balance by (B) the Next Financing Price (the "**Number of Preferred Stock**") and (ii) that number of shares of Common Stock equal to the Total Number of Shares minus the Number of Preferred Stock. Such conversion shall be deemed to occur under this Section 6.1 as of immediately prior to the Next Financing Closing, without regard to whether Holder has then delivered to Borrower this Note (or the Lost Note Documentation where applicable) or executed any other documents including, if applicable, the investors' rights, co-sale, voting or other agreements, required to be executed by the investors purchasing the Conversion Stock in the Next Financing.

Drafting Note to Section 6.1: This formulation contemplates that the noteholder receives a number of shares of preferred stock sufficient to align its liquidation preference with the amount of capital it invested pursuant to the note. The remainder of the shares to be issued as a result of the discount and/or valuation are issued in common stock. This formulation is generally understood and accepted within the angel investor community.

Optional Clauses to be added after Section 6.1:

6.2 Conversion Other than upon Next Financing.

(a) Optional Conversion in Nonqualified Financing. If, prior to the earlier of (i) a Change of Control or (ii) the Maturity Date, the Borrower sells shares of preferred stock in an equity financing that does not constitute a Next Financing (such financing a “**Nonqualified Financing**” and such shares of preferred stock, the “**Nonqualified Preferred Stock**”), then, at the closing of the Nonqualified Financing, the entire Balance then outstanding may be converted, at the option of the Holder, into that number of shares of Nonqualified Preferred Stock determined by dividing such converting Balance by the Conversion Price, rounded down to the nearest whole number of shares. In connection with a conversion pursuant to this Section 6.2, Holder shall deliver the original Note to the Borrower and will execute and deliver to the Borrower at the closing of the Nonqualified Financing such Preferred Financing Documents as are entered into by the investors in the Nonqualified Financing generally. The Holder shall thereupon receive all of the rights, preferences and privileges granted to other investors in the Nonqualified Financing.

(b) Change of Control. If at any time before payment or conversion of the entire Balance, the Borrower effects a Change of Control, then, upon the closing of such Change of Control, Holder shall be repaid either, upon the determination of the Majority Holders, (i) the entire Balance then outstanding under this Note or (ii) the amount that would be payable in connection with such Change of Control with respect to that number of shares of Common Stock issuable if the entire Balance then outstanding was converted immediately prior to the consummation of such Change of Control into that number of shares of the Borrower’s Common Stock determined by dividing (x) the entire Balance then outstanding by (y) the quotient obtained by dividing (A) \$[VALUATION CAP] by (B) the total number of Common Stock Equivalents immediately prior to the consummation of the Change of Control and conversion of this Note (excluding, in this instance, any shares of Common Stock reserved for issuance upon exercise of stock options or stock awards to be granted in the future, and hence unissued as of immediately prior to the consummation of the Change of Control, under any stock option or equity incentive plan of the Borrower).

Drafting Note to Optional Clauses to be added after Section 6.1: Sections 6.2(a) and (b) may be included if you wish to provide for optional conversion in situations other than a qualified financing or if you include conversion on change of control.

6.3 Termination of Rights. Except for the right to obtain certificates representing the Conversion Stock under Section 7 hereof, all rights with respect to this Note shall terminate upon the effective conversion of the entire Balance of the Note as provided in Section 6 hereof. Notwithstanding the foregoing, Holder agrees to surrender this Note to Borrower (or Lost Note Documentation where applicable) as soon as practicable after conversion. In any event, Holder shall not be entitled to receive any stock certificates representing the shares of Conversion Stock issuable upon conversion of this Note unless and until Holder has surrendered the original of this Note (or Lost Note Documentation where applicable) and entered into any agreements contemplated by Section 6.1 hereof.

7. CERTIFICATES; NO FRACTIONAL SHARES. Subject to Section 6 hereof, as soon as practicable after conversion of this Note pursuant to Section 6 hereof Borrower at its expense will register such shares of Conversion Stock in Borrower’s Register of Shareholders in the name of the respective Holder and will cause to

be issued in the name of Holder and to be delivered to Holder, a certificate or certificates for the number of shares of Conversion Stock to which Holder shall be entitled upon such conversion (bearing such legends as may be required by applicable state and federal securities laws in the opinion of legal counsel of Borrower, by Borrower's Articles of Incorporation and Bylaws and by any agreement between Borrower and Holder), together with any other securities and property to which Holder is entitled upon such conversion under the terms of this Note. No fractional shares shall be issued upon conversion of this Note. If upon any conversion of this Note (and after aggregating the amounts of all other Notes held by the same Holder which are converted at the same time as this Note), a fraction of a share would otherwise be issued, then in lieu of such fractional share, Borrower shall pay to Holder an amount in cash equal to such fraction of a share multiplied by the applicable Conversion Price.

8. PROVISIONS RELATING TO SHAREHOLDERS RIGHTS.

8.1 Rights as Investor. Upon conversion pursuant to Section 6 hereof and as a condition precedent to receiving Holder's stock certificate(s), Holder shall be obligated to enter into and deliver to Borrower all documents to be executed by investors in the Next Financing with respect to the issuance of the Conversion Stock, thereby agreeing to be bound by all obligations and receive all rights thereunder. If Borrower is unable to obtain Holder's signature on any such document within three (3) Business Days of delivery thereof of Holder, whether due to any cause, then by the acceptance of this Note, Holder hereby irrevocably designates and appoints Borrower and each of its officers and agents as Holder's agent and attorney-in-fact, to act for and on its behalf and stead, to execute and deliver any such document with the same force and effect as if executed and delivered by Holder.

8.2 No Voting or Other Rights. This Note does not entitle Holder to any voting rights or other rights as a shareholder of Borrower, unless and until (and only to the extent that) this Note is actually converted into shares of Borrower's capital stock in accordance with its terms. In the absence of conversion of this Note into Conversion Stock, no provisions of this Note, and no enumeration herein of the rights or privileges of Holder, shall cause Holder to be a shareholder of Borrower for any purpose.

9. REPRESENTATIONS AND WARRANTIES OF BORROWER. Borrower hereby represents and warrants to Holder that the statements in the following paragraphs of this Section 9 are all true and complete as of the date hereof.

9.1 Organization, Good Standing and Qualification. Borrower has been duly incorporated and organized, and is validly existing in good standing, under the laws of the State of [Delaware]. Borrower has the corporate power and authority to own and operate its properties and assets and to carry on its business as currently conducted.

9.2 Due Authorization. All corporate action on the part of Borrower's board of directors and shareholders necessary for the authorization, execution, delivery of, and the performance of all obligations of Borrower under this Note has been taken prior to the date hereof, other than the authorization of the capital stock to be issued in a Next Financing. This Note constitutes a valid and legally binding obligation of Borrower, enforceable against Borrower in accordance with its terms, except as may be limited by (i) applicable bankruptcy, insolvency, reorganization or other laws of general application relating to or affecting the enforcement of creditors' rights generally and (ii) the effect of rules of law governing the availability of equitable remedies.

9.3 Corporate Power. Borrower has the corporate power and authority to issue, execute and deliver this Note and to carry out and perform all its obligations under this Note.

Optional Clauses to be added after Section 9.3:

9.4 Litigation. There is no action, suit, proceeding or investigation pending or, to the Borrower's knowledge, currently threatened against the Borrower that questions the validity of this Note, or the right of the Borrower to enter into the Note, or to consummate the transactions contemplated hereby or thereby, or that, if determined adversely, would reasonably be expected to, either individually or in the aggregate, result in a material adverse effect on the business, operations, assets or condition (financial or otherwise) of the Borrower (a "**Material Adverse Effect**"). The Borrower is not a party or subject to the provisions of any order, writ, injunction, judgment or decree of any court or government agency or instrumentality. There is no action, suit, proceeding or investigation by the Borrower currently pending or which the Borrower intends to initiate. The Borrower has not received any correspondence from any third party with respect to any of the foregoing.

9.5. Compliance with Other Instruments. The Borrower is not in violation or default (i) of any provisions of its charter documents, (ii) any judgment, order or decree of any court or arbitrator to which the Borrower is a party or is subject, (iii) under any material agreement or contract of the Borrower, or (iv) of, to the Borrower's knowledge, any provision of law applicable to the Borrower, except, in each case, for such violations or default as would not reasonably be expected to, individually or in the aggregate, result in a Material Adverse Effect. The execution, delivery and performance of the Note and the consummation of the transactions contemplated hereby will not result in any such violation or default, or be in conflict with or result in a violation or breach of, with or without the passage of time or the giving of notice or both, the charter documents of the Borrower, any judgment, order or decree of any court or arbitrator to which the Borrower is a party or is subject, any material agreement or contract of the Borrower, or, to the Borrower's knowledge, a violation of any statute, law, regulation or order, or an event which results in the creation of any lien, charge or encumbrance upon any asset of the Borrower.

Drafting Note to Optional Clauses to be added after Section 9.3: Include these additional representations if you wish for the note to include stronger representations and warranties of the borrower.

10 REPRESENTATIONS, WARRANTIES AND CERTAIN AGREEMENTS OF HOLDER. Holder hereby represents and warrants to, and agrees with Borrower as follows.

10.1 Authorization. This Note constitutes Holder's valid and legally binding obligations, enforceable against Holder in accordance with its terms, except as may be limited by (i) applicable bankruptcy, insolvency, reorganization or other laws of general application relating to or affecting the enforcement of creditors' rights generally and (ii) the effect of rules of law governing the availability of equitable remedies. Holder represents and warrants to Borrower that Holder has full power and authority to enter into this Note.

10.2 Purchase for Own Account. This Note, the Conversion Stock, and Borrower's Common Stock issuable upon conversion of such Conversion Stock (collectively, the "**Securities**") are being and will be acquired for investment for Holder's own account, not as a nominee or agent, and not with a view to the public resale or distribution thereof within the meaning of the Act, and Holder has no present intention of selling, granting any participation in, or otherwise distributing the same.

Drafting Note to Section 10.2: This representation is to support the borrower's/issuer's stance that it is not selling securities to an underwriter. It also supports the holder's exemption for possible resale. An underwriter is defined in Section 2(a)(11) of the Securities Act as a person who acquires securities with a view to distribute them or who acquires securities from an issuer in connection with a distribution. See [Domestic Resales of Unregistered Securities — Rule 144, Section 4\(a\)\(1½\) and Section 4\(a\)\(7\)](#).

10.3 No Solicitation. At no time was Holder presented with or solicited by any publicly issued or circulated newspaper, mail, radio, television or other form of general advertising or solicitation in connection with the offer, sale and purchase of the Securities.

Drafting Note to Section 10.3: For most private offerings, there is no general solicitation, which is why this representation is included (i.e., to support the exemption from registration for a private offering under Section 4(a)(2)). Note that Regulation D was recently amended to allow for general solicitation in offerings under Rule 506(c) (17 C.F.R. § 230.506) if the purchasers are accredited investors “accredited investors” TO Accredited Investor (Securities & Capital Markets Glossary)] and the issuer has taken steps to verify that status. See [General Solicitation and Start-up Capital-Raising under Rule 506 of Regulation D](#).

10.4 Disclosure of Information. Holder has received or has had full access to all the information Holder considers necessary or appropriate to make an informed investment decision with respect to the Securities. Holder further has had an opportunity to ask questions and receive answers from Borrower regarding the terms and conditions of the offering of the Securities and to obtain additional information (to the extent Borrower possessed such information or could acquire it without unreasonable effort or expense) necessary to verify any information furnished to Holder or to which Holder had access. The foregoing, however, does not in any way limit or modify the representations and warranties made by Borrower in Section 9 hereof.

10.5 Investment Experience. Holder understands that the purchase of the Securities involves substantial risk. Holder (i) has experience as a Holder in securities of companies in the development stage and acknowledges that Holder is able to fend for itself, can bear the economic risk of Holder's investment in the Securities and has such knowledge and experience in financial or business matters that Holder is capable of evaluating the merits and risks of this investment in the Securities and protecting Holder's own interests in connection with this investment in the Securities or (ii) has a preexisting personal or business relationship with Borrower and certain of its officers, directors or controlling persons of a nature and duration that enables Holder to be aware of the character, business acumen and financial circumstances of such persons. Holder acknowledges that any investment in the Securities involves a high degree of risk, and represents that it is able, without materially impairing its financial condition, to hold the Securities for an indefinite period of time and to suffer a complete loss of its investment.

Drafting Note to Section 10.5: This is a representation that the holder is sophisticated and aware of the risk of the investment, which helps protect the borrower from future liability.

10.6 Accredited Investor Status. Holder is familiar with the definition of, and qualifies as, an “accredited investor” within the meaning of Regulation D promulgated under the Act.

Drafting Note to Section 10.6: Most borrowers prefer to issue notes only to accredited investors. This allows more flexibility in the availability of federal exemptions for an offering (e.g., Rule 506(c) can be used only if all purchasers are accredited investors). In addition, under Regulation D in general, the information requirements for distributing to accredited investors is minimal. Although the representation in Section 10.6 is necessary in an offering to accredited investors, if the borrower is using Rule 506(c), it must also take steps to verify a purchaser's accredited investor status. For more information, see [Rule 506\(c\) Accredited Investor Representation Letter](#).

Restricted Securities. Holder understands that the Securities are characterized as “restricted securities” under the Act and Rule 144 promulgated thereunder (“**Rule 144**”) since they are being acquired from Borrower in a transaction not involving a public offering, and that under the Act and applicable regulations thereunder the Securities may be resold without registration under the Act only in certain limited circumstances. Holder further understands that Borrower is under no obligation to register the Securities, and Borrower has no present plans to do so. Furthermore, Holder is familiar with Rule 144, as presently in effect, and understands the limitations imposed thereby and by the Act on resale of the Securities without such registration. Holder understands that, whether or not the Securities may be resold in the future without registration under the Act, no public market now exists for any of the Securities and that it is uncertain whether a public market will ever exist for the Securities.

10.7 Further Limitations on Disposition. Without in any way limiting the representations set forth above, Holder further agrees not to make any disposition of all or any portion of the Securities unless and until:

- (a) there is then in effect a registration statement under the Act covering such proposed disposition and such disposition is made in accordance with such effective registration statement; or
- (b) (i) Holder shall have notified Borrower of the proposed disposition and shall have furnished Borrower with a detailed statement of the circumstances surrounding the proposed disposition, and (ii) if reasonably requested by Borrower, Holder shall have furnished Borrower with an opinion of counsel, reasonably satisfactory to Borrower that such disposition will not require registration of such shares under the Act. It is agreed that Borrower will not require opinions of counsel for transactions made pursuant to Rule 144 except in unusual circumstances.

Notwithstanding the provisions of paragraphs (a) and (b) above, no such registration statement or opinion of counsel shall be necessary for a transfer by a Holder that is a partnership to a partner of such partnership or a retired partner of such partnership who retires after the date hereof, or to the estate of any such partner or retired partner or the transfer by gift, will or intestate succession of any partner to his or her spouse or to the siblings, lineal descendants or ancestors of such partner or his or her spouse, if the transferee agrees in writing to be subject to the terms hereof to the same extent as if he or she were the original Holder hereunder.

10.8 Legends. Holder understands and agrees that the certificates evidencing the Securities will bear a legend substantially similar to that set forth below in addition to any other legend that may be required by applicable law, Borrower's Articles of Incorporation or Bylaws, Section 10.10 hereof or any other agreement between Borrower and Holder:

“These securities have not been registered under the Securities Act of 1933, as amended. They may not be sold, offered for sale, pledged or hypothecated in the absence of a registration statement in effect with respect to the securities under such Act or an opinion of counsel satisfactory to Borrower that such registration is not required or unless sold pursuant to Rule 144 of such Act.”

10.9 “Market Stand-Off” Agreement. Holder hereby agrees that Holder will not, without the prior written consent of the managing underwriter during Restricted Period (i) lend, offer, pledge, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase, or otherwise transfer or dispose of, directly or indirectly, any Securities or other securities of Borrower then or thereafter owned by Holder, or (ii) enter into any swap or other arrangement that transfers to another, in whole or in part, any of the economic consequences of ownership of any Securities or other securities of Borrower then or thereafter owned by Holder, whether any such transaction described in clause (i) or (ii) above is to be settled by delivery of securities of Borrower, in cash or otherwise. The underwriters in connection with Borrower’s public offerings are intended third party beneficiaries of this Section 10.10 and shall have the right, power and authority to enforce the provisions hereof as though they were a party hereto. In order to enforce the foregoing covenant, Borrower may impose stop transfer instructions with respect to the Securities and other securities of Borrower then or thereafter owned by Holder until the end of such period.

Drafting Note to Section 10.10: This is analogous to a lock-up agreement, which underwriters obtain from management in a public offering. Its purpose is to stabilize the market after an offering by preventing certain sales during a specified period. For a form of lock-up agreement in that context, [Lock-Up Agreement \(IPO\)](#).

11. GENERAL PROVISIONS.

11.1 Waivers. Borrower and all endorsers of this Note hereby waive notice, presentment, protest and notice of dishonor.

11.2 Attorneys’ Fees. If any party is required to engage the services of an attorney for the purpose of enforcing this Note, or any provision thereof, the prevailing party shall be entitled to recover its reasonable expenses and costs in enforcing this Note, including attorneys’ fees.

11.3 Transfer. Neither this Note nor any of the rights or obligations of Holder hereunder may be assigned, conveyed or transferred, in whole or in part, without Borrower’s prior written consent, which Borrower may withhold in its sole discretion; *provided, however*, that this Note may be assigned, conveyed or transferred without the prior written consent of Borrower to any Affiliate of Holder who: (a) executes and delivers an acknowledgement that such transferee agrees to be subject to, and bound by, all the terms and conditions of this Note, (b) makes the representations and warranties to Borrower that are set forth in Section 10 hereof and (c) (if requested by Borrower) delivers to Borrower an opinion of legal counsel, reasonably satisfactory to Borrower, that such transfer complies with state and federal securities laws. Neither this Note nor any of the rights or obligations of Borrower hereunder may be assigned, by operation of law or otherwise, in whole or in part, by Borrower without the prior written consent of Holder. Subject to the foregoing, the rights and obligations of Borrower and Holder under this Note and the other Financing Documents shall be binding upon and benefit their respective permitted successors, assigns, heirs, administrators and transferees.

11.4 Governing Law. This Note shall be governed by and construed under the internal laws of the State of [Delaware] as applied to agreements among [Delaware] residents entered into and to be performed entirely within the State of [Delaware], without reference to principles of conflict of laws or choice of laws.

11.5 Headings. The headings and captions used in this Note are used only for convenience and are not to be considered in construing or interpreting this Note. All references in this Note to “Sections” shall, unless otherwise provided, refer to sections hereof.

11.6 Notices. All notices required or permitted to be given to a party pursuant to this Note will be in writing and will be effective and deemed to provide such party sufficient notice under this Note on the earliest of

the following: (i) at the time of personal delivery; (ii) one (1) Business Day after deposit with an express overnight courier for United States deliveries; or (iii) three (3) Business Days after deposit in the United States mail by certified mail (return receipt requested) for United States deliveries. All notices for delivery outside the United States will be sent by express courier. All notices not delivered personally will be sent with postage and/or other charges prepaid and properly addressed to the party to be notified at the address indicated for such party on the signature page hereto or, in the case of Borrower, at [STREET ADDRESS], [CITY], [STATE] [ZIP CODE], Attention: Chief Executive Officer, or at such other address as any party or Borrower may designate by giving ten (10) days' advance written notice to all other parties.

11.7 Amendments and Waivers. This Note and all other Notes may be amended, and any provisions under this Note and all other Notes may be waived, by the written consent of the Majority Holders and Borrower. Notwithstanding the foregoing, this Note and all other Notes may not be amended and the observance of any term of this Note and all other Notes may not be waived, with respect to any Holder without the written consent of such Holder, unless such amendment or waiver, by its express, facial terms, applies to all holders of Notes in the same fashion. Any amendment or waiver effected in accordance with this Section 11.7 shall be binding upon each holder of Notes then outstanding, each future holder of Notes and Borrower. Except as provided above with respect to waivers by Borrower, no waiver or consent with respect to this Note will be binding or effective unless it is set forth in writing and signed by the party against whom such waiver is asserted. No course of dealing between Borrower and Holder will operate as a waiver or modification of any party's rights or obligations under this Note. No delay or failure on the part of either party in exercising any right or remedy under this Note will operate as a waiver of such right or any other right. A waiver given on one occasion will not be construed as a bar to, or as a waiver of, any right or remedy on any future occasion.

11.8 Severability. If one or more provisions of this Note are held to be unenforceable under applicable law, then such provision(s) shall be excluded from this Note to the extent they are held to be unenforceable and the remainder of the Note shall be interpreted as if such provision(s) were so excluded and shall be enforceable in accordance with its terms.

[Signature Page Follows]

IN WITNESS WHEREOF, Borrower has caused this Convertible Promissory Note to be signed in its name as of the date first written above.

BORROWER:

[Name of Company]

By: _____

Name: _____

Title _____

AGREED AND ACKNOWLEDGED:

HOLDER:

[HOLDER]

By: _____

Name: _____

Title: _____

HOLDER'S ADDRESS FOR NOTICE:

Email: _____

Kristine M. Di Bacco
Fenwick & West LLP

Kristine M. Di Bacco represents emerging technology companies primarily in the consumer Internet, e-commerce, FinTech, digital health, consumer hardware and software sectors.

Her practice includes a broad range of corporate transactional matters, including the formation of new start-up companies, venture capital financings, mergers & acquisitions and public offerings. Kristine provides clients with practical and thoughtful advice to help solve their business and legal issues, and assists clients in structuring, negotiating and closing business transactions quickly and effectively. She also represents and advises leading incubators, angel investors and venture capitalists investing in technology companies.

Kristine earned her J.D. from McGill University Law School and her MBA from Cornell University.

Doug Sharp
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Doug Sharp is an associate at Fenwick & West. He counsels established and emerging technology companies and investors in a variety of corporate matters, with an emphasis on start-up financings, M&A and strategic transactions. His emerging company clients span the technology sector and include innovators in cybersecurity, aerospace, virtual and augmented reality, enterprise software and social media.

Doug earned his J.D. from Stanford Law School.

Learn more

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