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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549**

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**FORM 8-K**

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**CURRENT REPORT  
PURSUANT TO SECTION 13 OR 15(d)  
OF THE SECURITIES EXCHANGE ACT OF 1934**

**Date of Report (Date of earliest event reported) August 26, 2022**

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**Nogin, Inc.**

(Exact name of registrant as specified in its charter)

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**Delaware**  
(State or other jurisdiction  
of incorporation)

**001-40682**  
(Commission  
File Number)

**86-1370703**  
(IRS Employer  
Identification No.)

**1775 Flight Way STE 400, Tustin, California**  
(Address of principal executive offices)

**92782**  
(Zip Code)

**(949) 864-8136**  
Registrant's telephone number, including area code

**Software Acquisition Group Inc. III  
1980 Festival Plaza Drive, Ste. 300  
Las Vegas, Nevada 89135**  
(Former name or former address, if changed since last report.)

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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:

- 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:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
<b>Common stock, par value \$0.0001 per share</b>	<b>NOGN</b>	<b>The Nasdaq Stock Market LLC</b>
<b>Warrants, each whole warrant exercisable for one share of Common stock at an exercise price of \$11.50 per share</b>	<b>NOGNW</b>	<b>The Nasdaq Stock Market LLC</b>

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.

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## INTRODUCTORY NOTE

Unless the context otherwise requires, “we,” “us,” “our,” “Nogin” and the “Company” refer to Nogin, Inc., a Delaware corporation (f/k/a Software Acquisition Group Inc. III, a Delaware corporation), and its consolidated subsidiaries following the Closing (as defined below). Unless the context otherwise requires, references to “SWAG” refer to Software Acquisition Group Inc. III, a Delaware corporation, prior to the Closing. All references herein to the “Board” refer to the board of directors of the Company.

Terms used in this Current Report on Form 8-K (this “Report”) but not defined herein, or for which definitions are not otherwise incorporated by reference herein, shall have the meaning given to such terms in the Proxy Statement/Prospectus (as defined below) in the section entitled “Basis of Presentation and Glossary” beginning on page i thereof, and such definitions are incorporated herein by reference.

### **Item 1.01. Entry into a Material Definitive Agreement.**

#### **Business Combination**

As disclosed under the sections entitled “Proposal No. 1—The Business Combination Proposal,” “The Business Combination” and “The Merger Agreement” beginning on pages 91, 194 and 219, respectively, of the proxy statement/prospectus (the “Proxy Statement/Prospectus”) filed with the Securities and Exchange Commission (the “SEC”) by SWAG on July 27, 2022, SWAG entered into an Agreement and Plan of Merger (the “Merger Agreement”), dated as of February 14, 2022 (as amended on April 19, 2022 and August 26, 2022), with Nuevo Merger Sub, Inc., a wholly owned subsidiary of SWAG (“Merger Sub”), and Branded Online, Inc. dba Nogin (“Legacy Nogin”). Pursuant to the Merger Agreement, Merger Sub was merged with and into Legacy Nogin, with Legacy Nogin surviving the merger as a wholly owned subsidiary of the Company (the “Business Combination” and, together with the other transactions contemplated by the Merger Agreement, the “Transactions”).

#### **Amendment to Merger Agreement**

On August 26, 2022, SWAG, Merger Sub and Nogin entered into the Amendment No. 2 to the Merger Agreement (“MA Amendment No. 2”). MA Amendment No. 2 reflects the parties’ agreement that the cash merger consideration to be paid to the Excess Cash Stockholders (as defined in the Merger Agreement) following closing of the Transactions is subject to certain limitations.

The foregoing description of MA Amendment No. 2 does not purport to be complete and is qualified in its entirety by the terms and conditions of MA Amendment No. 2, a copy of which is attached hereto as Exhibit 2.3 and is incorporated herein by reference.

#### **Special Meeting and Closing of the Transactions**

On August 22, 2022, SWAG held a special meeting of stockholders (the “Special Meeting”), at which the SWAG stockholders considered and adopted, among other matters, a proposal to approve the Business Combination, including (a) adopting the Merger Agreement and (b) approving the other transactions contemplated by the Merger Agreement and related agreements described in the Proxy Statement/Prospectus.

Pursuant to the terms and subject to the conditions set forth in the Merger Agreement, following the Special Meeting, on August 26, 2022 (the “Closing Date”), the Transactions were consummated (the “Closing”).

Item 2.01 of this Report discusses the consummation of the Transactions and the entry into agreements relating thereto and is incorporated herein by reference.

#### **PIPE Investment**

As previously disclosed, on April 19, 2022, the Company, certain guarantors named therein (the “Notes Guarantors”) and certain investors named therein (each, a “Subscriber” and collectively, the “Subscribers”), entered into subscription agreements (each, a “PIPE Subscription Agreement” and collectively, the “PIPE Subscription Agreements”) pursuant to which the Company agreed to issue and sell to the Subscribers immediately prior to the closing of the Merger (i) up to an aggregate principal amount of \$75.0 million of 7.00%

Convertible Senior Notes due 2026 at the par value of the notes and (ii) up to an aggregate of 1.5 million warrants (the “PIPE Warrants”) with each whole PIPE Warrant entitling the holder thereof to purchase one share of the Company’s common stock, par value \$0.0001 per share (“Common Stock”).

On August 26, 2022, the Company and a subscriber (the “Equity Subscriber”) entered into a subscription agreement (the “Equity PIPE Subscription Agreement”) pursuant to which the Company agreed to issue and sell to the Equity Subscriber, immediately prior to the closing of the Merger, 517,079 shares of Class A Stock (as defined below) (the “PIPE Shares”) at a price per PIPE Share equal to \$10.17 (the “Equity PIPE” and, together with the transactions described in clauses (i) and (ii) above, the “PIPE Investment”). The Equity PIPE Subscription Agreement provides, among other things, that the Company will file a shelf registration statement within 15 business days of the Closing to register the PIPE Shares for resale.

The foregoing description of the Equity PIPE Subscription Agreement does not purport to be complete and is qualified in its entirety by the terms and conditions of the form of Equity PIPE Subscription Agreement, a copy of which is attached hereto as Exhibit 10.10 and is incorporated herein by reference.

#### ***PIPE Shares***

On August 26, 2022, immediately prior to the Closing, the Company issued 517,079 shares of SWAG Common Stock to the Equity Subscriber in accordance with the terms of the Equity PIPE Subscription Agreement. The shares of SWAG Common Stock issued in the Equity PIPE were offered in a private placement under the Securities Act of 1933, as amended (the “Securities Act”), pursuant to the Equity PIPE Subscription Agreement.

#### ***Convertible Notes and Indenture***

On August 26, 2022, immediately prior to Closing, the Company issued \$65.5 million aggregate principal amount of 7.00% Convertible Senior Notes due 2026 (the “Convertible Notes”) and, as contemplated by the PIPE Subscription Agreements, the Company, the Note Guarantors and U.S. Bank Trust Company, National Association, as trustee, entered into an Indenture governing the Convertible Notes (the “Indenture”). The Convertible Notes were offered in a private placement under the Securities Act, pursuant to the PIPE Subscription Agreements.

The Convertible Notes will mature on September 1, 2026 (the “Maturity Date”), unless earlier repurchased, redeemed or converted in accordance with their terms, and will accrue interest at a rate of 7.00% per annum, payable in cash.

The Convertible Notes may be converted at any time (in whole or in part) into shares of Common Stock, at the option of the holder of such Convertible Note, based on the applicable conversion rate at such time. The initial conversion price is approximately \$11.50 per share of Common Stock, based on an initial conversion rate of 86.9565 shares of Common Stock per \$1,000 principal amount of Convertible Notes. For conversions with a conversion date on or after the first anniversary of the closing of the Transactions and prior to the regular record date immediately preceding the Maturity Date, the conversion consideration will also include an interest make-whole payment equal to the remaining scheduled payments of interest on the Convertible Note being converted through the Maturity Date. The Company will be able to elect to make such interest make-whole payment in cash or in Common Stock, subject to certain conditions. The conversion rate is subject to adjustments set forth in the Indenture, including conversion rate resets (x) on August 27, 2023, September 26, 2023 and September 26, 2024 and (y) following the consummation of certain equity and equity-linked offerings by the Company and sales of certain equity and equity-linked securities by certain shareholders of the Company.

Each holder of a Convertible Note will have the right to cause the Post-Combination Company to repurchase for cash all or a portion of the Convertible Notes held by such holder upon the occurrence of a “Fundamental Change” (as defined in the Indenture) at a price equal to (i) on or before September 26, 2023, 100% of the original principal amount of such Convertible Note, and (ii) from and after September 26, 2023, 100% of the accreted principal amount applicable at such time pursuant to the terms of the Indenture, in each case, plus accrued and unpaid interest. In the event of a conversion in connection with a Fundamental Change, the Conversion Rate will be adjusted in accordance with the terms of the Indenture (subject to the converting holder’s ability to instead receive the interest make-whole payment described above, if so elected).

The Indenture includes restrictive covenants that, among other things, require the Company to maintain a minimum level of liquidity on a consolidated basis and limit the ability of the Company and its subsidiaries to incur indebtedness above certain thresholds or to issue preferred stock, to make certain restricted payments, to dispose of certain material assets and engage in other asset sales, subject to reinvestment rights, to pay certain advisory fees in connection to the Transactions and the transactions contemplated by the PIPE Subscription Agreements above a certain threshold, and other customary covenants with respect to the collateral securing the obligations created by the Convertible Notes and the Indenture, including the entry into security documents (in each case, subject to certain exceptions set forth in the Indenture); provided that the covenants with respect to (i) the making of restricted payments, (ii) the incurrence of indebtedness, (iii) the disposition of certain material assets and asset sales, (iv) liquidity, (v) the payment of advisory fees and (vi) the collateral securing the obligations created by the Convertible Notes and the Indenture shall terminate once less than 15% of the aggregate principal amount of the Convertible Notes are outstanding. The liquidity covenant would terminate if the Company achieves \$175 million in consolidated revenue in the preceding four fiscal quarters.

Certain of the Company's subsidiaries will serve as Notes Guarantors that jointly and severally, fully and unconditionally guarantee the obligations under the Convertible Notes and the Indenture. The Indenture also requires certain future subsidiaries of the Post-Combination Company, if any, to become Notes Guarantors. This covenant will terminate once less than 15% of the aggregate principal amount of the Convertible Notes are outstanding.

The Indenture also includes customary events of default and related provisions for potential acceleration of the Convertible Notes.

The above description of the Indenture and Convertible Notes does not purport to be complete and is qualified in its entirety by reference to the full text of the Indenture and the form of the certificate representing the Convertible Notes, copies of which are filed as Exhibits 4.4 and 4.5 hereto and incorporated herein by reference.

#### ***PIPE Warrants and PIPE Warrant Agreement***

On August 26, 2022, immediately prior to Closing, the Company issued 1,396,419 PIPE Warrants with each whole PIPE Warrant entitling the holder thereof to purchase one share of Common Stock at a price of \$11.50 per share, subject to adjustment as described below, at any time until the PIPE Warrant's expiration. In connection with the Closing and the issuance of the PIPE Warrants, the Company and Continental Stock Transfer & Trust Company (the "Warrant Agent") entered into a Warrant Agreement (the "PIPE Warrant Agreement"). Pursuant to the PIPE Warrant Agreement, the PIPE Warrants may be exercised beginning September 25, 2022 and ending at 5:00 p.m. New York City time on the earlier to occur of (i) August 26, 2027, (ii) the Redemption Date (as defined in the PIPE Warrant Agreement) and (iii) the liquidation of Nogin.

The PIPE Warrants may be called for redemption by the Company at any time if, and only if, the reported last sale price of the shares of Common Stock equals or exceeds \$18.00 per share (subject to adjustment as described below), for any twenty (20) trading days within a thirty (30) trading day period commencing after the PIPE Warrants become exercisable and ending on the third trading day prior to the date on which notice of redemption is given, *provided that* there is a current registration statement in effect with respect to the resale of shares of Common Stock underlying such PIPE Warrants (either on a cash or "cashless" exercise basis), and a current prospectus relating thereto is available for delivery, throughout the thirty-day redemption period.

The exercise price and number of shares of Common Stock issuable on exercise of the PIPE Warrants may be adjusted in certain circumstances, including in the event of a stock dividend, extraordinary dividend or a recapitalization, reorganization, merger or consolidation.

The above description of the PIPE Warrants and the PIPE Warrant Agreement does not purport to be complete and is qualified in its entirety by reference to the full text of the PIPE Warrant Agreement, a copy of which is filed as Exhibit 4.6 hereto and incorporated herein by reference.

#### **Registration Rights Agreement**

On August 26, 2022, in connection with the consummation of the Business Combination and as contemplated by the Merger Agreement, Nogin, Software Acquisition Holdings III, LLC, a Delaware limited liability company ("Sponsor"), certain stockholders of Legacy Nogin and certain stockholders of SWAG entered into that certain Amended and Restated Registration Rights Agreement (the "Registration Rights Agreement"). The material terms of the Registration Rights Agreement are described in the section of the Proxy Statement/Prospectus beginning on page 227 titled "Other Agreements—Registration Rights Agreement." Such description is qualified in its entirety by the text of the Registration Rights Agreement, which is included as Exhibit 10.1 to this Report and is incorporated herein by reference.

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**Item 2.01. Completion of Acquisition or Disposition of Assets.**

As described in Item 1.01 above, on August 22, 2022, SWAG held the Special Meeting, at which the SWAG stockholders considered and adopted, among other matters, a proposal to approve the Merger Agreement and the Transactions. On August 26, 2022, the parties consummated the Business Combination. In connection with the Closing, the Company changed its name from Software Acquisition Group Inc. III to Nogin, Inc.

Holders of 17,021,595 shares of SWAG's Class A common stock, par value \$0.0001 per share ("Class A Stock"), sold in its initial public offering (the "Initial Shares") properly exercised their right to have such shares redeemed for a full pro rata portion of the trust account holding the proceeds from SWAG's initial public offering, calculated as of two business days prior to the consummation of the business combination, which was approximately \$10.1655 per share, or \$173,033,055.47 in the aggregate.

As a result of the Business Combination, each share of Legacy Nogin preferred stock and common stock was converted into the right to receive approximately 4.34 shares of Common Stock.

Additionally, the shares of SWAG Class B common stock, par value \$0.0001 per share ("Class B Stock"), held by Sponsor automatically converted to 5,701,967 shares of Common Stock (of which 2,565,885 shares of Common Stock are subject to vesting under certain conditions).

As described in Item 1.01 above, on August 26, 2022, pursuant to the PIPE Subscription Agreements, the Company issued and sold to the Subscribers immediately prior to the closing of the Merger (i) \$65.5 million aggregate principal amount of Convertible Notes and (ii) an aggregate of 1,396,419 PIPE Warrants. In addition, the Company issued and sold to the Equity Subscriber immediately prior to the closing of the Merger 517,079 PIPE Shares.

After giving effect to the Transactions, the redemption of Initial Shares as described above, and the consummation of the PIPE Investment, there are currently 66,694,295 shares of Common Stock issued and outstanding.

The Common Stock and warrants commenced trading on the Nasdaq Stock Market ("Nasdaq") under the symbols "NOGN" and "NOGNW," respectively, on August 30, 2022, subject to ongoing review of the Company's satisfaction of all listing criteria following the Business Combination.

As noted above, an aggregate of approximately \$173.0 million was paid from the Company's trust account to holders that properly exercised their right to have Initial Shares redeemed, and the remaining balance immediately prior to the Closing of approximately \$58.8 million remained in the trust account. The remaining amount in the trust account was used to fund the Business Combination.

## FORM 10 INFORMATION

Item 2.01(f) of Form 8-K states that if the registrant was a shell company, as the Company was immediately before the Business Combination, then the registrant must disclose the information that would be required if the registrant were filing a general form for registration of securities on Form 10. As a result of the consummation of the Business Combination, and as discussed below in Item 5.06 of this Report, the Company has ceased to be a shell company. Accordingly, the Company is providing below the information that would be included in a Form 10 if it were to file a Form 10. Please note that the information provided below relates to the combined company after the consummation of the Business Combination, unless otherwise specifically indicated or the context otherwise requires.

### Cautionary Note Regarding Forward-Looking Statements

This Report includes statements that express the Company's opinions, expectations, beliefs, plans, objectives, assumptions or projections regarding future events or future results and therefore are, or may be deemed to be, "forward-looking statements." These forward-looking statements can generally be identified by the use of forward-looking terminology, including the terms "believes," "estimates," "anticipates," "expects," "seeks," "projects," "intends," "plans," "may" or "should" or, in each case, their negative or other variations or comparable terminology. These forward-looking statements include all matters that are not historical facts. They appear in a number of places throughout this Report (including in information that is incorporated by reference into this Report) and include statements regarding our intentions, beliefs or current expectations concerning, among other things, the Transactions and the benefits of the Transactions, including results of operations, financial condition, liquidity, prospects, growth, strategies and the markets in which the Company operates. Such forward-looking statements are based on available current market material and management's expectations, beliefs and forecasts concerning future events impacting the Company. Factors that may impact such forward-looking statements include:

- the ability to maintain the listing of the shares of Common Stock and warrants of the Company on Nasdaq;
- risks related to disruption of management's time from ongoing business operations due to the Transactions;
- litigation, complaints, product liability claims and/or adverse publicity;
- privacy and data protection laws, privacy or data breaches, or the loss of data;
- the impact of changes in customer spending patterns, customer preferences, local, regional and national economic conditions, crime, weather, demographic trends and employee availability;
- the impact of the COVID-19 pandemic on the financial condition and results of operations of the Company; and
- other risks and uncertainties described in the Proxy Statement/Prospectus, including those under the section entitled "Risk Factors."

The forward-looking statements contained in this Report are based on the Company's current expectations and beliefs concerning future developments and their potential effects on the Company. There can be no assurance that future developments affecting the Company will be those that the Company has anticipated. These forward-looking statements involve a number of risks, uncertainties (some of which are beyond the Company's control) or other assumptions that may cause actual results or performance to be materially different from those expressed or implied by these forward-looking statements. These risks and uncertainties include, but are not limited to, those factors described or incorporated by reference under the heading "Risk Factors" below. Should one or more of these risks or uncertainties materialize, or should any of the assumptions prove incorrect, actual results may vary in material respects from those projected in these forward-looking statements. The Company will not and does not undertake any obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, except as may be required under applicable securities laws.

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**Business**

The business of the Company is described in the Proxy Statement/Prospectus in the section entitled “Information About Nogin” beginning on page 136 thereof and that information is incorporated herein by reference.

**Risk Factors**

The risks associated with the Company’s business are described in the Proxy Statement/Prospectus in the section entitled “Risk Factors” beginning on page 23 thereof and are incorporated herein by reference. A summary of the risks associated with the Company’s business are also described on pages 11-12 of the Proxy Statement/Prospectus under the heading “Summary Risk Factors” and are incorporated herein by reference.

**Unaudited Condensed Consolidated Financial Statements**

The unaudited condensed consolidated financial statements as of and for the six months ended June 30, 2022 and 2021 of Legacy Nogin set forth in Exhibit 99.1 hereto have been prepared in accordance with U.S. generally accepted accounting principles and pursuant to the regulations of the SEC. The unaudited financial information reflects, in the opinion of management, all adjustments, consisting of normal recurring adjustments, considered necessary for a fair statement of Legacy Nogin’s financial position, results of operations and cash flows for the period indicated. The results reported for the interim period presented are not necessarily indicative of results that may be expected for the full year.

These unaudited condensed consolidated financial statements should be read in conjunction with the historical audited consolidated financial statements of Legacy Nogin as of and for the years ended December 31, 2021 and 2020 and the related notes included in the Proxy Statement/Prospectus, the section entitled “Nogin’s Management’s Discussion and Analysis of Financial Condition and Results of Operations” beginning on page 155 of the Proxy Statement/Prospectus and the section entitled “Management’s Discussion and Analysis of Financial Condition and Results of Operations” included herein.

**Unaudited Pro Forma Condensed Combined Financial Information**

The unaudited pro forma condensed combined financial information of the Company as of and for the year ended December 31, 2021 is included in the Proxy Statement/Prospectus in the section entitled “Unaudited Pro Forma Condensed Combined Financial Information” beginning on page 68 of the Proxy Statement/Prospectus and is incorporated herein by reference.

The unaudited pro forma condensed combined financial information of the Company as of and for the six months ended June 30, 2022 and 2021 is set forth in Exhibit 99.2 hereto and is incorporated herein by reference.

**Management’s Discussion and Analysis of Financial Condition and Results of Operations**

Management’s discussion and analysis of the financial condition and results of operation of Legacy Nogin as of and for the year ended December 31, 2021 is included in the Proxy Statement/Prospectus in the section titled “Nogin’s Management’s Discussion and Analysis of Financial Condition and Results of Operations” beginning on page 155 of the Proxy Statement/Prospectus, which is incorporated herein by reference.

Management’s discussion and analysis of the financial condition and results of operations of Legacy Nogin as of and for the six months ended June 30, 2022 and 2021 is set forth below.

The following discussion and analysis of our financial condition and results of operations should be read in conjunction with the sections titled “Financial Information” and our financial statements and related notes included as Exhibit 99.1 to this Report. This discussion contains forward-looking statements that involve risks and uncertainties. Our actual results could differ materially from such forward-looking statements. Factors that could cause or contribute to those differences include, but are not limited to, those identified below and those discussed in the sections titled “Risk Factors” and “Forward-Looking Statements” included elsewhere in this Report.

Additionally, our historical results are not necessarily indicative of the results that may be expected for any period in the future. References in this section to “Nogin,” “we,” “our,” “us” and the “Company” generally refer to Legacy Nogin and its consolidated subsidiaries prior to the Business Combination and to the Company and its consolidated subsidiaries after giving effect to the Business Combination.

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## ***Company Overview***

Nogin is an e-commerce, technology platform provider in the apparel and ancillary industry's multichannel retailing, business-to-consumer and business-to-business domains. Nogin's Commerce-as-a-Service ("CaaS") platform delivers full-stack enterprise-level capabilities to our clients enabling them to compete with large retailers. As brands grow their GMV, they require additional capabilities beyond a simple online storefront. We provide the technology for these growing brands to manage complexities related to customer management, order optimization, returns, and fulfillment. The platform's tools provide clients with capabilities around website development, photography, content management, customer service, marketing, warehousing, and fulfillment. The Company's business model is based on providing a total e-commerce software solution to its partners on a revenue-sharing basis. The Company's platform is used by online businesses whose needs are too complex for low cost SaaS ecommerce platforms, yet require more flexibility and economic viability than provided by enterprise solutions.

Our platform helps brands develop relationships directly with their customers leading to accelerated GMV growth, improved customer engagement, and reduced costs related to re-platforming and third-party integrations.

The Company's headquarters and principal place of business are in Tustin, California.

## ***Impact of COVID-19 pandemic***

In March 2020, the World Health Organization declared the COVID-19 outbreak a pandemic. The worldwide spread of COVID-19 has resulted, and is expected to continue to result, in a global slowdown of economic activity which is likely to decrease demand for a broad variety of goods and services, including those provided by our clients, while also disrupting sales channels and advertising and marketing activities for an unknown period until the virus is contained, or economic activity normalizes. Our revenue growth and results of operations have been resilient despite the headwinds created by the COVID-19 pandemic. The extent to which ongoing and future developments related to the global impact of the COVID-19 pandemic and related vaccination measures designed to curb its spread continue to impact our business, financial condition, and results of operations, all of which cannot be predicted with certainty. Many of these ongoing and future developments are beyond our control, including the speed of contagion, the development, distribution and implementation of effective preventative or treatment measures, including vaccines (and vaccination rates), the scope of governmental and other restrictions on travel, discretionary services and other activity, and the public reactions and receptiveness to these developments. See the section entitled "*Risk Factors*" for further discussion of the adverse impacts of the COVID-19 pandemic on our business.

At the onset of COVID-19, the Company anticipated an impact to the business, its financial conditions and results of operations. The Company applied for and was granted a Paycheck Protection Plan ("PPP") loan. In addition, the Company has taken a number of actions to mitigate the impacts of the COVID-19 pandemic on its business. The Company witnessed a large shift in consumer spending from retail stores to online stores, and as a result, there were no significant declines in the periods presented. However, the impacts of the COVID-19 pandemic will depend on future developments, including the duration and spread of the pandemic. These developments and the impacts of the COVID-19 pandemic on the financial markets and overall economy are highly uncertain and cannot be predicted.

In 2020, due to COVID-19, the Company implemented a pay reduction of 20% for the majority of our salaried employees. Once the PPP loan was received, the Company removed the pay reduction for the employees who were affected by the pay reduction.

## ***Components of Our Results of Operations***

### ***Revenue***

The Company generates revenue primarily from its "Commerce-as-a-Service" revenue stream which generates commission fees derived from contractually committed gross revenue processed by customers on the Company's e-commerce platform. Consideration for online sales is collected directly from the shopper by the Company and amounts not owed to the Company are remitted to the client. Revenue is recognized on a net basis from maintaining e-commerce



platforms and online orders, as the Company is engaged in an agency relationship with its customers and earns defined amounts based on the individual contractual terms for the customer and the Company does not take possession of the customers' inventory or any credit risks relating to the products sold. Other than its "Commerce-as-a-Service" revenue stream, the Company also earns revenue from the following:

- *Product revenue*—Beginning in fiscal 2021, under one of the Company's Master Services Agreements, the Company is the owner of inventory and reseller of record. As a result, the Company is the principal in sales to end customers and records these revenues on a gross basis at a point in time.
- *Fulfillment service revenue*—Revenue for business-to-business ("B2B") fulfillment services is recognized on a gross basis either at a point in time or over a point in time. For example, inbound and outbound services are recognized when the service is complete, while monthly storage services are recognized over the service period.
- *Marketing service revenue*—Revenue for marketing services is recognized on a gross basis as marketing services are complete. Performance obligations include providing marketing and program management such as procurement and implementation.
- *Shipping service revenue*—Revenue for shipping services is recognized on a gross basis as shipments are completed and products are shipped to end customers. This historical source of revenue is separate from the Smart Ship offering. Smart Ship is an offering that provides order storage and fulfillment solutions, designed for small to mid-size companies to manage the fulfillment of their orders and would be included as Fulfillment service revenue.
- *Other service revenue*—Revenue for other services such as photography, business to customer ("B2C") fulfillment, customer service, development and web design are reimbursable costs and recognized on the gross basis, and are services rendered as part of the performance obligations to clients for which an online platform and online orders are managed. All reimbursable costs are the responsibility of the Company as the Company uses such services to fulfill its performance obligations.
- *Set up and implementation service revenue*—The Company provides set up and implementation services for new clients. The revenue is recognized on a gross basis at the completion of the service, with the unearned amounts received for incomplete services recorded as deferred revenue, if any.

#### *Operating Expenses*

We classify our operating expenses into the following categories:

- *Cost of services.* Cost of services reflects costs directly related to providing services under the master service agreements with customers, which primarily includes service provider costs directly related to processing revenue transactions, marketing expenses and shipping and handling expenses which correspond to marketing and shipping revenues, as well as credit card merchant fees. Cost of services is exclusive of depreciation and amortization and general salaries and related expenses.
- *Cost of product revenue.* Cost of product revenue reflects costs directly related to selling inventory acquired from select clients, which primarily includes product cost, warehousing costs, fulfillment costs, credit card merchant fees and third-party royalty costs. Cost of product revenue is exclusive of depreciation and amortization and general salaries and related expenses.
- *Sales and marketing.* Sales and marketing expense consists primarily of salaries associated with selling across all our revenue streams.
- *Research and development.* Research and development expense consists primarily of salaries and contractors' costs associated with research and development of the Company's technology platform.
- *General, and administrative.* General and administrative expense consists primarily of lease expense, materials and equipment, dues and subscriptions, professional services, and acquisition costs incurred.

- *Depreciation and amortization.* Depreciation and amortization expenses are primarily attributable to our capital investment and consist of fixed asset depreciation and amortization of intangibles considered to have finite lives.

#### *Interest Expense*

Interest expense primarily consists of interest incurred under our line of credit and promissory notes.

#### *Change in Fair Value of Unconsolidated Affiliates*

Change in fair value of unconsolidated affiliates represents the fair value adjustments associated with the Company's ModCloth and IPCO investments for which the Company elected to use the fair value option of accounting.

#### *Other Income (Expense)*

Other income (expense) is mainly related to sublease rental income (expense) derived from the sublease of property by the Company as well as gain from legal settlements.

#### *Provision (Benefit) for Income Taxes*

The provision (benefit) for income taxes consist primarily of U.S. federal, state, and foreign income taxes. Deferred tax assets and liabilities are recognized with respect to the tax consequences attributable to differences between the financial statement carrying values and tax basis of assets and liabilities. Deferred tax assets and liabilities are measured using tax rates expected to apply to taxable income in the years in which these temporary differences are expected to be recovered or settled. A valuation allowance is established, when necessary, to reduce deferred tax assets if it is more likely than not that some portion or all the deferred tax assets will not be realized.

Realization of our deferred tax assets is dependent primarily on the generation of future taxable income. In considering the need for a valuation allowance, we consider our historical, as well as future, projected taxable income along with other objectively verifiable evidence. Objectively verifiable evidence includes our realization of tax attributes, assessment of tax credits and utilization of net operating loss carryforwards during the year.

#### *Results of Operations*

The following tables set forth our consolidated results of operations and out consolidated results of operations as a percentage of revenue for the periods presented (in thousands):

	<b>For the Six Months Ended June 30</b>	
	<b>2022</b>	<b>2021</b>
Net service revenue	\$ 17,787	\$22,171
Net product revenue	20,756	4,515
Net revenue from related parties	<u>7,005</u>	<u>1,588</u>
Total net revenue	45,548	28,274
Operating costs and expenses:		
Cost of services <sup>(1)</sup>	11,192	11,471
Cost of product sales <sup>(1)</sup>	15,407	1,908
Sales and marketing	1,186	677
Research and development	2,827	2,424
General and administrative	30,362	14,642
Depreciation and amortization	<u>420</u>	<u>240</u>
Total operating costs and expenses	<u>61,394</u>	<u>31,362</u>
Operating loss	<u>(15,846)</u>	<u>(3,088)</u>
Interest expense	(2,117)	(120)
Change in fair value of promissory notes	(2,566)	—

	<b>For the Six Months Ended June 30</b>	
	<b>2022</b>	<b>2021</b>
Change in fair value of unconsolidated affiliates	(1,982)	4,937
Other income	1,661	312
(Loss) income before income taxes	(20,850)	2,041
Provision (benefit) for income taxes	65	(284)
Net (loss) income	<u>\$(20,915)</u>	<u>\$2,325</u>

(1) Exclusive of depreciation and amortization shown separately.

	<b>For the Six Months Ended June 30,</b>	
	<b>2022</b>	<b>2021</b>
<i>(as a percentage of revenue*)</i>		
Net service revenue	39.0%	78.4%
Net product revenue	45.6	16.0
Net revenue from related parties	15.4	5.6
Total net revenue	100.0	100.0
Operating costs and expenses:		
Cost of services <sup>(1)</sup>	24.6	40.6
Cost of product revenue <sup>(1)</sup>	33.8	6.7
Sales and marketing	2.6	2.4
Research and development	6.2	8.6
General and administrative	66.7	51.8
Depreciation and amortization	0.9	0.8
Total operating costs and expenses	134.8	110.9
Operating loss	(34.8)	(10.9)
Interest expense	(4.6)	(0.4)
Change in fair value of promissory notes	(5.6)	—
Change in fair value of unconsolidated affiliate	(4.4)	17.5
Other income	3.6	1.1
(Loss) income before income taxes	(45.8)	7.2
Provision (benefit) for income taxes	0.1	(1.0)
Net (loss) income	<u>(45.9)%</u>	<u>8.2%</u>

\* Percentages may not sum due to rounding

(1) Exclusive of depreciation and amortization shown separately.

#### Comparison of the Six Months Ended June 30, 2022 and 2021

##### Net service revenue

	<b>For the Six Months Ended June 30</b>			
	<b>2022</b>	<b>2021</b>	<b>\$ Change</b>	<b>% Change</b>
	<i>(in thousands, except percentages)</i>			
Net service revenue	\$ 17,787	\$ 22,171	\$ (4,384)	19.8%

Net service revenue decreased by \$4.4 million, or 19.8%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The Company historically recognizes net revenue as a percentage of service sales. The decrease is primarily due to a client for whom the Company recognized service revenue in 2021 until the Company purchased inventory from the client, and as a result, the Company began recognizing product revenue instead of service revenue starting in the third quarter of 2021. See below for further discussion on product revenue.

##### Net product revenue

	<b>For the Six Months Ended June 30</b>			
	<b>2022</b>	<b>2021</b>	<b>\$ Change</b>	<b>% Change</b>
	<i>(in thousands, except percentages)</i>			
Net product revenue	\$ 20,756	\$ 4,515	\$ 16,241	359.7%

Net product revenue increased by \$16.2 million, or 359.7%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The Company historically recognizes net revenue as a percentage of service sales. Starting in the second quarter of 2021, the Company added product revenue, which was generated from purchased inventory from select clients, to assist those clients with managing inventory through the pandemic in order to continue marketing and selling their particular brand of products. The Company sourced the products from vendors approved by licensees, and the products were received into the Company's leased distribution centers and orders from end-customers were then fulfilled. As a result, the Company recognized the gross revenue for the sale of the inventory-owned products, and the corresponding cost of product revenue in the period the order was fulfilled. The practice of purchasing inventory was unique to 2021 and 2022, and the Company does not anticipate continuing after finding a buyer to distribute the inventory.

##### Net revenue from related parties

	<b>For the Six Months Ended June 30</b>			
	<b>2022</b>	<b>2021</b>	<b>\$ Change</b>	<b>% Change</b>
	<i>(in thousands, except percentages)</i>			
Net revenue from related parties	\$ 7,005	\$ 1,588	\$ 5,417	341.1%

Net revenue from related parties increased by \$5.4 million, or 341.1%, for the six months ended June 30, 2022 as compared to the six months ended

June 30, 2021. Net revenue from related parties is driven by revenue generated from the Company's joint ventures, Modcloth, which was formed in April 2021, and IPCO, which was formed in December 2021.

Cost of services

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Cost of Services	\$ 11,192	\$ 11,471	\$ (279)	(2.4)%
Percent of revenue	24.6%	40.6%		

Cost of services decreased by \$0.3 million, or 2.4%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The decrease in cost of services in 2022 was related to select clients transitioning from service clients to product sales clients; and therefore, the related cost was recorded in cost of product revenue instead of cost of services. Cost of services as a percentage of revenue was 24.6% for the six months ended June 30, 2022 compared to 40.6% for the six months ended June 30, 2021.

Cost of product revenue

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Cost of product revenue	\$ 15,407	1,908	\$13,499	707.5%
Percent of revenue	33.8%	6.7%		

Cost of product revenue increased by \$13.5 million, or 707.5%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The increase was related to the acquisition of inventory starting in the second quarter of 2021 in order to support select clients during the pandemic. The practice of purchasing inventory was unique to 2021 and 2022, and the Company does not anticipate continuing after finding a buyer to distribute the inventory.

Sales and Marketing

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Sales and marketing	\$ 1,186	\$ 677	\$ 509	75.2%
Percent of revenue	2.6%	2.4%		

Sales and marketing expense increased by \$0.5 million, or 75.2%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The increase in sales and marketing expense in 2022 was primarily due to rebuilding of the sales team after a reduction as a result of the COVID-19 pandemic.

## Research and development

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Research and development	\$ 2,827	\$ 2,424	\$ 403	16.6%
Percent of revenue	6.2%	8.6%		

Research and development expense increased by \$0.4 million, or 16.6%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The increase in research and development expense in 2022 was primarily due to general growth in the Company as a result of the economic recovery from the COVID-19 pandemic, along with additional cost investments related to new product launches.

## General and administrative

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
General and administrative	\$ 30,362	\$ 14,642	\$15,720	107.4%
Percent of revenue	66.7%	51.8%		

General and administrative expense increased by \$15.7 million, or 107.4%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The increase in general and administrative expense in 2022 was primarily due to a new distribution center in Pennsylvania, along with additional headcount and operating expense to support the growth in the Company's revenue, strategic initiatives and the closing of the Business Combination.

## Depreciation and amortization

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Depreciation and amortization	\$ 420	\$ 240	\$ 180	75.0%
Percent of revenue	0.9%	0.8%		

Depreciation and amortization expense increased by \$0.2 million, or 75.0%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The increase in depreciation and amortization in 2022 was primarily due to the purchase of new hardware and equipment during the year ended December 31, 2021 and additional capitalized software in 2022.

*Interest expense*

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Interest expense	\$ 2,117	\$ 120	\$ 1,997	1,664.2%
Percent of revenue	4.6%	0.4%		

Interest expense increased by \$2.0 million, or 1,664.2%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The increase in interest expense in 2022 was primarily due to interest on the Company's notes payables issued in August 2021.

*Change in fair value of promissory notes*

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Change in fair value of promissory notes	\$ (2,566)	\$ —	\$ (2,566)	100%
Percent of revenue	(5.6)%	— %		

The Company recognized a loss of \$2.6 million for the promissory notes issued in the second quarter of 2022, which was based on the estimated cash payment needed to repay the promissory notes at the close of the Business Combination.

*Change in fair value of unconsolidated affiliates*

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Change in fair value of unconsolidated affiliates	\$ (1,982)	\$ 4,937	\$ (6,919)	(140.1)%
Percent of revenue	(4.4)%	17.5 %		

Change in fair value of unconsolidated affiliate decreased by \$6.9 million for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The decrease is attributable to the Company's investment in ModCloth, which was formed in April 2021, and IPCO, which was formed in December 2021. The Company elected to apply the fair value option of accounting to the joint ventures. The Company engaged a third-party valuation specialist to assist with the fair value assessments. As a result, the Company recorded fair value adjustments for the investment in connection with its 50% interest during the year ended December 31, 2021 and the six months June 30, 2022. The adjustment in 2022 was primarily driven by changes in forecast due to unexpected supply chain issues.

## Other income

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Other income	\$ 1,661	\$ 312	\$ 1,349	432.4%
Percent of revenue	3.6%	1.1%		

Other income increased by \$1.3 million, or 432.4%, for the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The increase in other income was primarily related to the settlement of deferred revenue of \$1.6 million related to sale of finished inventory to IPCO in the first quarter of 2022.

## Provision (benefit) for income tax

	For the Six Months Ended June 30		<u>\$ Change</u>	<u>% Change</u>
	<u>2022</u>	<u>2021</u>		
	(in thousands, except percentages)			
Provision (benefit) for income tax	\$ 65	\$ (284)	\$ 349	122.9%
Percent of revenue	0.1%	(1.0)%		

The provision for income tax expense increased \$0.3 million, or 122.9%, during the six months ended June 30, 2022 as compared to the six months ended June 30, 2021. The increase was primarily due to full valuation allowances for differences related to GAAP and tax book income related to the Company's joint ventures due to election of accounting for the joint ventures using the equity method fair value option.

## Non-GAAP Financial Measures

We prepare and present our consolidated financial statements in accordance with U.S. GAAP. However, management believes that Adjusted EBITDA, a non-GAAP financial measure, provides investors with additional useful information in evaluating our performance, as these measures are regularly used by security analysts, institutional investors and other interested parties in analyzing operating performance and prospects. This non-GAAP measure is not intended to be a substitute for any U.S. GAAP financial measure and, as calculated, may not be comparable to other similarly titled measures of performance of other companies in other industries or within the same industry.

We calculate and define Adjusted EBITDA as net loss, adjusted to exclude: (1) interest expense, (2) income tax expense and (3) depreciation and amortization.

Adjusted EBITDA is a financial measure that is not required by or presented in accordance with U.S. GAAP. We believe that Adjusted EBITDA, when taken together with our financial results presented in accordance with U.S. GAAP, provides meaningful supplemental information regarding our operating performance and facilitates internal comparisons of our historical operating performance on a more consistent basis by excluding certain items that may not be indicative of our business, results of operations, or outlook. In particular, we believe that the use of Adjusted EBITDA is helpful to our investors as it is a measure used by management in assessing the health of our business and evaluating our operating performance, as well as for internal planning and forecasting purposes.

Adjusted EBITDA is presented for supplemental informational purposes only, has limitations as an analytical tool and should not be considered in isolation or as a substitute for financial information presented in accordance with U.S. GAAP. Some of the limitations of Adjusted EBITDA include that (1) it does not reflect capital commitments to be paid in the future, (2) although depreciation and amortization are non-cash charges, the underlying assets may need to be replaced and adjusted EBITDA does not reflect these capital expenditures, (3) it does not reflect tax payments that may represent a reduction in cash available to us and (4) does not include certain non-recurring cash expenses that we do not believe are representative of our business on a steady-state basis. In addition, our use of



Adjusted EBITDA may not be comparable to similarly titled measures of other companies because they may not calculate Adjusted EBITDA in the same manner, limiting its usefulness as a comparative measure. Because of these limitations, when evaluating our performance, you should consider Adjusted EBITDA alongside other financial measures, including our net loss and other results stated in accordance with U.S. GAAP.

The following table presents a reconciliation of net loss, the most directly comparable financial measure stated in accordance with U.S. GAAP, to Adjusted EBITDA, for each of the periods presented (in thousands):

	Six Months ended June 30,	
	2022	2021
Net loss	\$(20,915)	\$2,325
Interest expense	2,117	120
Provision (benefit) for income taxes	65	(284)
Depreciation and amortization	420	240
Adjusted EBITDA	<u>\$(18,313)</u>	<u>\$1,681</u>

The Adjusted EBITDA presented above in 2021 includes revenue and cost from product revenue, which the Company began during the second quarter in the prior year. In 2021, the Company purchased inventory from select clients to assist those clients with managing inventory through the pandemic in order to continue marketing and selling the particular brand of product. The inventory purchase was a unique situation in 2021 which we do not anticipate continuing after we find a buyer to distribute the inventory.

For the six months ended June 30, 2022, the decrease in Adjusted EBITDA was primarily due to the Company experiencing supply chain issues related to the shifting economy, which resulted in a delay in receiving product for several clients as well as a delay in inventory owned by the Company. As such, the Company sold the inventory at lower prices and realized lower gross margins in the first and second quarter of 2022. In addition, the Company anticipated the closing of the Business Combination in the second quarter of 2022, which would have allowed for investment into the business in areas such as sales and marketing to drive increases in revenue. As a result of these factors, the Company reported lower Adjusted EBITDA (and higher net loss) for the six months ended June 30, 2022.

#### **Other Key Performance Indicators**

We review the following indicators to measure our performance, identify trends affecting our business, formulate business plans, and make strategic decisions. Increases or decreases in our key performance indicators may not correspond with increases or decreases in our revenue.

- *Gross Merchandise Value (GMV).* We derive the substantial part of our revenue from fees we charge for the use of our CaaS platform. These fees are generally correlated with the total value of transactions processed through our platform. We assess the growth in transaction volume using a metric we refer to as GMV which is defined as the combined amount we collect from the shopper of a given transaction, including products, duties and taxes and shipping. This includes the full value collected from shoppers prior to any value being remitted back to our clients. GMV does not represent revenue earned by us; however, the GMV processed through our platform is an indicator of the volume of transactions processed through our CaaS platform.
- *Net Dollar Retention Rate.* We assess our performance in retaining and expanding relationships with our existing client base using a metric we refer to as Net Dollar Retention Rate, which compares our Revenue from the same set of clients across comparable periods. We calculate Net Dollar Retention Rate for a given period as the revenue in that period divided by the revenue in the comparable period in the prior year. Our Net Dollar Retention Rate therefore includes the effect on revenue of any merchant renewals, expansion, contraction and churn but excludes the effect of revenue from clients that contributed to our revenue in the current period but not in the earlier period. A Net Dollar Retention Rate greater than 100% for a given period implies overall growth in revenue from clients that were already generating revenue on our CaaS platform prior to that period.

#### **Liquidity and Capital Resources**

As of June 30, 2022, we had cash of \$1.2 million, which consists of amounts held as bank deposits.

To date, the Company's available liquidity and operations have been financed through equity contributions, line of credit, promissory notes and cash flow from operations. With the close of the Business Combination, the Company believes its existing cash and restricted cash

will be sufficient to support working capital and capital expenditure requirements for at least the next twelve months. The Company believes it has the ability to continue as a going concern.

## *Debt*

### *Line of credit*

Effective January 14, 2015, the Company entered into a Revolving Credit Agreement with a financial institution that provided maximum borrowing under a revolving loan commitment of up to \$2.0 million bearing an interest rate of 2% plus prime rate as published by the Wall Street Journal. Effective July 3, 2020, the Company renewed the line of credit with the financial institution through May 31, 2021 that provided maximum borrowing under a revolving loan commitment of up to \$5.0 million. In May 2021, the maturity date was extended to June 30, 2021 and then further extended to July 31, 2021. The line was then renewed on July 21, 2021 with an expanded credit limit of \$8.0 million, a new maturity date of June 30, 2023 and an amended per annum interest rate of the greater of 2.25% plus prime rate as published by the Wall Street Journal and 5.50%. As of June 30, 2022, the Company had \$5.0 million due on its line of credit with a \$3.0 million letter of credit issued against the line of credit. The line of credit contained covenants regarding certain financial statement amounts and ratios of the Company. The Company received a waiver for its financial statement covenants for the period ended June 30, 2022. In July 2022, the Company amended the financial covenants in the Revolving Credit Agreement to account for updated projections of the financial performance of the Company.

In connection with the closing of the Business Combination, the Company repaid all amounts outstanding under the line of credit and terminated the Revolving Credit Agreement.

### *Paycheck Protection Program Loan*

On April 14, 2020, the Company received loan proceeds of \$2.3 million, maturing on April 22, 2022 with an annual interest rate of 1% pursuant to the Paycheck Protection Program (the "PPP Loan") under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and administered by the U.S. Small Business Administration ("SBA"). The balance as of December 31, 2020 of \$2.3 million is included in Paycheck Protection Program loan payable on the condensed consolidated balance sheets. On September 17, 2021, the PPP Loan was forgiven in full including accrued interest thereon. As such, the Company recorded a gain on loan forgiveness during the year ended December 31, 2021 of \$2.3 million included in other income in the consolidated statement of operations.

### *Notes Payable*

On August 11, 2021, the Company entered into a loan and security agreement ("Note Agreement") with a financial institution that provided for a borrowing commitment of \$15.0 million in the form of promissory notes. In August 2021, the Company borrowed \$10.0 million under the first tranche ("First Tranche Notes"). The Note Agreement had a commitment for additional second tranche borrowings of \$5.0 million through June 30, 2022. In October 2021, the Company borrowed the remaining \$5.0 million committed under the Note Agreement. The borrowings under the Note Agreement were secured by substantially all assets of the Company.

The First and Second Tranche Notes mature on September 1, 2026 and November 1, 2026, respectively, and bear an interest at a rate per annum of 6.25% plus the greater of 3.25% or the prime rate as published by the Wall Street Journal. The Company is required to make interest only payments on the first of each month beginning October 1, 2021 and December 1, 2021, respectively. Beginning October 1, 2023 and December 1, 2023, respectively, the Company is required to make principal payments of \$278,000 and \$139,000, respectively, plus accrued interest on the first of each month through maturity. Upon payment in full of the First and Second Tranche Notes, the Company is required to pay exit fees ("Exit Fee") of \$600,000 and \$300,000, respectively.

In December 2021 the Company borrowed an additional \$6 million from the same financial institution, of which \$1 million was repaid in full on December 31, 2021, and the remaining \$5 million ("Third Tranche Notes") bear an interest at a rate per annum of 6.25% plus the greater of 3.25% or the prime rate as published by the Wall Street

Journal. The Company is required to make interest only payments on the first of each month beginning February 1, 2022, with the full principal amount due on July 1, 2023. Upon payment in full, the Company is required to pay exit fees of \$50,000.

In connection with the Note Agreement, the Company issued warrants to purchase up to 33,357 shares of common stock of the Company (the "Note Warrants") at an exercise price of \$0.01 per share. See below for further discussion of the Note Warrants. On the date of issuance, the Company recorded the fair value of the Note Warrants as a discount to the First Tranche Notes which is being amortized into interest expense over the term of the First Tranche Notes using the effective interest method.

The issuance costs are deferred over the repayment term of the debt. Deferred issuance costs relate to the Company's debt instruments, the short-term and long-term portions are reflected as a deduction from the carrying amount of the related debt.

In July 2022, the Company borrowed an additional \$3 million ("Fourth Tranche Notes") from the financial institution party to the Note Agreement with the Company (Note 6) that bears interest at a rate per annum of 7.75% plus the greater of 3.5% or the prime rate as published by the Wall Street Journal. The Company is required to make interest only payments on the first of each month beginning August 1, 2022, with the full principal amount due on December 31, 2022. In connection with the Fourth Tranche Notes, the Company issued Note Warrants to purchase up to 13,343 shares of common stock of the Company at an exercise price of \$0.01 per share with similar terms to previously issued Note Warrants to the same financial institution (Note 7).

Prior to the closing of the Business Combination, the Note Warrants converted into a number of shares of Nogen common stock in accordance with the applicable warrant agreement. In connection with the closing of the Business Combination, the Company repaid all amounts outstanding under the Note Agreement.

### **Cash Flows**

The following table summarizes our cash flows for the periods presented:

	Six Months Ended	
	June 30,	
	2022	2021
Cash flow used in operating activities	\$(13,193)	\$(11,400)
Cash flow used in investing activities	(226)	(1,949)
Cash flow provided by financing activities	11,555	5,000

#### *Operating Activities*

Our cash flows from operating activities are primarily driven by the activities associated with our Consumer as a Service revenue stream, offset by the cash costs of operations, and are significantly influenced by the timing of and fluctuations in receipts from buyers and related payments to our clients. We typically receive cash from the end users of products sold prior to remitting back to our clients. Our collection and payment cycles can vary from period to period. In addition, seasonality may impact cash flows from operating activities on a sequential quarterly basis during the year.

During the six months ended June 30, 2022, net cash used in operating activities was \$13.2 million, compared to net cash used in operating activities of \$11.4 million during the six months ended June 30, 2021. The primary driver of the change was the increase in net loss and the purchase of inventory.

#### *Investing Activities*

Our primary investing activities have consisted of purchases of property and equipment and software.

During the six months ended June 30, 2022, net cash used in investing activities was \$0.2 million compared to net cash used in investing activities of \$1.9 million during the six months ended June 30, 2021. In the second quarter of 2021, the Company made a \$1.5 million investment into ModCloth.

### *Financing Activities*

Our financing activities consisted primarily of borrowings and repayments of debt as well as repurchases of outstanding common stock.

During the six months ended June 30, 2022, net cash provided by financing activities was \$11.6 million compared to net cash provided by financing activities of \$5.0 million for the six months ended June 30, 2021. The change was primarily due to the addition of promissory notes and increase in use of line of credit.

### *Off-Balance Sheet Arrangements*

We do not have any relationships with other entities or financial partnerships, such as entities often referred to as structured finance or special purpose entities that have been established for the purpose of facilitating off-balance sheet arrangements or other contractually narrow or limited purposes. We did not have any other off-balance sheet arrangements during the periods presented other than the indemnification agreements.

### *Contractual Obligations and Known Future Cash Requirements*

Our principal commitments consist of operating lease for the offices and warehouse located in California and Pennsylvania. Our five monthly lease commitment payments range from approximately \$36 thousand to approximately \$124 thousand. Each of our five lease commitments expire at various times through November 2028. Some of the leases contain renewal options. Minimum rent payments under all operating leases are recognized on a straight-line basis over the term of the lease including any periods of free rent.

Rent expense for the six months ended June 30, 2022 and 2021 was approximately \$2.7 million and \$1.6 million, respectively, and is included in general and administrative expenses in the consolidated statements of operations.

In addition, we anticipate to have future cash requirements related to investment in new products, technology, sales and marketing. Our budgeted expenditure is approximately \$3.7 million for the year ended December 31, 2022.

As of June 30, 2022, the expected future obligations of the Company are as follows:

<b>Contractual obligations</b>	<b>Total</b>	<b>2022</b>	<b>2023</b>	<b>2024</b>	<b>2025</b>	<b>2026</b>	<b>Thereafter</b>
Operating lease obligations	\$7,178	\$1,353	\$1,272	\$873	\$900	\$927	\$ 1,853

### *Critical Accounting Policies and Estimates*

Other than as noted below, there have been no material changes to our critical accounting policies and estimates as disclosed in the Proxy Statement/Prospectus beginning on page 176 thereof, which information is incorporated herein by reference.

The Company elected to account for the Promissory Notes under the fair value option of accounting in accordance with ASC 825 *Financial Instruments* wherein the financial instrument is initially measured at its fair value upon issuance and then subsequently re-measured at its estimated fair value on a recurring basis at each reporting period with the change in fair value recognized in earnings. The portion of the fair value adjustment attributed to a change in the instrument-specific credit risk, if any, is recognized as a component of other comprehensive income or loss.

### *Recently Issued Accounting Pronouncements*

We discuss the potential impact of recent accounting pronouncements in Note 2 to our unaudited condensed consolidated financial statements included as Exhibit 99.1 to this Report, which is incorporated herein by reference.

### *Quantitative and Qualitative Disclosure about Market Risk*

Our market risk disclosures involve forward-looking statements. Actual results could differ materially from those projected in such forward-looking statements. We are exposed to market risk related to changes in inflation, interest rates and credit risk.

### *Inflation*

We do not believe that inflation has had a material effect on our business, financial condition, or results of operations. If our costs were to become subject to significant inflationary pressures, we might not be able to fully offset such higher costs through price increases. Our inability or failure to do so could harm our business, financial condition, and results of operations.

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### *Interest Rate Risk*

We are exposed to market risk from changes in interest rates on our line of credit, which accrues interest at a variable rate. We have not used any derivative financial instruments to manage our interest rate risk exposure. Based upon the outstanding line of credit balance of \$5 million and \$348 thousand as of June 30, 2022 and December 31, 2021, respectively, a hypothetical one percentage point increase or decrease in the interest rate would result in a corresponding increase or decrease in interest expense of approximately \$50,000 and \$3,000 annually, respectively. Our PPP Loan, which incurred an annual 1.0% interest rate, was fully forgiven including accrued interest thereon in fiscal year 2021.

### *Credit Risk*

Financial instruments that potentially subject the Company to concentration of credit risk consist primarily of cash and cash equivalents, restricted cash, and accounts receivable. The Company deposits cash and cash equivalents with high-quality financial institutions. Accounts receivable are typically unsecured. Credit risk is concentrated in two customers who accounted for 84% of accounts receivable as of June 30, 2022 and 88% of the accounts receivable as of December 31, 2021. The Company has historically experienced insignificant credit losses. The Company maintains an allowance for estimated credits losses based on the Company's assessment of the likelihood of collection.

### **Properties**

The properties of the Company are described in the Proxy Statement/Prospectus in the section entitled "Information About Nogin" beginning on page 136 thereof and that information is incorporated herein by reference.

### **Security Ownership of Certain Beneficial Owners and Management**

The following table sets forth information known to us regarding the beneficial ownership of our Common Stock immediately following consummation of the Transactions by:

- each person who is the beneficial owner of more than 5% of the outstanding shares of our Common Stock;
- each of our named executive officers and directors; and
- all of our executive officers and directors as a group

Beneficial ownership is determined according to the rules of the SEC, which generally provide that a person has beneficial ownership of a security if he, she or it possesses sole or shared voting or investment power over that security, including options and warrants that are currently exercisable or exercisable within 60 days. Except as described in the footnotes below and subject to applicable community property laws and similar laws, we believe that each person listed above has sole voting and investment power with respect to such shares. Unless otherwise noted, the address of each beneficial owner is c/o Nogin, Inc., 1775 Flight Way STE 400, Tustin, CA 92782.

The beneficial ownership of our Common Stock is based on 66,694,295 shares of Common Stock issued and outstanding immediately following consummation of the Transactions, including the redemption of Initial Shares as described above and the consummation of the PIPE Investment.

**Beneficial Ownership Table**

Name of Beneficial Owners	Number of Shares of Common Stock Beneficially Owned	Percentage of Outstanding Common Stock
<b>5% Stockholders:</b>		
Jan-Christopher Nugent	11,152,498	16.7%
Software Acquisition Holdings III, LLC (1)	15,684,721	20.5%
Geoffrey Van Haeren(2)	5,659,493	8.5%
<b>Directors and Named Executive Officers:</b>		
Jan-Christopher Nugent	11,152,498	16.7%
Jonathan Huberman(3)	15,762,395	20.5%
Shahriyar Rahmati	—	—
Geoffrey Van Haeren(2)	5,659,493	8.5%
Wilhelmina Fader	—	—
Eileen Moore Johnson	—	—
Deborah Weinswig	—	—
Hussain Baig	—	—
<b>Directors and executive officers as a group (10 individuals)</b>	<b>32,574,386</b>	<b>37.5%</b>

\* Less than one percent.

- (1) Consists of (a) 5,701,957 shares of Common Stock and (b) 9,982,754 shares of Common Stock underlying warrants exercisable within 60 days of August 26, 2022. The Sponsor is the record holder of such securities. The Sponsor is controlled by a board of managers which consists of Jonathan Huberman, Mike Nikzad and Andrew Nikou. As such, they have voting and investment discretion with respect to the securities held of record by the Sponsor and may be deemed to have shared beneficial ownership of the securities held directly by the Sponsor. The address for each of the foregoing is 1980 Festival Plaza Drive, Ste. 300, Las Vegas, Nevada 89135.
- (2) Consists of (a) 5,475,041 shares of Common Stock held directly by Mr. Van Haeren and (b) 184,452 shares of Common Stock held by members of Mr. Van Haeren’s immediate family for which he may be deemed to have beneficial ownership. Mr. Van Haeren disclaims any beneficial ownership of the shares held by such family members except to the extent of his indirect pecuniary interest in such shares.
- (3) Consists of (a) 5,701,957 shares of Common Stock held by the Sponsor, (b) 9,982,754 shares of Common Stock underlying warrants exercisable within 60 days of August 26, 2022 held by the Sponsor, (c) 23,482 shares of Common Stock held directly by Mr. Huberman, (d) 10,714 shares of Common Stock underlying PIPE Warrants exercisable within 60 days of August 26, 2022 and (e) 43,478 shares of Common Stock underlying Convertible Notes exercisable within 60 days of August 26, 2022.

**Directors and Executive Officers**

The Company’s directors and executive officers upon the Closing are described in the Proxy Statement/Prospectus in the section entitled “Management of the Post-Combination Company Following the Business Combination” beginning on page 183 thereof and that information is incorporated herein by reference.

**Directors**

Pursuant to the approval of SWAG stockholders from the Special Meeting, the following persons constitute the Company’s Board as of the Closing: Jan-Christopher Nugent, Jonathan S. Huberman, Geoffrey Van Haeren, Wilhelmina Fader, Eileen Moore Johnson, Hussain Baig and Deborah Weinswig. Mike Nikzad, Andrew K. Nikou, C. Matthew Olton, Stephanie Davis, Steven Guggenheimer and Dr. Peter H. Diamandis resigned as directors of the Company effective as of the Closing. Mr. Baig and Ms. Weinswig were appointed to serve as Class I directors, with terms expiring at the Company’s first annual meeting of stockholders following the Closing; Mmes. Johnson and Fader and Mr. Van Haeren were appointed to serve as Class II directors, with terms expiring at the Company’s second annual meeting of stockholders following the Closing; and Messrs. Huberman and Nugent were appointed to serve as Class III directors, with terms expiring at the Company’s third annual meeting of stockholders following the Closing. Biographical information for these individuals is set forth in the Proxy Statement/Prospectus in the section titled “Management of the Post-Combination Company Following the Business Combination” beginning on page 183, which is incorporated herein by reference.

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### ***Independence of Directors***

Nasdaq listing standards require that a majority of our board of directors be independent. An “independent director” is defined generally as a person other than an officer or employee of the company or any other individual having a relationship which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Our board of directors has determined that Mmes. Weinswig, Johnson and Fader and Mr. Baig are “independent directors” as defined in the Nasdaq listing standards and applicable SEC rules. Our independent directors will have regularly scheduled meetings at which only independent directors are present.

### ***Committees of the Board of Directors***

Effective as of the Closing, the standing committees of the Company’s Board consist of an audit committee (the “Audit Committee”), a compensation committee (the “Compensation Committee”) and a nominating committee (the “Nominating Committee”). Each of the committees report to the Board.

Effective as of the Closing, the Board appointed Mmes. Fader and Johnson and Mr. Baig to serve on the Audit Committee, with Ms. Fader as chair. The Board appointed Mmes. Fader and Johnson and Mr. Baig to serve on the Compensation Committee, with Ms. Johnson as chair. The Board appointed Mmes. Weinswig and Johnson and Mr. Baig to serve on the Nominating Committee, with Ms. Weinswig as chair.

### ***Executive Officers***

Effective as of the Closing, each of Messrs. Huberman and Nikzad resigned as Chairman, Chief Executive Officer and Chief Financial Officer and Vice President of Acquisitions, respectively. Effective as of the Closing, the Board appointed Messrs. Nugent and Huberman to serve as Co-Chief Executive Officers, Mr. Van Haeren to serve as Chief Technology Officer and Shahriyar Rahmati to serve as Chief Financial Officer. Biographical information for these individuals (other than Mr. Rahmati) is set forth in the Proxy Statement/Prospectus in the section titled “Management of the Post-Combination Company Following the Business Combination” beginning on page 183, which is incorporated herein by reference. Biographical information for Mr. Rahmati is below.

*Shahriyar Rahmati*, age 45, joined Nogin as Chief Financial Officer upon consummation of the Business Combination and has over twenty years of experience in various executive-level roles across several industries. From September 2020 until August 2022, Mr. Rahmati served as Principal of RSM US LLP. Previously, he served as Chief Operating Officer of RugsUSA from December 2018 to March 2020 and as Managing Director and Head of Portfolio Operations for Comvest Partners from July 2016 to December 2018. Prior to that, Mr. Rahmati was a Principal at the Gores Group and an Operating Partner at Graham Partners. He holds an MBA from Massachusetts Institute of Technology and a B.A. in Economics from New York University.

### ***Executive Compensation***

The executive compensation of the Company’s named executive officers and directors is described in the Proxy Statement/Prospectus in the section entitled “Executive Compensation” beginning on page 190 thereof and that information is incorporated herein by reference.

### ***Compensation Committee Interlocks and Insider Participation***

None of our executive officers serves as a member of a compensation committee (or other committee performing equivalent functions) of any entity that has one or more executive officers serving on our compensation committee.

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## **Certain Relationships and Related Transactions**

### ***Certain Relationships and Related Person Transactions***

Certain relationships and related person transactions are described in the Proxy Statement/Prospectus in the section entitled “Certain Relationships and Related Person Transactions” beginning on page 252 thereof and are incorporated herein by reference.

In addition, Nogin entered into certain promissory notes during the second quarter of 2022 to certain principal owners and members of management of Nogin that have been identified as related parties. The promissory notes matured on the earlier of one year from issuance or close of the Business Combination and bore per annum interest at the rate of 7.75% plus the greater of 3.50% or the prime rate as published by the Wall Street Journal. In connection with the related party promissory notes, Nogin issued warrants (“Promissory Note Warrants”) to purchase up to 8,785 shares of common stock of Nogin at an exercise price of \$0.01 per share. From such related parties, Nogin received proceeds of approximately \$2.0 million at issuance, of which approximately \$0.2 million was allocated to Promissory Note Warrants. The fair value of the promissory notes with related parties as of June 30, 2022 was \$2.7 million. Prior to the closing of the Business Combination, the Promissory Note Warrants converted into a number of shares of Nogin common stock in accordance with the applicable warrant agreement. The promissory notes were fully repaid in connection with the closing of the Transactions.

### ***Risk Oversight***

Our risk management oversight is described in the Proxy Statement/Prospectus in the section entitled “Management of the Post-Combination Company Following the Business Combination—Risk Oversight” beginning on page 188 thereof and that information is incorporated herein by reference.

### **Legal Proceedings**

Reference is made to the disclosure regarding legal proceedings in the section of the Proxy Statement/Prospectus titled “Information About Nogin—Legal Proceedings” beginning on page 152, which is incorporated herein by reference.

## **Market Price of and Dividends on the Registrant’s Common Equity and Related Stockholder Matters**

### ***Market Price and Dividend Information***

The market price of and dividends on SWAG’s common equity, warrants and units and related stockholder matters is described in the Proxy Statement/Prospectus in the Section entitled “Market Price and Dividend Information” beginning on page 20 thereof and that information is incorporated herein by reference.

The Common Stock and warrants commenced trading on Nasdaq under the symbols “NOGN” and “NOGNW,” respectively, on August 30, 2022, subject to ongoing review of the Company’s satisfaction of all listing criteria following the Business Combination, in lieu of the Class A Stock and warrants of SWAG. SWAG’s units ceased trading separately on Nasdaq on August 29, 2022.

### ***Holdings of Record***

As of the Closing and following the completion of the Transactions, including the redemption of Initial Shares as described above and the consummation of the PIPE Investment, the Company had 66,694,295 shares of Common Stock outstanding held of record by 109 holders, no shares of preferred stock outstanding, and 21,386,688 warrants outstanding held of record by 1 holder. Such amounts do not include DTC participants or beneficial owners holding shares through nominee names.

### ***Securities Authorized for Issuance Under Equity Compensation Plans***

Reference is made to the disclosure described in the Proxy Statement/Prospectus in the section entitled “Proposal No. 6—The Incentive Award Plan Proposal” beginning on page 104 thereof, which is incorporated herein by reference. As described below, the Nogin, Inc. 2022 Incentive Award Plan (the “2022 Plan”) and the material terms thereunder, including the authorization of the initial share reserve thereunder, were approved by SWAG’s stockholders at the Special Meeting.

### **Recent Sales of Unregistered Securities**

Reference is made to the disclosure set forth under Item 3.02 of this Report relating to the issuance of Convertible Notes, PIPE Warrants and PIPE Shares pursuant to the PIPE Investment, which is incorporated herein by reference.

### **Description of Registrant’s Securities to be Registered**

The Company’s securities are described in the Proxy Statement/Prospectus in the section entitled “Description of Securities of the Post-Combination Company” beginning on page 244 thereof and that information is incorporated herein by reference. As described below, the Company’s Second Amended and Restated Certificate of Incorporation was approved by SWAG’s stockholders at the Special Meeting and became effective as of the Closing.



## **Indemnification of Directors and Officers**

The indemnification of our directors and officers is described in the Proxy Statement/Prospectus in the section entitled “Certain Relationships and Related Party Transactions—Director and Officer Indemnification” beginning on page 253 thereof and that information is incorporated herein by reference.

## **Changes in and Disagreements with Accountants on Accounting and Financial Disclosure**

Reference is made to the disclosure set forth under Item 4.01 of this Report relating to the change in the Company’s certifying accountant, which is incorporated herein by reference.

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

The disclosure set forth in Item 1.01 above under the caption “Convertible Notes and Indenture” is incorporated by reference into this Item 2.03.

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

At the Closing, the Company consummated the PIPE Investment. The disclosure under Item 2.01 of this Report relating to the PIPE Investment is incorporated into this Item 3.02 by reference.

The Company issued the foregoing securities under Section 4(a)(2) of the Securities Act of 1933, as amended (the “Securities Act”), and/or Rule 506 of Regulation D promulgated under the Securities Act, as a transaction not requiring registration under Section 5 of the Securities Act. The parties receiving the securities represented their intentions to acquire the securities for investment only and not with a view to or for sale in connection with any distribution, and appropriate restrictive legends were affixed to the certificates representing the securities (or reflected in restricted book entry with the Company’s transfer agent). The parties also had adequate access, through business or other relationships, to information about the Company.

### **Item 3.03. Material Modification to Rights of Security Holders.**

The information set forth in Item 5.03 to this Report is incorporated herein by reference.

### **Item 4.01. Changes in Registrant’s Certified Accountant.**

On August 27, 2022, the Audit Committee approved the engagement of Grant Thornton LLP (“Grant Thornton”) as the Company’s independent registered public accounting firm to audit the Company’s consolidated financial statements for the year ended December 31, 2022. Grant Thornton served as the independent registered public accounting firm of Legacy Nogin prior to the Business Combination. Accordingly, Marcum LLP (“Marcum”), the Company’s independent registered public accounting firm prior to the Business Combination, was informed that it would be replaced by Grant Thornton as the Company’s independent registered public accounting firm.

Marcum’s report on the Company’s financial statements as of December 31, 2021 and for the period from January 5, 2021 (inception) through December 31, 2021 did not contain any adverse opinion or disclaimer of opinion, nor were they qualified or modified as to uncertainty, audit scope or accounting principles, except for an explanatory paragraph regarding substantial doubt about SWAG’s ability to continue as a going concern.

During the period from January 5, 2021 (inception) through December 31, 2021 and the subsequent period through June 30, 2022, there were no: (i) disagreements with Marcum on any matter of accounting principles or practices, financial statement disclosures or audited scope or procedures, which disagreements if not resolved to Marcum’s satisfaction would have caused Marcum to make reference to the subject matter of the disagreement in connection with its report or (ii) reportable events as defined in Item 304(a)(1)(v) of Regulation S-K, other than a previously disclosed material weakness in SWAG’s internal control over financial reporting related to SWAG’s accounting for complex financial instruments identified by SWAG, which resulted in the restatement of SWAG’s financial statements for certain periods.

During the period from January 5, 2021 (inception) to December 31, 2021 and the interim period through June 30, 2022, the Company did not consult Grant Thornton with respect to either (i) the application of accounting principles to a specified transaction, either completed or proposed; or the type of audit opinion that might be rendered on the Company’s financial statements, and no written report or oral advice was provided to the Company by Grant Thornton that Grant Thornton concluded was an important factor considered by the Company in reaching a decision as to the accounting, auditing or financial reporting issue; or (ii) any matter that was either the subject of a disagreement, as that term is described in Item 304(a)(1)(iv) of Regulation S-K under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and the related instructions to Item 304 of Regulation S-K under the Exchange Act, or a reportable event, as that term is defined in Item 304(a)(1)(v) of Regulation S-K under the Exchange Act.

The Company has provided Marcum with a copy of the disclosures made by the Company in response to this Item 4.01 and has requested that Marcum furnish the Company with a letter addressed to the SEC stating whether it agrees with the statements made by the registrant in response to this Item 304(a) and, if not, stating the respects in which it does not agree. A letter from Marcum is attached as Exhibit 16.1 to this Report.

### **Item 5.01. Changes in Control of the Registrant.**

The information set forth above under Item 1.01 and Item 2.01 of this Report is incorporated herein by reference.

### **Item 5.02. Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.**

The information set forth above in the sections titled “Directors and Officers,” “Executive Compensation,” “Certain Relationships and Related Transactions” and “Indemnification of Directors and Officers” in Item 2.01 to this Report is incorporated herein by reference.

As previously disclosed, at the Special Meeting, the stockholders of SWAG considered and approved the 2022 Plan which became effective immediately upon the Closing. A description of the 2022 Plan is included in the Proxy Statement/Prospectus in the section entitled “Proposal No. 6—The Incentive Award Plan Proposal” beginning on page 104 thereof, which is incorporated herein by reference.

The foregoing description of the 2022 Plan is qualified in its entirety by the full text of the 2022 Plan and the related forms of award agreements under the 2022 Plan, which are attached hereto as Exhibits 10.7, 10.8 and 10.9, respectively, and incorporated herein by reference.

### **Item 5.03. Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.**

On August 26, 2022, in connection with the consummation of the Transactions, the Company amended and restated its certificate of incorporation, effective as of the Closing (the “A&R Charter”), and amended and restated its bylaws (as amended, the “A&R Bylaws”) effective as of the Closing.

Copies of the A&R Charter and the A&R Bylaws are attached as Exhibit 3.1 and Exhibit 3.2 to this Report, respectively, and are incorporated herein by reference. The material terms of each of the A&R Charter and the A&R Bylaws and the general effect upon the rights of holders of the Company's capital stock are included in the Proxy Statement/Prospectus under the sections titled "Proposal No. 2—The Charter Approval Proposal," "Proposal No. 3—The Governance Proposal," "Comparison of Stockholders' Rights" and "Description of Securities of the Post-Combination Company" beginning on pages 92, 96, 235, and 244 of the Proxy Statement/Prospectus, respectively, which are incorporated herein by reference.

**Item 5.05. Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.**

In connection with the Business Combination, on August 27, 2022, the Board approved and adopted a new Code of Ethics and Conduct applicable to all employees, officers and directors of the Company. A copy of the Code of Ethics and Conduct can be found at <https://ir.nogin.com/> under the link "Governance." The above description of the Code of Ethics and Conduct does not purport to be complete and is qualified in its entirety by reference to the full text of the Code of Business Conduct and Ethics, a copy of which is filed as Exhibit 14.1 hereto and incorporated herein by reference.

**Item 5.06. Change in Shell Company Status.**

As a result of the Business Combination, the Company ceased to be a shell company. Reference is made to the disclosure in the Proxy Statement/Prospectus in the sections entitled "Proposal No. 1—The Business Combination Proposal" beginning on page 90 thereof, which is incorporated herein by reference.

**Item 8.01. Other Events.**

On August 29, 2022, the Company issued a press release announcing the completion of the Business Combination, a copy of which is furnished as Exhibit 99.3 hereto.

The information set forth in Item 8.01 (including Exhibit 99.3) shall not be deemed “filed” for purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities of that section, nor shall it be deemed incorporated by reference in any filing under the Securities Act or the Exchange Act, except as expressly set forth by specific reference in such a filing.

**Item 9.01. Financial Statement and Exhibits.****(a) Financial Statements of Businesses Acquired**

The audited consolidated financial statements of Legacy Nogin as of and for the years ended December 31, 2021 and 2020 and the related notes are included in the Proxy Statement/Prospectus beginning on page F-49 of the Proxy Statement/Prospectus, which is incorporated herein by reference.

The unaudited condensed consolidated financial statements of Legacy Nogin as of and for the six months ended June 30, 2022 and 2021 are set forth in Exhibit 99.1 hereto and are incorporated herein by reference.

**(b) Pro forma financial information**

The unaudited pro forma condensed combined financial information of the Company as of and for the year ended December 31, 2021 is included in the Proxy Statement/Prospectus in the section entitled “Unaudited Pro Forma Condensed Combined Financial Information” beginning on page 68 of the Proxy Statement/Prospectus, which is incorporated herein by reference.

The unaudited pro forma condensed combined financial information of the Company as of and for the six months ended June 30, 2022 are set forth in Exhibit 99.2 hereto and are incorporated herein by reference.

**(c) Exhibits.**

<u>Exhibit Number</u>	<u>Description</u>	<u>Incorporated by Reference</u>		
		<u>Form</u>	<u>Exhibit</u>	<u>Filing Date</u>
2.1*	<a href="#"><u>Agreement and Plan of Merger, dated as of February 14, 2022, by and among Software Acquisition Group Inc. III, Nuevo Merger Sub, Inc. and Branded Online, Inc. dba Nogin.</u></a>	S-4	2.1	2/14/22
2.2	<a href="#"><u>Amendment to Agreement and Plan of Merger, dated as of April 19, 2022, by and among Software Acquisition Group Inc. III, Nuevo Merger Sub, Inc. and Branded Online, Inc. dba Nogin.</u></a>	S-4	2.2	5/16/22
2.3	<a href="#"><u>Amendment to Agreement and Plan of Merger, dated as of August 26, 2022, by and among Software Acquisition Group Inc. III, Nuevo Merger Sub, Inc., Branded Online, Inc. dba Nogin, Jan Nugent and Geoff Van Haeren.</u></a>			
3.1	<a href="#"><u>Second Amended and Restated Certificate of Incorporation of Nogin, Inc.</u></a>			
3.2	<a href="#"><u>Second Amended and Restated Bylaws of Nogin, Inc.</u></a>			
4.1	<a href="#"><u>Specimen Common Stock Certificate.</u></a>	S-1	4.2	7/14/21
4.2	<a href="#"><u>Specimen Warrant Certificate.</u></a>	S-1	4.3	7/14/21

<u>Exhibit Number</u>	<u>Description</u>	<u>Form</u>	<u>Exhibit</u>	<u>Filing Date</u>
4.3	<a href="#"><u>Warrant Agreement, dated as of July 28, 2021, by and between the Company and Continental Stock Transfer &amp; Trust Company, as warrant agent.</u></a>	8-K	4.1	8/02/21
4.4	<a href="#"><u>Convertible Notes Indenture, dated as of August 26, 2022, by and among the Company, the guarantors named therein and the subscribers named therein.</u></a>			
4.5	<a href="#"><u>Form of 7.00% Convertible Senior Notes due 2026 (included in Exhibit 4.4).</u></a>			
4.6	<a href="#"><u>PIPE Warrant Agreement, dated as of August 26, 2022, by and among the Company and Continental Stock Transfer &amp; Trust Company, as warrant agent.</u></a>			
10.1	<a href="#"><u>Amended and Restated Registration Rights Agreement, dated as of August 26, 2022, by and among the Company, certain equityholders of the Company named therein and certain equityholders of Legacy Nogin named therein.</u></a>			
10.2	<a href="#"><u>Letter Agreement, dated as of July 28, 2021, by and among the Company, its officers, its directors and Sponsor.</u></a>	8-K	10.1	8/02/21
10.3	<a href="#"><u>Sponsor Support Agreement, dated as of February 14, 2022, by and among the Company, Sponsor and Legacy Nogin.</u></a>	S-4	10.9	2/14/22
10.4	<a href="#"><u>Form of Convertible Note Subscription Agreement.</u></a>	S-4	10.14	5/16/22
10.5	<a href="#"><u>Form of Indemnification Agreement.</u></a>	S-4	10.13	7/18/22
10.6	<a href="#"><u>Branded Online, Inc. 2013 Stock Incentive Plan.</u></a>			
10.7	<a href="#"><u>Nogin, Inc. 2022 Incentive Award Plan.</u></a>			
10.8	<a href="#"><u>Form of Stock Option Grant Notice and Stock Option Agreement under the Nogin, Inc. 2022 Incentive Award Plan.</u></a>			
10.9	<a href="#"><u>Form of Restricted Stock Unit Grant Notice and Restricted Stock Unit Agreement under the Nogin, Inc. 2022 Incentive Award Plan.</u></a>			
10.10	<a href="#"><u>Form of Equity PIPE Subscription Agreement.</u></a>			
14.1	<a href="#"><u>Code of Business Conduct and Ethics of Nogin, Inc.</u></a>			
16.1	<a href="#"><u>Letter from Marcum LLP to the Securities and Exchange Commission.</u></a>			
21.1	<a href="#"><u>Subsidiaries of the Company.</u></a>			
99.1	<a href="#"><u>Unaudited condensed consolidated financial statements of Legacy Nogin as of and for the six months ended June 30, 2022 and 2021.</u></a>			
99.2	<a href="#"><u>Unaudited pro forma condensed combined financial information of the Company as of and for the six months ended June 30, 2022.</u></a>			
99.3	<a href="#"><u>Press Release dated August 29, 2022.</u></a>			
104	Cover Page Interactive Data File (embedded within the Inline XBRL document).			

\* Certain of the exhibits and schedules to this Exhibit have been omitted in accordance with RegulationS-K Item 601(a)(5). The Company agrees to furnish a copy of all omitted exhibits and schedules to the SEC upon its request.

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**SIGNATURES**

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.

Date: September 1, 2022

**Nogin, Inc.**

By: /s/ Jan-Christopher Nugent

Name: Jan-Christopher Nugent

Title: Chief Executive Officer and Chairman

## AMENDMENT TO AGREEMENT AND PLAN OF MERGER

THIS AMENDMENT TO AGREEMENT AND PLAN OF MERGER (this "Amendment") is made and entered into as of August 26, 2022 by and among Software Acquisition Group Inc. III, a Delaware corporation ("Parent"), Nuevo Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of Parent ("Merger Sub"), and Branded Online, Inc. dba Nogin, a Delaware corporation (the "Company"), and amends that certain Agreement and Plan of Merger, dated as of February 14, 2022, as previously amended (the "Merger Agreement"), by and among Parent, Merger Sub, and the Company (collectively, the "Parties"). Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Merger Agreement.

WHEREAS, the Parties desire to amend the Merger Agreement pursuant to Section 9.13 of the Merger Agreement.

NOW, THEREFORE, in consideration of the covenants and agreements contained herein, and certain other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto, intending to be legally bound, hereby agree as follows:

1. Amendments to the Merger Agreement Effective as of the execution hereof, the Company, Parent, and the Excess Cash Stockholders agree that the following shall be added at the end of Section 2.2 of the Merger Agreement:

"Notwithstanding anything to the contrary in the Merger Agreement, any Cash Merger Consideration payable to the Excess Cash Stockholders, in their capacity as stockholders of the Company with respect to their Cash Electing Shares, pursuant to Section 2.3(a) and Section 2.6 of the Merger Agreement shall be payable as follows:

(i) on the date that is the 179th day following the Closing (the "Initial Interim Payment Date"), Parent shall pay to the Excess Cash Stockholders an aggregate amount of cash equal to \$5 million (allocated among the Excess Cash Stockholders in accordance with Exhibit H) (the "Interim Payment Amount"); provided, however, that if Parent is prohibited from paying all or a portion of the Interim Payment Amount on the Initial Interim Payment Date because the aggregate amount of all fees and expenses incurred by Parent, the Company and their respective Subsidiaries in connection with the Transactions (the "Fees and Expenses"), together with the Cash Merger Consideration actually paid at Closing (the "Closing Cash") and the Interim Payment Amount (collectively, the "Transaction Expenses") would exceed \$40.0 million (the "Expense Cap"), then on the Initial Interim Payment Date, Parent shall pay to the Excess Cash Stockholders an amount equal to the difference of (x) \$5.0 million and (y) the amount resulting from the difference of (A) the Expense Cap and (B) the sum of the Fees and Expenses and the Closing Cash; provided further, that Parent shall pay to the Excess Cash Stockholders the balance, if any, of the Interim Payment Amount as soon as practical following the Initial Interim Payment Date if it determines in good faith that it is permitted to do so in compliance with the Expense Cap; and

(ii) on the earlier of (x) the date on which Parent completes a primary offering of equity securities that generates gross proceeds to Parent equal to or in excess of \$15,000,000 and (y) the date that is four years and ninety-one days following the Closing (the "Final Payment Date"), Parent shall pay to the Excess Cash Stockholders an amount of cash equal to the lesser of (A) the difference of the Cash Merger Consideration owed to the Excess Cash Stockholders with respect to their Cash Electing Shares and the Interim Payment Amount (allocated among the Excess Cash Stockholders in accordance with Exhibit H) and (B) the amount resulting from the difference of (x) the Expense Cap and (y) the Transaction Expenses the "Final Payment Amount""); provided, however, in no

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event shall the Excess Cash Stockholders be paid in excess of the Cash Merger Consideration that the Excess Cash Stockholders would have otherwise been entitled to receive pursuant to Section 2.3(a) and Section 2.6 of the Merger Agreement with respect to their Cash Electing Shares (the "Excess Cash Stockholders Cash Consideration Amount"). If the Final Payment Amount does not equal the Excess Cash Stockholders Cash Consideration Amount, Parent shall issue the Excess Cash Stockholders a number of shares of Parent Common Stock equal to the quotient of (X) the difference of (I) the Excess Cash Stockholders Cash Consideration Amount and (II) the sum of the Final Payment Amount and the Interim Payment Amount divided by (Y) the 10-day volume weighted average trading price of Parent Common Stock on NASDAQ (or such other stock exchange that Parent Common Stock is then traded) prior to the Final Payment Date, and following such issuance of Parent Common Stock, the Excess Cash Stockholders shall be deemed to have received the Cash Merger Consideration to which they were entitled in full."

Effective as of the execution hereof, the Company, Parent, and the Excess Cash Stockholders agree that the information set forth in Annex A hereto shall be added as Exhibit H to the Merger Agreement:

2. No Further Amendment. The Parties, Jan Nugent, and Geoff Van Haeren agree that, except as provided herein, all other provisions of the Merger Agreement shall continue unmodified, in full force and effect and constitute legal and binding obligations of all parties thereto in accordance with its terms. This Amendment forms an integral and inseparable part of the Merger Agreement.

3. References. All references to the "Agreement" (including "hereof," "herein," "hereunder," "hereby" and "this Agreement") in the Merger Agreement shall refer to the Merger Agreement as amended by this Amendment. Notwithstanding the foregoing, references to the date of the Merger Agreement (as amended hereby) and references in the Merger Agreement to "the date hereof," "the date of this Agreement" and terms of similar import shall in all instances continue to refer to February 14, 2022.

4. Other Miscellaneous Terms. Sections 9.3 through 9.14, Section 9.16 and Section 9.17 of the Merger Agreement (as amended by this Amendment) shall apply *mutatis mutandis* to this Amendment, as if set forth in full herein.

[Signature pages follow]

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IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed and delivered as of the date first written above.

**SOFTWARE ACQUISITION GROUP INC. III**

By: /s/ Jonathan Huberman

Name: Jonathan Huberman

Title: Chairman, CEO & CFO

[Signature Page to Amendment to Agreement and Plan of Merger]



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**NUEVO MERGER SUB, INC.**

By: /s/ Jonathan Huberman  
Name: Jonathan Huberman  
Title: Chairman, CEO & CFO

/s/ Jan Nugent  
Jan Nugent

/s/ Geoff Van Haeren  
Geoff Van Haeren

[Signature Page to Amendment to Agreement and Plan of Merger]

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**BRANDED ONLINE, INC. DBA NOGIN**

By: /s/ Jan Nugent  
Name: Jan Nugent  
Title: Chief Executive Officer

[Signature Page to Amendment to Agreement and Plan of Merger]

**SECOND AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
SOFTWARE ACQUISITION GROUP INC. III**

Software Acquisition Group Inc. III (the "Corporation"), a corporation organized and existing under the General Corporation Law of the State of Delaware (the "DGCL"), does hereby certify as follows:

1. The name of the Corporation is Software Acquisition Group Inc. III. The Corporation was incorporated under the name Software Acquisition Group Inc. III by the filing of its original Certificate of Incorporation with the Secretary of State of the State of Delaware on January 5, 2021 (the "Original Certificate").

2. An Amended and Restated Certificate of Incorporation, which amended and restated the Original Certificate in its entirety, was filed with the Secretary of State of the State of Delaware on July 28, 2021 (as amended from time to time, the "Existing Certificate").

3. This Second Amended and Restated Certificate of Incorporation (the "Second Amended and Restated Certificate"), which amends and restates the Existing Certificate in its entirety, has been approved by the Board of Directors of the Corporation (the "Board of Directors") in accordance with Sections 242 and 245 of the DGCL and has been adopted by the stockholders of the Corporation at a meeting of the stockholders of the Corporation in accordance with the provisions of Section 211 of the DGCL.

4. The text of the Existing Certificate is hereby amended and restated by this Second Amended and Restated Certificate to read in its entirety as set forth in EXHIBIT A attached hereto.

5. This Second Amended and Restated Certificate shall become effective on the date of filing with the Secretary of State of the State of Delaware.

6. IN WITNESS WHEREOF, Software Acquisition Group Inc. III has caused this Second Amended and Restated Certificate to be signed by a duly authorized officer of the Corporation, on August 26, 2022.

**SOFTWARE ACQUISITION GROUP INC. III**

By: /s/ Jonathan Huberman  
Name: Jonathan Huberman  
Title: Chairman, CEO & CFO

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**EXHIBIT A**

**ARTICLE I**  
**NAME**

The name of the corporation is Nogin, Inc. (the "Corporation").

**ARTICLE II**  
**REGISTERED OFFICE AND AGENT**

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

**ARTICLE III**  
**PURPOSE**

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware (the "DGCL") as it now exists or may hereafter be amended and supplemented.

**ARTICLE IV**  
**CAPITAL STOCK**

The Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares of capital stock which the Corporation shall have authority to issue is 550,000,000. The total number of shares of Common Stock that the Corporation is authorized to issue is 500,000,000, having a par value of \$0.0001 per share, and the total number of shares of Preferred Stock that the Corporation is authorized to issue is 50,000,000, having a par value of \$0.0001 per share.

The Corporation has the authority to create and issue rights, warrants and options entitling the holders thereof to acquire from the Corporation any shares of its capital stock of any class or classes, with such rights, warrants and options to be evidenced by or in instrument(s) approved by the Board. The Board is empowered to set the exercise price, duration, times for exercise and other terms and conditions of such rights, warrants or options; provided, however, that the consideration to be received for any shares of capital stock issuable upon exercise thereof may not be less than the par value thereof.

The designations and the powers, privileges and rights, and the qualifications, limitations or restrictions thereof in respect of each class of capital stock of the Corporation are as follows:

A. COMMON STOCK.

1. General. The voting, dividend, liquidation, and other rights and powers of the Common Stock are subject to and qualified by the rights, powers and preferences of any series of Preferred Stock as may be designated by the Board of Directors of the Corporation (the "Board of Directors") and outstanding from time to time.

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2. Voting.

- a. Except as otherwise provided herein (including any Certificate of Designation) or otherwise required by law, the holders of the shares of Common Stock shall exclusively possess all voting power with respect to the Corporation.
- b. Except as otherwise provided herein or expressly required by law, each holder of Common Stock, as such, shall be entitled to vote on each matter submitted to a vote of stockholders and shall be entitled to one (1) vote for each share of Common Stock held of record by such holder as of the record date for determining stockholders entitled to vote on such matter.
- c. Except as otherwise provided herein (including any Certificate of Designation) or otherwise required by law, at any annual or special meeting of the stockholders of the Corporation, holders of the Common Stock shall have the exclusive right to vote for the election of directors and on all other matters properly submitted to a vote of the stockholders.
- d. Except as otherwise required by law, holders of Common Stock, as such, shall not be entitled to vote on any amendment to this Second Amended and Restated Certificate (including any Certificate of Designation (as defined below)) that relates solely to the rights, powers, preferences (or the qualifications, limitations or restrictions thereof) or other terms of one or more outstanding series of Preferred Stock if the holders of such affected series are entitled, either separately or together with the holders of one or more other such series, to vote thereon pursuant to this Second Amended and Restated Certificate (including any Certificate of Designation) or pursuant to the DGCL.

Subject to the rights of any holders of any outstanding series of Preferred Stock, the number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the Corporation entitled to vote, irrespective of the provisions of Section 242(b)(2) of the DGCL.

3. Dividends. Subject to applicable law and the rights and preferences of any holders of any outstanding series of Preferred Stock, the holders of Common Stock, as such, shall be entitled to the payment of dividends on the Common Stock when, as and if declared by the Board of Directors in accordance with applicable law.

4. Liquidation. Subject to the rights and preferences of any holders of any shares of any outstanding series of Preferred Stock, in the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the funds and assets of the Corporation that may be legally distributed to the Corporation's stockholders shall be distributed among the holders of the then outstanding Common Stock *pro rata* in accordance with the number of shares of Common Stock held by each such holder.

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**B. PREFERRED STOCK**

Shares of Preferred Stock may be issued from time to time in one or more series, each of such series to have such terms as stated or expressed herein and in the resolution or resolutions providing for the creation and issuance of such series adopted by the Board of Directors as hereinafter provided.

Authority is hereby expressly granted to the Board of Directors from time to time to issue the Preferred Stock in one or more series, and in connection with the creation of any such series, by adopting a resolution or resolutions providing for the issuance of the shares thereof and by filing a certificate of designation relating thereto in accordance with the DGCL (a "Certificate of Designation"), to determine and fix the number of shares of such series and such voting powers, full or limited, or no voting powers, and such designations, preferences and relative participating, optional or other special rights, and qualifications, limitations or restrictions thereof, including without limitation thereof, dividend rights, conversion rights, redemption privileges and liquidation preferences, and to increase or decrease (but not below the number of shares of such series then outstanding) the number of shares of any series as shall be stated and expressed in such resolutions, all to the fullest extent now or hereafter permitted by the DGCL. Without limiting the generality of the foregoing, the resolution or resolutions providing for the creation and issuance of any series of Preferred Stock may provide that such series shall be superior or rank equally or be junior to any other series of Preferred Stock to the extent permitted by law and this Second Amended and Restated Certificate (including any Certificate of Designation). Except as otherwise required by law, holders of any series of Preferred Stock shall be entitled only to such voting rights, if any, as shall expressly be granted thereto by this Second Amended and Restated Certificate (including any Certificate of Designation).

The number of authorized shares of Preferred Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the Corporation entitled to vote, irrespective of the provisions of Section 242(b)(2) of the DGCL.

**ARTICLE V**  
**BOARD OF DIRECTORS**

For the management of the business and for the conduct of the affairs of the Corporation it is further provided that:

A. Subject to the special rights of the holders of one or more outstanding series of Preferred Stock to elect directors, the directors of the Corporation shall be classified with respect to the time for which they severally hold office into three classes, as nearly equal in number as possible and designated as Class I, Class II and Class III. The initial Class I directors shall serve for a term expiring at the first annual meeting of the stockholders following the date of this Second Amended and Restated Certificate; the initial Class II directors shall serve for a term expiring at the second annual meeting of the stockholders following the date of this Second Amended and Restated Certificate; and the initial Class III directors shall serve for a term expiring at the third annual meeting following the date of this Second Amended and Restated Certificate. At each annual meeting of the stockholders of the Corporation beginning with the first annual meeting of the

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stockholders following the date of this Second Amended and Restated Certificate, subject to the special rights of the holders of one or more outstanding series of Preferred Stock to elect directors, the successors of the class of directors whose term expires at that meeting shall be elected to hold office for a term expiring at the annual meeting of the stockholders held in the third year following the year of their election. Each director shall hold office until his or her successor is duly elected and qualified or until his or her earlier death, resignation, disqualification or removal. No decrease in the number of directors shall shorten the term of any incumbent director. The Board of Directors is authorized to assign members of the Board of Directors already in office to Class I, Class II and Class III.

B. Except as otherwise expressly provided by the DGCL or this Second Amended and Restated Certificate, the business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors. The number of directors which shall constitute the whole Board of Directors shall be fixed exclusively by one or more resolutions adopted from time to time by the Board of Directors. Directors shall be elected by a plurality of the votes cast by the stockholders present in person or represented by proxy at the meeting and entitled to vote thereon.

C. Subject to the special rights of the holders of one or more outstanding series of Preferred Stock to elect directors, the Board of Directors or any individual director may be removed from office at any time, but only for cause and only by the affirmative vote of the holders of at least two-thirds (66 and 2/3%) of the voting power of all of the then outstanding shares of voting stock of the Corporation entitled to vote at an election of directors.

D. Subject to the special rights of the holders of one or more outstanding series of Preferred Stock to elect directors, except as otherwise provided by law, any vacancies on the Board of Directors resulting from death, resignation, disqualification, retirement, removal or other causes and any newly created directorships resulting from any increase in the number of directors shall be filled exclusively by the affirmative vote of a majority of the directors then in office, even though less than a quorum, or by a sole remaining director (other than any directors elected by the separate vote of one or more outstanding series of Preferred Stock), and shall not be filled by the stockholders. Any director appointed in accordance with the preceding sentence shall hold office until the expiration of the term of the class to which such director shall have been appointed or until his or her earlier death, resignation, retirement, disqualification, or removal.

E. Whenever the holders of any one or more series of Preferred Stock issued by the Corporation shall have the right, voting separately as a series or separately as a class with one or more such other series, to elect directors at an annual or special meeting of stockholders, the election, term of office, removal and other features of such directorships shall be governed by the terms of this Second Amended and Restated Certificate (including any Certificate of Designation). Notwithstanding anything to the contrary in this Article V, the number of directors that may be elected by the holders of any such series of Preferred Stock shall be in addition to the number fixed pursuant to paragraph B of this Article V, and the total number of directors constituting the whole Board of Directors shall be automatically adjusted accordingly. Except as otherwise provided in the Certificate of Designation(s) in respect of one or more series of Preferred Stock, whenever the holders of any series of Preferred Stock having such right to elect additional directors are divested of such right pursuant to the provisions of such Certificate of Designation(s), the terms of office of all such additional directors elected by the holders of such series of Preferred Stock, or elected to fill any vacancies resulting from the death, resignation, disqualification or removal of such additional directors, shall forthwith terminate (in which case each such director thereupon shall cease to be qualified as, and shall cease to be, a director) and the total authorized number of directors of the Corporation shall automatically be reduced accordingly.

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F. In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to adopt, amend or repeal the Amended and Restated Bylaws of the Corporation (as amended and/or restated from time to time, the "Bylaws"). In addition to any vote of the holders of any class or series of stock of the Corporation required by applicable law or by this Second Amended and Restated Certificate (including any Certificate of Designation in respect of one or more series of Preferred Stock) or the Bylaws of the Corporation, the adoption, amendment or repeal of the Bylaws of the Corporation by the stockholders of the Corporation shall require the affirmative vote of the holders of at least two-thirds (66 and 2/3%) of the voting power of all of the then outstanding shares of voting stock of the Corporation entitled to vote generally in an election of directors.

G. The directors of the Corporation need not be elected by written ballot unless the Bylaws so provide.

#### **ARTICLE VI STOCKHOLDERS**

A. Any action required or permitted to be taken by the stockholders of the Corporation must be effected at an annual or special meeting of the stockholders of the Corporation, and shall not be taken by written consent in lieu of a meeting. Notwithstanding the foregoing, any action required or permitted to be taken by the holders of any series of Preferred Stock, voting separately as a series or separately as a class with one or more other such series, may be taken without a meeting, without prior notice and without a vote, to the extent expressly so provided by the applicable Certificate of Designation relating to such series of Preferred Stock, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding shares of the relevant series of Preferred Stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted and shall be delivered to the Corporation in accordance with the applicable provisions of the DGCL.

B. Subject to the special rights of the holders of one or more series of Preferred Stock, special meetings of the stockholders of the Corporation may be called, for any purpose or purposes, at any time only by or at the direction of the Board of Directors, the Chairperson of the Board of Directors, the Chief Executive Officer or the President, and shall not be called by any other person or persons.

C. Advance notice of stockholder nominations for the election of directors and of other business proposed to be brought by stockholders before any meeting of the stockholders of the Corporation shall be given in the manner provided in the Bylaws of the Corporation.



**ARTICLE VII**  
**LIABILITY**

No director of the Corporation shall have any personal liability to the Corporation or its stockholders for monetary damages for any breach of fiduciary duty as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the DGCL as the same exists or hereafter may be amended. Any amendment, repeal or modification of this Article VII, or the adoption of any provision of the Second Amended and Restated Certificate inconsistent with this Article VII, shall not adversely affect any right or protection of a director of the Corporation with respect to any act or omission occurring prior to such amendment, repeal, modification or adoption. If the DGCL is amended after approval by the stockholders of this Article VII to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the DGCL as so amended.

**ARTICLE VIII**  
**INDEMNIFICATION**

A. To the fullest extent permitted by the DGCL or any other applicable law, as it presently exists or may hereafter be amended, the Corporation shall indemnify and hold harmless each person who is or was made a party or is threatened to be made a party to or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (a "proceeding") by reason of the fact that he or she or a person for whom he or she is the legal representative is or was a director or officer of the Corporation or, while serving as a director or officer of the Corporation, is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust, other enterprise or nonprofit entity, including service with respect to an employee benefit plan (an "indemnitee"), whether the basis of such proceeding is alleged action in an official capacity as a director, officer, employee or agent, or in any other capacity while serving as a director, officer, employee or agent, against all liability and loss suffered and expenses (including, attorneys' fees, judgments, fines, ERISA excise taxes and penalties and amounts paid in settlement) reasonably incurred by such indemnitee in connection with such proceeding; provided that such indemnitee acted in good faith and in a manner such indemnitee reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe such indemnitee's conduct was unlawful. The Corporation shall to the fullest extent not prohibited by applicable law pay the expenses (including attorneys' fees) incurred by an indemnitee in defending or otherwise participating in any proceeding in advance of its final disposition; provided, however, that, to the extent required by applicable law, such payment of expenses in advance of the final disposition of the proceeding shall be made only upon receipt of an undertaking, by or on behalf of the indemnitee, to repay all amounts so advanced if it shall ultimately be determined that the indemnitee is not entitled to be indemnified under this Article VIII or otherwise. The rights to indemnification and advancement of expenses conferred by this Article VIII shall be contract rights and such rights shall continue as to an indemnitee who has ceased to be a director, officer, employee or agent and shall inure to the benefit of his or her heirs, executors and administrators. Notwithstanding the foregoing provisions of this Article VIII, except for proceedings to enforce rights to indemnification and advancement of expenses, the Corporation shall indemnify and advance expenses to an indemnitee in connection with a proceeding (or part thereof) initiated by such indemnitee only if such proceeding (or part thereof) was authorized by the Board.

B. The rights to indemnification and advancement of expenses conferred on any indemnitee by this Article VIII shall not be exclusive of any other rights that any indemnitee may have or hereafter acquire under law, this Second Amended and Restated Certificate, the Bylaws, an agreement, vote of stockholders or disinterested directors, or otherwise.

C. Any repeal or amendment of this Article VIII by the stockholders of the Corporation or by changes in law, or the adoption of any other provision of this Second Amended and Restated Certificate inconsistent with this Article VIII, shall, unless otherwise required by law, be prospective only (except to the extent such amendment or change in law permits the Corporation to provide broader indemnification rights on a retroactive basis than permitted prior thereto), and shall not in any way diminish or adversely affect any right or protection existing at the time of such repeal or amendment or adoption of such inconsistent provision in respect of any proceeding (regardless of when such proceeding is first threatened, commenced or completed) arising out of, or related to, any act or omission occurring prior to such repeal or amendment or adoption of such inconsistent provision.

D. This Article VIII shall not limit the right of the Corporation, to the extent and in the manner authorized or permitted by law, to indemnify and to advance expenses to persons other than indemnitees.

#### **ARTICLE IX** **FORUM SELECTION**

Unless the Corporation consents in writing to the selection of an alternative forum, (a) the Court of Chancery (the "Chancery Court") of the State of Delaware (or, in the event that the Chancery Court does not have jurisdiction, the federal district court for the District of Delaware or other state courts of the State of Delaware) shall, to the fullest extent permitted by law, be the sole and exclusive forum for (i) any derivative action, suit or proceeding brought on behalf of the Corporation, (ii) any action, suit or proceeding asserting a claim of breach of a fiduciary duty owed by any director, officer or stockholder of the Corporation to the Corporation or to the Corporation's stockholders, (iii) any action, suit or proceeding arising pursuant to any provision of the DGCL or the bylaws of the Corporation or this Second Amended and Restated Certificate (as either may be amended from time to time) or (iv) any action, suit or proceeding asserting a claim against the Corporation governed by the internal affairs doctrine; and (b) subject to the preceding provisions of this Article IX, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933, as amended, including all causes of action asserted against any defendant to such complaint. If any action the subject matter of which is within the scope of clause (a) of the immediately preceding sentence is filed in a court other than the courts in the State of Delaware (a "Foreign Action") in the name of any stockholder, such stockholder shall be deemed to have consented to (x) the personal jurisdiction of the state and federal courts in the State of Delaware in connection with any action brought in any such court to enforce the provisions of clause (a) of the immediately preceding sentence and (y) having service of process made upon such stockholder in any such action by service upon such stockholder's counsel in the Foreign Action as agent for such stockholder.

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Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to this Article IX. Notwithstanding the foregoing, the provisions of this Article IX shall not apply to suits brought to enforce any liability or duty created by the Securities Exchange Act of 1934, as amended, or any other claim for which the federal courts of the United States have exclusive jurisdiction.

If any provision or provisions of this Article IX shall be held to be invalid, illegal or unenforceable as applied to any circumstances for any reason whatsoever, (a) the validity, legality and enforceability of such provisions in any other circumstance and of the remaining provisions of this Article IX (including, without limitation, each portion of any paragraph of this Article IX containing any such provision held to be invalid, illegal or unenforceable that is not itself held to be invalid, illegal or unenforceable) shall not in any way be affected or impaired thereby and (b) the application of such provision to other persons or entities and circumstances shall not in any way be affected or impaired thereby.

#### **ARTICLE X** **AMENDMENTS**

A. Notwithstanding anything contained in this Second Amended and Restated Certificate to the contrary, in addition to any vote required by applicable law, the following provisions in this Second Amended and Restated Certificate may be amended, altered, repealed or rescinded, in whole or in part, or any provision inconsistent therewith or herewith may be adopted, only by the affirmative vote of the holders of at least two-thirds (66 and 2/3%) of the total voting power of all the then outstanding shares of stock of the Corporation entitled to vote thereon, voting together as a single class: Part B of Article IV, Article V, Article VI, Article VII, Article VIII, Article IX, and this Article X.

B. If any provision or provisions of this Second Amended and Restated Certificate shall be held to be invalid, illegal or unenforceable as applied to any circumstance for any reason whatsoever: (i) the validity, legality and enforceability of such provisions in any other circumstance and of the remaining provisions of this Second Amended and Restated Certificate (including, without limitation, each portion of any paragraph of this Second Amended and Restated Certificate containing any such provision held to be invalid, illegal or unenforceable that is not itself held to be invalid, illegal or unenforceable) shall not, to the fullest extent permitted by applicable law, in any way be affected or impaired thereby and (ii) to the fullest extent permitted by applicable law, the provisions of this Second Amended and Restated Certificate (including, without limitation, each such portion of any paragraph of this Second Amended and Restated Certificate containing any such provision held to be invalid, illegal or unenforceable) shall be construed so as to permit the Corporation to protect its directors, officers, employees and agents from personal liability in respect of their good faith service to or for the benefit of the Corporation to the fullest extent permitted by law.

**Amended and Restated Bylaws of**

**Nogin, Inc.**

**(a Delaware corporation)**

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**Amended and Restated Bylaws of  
Nogin, Inc.**

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**Article I—Corporate Offices**

1.1 Registered Office.

The address of the registered office of Nogin, Inc. (the “Corporation”) in the State of Delaware, and the name of its registered agent at such address, shall be as set forth in the Corporation’s certificate of incorporation, as the same may be amended and/or restated from time to time (the “Certificate of Incorporation”).

1.2 Other Offices.

The Corporation may have additional offices at any place or places, within or outside the State of Delaware, as the Corporation’s board of directors (the “Board”) may from time to time establish or as the business and affairs of the Corporation may require.

**Article II—Meetings of Stockholders**

2.1 Place of Meetings.

Meetings of stockholders shall be held at any place, within or outside the State of Delaware, designated by the Board. The Board may, in its sole discretion, determine that a meeting of stockholders shall not be held at any place, but may instead be held solely by means of remote communication as authorized by Section 211(a)(2) of the General Corporation Law of the State of Delaware (the “DGCL”). In the absence of any such designation or determination, stockholders’ meetings shall be held at the Corporation’s principal executive office, whether within or outside of the State of Delaware.

2.2 Annual Meeting.

The Board shall designate the date and time of the annual meeting. At the annual meeting, the stockholders entitled to vote on such matters shall elect those directors of the Corporation to fill any term of a directorship that expires on the date of such annual meeting and may transact any other business as may properly be brought before the meeting in accordance with Section 2.4. The Board may postpone, reschedule or cancel any previously scheduled annual meeting of stockholders.

2.3 Special Meeting.

Special meetings of the stockholders may be called only by such persons and only in such manner as set forth in the Certificate of Incorporation.

No business may be transacted at any special meeting of stockholders other than the business specified in the notice of such meeting. The Board may postpone, reschedule or cancel any previously scheduled special meeting of stockholders.

#### 2.4 Notice of Business to be Brought before a Meeting

(a) At an annual meeting of the stockholders, only such business shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (i) specified in the Corporation's notice of meeting (or any supplement thereto) given by or at the direction of the Board, (ii) if not specified in a notice of meeting, otherwise brought before the meeting by or at the direction of the Board or the Chairman of the Board or (iii) otherwise properly brought before the meeting by a stockholder present in person who (A) (1) was a record owner of shares of the Corporation both at the time of giving the notice provided for in this Section 2.4 and at the time of the meeting, (2) is entitled to vote at the meeting and (3) has complied with this Section 2.4 in all applicable respects or (B) properly made such proposal in accordance with Rule 14a-8 under the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder (as so amended and inclusive of such rules and regulations, the "Exchange Act"). The foregoing clause (iii) shall be the exclusive means for a stockholder to propose business to be brought before an annual meeting of the stockholders. The only matters that may be brought before a special meeting are the matters specified in the notice of meeting given by or at the direction of the person calling the meeting pursuant to Section 2.3, and stockholders shall not be permitted to propose business to be brought before a special meeting of the stockholders. For purposes of this Section 2.4, "present in person" shall mean that the stockholder proposing that the business be brought before the annual meeting of the Corporation, or a qualified representative of such proposing stockholder, appear at such annual meeting. A "qualified representative" of such proposing stockholder shall be a duly authorized officer, manager or partner of such stockholder or any other person authorized by a writing executed by such stockholder or an electronic transmission delivered by such stockholder to act for such stockholder as proxy at the meeting of stockholders and such person must produce such writing or electronic transmission, or a reliable reproduction of the writing or electronic transmission, at the meeting of stockholders. Stockholders seeking to nominate persons for election to the Board must comply with Section 2.5, and this Section 2.4 shall not be applicable to nominations except as expressly provided in Section 2.5.

(b) For business to be properly brought before an annual meeting by a stockholder, the stockholder must (i) provide Timely Notice (as defined below) thereof in writing and in proper form to the Secretary of the Corporation and (ii) provide any updates or supplements to such notice at the times and in the forms required by this Section 2.4. To be timely, a stockholder's notice must be delivered to, or mailed and received at, the principal executive offices of the Corporation not less than ninety (90) days nor more than one hundred twenty (120) days prior to the one-year anniversary of the preceding year's annual meeting; *provided, however*, that if no annual meeting was held in the preceding year, to be timely, a stockholder's notice must be so delivered, or mailed and received, not earlier than the close of business on the one hundred and twentieth (120<sup>th</sup>) day prior to such annual meeting and not later than the close of business on the later of the ninetieth (90<sup>th</sup>) day prior to such annual meeting or, if later, the tenth (10<sup>th</sup>) day following the day on which public disclosure of the date of such annual meeting was first made by the Corporation; *provided, further*, that if the date of the annual meeting is more than thirty (30) days before or more than sixty (60) days after such anniversary date, to be timely, a stockholder's notice must be so delivered, or mailed and received, not later than the ninetieth (90<sup>th</sup>) day prior to such annual meeting or, if later, the tenth (10<sup>th</sup>) day following the day on which public disclosure of the date of such annual meeting was first made by the Corporation (such notice within such time periods, "Timely Notice"). In no event shall any adjournment or postponement of an annual meeting or the announcement thereof commence a new time period for the giving of Timely Notice as described above.

(c) To be in proper form for purposes of this Section 2.4, a stockholder's notice to the Secretary of the Corporation shall set forth:



(i) As to each Proposing Person (as defined below), (A) the name and address of such Proposing Person (including, if applicable, the name and address that appear on the Corporation's books and records); and (B) the class or series and number of shares of the Corporation that are, directly or indirectly, owned of record or beneficially owned (within the meaning of Rule 13d-3 under the Exchange Act) by such Proposing Person, except that such Proposing Person shall in all events be deemed to beneficially own any shares of any class or series of the Corporation as to which such Proposing Person has a right to acquire beneficial ownership at any time in the future (the disclosures to be made pursuant to the foregoing clauses (A) and (B) are referred to as "Stockholder Information");

(ii) As to each Proposing Person, (A) the full notional amount of any securities that, directly or indirectly, underlie any "derivative security" (as such term is defined in Rule 16a-1(c) under the Exchange Act) that constitutes a "call equivalent position" (as such term is defined in Rule 16a-1(b) under the Exchange Act) ("Synthetic Equity Position") and that is, directly or indirectly, held or maintained by such Proposing Person with respect to any shares of any class or series of shares of the Corporation; *provided* that, for the purposes of the definition of "Synthetic Equity Position," the term "derivative security" shall also include any security or instrument that would not otherwise constitute a "derivative security" as a result of any feature that would make any conversion, exercise or similar right or privilege of such security or instrument becoming determinable only at some future date or upon the happening of a future occurrence, in which case the determination of the amount of securities into which such security or instrument would be convertible or exercisable shall be made assuming that such security or instrument is immediately convertible or exercisable at the time of such determination; and, *provided, further*, that any Proposing Person satisfying the requirements of Rule 13d-1(b)(1) under the Exchange Act (other than a Proposing Person that so satisfies Rule 13d-1(b)(1) under the Exchange Act solely by reason of Rule 13d-1(b)(1)(ii)(E)) shall not be deemed to hold or maintain the notional amount of any securities that underlie a Synthetic Equity Position held by such Proposing Person as a hedge with respect to a bona fide derivatives trade or position of such Proposing Person arising in the ordinary course of such Proposing Person's business as a derivatives dealer, (B) any rights to dividends on the shares of any class or series of shares of the Corporation owned beneficially by such Proposing Person that are separated or separable from the underlying shares of the Corporation, (C) any material pending or threatened legal proceeding in which such Proposing Person is a party or material participant involving the Corporation or any of its officers or directors, or any affiliate of the Corporation, (D) any other material relationship between such Proposing Person, on the one hand, and the Corporation or any affiliate of the Corporation, on the other hand, (E) any direct or indirect material interest in any material contract or agreement of such Proposing Person with the Corporation or any affiliate of the Corporation (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement), (F) a representation that such Proposing Person intends or is part of a group that intends to deliver a proxy statement or form of proxy to holders of at least the percentage of the Corporation's outstanding capital stock required to approve or adopt the proposal or otherwise solicit proxies from stockholders in support of such proposal and (G) any other information relating to such Proposing Person that would be required to be disclosed in a proxy statement or other filing required to be made in connection with solicitations of proxies or consents by such Proposing Person in support of the business proposed to be brought before the meeting pursuant to Section 14(a) of the Exchange Act (the disclosures to be made pursuant to the foregoing clauses (A) through (G) are referred to as "Disclosable Interests"); *provided, however*, that Disclosable Interests shall not include any such disclosures with respect to the ordinary course business activities of any broker, dealer, commercial bank, trust company or other nominee who is a Proposing Person solely as a result of being the stockholder directed to prepare and submit the notice required by these bylaws on behalf of a beneficial owner; and

(iii) As to each item of business that the stockholder proposes to bring before the annual meeting, (A) a brief description of the business desired to be brought before the annual meeting, the reasons for conducting such business at the annual meeting and any material interest in such business of each Proposing Person, (B) the text of the proposal or business (including the text of any resolutions proposed for consideration and in the event that such business includes a proposal to amend the bylaws, the language of the proposed amendment), and (C) a reasonably detailed description of all agreements, arrangements and understandings (x) between or among any of the Proposing Persons or (y) between or among any Proposing Person and any other person or entity (including their names) in connection with the proposal of such business by such stockholder; and (D) any other information relating to such item of business that would be required to be disclosed in a proxy statement or other filing required to be made in connection with solicitations of proxies in support of the business proposed to be brought before the meeting pursuant to Section 14(a) of the Exchange Act; *provided, however*, that the disclosures required by this Section 2.4(c)(iii) shall not include any disclosures with respect to any broker, dealer, commercial bank, trust company or other nominee who is a Proposing Person solely as a result of being the stockholder directed to prepare and submit the notice required by these bylaws on behalf of a beneficial owner.

For purposes of this Section 2.4, the term “Proposing Person” shall mean (i) the stockholder providing the notice of business proposed to be brought before an annual meeting, (ii) the beneficial owner or beneficial owners, if different, on whose behalf the notice of the business proposed to be brought before the annual meeting is made, and (iii) any participant (as defined in paragraphs (a)(ii)-(vi) of Instruction 3 to Item 4 of Schedule 14A) with such stockholder in such solicitation.

(d) A Proposing Person shall update and supplement its notice to the Corporation of its intent to propose business at an annual meeting, if necessary, so that the information provided or required to be provided in such notice pursuant to this Section 2.4 shall be true and correct as of the record date for stockholders entitled to vote at the meeting and as of the date that is ten (10) business days prior to the meeting or any adjournment or postponement thereof, and such update and supplement shall be delivered to, or mailed and received by, the Secretary of the Corporation at the principal executive offices of the Corporation not later than five (5) business days after the record date for stockholders entitled to vote at the meeting (in the case of the update and supplement required to be made as of such record date), and not later than eight (8) business days prior to the date for the meeting or, if practicable, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the meeting has been adjourned or postponed) (in the case of the update and supplement required to be made as of ten (10) business days prior to the meeting or any adjournment or postponement thereof). For the avoidance of doubt, the obligation to update and supplement as set forth in this paragraph or any other Section of these bylaws shall not limit the Corporation’s rights with respect to any deficiencies in any notice provided by a stockholder, extend any applicable deadlines hereunder or enable or be deemed to permit a stockholder who has previously submitted notice hereunder to amend or update any proposal or to submit any new proposal, including by changing or adding matters, business or resolutions proposed to be brought before a meeting of the stockholders.

(e) Notwithstanding anything in these bylaws to the contrary, no business shall be conducted at an annual meeting that is not properly brought before the meeting in accordance with this Section 2.4. The presiding officer of the meeting shall, if the facts warrant, determine that the business was not properly brought before the meeting in accordance with this Section 2.4, and if he or she should so determine, he or she shall so declare to the meeting and any such business not properly brought before the meeting shall not be transacted.

(f) This Section 2.4 is expressly intended to apply to any business proposed to be brought before an annual meeting of stockholders other than any proposal made in accordance with Rule 14a-8 under the Exchange Act and included in the Corporation’s proxy statement. In addition to the requirements of this Section 2.4 with respect to any business proposed to be brought before an annual meeting, each Proposing Person shall comply with all applicable requirements of the Exchange Act with respect to any such business. Nothing in this Section 2.4 shall be deemed to affect the rights of stockholders to request inclusion of proposals in the Corporation’s proxy statement pursuant to Rule 14a-8 under the Exchange Act.

(g) For purposes of these bylaws, “public disclosure” shall mean disclosure in a press release reported by a national news service or in a document publicly filed by the Corporation with the Securities and Exchange Commission pursuant to Sections 13, 14 or 15(d) of the Exchange Act.

#### 2.5 Notice of Nominations for Election to the Board.

(a) Nominations of any person for election to the Board at an annual meeting or at a special meeting (but only if the election of directors is a matter specified in the notice of meeting given by or at the direction of the person calling such special meeting) may be made at such meeting only (i) by or at the direction of the Board, including by any committee or persons authorized to do so by the Board or these bylaws, or (ii) by a stockholder present in person (A) who was a record owner of shares of the Corporation both at the time of giving the notice provided for in this Section 2.5 and at the time of the meeting, (B) is entitled to vote at the meeting, and (C) has complied with this Section 2.5 as to such notice and nomination. For purposes of this Section 2.5, “present in person” shall mean that the stockholder proposing that the business be brought before the meeting of the Corporation, or a qualified representative of such stockholder, appear at such meeting. A “qualified representative” of such proposing stockholder shall be a duly authorized officer, manager or partner of such stockholder or any other person authorized by a writing executed by such stockholder or an electronic transmission delivered by such stockholder to act for such stockholder as proxy at the meeting of stockholders and such person must produce such writing or electronic transmission, or a reliable reproduction of the writing or electronic transmission, at the meeting of stockholders. The foregoing clause (ii) shall be the exclusive means for a stockholder to make any nomination of a person or persons for election to the Board at an annual meeting or special meeting.

(b) (i) Without qualification, for a stockholder to make any nomination of a person or persons for election to the Board at an annual meeting, the stockholder must (1) provide Timely Notice (as defined in Section 2.4) thereof in writing and in proper form to the Secretary of the Corporation, (2) provide the information, agreements and questionnaires with respect to such stockholder and its candidate for nomination as required to be set forth by this Section 2.5 and (3) provide any updates or supplements to such notice at the times and in the forms required by this Section 2.5.

(ii) Without qualification, if the election of directors is a matter specified in the notice of meeting given by or at the direction of the person calling a special meeting, then for a stockholder to make any nomination of a person or persons for election to the Board at a special meeting, the stockholder must (i) provide Timely Notice thereof in writing and in proper form to the Secretary of the Corporation at the principal executive offices of the Corporation, (ii) provide the information with respect to such stockholder and its candidate for nomination as required by this Section 2.5 and (iii) provide any updates or supplements to such notice at the times and in the forms required by this Section 2.5. To be timely, a stockholder’s notice for nominations to be made at a special meeting must be delivered to, or mailed and received at, the principal executive offices of the Corporation not earlier than the one hundred twentieth (120<sup>th</sup>) day prior to such special meeting and not later than the ninetieth (90<sup>th</sup>) day prior to such special meeting or, if later, the tenth (10<sup>th</sup>) day following the day on which public disclosure (as defined in Section 2.4) of the date of such special meeting was first made.

(iii) In no event shall any adjournment or postponement of an annual meeting or special meeting or the announcement thereof commence a new time period for the giving of a stockholder's notice as described above.

(iv) In no event may a Nominating Person provide Timely Notice with respect to a greater number of director candidates than are subject to election by shareholders at the applicable meeting. If the Corporation shall, subsequent to such notice, increase the number of directors subject to election at the meeting, such notice as to any additional nominees shall be due on the later of (i) the conclusion of the time period for Timely Notice, (ii) the date set forth in Section 2.5(b)(ii) or (iii) the tenth day following the date of public disclosure (as defined in Section 2.4) of such increase.

(c) To be in proper form for purposes of this Section 2.5, a stockholder's notice to the Secretary of the Corporation shall set forth:

(i) As to each Nominating Person (as defined below), the Stockholder Information (as defined in Section 2.4(c)(i)), except that for purposes of this Section 2.5, the term "Nominating Person" shall be substituted for the term "Proposing Person" in all places it appears in Section 2.4(c)(i);

(ii) As to each Nominating Person, any Disclosable Interests (as defined in Section 2.4(c)(ii)), except that for purposes of this Section 2.5, the term "Nominating Person" shall be substituted for the term "Proposing Person" in all places it appears in Section 2.4(c)(ii) and the disclosure with respect to the business to be brought before the meeting in Section 2.4(c)(ii) shall be made with respect to the election of directors at the meeting; and

(iii) As to each candidate whom a Nominating Person proposes to nominate for election as a director, (A) all information with respect to such candidate for nomination that would be required to be set forth in a stockholder's notice pursuant to this Section 2.5 if such candidate for nomination were a Nominating Person, (B) all information relating to such candidate for nomination that is required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for election of directors in a contested election pursuant to Section 14(a) under the Exchange Act (including such candidate's written consent to being named in the proxy statement as a nominee and to serving as a director if elected), (C) a description of any direct or indirect material interest in any material contract or agreement between or among any Nominating Person, on the one hand, and each candidate for nomination or his or her respective associates or any other participants in such solicitation, on the other hand, including, without limitation, all information that would be required to be disclosed pursuant to Item 404 under Regulation S-K if such Nominating Person were the "registrant" for purposes of such rule and the candidate for nomination were a director or executive officer of such registrant and (D) a completed and signed questionnaire, representation and agreement as provided in Section 2.5(f).

For purposes of this Section 2.5, the term "Nominating Person" shall mean (i) the stockholder providing the notice of the nomination proposed to be made at the meeting, (ii) the beneficial owner or beneficial owners, if different, on whose behalf the notice of the nomination proposed to be made at the meeting is made, and (iii) any other participant in such solicitation.

(d) A stockholder providing notice of any nomination proposed to be made at a meeting shall further update and supplement such notice, if necessary, so that the information provided or required to be provided in such notice pursuant to this Section 2.5 shall be true and correct as of the record date for stockholders entitled to vote at the meeting and as of the date that is ten (10) business days prior to the meeting or any adjournment or postponement thereof, and such update and supplement shall be delivered to, or mailed and received by, the Secretary of the Corporation at the principal executive offices of the Corporation not later than five (5) business days after the record date for stockholders entitled to vote at the meeting (in the case of the update and supplement required to be made as of such record date), and not later than eight (8) business days prior to the date for the meeting or, if practicable, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the meeting has been adjourned or postponed) (in the case of the update and supplement required to be made as of ten (10) business days prior to the meeting or any adjournment or postponement thereof). For the avoidance of doubt, the obligation to update and supplement as set forth in this paragraph or any other Section of these bylaws shall not limit the Corporation's rights with respect to any deficiencies in any notice provided by a stockholder, extend any applicable deadlines hereunder or enable or be deemed to permit a stockholder who has previously submitted notice hereunder to amend or update any nomination or to submit any new nomination.

(e) In addition to the requirements of this Section 2.5 with respect to any nomination proposed to be made at a meeting, each Nominating Person shall comply with all applicable requirements of the Exchange Act with respect to any such nominations.

(f) To be eligible to be a candidate for election as a director of the Corporation at an annual or special meeting, a candidate must be nominated in the manner prescribed in Section 2.5 and the candidate for nomination, whether nominated by the Board or by a stockholder of record, must have previously delivered (in accordance with the time period prescribed for delivery in a notice to such candidate given by or on behalf of the Board), to the Secretary of the Corporation at the principal executive offices of the Corporation, (i) a completed written questionnaire (in a form provided by the Corporation) with respect to the background, qualifications, stock ownership and independence of such proposed nominee and (ii) a written representation and agreement (in form provided by the Corporation) that such candidate for nomination (A) is not and, if elected as a director during his or her term of office, will not become a party to (1) any agreement, arrangement or understanding with, and has not given and will not give any commitment or assurance to, any person or entity as to how such proposed nominee, if elected as a director of the Corporation, will act or vote on any issue or question (a "Voting Commitment") or (2) any Voting Commitment that could limit or interfere with such proposed nominee's ability to comply, if elected as a director of the Corporation, with such proposed nominee's fiduciary duties under applicable law, (B) is not, and will not become a party to, any agreement, arrangement or understanding with any person or entity other than the Corporation with respect to any direct or indirect compensation or reimbursement for service as a director that has not been disclosed to the Corporation and (C) if elected as a director of the Corporation, will comply with all applicable corporate governance, conflict of interest, confidentiality, stock ownership and trading and other policies and guidelines of the Corporation applicable to directors and in effect during such person's term in office as a director (and, if requested by any candidate for nomination, the Secretary of the Corporation shall provide to such candidate for nomination all such policies and guidelines then in effect).

(g) The Board may also require any proposed candidate for nomination as a Director to furnish such other information as may reasonably be requested by the Board in writing prior to the meeting of stockholders at which such candidate's nomination is to be acted upon in order for the Board to determine the eligibility of such candidate for nomination to be an independent director of the Corporation in accordance with the Corporation's corporate governance guidelines.

(h) A candidate for nomination as a director shall further update and supplement the materials delivered pursuant to this Section 2.5, if necessary, so that the information provided or required to be provided pursuant to this Section 2.5 shall be true and correct as of the record date for stockholders entitled to vote at the meeting and as of the date that is ten (10) business days prior to the meeting or any adjournment or postponement thereof, and such update and supplement shall be delivered to, or mailed and received by, the Secretary of the Corporation at the principal executive offices of the Corporation (or any other office specified by the Corporation in any public announcement) not later than five (5) business days after the record date for stockholders entitled to vote at the meeting (in the case of the update and supplement required to be made as of such record date), and not later than eight (8) business days prior to the date for the meeting or, if practicable, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the meeting has been adjourned or postponed) (in the case of the update and supplement required to be made as of ten (10) business days prior to the meeting or any adjournment or postponement thereof). For the avoidance of doubt, the obligation to update and supplement as set forth in this paragraph or any other Section of these bylaws shall not limit the Corporation's rights with respect to any deficiencies in any notice provided by a stockholder, extend any applicable deadlines hereunder or enable or be deemed to permit a stockholder who has previously submitted notice hereunder to amend or update any proposal or to submit any new proposal, including by changing or adding nominees, matters, business or resolutions proposed to be brought before a meeting of the stockholders.

(i) No candidate shall be eligible for nomination as a director of the Corporation unless such candidate for nomination and the Nominating Person seeking to place such candidate's name in nomination has complied with this Section 2.5. The presiding officer at the meeting shall, if the facts warrant, determine that a nomination was not properly made in accordance with Section 2.5, and if he or she should so determine, he or she shall so declare such determination to the meeting, the defective nomination shall be disregarded and any ballots cast for the candidate in question (but in the case of any form of ballot listing other qualified nominees, only the ballots cast for the nominee in question) shall be void and of no force or effect.

(j) Notwithstanding anything in these bylaws to the contrary, no candidate for nomination shall be eligible to be seated as a director of the Corporation unless nominated and elected in accordance with Section 2.5.

#### 2.6 Notice of Stockholders' Meetings.

Unless otherwise provided by law, the Certificate of Incorporation or these bylaws, the notice of any meeting of stockholders shall be sent or otherwise given in accordance with Section 8.1 not less than ten (10) nor more than sixty (60) days before the date of the meeting to each stockholder entitled to vote at such meeting. The notice shall specify the place, if any, date and time of the meeting, the means of remote communication, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such meeting, and, in the case of a special meeting, the purpose or purposes for which the meeting is called.

#### 2.7 Quorum.

Unless otherwise provided by law, the Certificate of Incorporation or these bylaws, the holders of a majority in voting power of the stock issued and outstanding and entitled to vote, present in person, or by remote communication, if applicable, or represented by proxy, shall constitute a quorum for the transaction of business at all meetings of the stockholders. A quorum, once established at a meeting, shall not be broken by the withdrawal of enough votes to leave less than a quorum. If, however, a quorum is not present or represented at any meeting of the stockholders, then either (i) the person presiding over the meeting or (ii) a majority in voting power of the stockholders entitled to vote at the meeting, present in person, or by remote communication, if applicable, or represented by proxy, shall have power to recess the meeting or adjourn the meeting from time to time in the manner provided in Section 2.8 until a quorum is present or represented. At any recessed or adjourned meeting at which a quorum is present or represented, any business may be transacted that might have been transacted at the meeting as originally noticed.

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## 2.8 Adjourned Meeting: Notice.

When a meeting is adjourned to another time or place, unless these bylaws otherwise require, notice need not be given of the adjourned meeting if the time, place, if any, thereof, and the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such adjourned meeting are announced at the meeting at which the adjournment is taken. At any adjourned meeting, the Corporation may transact any business which might have been transacted at the original meeting. If the adjournment is for more than thirty (30) days, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting. If after the adjournment a new record date for determination of stockholders entitled to vote is fixed for the adjourned meeting, the Board shall fix as the record date for determining stockholders entitled to notice of such adjourned meeting the same or an earlier date as that fixed for determination of stockholders entitled to vote at the adjourned meeting, and shall give notice of the adjourned meeting to each stockholder of record entitled to vote at such meeting as of the record date so fixed for notice of such adjourned meeting.

## 2.9 Conduct of Business.

The date and time of the opening and the closing of the polls for each matter upon which the stockholders will vote at a meeting shall be announced at the meeting by the person presiding over the meeting. The Board may adopt by resolution such rules and regulations for the conduct of the meeting of stockholders as it shall deem appropriate. Except to the extent inconsistent with such rules and regulations as adopted by the Board, the person presiding over any meeting of stockholders shall have the right and authority to convene and (for any or no reason) to recess and/or adjourn the meeting, to prescribe such rules, regulations and procedures (which need not be in writing) and to do all such acts as, in the judgment of such presiding person, are appropriate for the proper conduct of the meeting. Such rules, regulations or procedures, whether adopted by the Board or prescribed by the person presiding over the meeting, may include, without limitation, the following: (i) the establishment of an agenda or order of business for the meeting; (ii) rules and procedures for maintaining order at the meeting and the safety of those present (including, without limitation, rules and procedures for removal of disruptive persons from the meeting); (iii) limitations on attendance at or participation in the meeting to stockholders entitled to vote at the meeting, their duly authorized and constituted proxies or such other persons as the person presiding over the meeting shall determine; (iv) restrictions on entry to the meeting after the time fixed for the commencement thereof; and (v) limitations on the time allotted to questions or comments by participants. The presiding person at any meeting of stockholders, in addition to making any other determinations that may be appropriate to the conduct of the meeting (including, without limitation, determinations with respect to the administration and/or interpretation of any of the rules, regulations or procedures of the meeting, whether adopted by the Board or prescribed by the person presiding over the meeting), shall, if the facts warrant, determine and declare to the meeting that a matter of business was not properly brought before the meeting and if such presiding person should so determine, such presiding person shall so declare to the meeting and any such matter or business not properly brought before the meeting shall not be transacted or considered. Unless and to the extent determined by the Board or the person presiding over the meeting, meetings of stockholders shall not be required to be held in accordance with the rules of parliamentary procedure.

#### 2.10 Voting.

Except as may be otherwise provided in the Certificate of Incorporation, these bylaws or the DGCL, each stockholder shall be entitled to one (1) vote for each share of capital stock held by such stockholder.

Except as otherwise provided by the Certificate of Incorporation, at all duly called or convened meetings of stockholders at which a quorum is present, for the election of directors, a plurality of the votes cast shall be sufficient to elect a director. Except as otherwise provided by the Certificate of Incorporation, these bylaws, the rules or regulations of any stock exchange applicable to the Corporation, or applicable law or pursuant to any regulation applicable to the Corporation or its securities, each other matter presented to the stockholders at a duly called or convened meeting at which a quorum is present shall be decided by the affirmative vote of the holders of a majority in voting power of the votes cast (excluding abstentions and broker non-votes) on such matter.

#### 2.11 Record Date for Stockholder Meetings and Other Purposes.

In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, the Board may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board, and which record date shall, unless otherwise required by law, not be more than sixty (60) days nor less than ten (10) days before the date of such meeting. If the Board so fixes a date, such date shall also be the record date for determining the stockholders entitled to vote at such meeting unless the Board determines, at the time it fixes such record date, that a later date on or before the date of the meeting shall be the date for making such determination. If no record date is fixed by the Board, the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be the close of business on the next day preceding the day on which notice is first given, or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; *provided, however*, that the Board may fix a new record date for determination of stockholders entitled to vote at the adjourned meeting; and in such case shall also fix as the record date for stockholders entitled to notice of such adjourned meeting the same or an earlier date as that fixed for determination of stockholders entitled to vote in accordance herewith at the adjourned meeting.

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

#### 2.12 Proxies.

Each stockholder entitled to vote at a meeting of stockholders may authorize another person or persons to act for such stockholder by proxy authorized by an instrument in writing or by a transmission permitted by law filed in accordance with the procedure established for the meeting, but no such proxy shall be voted or acted upon after three (3) years from its date, unless the proxy provides for a longer period. The revocability of a proxy that states on its face that it is irrevocable shall be governed by the provisions of Section 212 of the DGCL. A proxy may be in the form of an electronic transmission which sets forth or is submitted with information from which it can be determined that the transmission was authorized by the stockholder.



### 2.13 List of Stockholders Entitled to Vote

The Corporation shall prepare, at least ten (10) days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting (*provided, however*, that if the record date for determining the stockholders entitled to vote is less than ten (10) days before the date of the meeting, the list shall reflect the stockholders entitled to vote as of the tenth (10<sup>th</sup>) day before the meeting date), arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. The Corporation shall not be required to include electronic mail addresses or other electronic contact information on such list. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting for a period of at least ten (10) days prior to the meeting: (i) on a reasonably accessible electronic network, *provided* that the information required to gain access to such list is provided with the notice of the meeting, or (ii) during ordinary business hours, at the Corporation's principal executive office. In the event that the Corporation determines to make the list available on an electronic network, the Corporation may take reasonable steps to ensure that such information is available only to stockholders of the Corporation. If the meeting is to be held at a place, then the list shall be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder who is present. If the meeting is to be held solely by means of remote communication, then the list shall also be open to the examination of any stockholder during the whole time of the meeting on a reasonably accessible electronic network, and the information required to access such list shall be provided with the notice of the meeting. Such list shall presumptively determine the identity of the stockholders entitled to vote at the meeting and the number of shares held by each of them. Except as otherwise provided by law, the stock ledger shall be the only evidence as to who are the stockholders entitled to examine the list of stockholders required by this Section 2.13 or to vote in person or by proxy at any meeting of stockholders.

### 2.14 Inspectors of Election.

Before any meeting of stockholders, the Corporation shall appoint an inspector or inspectors of election to act at the meeting or its adjournment and make a written report thereof. The Corporation may designate one or more persons as alternate inspectors to replace any inspector who fails to act. If any person appointed as inspector or any alternate fails to appear or fails or refuses to act, then the person presiding over the meeting shall appoint a person to fill that vacancy.

Such inspectors shall:

- (i) determine the number of shares outstanding and the voting power of each, the number of shares represented at the meeting and the validity of any proxies and ballots;
  - (ii) count all votes or ballots;
  - (iii) count and tabulate all votes;
  - (iv) determine and retain for a reasonable period a record of the disposition of any challenges made to any determination by the inspector(s);
- and

(v) certify its or their determination of the number of shares represented at the meeting and its or their count of all votes and ballots.

Each inspector, before entering upon the discharge of the duties of inspector, shall take and sign an oath faithfully to execute the duties of inspection with strict impartiality and according to the best of such inspector's ability. Any report or certificate made by the inspectors of election is *prima facie* evidence of the facts stated therein. The inspectors of election may appoint such persons to assist them in performing their duties as they determine.

2.15 Delivery to the Corporation.

Whenever this Article II requires one or more persons (including a record or beneficial owner of stock) to deliver a document or information to the Corporation or any officer, employee or agent thereof (including any notice, request, questionnaire, revocation, representation or other document or agreement), such document or information shall be in writing exclusively (and not in an electronic transmission) and shall be delivered exclusively by hand (including, without limitation, overnight courier service) or by certified or registered mail, return receipt requested, and the Corporation shall not be required to accept delivery of any document not in such written form or so delivered. For the avoidance of doubt, the Corporation expressly opts out of Section 116 of the DGCL with respect to the delivery of information and documents to the Corporation required by this Article II.

**Article III—Directors**

3.1 Powers.

Except as otherwise provided by the Certificate of Incorporation or the DGCL, the business and affairs of the Corporation shall be managed by or under the direction of the Board.

3.2 Number of Directors.

Subject to the Certificate of Incorporation, the total number of directors constituting the Board shall be determined from time to time by resolution of the Board. No reduction of the authorized number of directors shall have the effect of removing any director before that director's term of office expires.

3.3 Election, Qualification and Term of Office of Directors.

Except as provided in Section 3.4, and subject to the Certificate of Incorporation, each director, including a director elected to fill a vacancy or newly created directorship, shall hold office until the expiration of the term of the class, if any, for which elected and until such director's successor is elected and qualified or until such director's earlier death, resignation, disqualification or removal. Directors need not be stockholders or residents of the State of Delaware. The Certificate of Incorporation or these bylaws may prescribe qualifications for directors.

#### 3.4 Resignation and Vacancies.

Any director may resign at any time upon notice given in writing or by electronic transmission to the Corporation. The resignation shall take effect at the time specified therein or upon the happening of an event specified therein, and if no time or event is specified, at the time of its receipt. When one or more directors so resigns and the resignation is effective at a future date or upon the happening of an event to occur on a future date, a majority of the directors then in office, including those who have so resigned, shall have power to fill such vacancy or vacancies, the vote thereon to take effect when such resignation or resignations shall become effective, and each director so chosen shall hold office as provided in Section 3.3.

Unless otherwise provided in the Certificate of Incorporation or these bylaws, vacancies resulting from the death, resignation, disqualification or removal of any director, and newly created directorships resulting from any increase in the authorized number of directors shall be filled only by a majority of the directors then in office, although less than a quorum, or by a sole remaining director.

#### 3.5 Place of Meetings; Meetings by Telephone.

The Board may hold meetings, both regular and special, either within or outside the State of Delaware.

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

#### 3.6 Regular Meetings.

Regular meetings of the Board may be held within or outside the State of Delaware and at such time and at such place as which has been designated by the Board and publicized among all directors, either orally or in writing, by telephone, including a voice-messaging system or other system designed to record and communicate messages, facsimile, telegraph or telex, or by electronic mail or other means of electronic transmission. No further notice shall be required for regular meetings of the Board.

#### 3.7 Special Meetings; Notice.

Special meetings of the Board for any purpose or purposes may be called at any time by the chairperson of the Board, the Chief Executive Officer, the President or the Secretary of the Corporation or a majority of the total number of directors constituting the Board.

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

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

directed to each director at that director's address, telephone number, facsimile number or electronic mail address, or other address for electronic transmission, as the case may be, as shown on the Corporation's records.

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If the notice is (i) delivered personally by hand, by courier or by telephone, (ii) sent by facsimile or electronic mail, or (iii) sent by other means of electronic transmission, it shall be delivered or sent at least twenty-four (24) hours before the time of the holding of the meeting. If the notice is sent by U.S. mail, it shall be deposited in the U.S. mail at least four (4) days before the time of the holding of the meeting. The notice need not specify the place of the meeting (if the meeting is to be held at the Corporation's principal executive office) nor the purpose of the meeting.

### 3.8 Quorum.

At all meetings of the Board, unless otherwise provided by the Certificate of Incorporation, a majority of the total number of directors shall constitute a quorum for the transaction of business. The vote of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board, except as may be otherwise specifically provided by statute, the Certificate of Incorporation or these bylaws. If a quorum is not present at any meeting of the Board, then the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present.

### 3.9 Board Action without a Meeting.

Unless otherwise restricted by the Certificate of Incorporation or these bylaws, any action required or permitted to be taken at any meeting of the Board, or of any committee thereof, may be taken without a meeting if all members of the Board or committee, as the case may be, consent thereto in writing or by electronic transmission. After an action is taken, the consent or consents relating thereto shall be filed with the minutes of the proceedings of the Board, or the committee thereof, in the same paper or electronic form as the minutes are maintained. Such action by written consent or consent by electronic transmission shall have the same force and effect as a unanimous vote of the Board.

### 3.10 Fees and Compensation of Directors.

Unless otherwise restricted by the Certificate of Incorporation or these bylaws, the Board shall have the authority to fix the compensation, including fees and reimbursement of expenses, of directors for services to the Corporation in any capacity.

## **Article IV—Committees**

### 4.1 Committees of Directors.

The Board may designate one (1) or more committees, each committee to consist, of one (1) or more of the directors of the Corporation. The Board may designate one (1) or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another member of the Board to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the Board or in these bylaws, shall have and may exercise all the powers and authority of the Board in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers that may require it; but no such committee shall have the power or authority to (i) approve or adopt, or recommend to the stockholders, any action or matter expressly required by the DGCL to be submitted to stockholders for approval, or (ii) adopt, amend or repeal any bylaw of the Corporation.

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#### 4.2 Committee Minutes.

Each committee shall keep regular minutes of its meetings and report the same to the Board when required.

#### 4.3 Meetings and Actions of Committees.

Meetings and actions of committees shall be governed by, and held and taken in accordance with, the provisions of:

- (i) Section 3.5 (place of meetings; meetings by telephone);
- (ii) Section 3.6 (regular meetings);
- (iii) Section 3.7 (special meetings; notice);
- (iv) Section 3.9 (board action without a meeting); and
- (v) Section 7.14 (waiver of notice),

with such changes in the context of those bylaws as are necessary to substitute the committee and its members for the Board and its members; *provided, however, that:*

- (i) the time of regular meetings of committees may be determined either by resolution of the Board or by resolution of the committee;
- (ii) special meetings of committees may also be called by resolution of the Board or the chairperson of the applicable committee; and
- (iii) the Board may adopt rules for the governance of any committee to override the provisions that would otherwise apply to the committee pursuant to this Section 4.3, provided that such rules do not violate the provisions of the Certificate of Incorporation or applicable law.

#### 4.4 Subcommittees.

Unless otherwise provided in the Certificate of Incorporation, these bylaws or the resolutions of the Board designating the committee, a committee may create one (1) or more subcommittees, each subcommittee to consist of one (1) or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee.

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## Article V—Officers

### 5.1 Officers.

The officers of the Corporation shall include a Chief Executive Officer, a President and a Secretary. The Corporation may also have, at the discretion of the Board, a Chairperson of the Board, a Vice Chairperson of the Board, a Chief Financial Officer, a Chief Operating Officer, a Treasurer, one (1) or more Vice Presidents, one (1) or more Assistant Vice Presidents, one (1) or more Assistant Treasurers, one (1) or more Assistant Secretaries, and any such other officers as may be appointed in accordance with the provisions of these bylaws. Any number of offices may be held by the same person. No officer need be a stockholder or director of the Corporation.

### 5.2 Appointment of Officers.

The Board shall appoint the officers of the Corporation, except such officers as may be appointed in accordance with the provisions of Section 5.3.

### 5.3 Subordinate Officers.

The Board may appoint, or empower the Chief Executive Officer or, in the absence of a Chief Executive Officer, the President, to appoint, such other officers and agents as the business of the Corporation may require. Each of such officers and agents shall hold office for such period, have such authority, and perform such duties as are provided in these bylaws or as the Board may from time to time determine.

### 5.4 Removal and Resignation of Officers.

Subject to the rights, if any, of an officer under any contract of employment, any officer may be removed, either with or without cause, by the Board or, except in the case of an officer chosen by the Board, by any officer upon whom such power of removal may be conferred by the Board.

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

### 5.5 Vacancies in Offices

Any vacancy occurring in any office of the Corporation shall be filled by the Board or as provided in Section 5.2.

### 5.6 Representation of Shares of Other Corporations.

The Chairperson of the Board, the Chief Executive Officer, or the President of this Corporation, or any other person authorized by the Board, the Chief Executive Officer or the President, is authorized to vote, represent and exercise on behalf of this Corporation all rights incident to any and all shares or voting securities of any other corporation or other person standing in the name of this Corporation. The authority granted herein may be exercised either by such person directly or by any other person authorized to do so by proxy or power of attorney duly executed by such person having the authority.

5.7 Authority and Duties of Officers.

All officers of the Corporation shall respectively have such authority and perform such duties in the management of the business of the Corporation as may be provided herein or designated from time to time by the Board and, to the extent not so provided, as generally pertain to their respective offices, subject to the control of the Board.

5.8 Compensation.

The compensation of the officers of the Corporation for their services as such shall be fixed from time to time by or at the direction of the Board. An officer of the Corporation shall not be prevented from receiving compensation by reason of the fact that he or she is also a director of the Corporation.

**Article VI—Records**

A stock ledger consisting of one or more records in which the names of all of the Corporation's stockholders of record, the address and number of shares registered in the name of each such stockholder, and all issuances and transfers of stock of the corporation are recorded in accordance with Section 224 of the DGCL shall be administered by or on behalf of the Corporation. Any records administered by or on behalf of the Corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device, or method, or one or more electronic networks or databases (including one or more distributed electronic networks or databases), *provided* that the records so kept can be converted into clearly legible paper form within a reasonable time and, with respect to the stock ledger, that the records so kept (i) can be used to prepare the list of stockholders specified in Sections 219 and 220 of the DGCL, (ii) record the information specified in Sections 156, 159, 217(a) and 218 of the DGCL, and (iii) record transfers of stock as governed by Article 8 of the Uniform Commercial Code as adopted in the State of Delaware.

**Article VII—General Matters**

7.1 Execution of Corporate Contracts and Instruments.

The Board, except as otherwise provided in these bylaws, may authorize any officer or officers, or agent or agents, to enter into any contract or execute any instrument in the name of and on behalf of the Corporation; such authority may be general or confined to specific instances.

7.2 Stock Certificates.

The shares of the Corporation shall be represented by certificates or shall be uncertificated. Certificates for the shares of stock, if any, shall be in such form as is consistent with the Certificate of Incorporation and applicable law. Every holder of stock represented by a certificate shall be entitled to have a certificate signed by, or in the name of the Corporation by, any two officers authorized to sign stock certificates representing the number of shares registered in certificate form. The Chairperson or Vice Chairperson of the Board, the Chief

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Executive Officer, the President, Vice President, the Treasurer, any Assistant Treasurer, the Secretary or any Assistant Secretary of the Corporation shall be specifically authorized to sign stock certificates. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate has ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the Corporation with the same effect as if he or she were such officer, transfer agent or registrar at the date of issue.

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

#### 7.3 Special Designation of Certificates.

If the Corporation is authorized to issue more than one class of stock or more than one series of any class, then the powers, the designations, the preferences and the relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights shall be set forth in full or summarized on the face or on the back of the certificate that the Corporation shall issue to represent such class or series of stock (or, in the case of uncertificated shares, set forth in a notice provided pursuant to Section 151 of the DGCL); *provided, however*, that except as otherwise provided in Section 202 of the DGCL, in lieu of the foregoing requirements, there may be set forth on the face of back of the certificate that the Corporation shall issue to represent such class or series of stock (or, in the case of any uncertificated shares, included in the aforementioned notice) a statement that the Corporation will furnish without charge to each stockholder who so requests the powers, the designations, the preferences and the relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights.

#### 7.4 Lost Certificates.

Except as provided in this Section 7.4, no new certificates for shares shall be issued to replace a previously issued certificate unless the latter is surrendered to the Corporation and cancelled at the same time. The Corporation may issue a new certificate of stock or uncertificated shares in the place of any certificate theretofore issued by it, alleged to have been lost, stolen or destroyed, and the Corporation may require the owner of the lost, stolen or destroyed certificate, or such owner's legal representative, to give the Corporation a bond sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft or destruction of any such certificate or the issuance of such new certificate or uncertificated shares.

#### 7.5 Shares Without Certificates

The Corporation may adopt a system of issuance, recordation and transfer of its shares of stock by electronic or other means not involving the issuance of certificates, provided the use of such system by the Corporation is permitted in accordance with applicable law.



7.6 Construction: Definitions.

Unless the context requires otherwise, the general provisions, rules of construction and definitions in the DGCL shall govern the construction of these bylaws. Without limiting the generality of this provision, the singular number includes the plural and the plural number includes the singular.

7.7 Dividends.

The Board, subject to any restrictions contained in either (i) the DGCL or (ii) the Certificate of Incorporation, may declare and pay dividends upon the shares of its capital stock. Dividends may be paid in cash, in property or in shares of the Corporation's capital stock.

The Board may set apart out of any of the funds of the Corporation available for dividends a reserve or reserves for any proper purpose and may abolish any such reserve. Such purposes shall include but not be limited to equalizing dividends, repairing or maintaining any property of the Corporation, and meeting contingencies.

7.8 Fiscal Year.

The fiscal year of the Corporation shall be fixed by resolution of the Board and may be changed by the Board.

7.9 Seal.

The Corporation may adopt a corporate seal, which shall be adopted and which may be altered by the Board. The Corporation may use the corporate seal by causing it or a facsimile thereof to be impressed or affixed or in any other manner reproduced.

7.10 Transfer of Stock.

Shares of the stock of the Corporation shall be transferable in the manner prescribed by law and in these bylaws. Shares of stock of the Corporation shall be transferred on the books of the Corporation only by the holder of record thereof or by such holder's attorney duly authorized in writing, upon surrender to the Corporation of the certificate or certificates representing such shares endorsed by the appropriate person or persons (or by delivery of duly executed instructions with respect to uncertificated shares), with such evidence of the authenticity of such endorsement or execution, transfer, authorization and other matters as the Corporation may reasonably require, and accompanied by all necessary stock transfer stamps. No transfer of stock shall be valid as against the Corporation for any purpose until it shall have been entered in the stock records of the Corporation by an entry showing the names of the persons from and to whom it was transferred.

7.11 Stock Transfer Agreements.

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

#### 7.12 Registered Stockholders.

The Corporation:

(i) shall be entitled to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends and to vote as such owner; and

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

#### 7.13 Lock-Up.

(i) Subject to Section 7.13(ii), the holders (the "Lock-up Holders") of common stock of the Corporation issued (a) as consideration pursuant to the merger of Nuevo Merger Sub, Inc., a Delaware corporation ("Merger Sub"), with and into Branded Online, Inc. dba Nogin, a Delaware corporation ("Nogin") (the "Nogin Transaction"), (b) upon the settlement or exercise of restricted stock units, stock options or other equity awards outstanding as of immediately following the closing of the Nogin Transaction in respect of awards of Nogin outstanding immediately prior to the closing of the Nogin Transaction (excluding, for the avoidance of doubt, the Parent Warrants (as defined in the Agreement and Plan of Merger entered into by and among the Corporation, Nogin and Merger Sub, dated as of February 13, 2022, as amended from time to time, the "Merger Agreement")) (such shares referred to in Section 7.13(i)(b), the "Nogin Equity Award Shares"), and (c) upon the exercise of warrants outstanding as of immediately following the closing of the Nogin Transaction in respect of Company Warrants (as defined in the Merger Agreement) outstanding immediately prior to the closing of the Nogin Transaction (such shares referred to in Section 7.13(i)(c), the "Nogin Warrant Shares"), may not Transfer any Lock-up Shares until (i) for Management Holders, the end of the Management Lock-Up Period, and (ii) for all Lock-up Holders other than the Management Holders, the end of the Stockholder Lock-up Period (together with the Management Lock-up Period, the "Lock-up Period") (the "Lock-up").

(ii) Notwithstanding the provisions set forth in Section 7.13(i), the Lock-up Holders or their respective Permitted Transferees may Transfer the Lock-up Shares during the applicable Lock-up Period (a) to (i) the Corporation's officers or directors, (ii) any affiliates or family members of the Corporation's officers or directors, or (iii) the other Lock-up Holders or any direct or indirect partners, members or equity holders of the Lock-up Holders, any affiliates of the Lock-up Holders or any related investment funds or vehicles controlled or managed by such persons or entities or their respective affiliates; (b) in the case of an individual, by gift to a member of the individual's immediate family or to a trust, the beneficiary of which is a member of the individual's immediate family or an affiliate of such person or entity, or to a charitable organization; (c) in the case of an individual, by virtue of laws of descent and distribution upon death of the individual; (d) in the case of an individual, pursuant to a qualified domestic relations order; (e) in connection with any bona fide mortgage, encumbrance or pledge to a financial institution in connection with any bona fide loan or debt transaction or enforcement thereunder, including foreclosure thereof; (f) to the Corporation; or (g) in connection with a liquidation, merger, stock exchange, reorganization, tender offer approved by the Board or a duly authorized committee thereof or other similar transaction which results in all of the Corporation's stockholders having the right to exchange their shares of common stock for cash, securities or other property subsequent to the closing date of the Nogin Transaction; provided, however, that any recipient of Lock-Up Shares pursuant to clauses (a), (b), (c), (d) and (e) of this Section 7.13(ii) shall continue to be bound by the lock-up provisions of this Section 7.13.

(iii) Notwithstanding the other provisions set forth in this Section 7.13, the Board may, in its sole discretion, determine to waive, amend, or repeal the Lock-up obligations set forth herein; provided, that, any such waiver, amendment or repeal shall require, in addition to any other vote of the members of the Board required to take such action pursuant to these bylaws or applicable law, the affirmative vote of the director that has been designated by Parent (as defined by the Merger Agreement).

(iv) For purposes of this Section 7.13:

a) The term “Management Holders” means Jan Nugent, Geoff Van Haeren and Jay Ku.

b) the term “Stockholder Lock-up Period” means the period beginning on the closing date of the Nogin Transaction and ending on the earlier of (i) the six month anniversary of the closing date of the Nogin Transaction and (ii) the date on which the Corporation completes a liquidation, merger, capital stock exchange or other similar transaction that results in all of the Corporation’s stockholders having the right to exchange their shares of common stock for cash, securities or other property, except in accordance with this Section 7.13;

c) the term “Management Lock-up Period” means the period beginning on the closing date of the Nogin Transaction and ending on the earliest of (i) the twelve month anniversary of the closing date of the Nogin Transaction, (ii) the date on which the last reported sale price of the common stock equals or exceeds \$12.00 per share (as adjusted for stock splits, stock dividends, reorganizations, recapitalizations and the like) for any 20 trading days within any 30-trading day period commencing at least 150 days after the closing date of the Nogin Transaction, and (iii) the date on which the Corporation completes a liquidation, merger, capital stock exchange or other similar transaction that results in all of the Corporation’s stockholders having the right to exchange their shares of common stock for cash, securities or other property, except in accordance with this Section 7.13;

d) the term “Lock-up Shares” means the Nogin Equity Award Shares, the Nogin Warrant Shares and eighty percent (80%) of the shares of common stock held by the Lock-up Holders immediately following the closing of the Nogin Transaction (for the avoidance of doubt, twenty percent (20%) of the shares of common stock held by each Lock-up Holder immediately following the closing of the Nogin Transaction shall not be subject to the Lock-up);

e) the term “Permitted Transferees” means, prior to the expiration of the applicable Lock-up Period, any person or entity to whom such Lock-up Holder is permitted to transfer such shares of common stock prior to the expiration of the applicable Lock-up Period pursuant to Section 7.13(ii); and

f) the term “Transfer” means the (a) sale or assignment of, offer to sell, contract or agreement to sell, hypothecate, pledge, grant of any option to purchase or otherwise dispose of or agreement to dispose of, directly or indirectly, or establishment or increase of a put equivalent position or liquidation with respect to or decrease of a call equivalent position within the meaning of Section 16 of the Exchange Act with respect to, any security, (b) entry into any swap or other arrangement that transfers to another, in whole or in part, any of the economic consequences of ownership of any security, whether any such transaction is to be settled by delivery of such securities, in cash or otherwise, or (c) public announcement of any intention to effect any transaction specified in clause (a) or (b).

#### 7.14 Waiver of Notice.

Whenever notice is required to be given under any provision of the DGCL, the Certificate of Incorporation or these bylaws, a written waiver, signed by the person entitled to notice, or a waiver by electronic transmission by the person entitled to notice, whether before or after the time of the event for which notice is to be given, shall be deemed equivalent to notice. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the stockholders need be specified in any written waiver of notice or any waiver by electronic transmission unless so required by the Certificate of Incorporation or these bylaws.

### **Article VIII—Notice**

#### 8.1 Delivery of Notice; Notice by Electronic Transmission

Without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders given by the Corporation under any provisions of the DGCL, the Certificate of Incorporation, or these bylaws may be given in writing directed to the stockholder's mailing address (or by electronic transmission directed to the stockholder's electronic mail address, as applicable) as it appears on the records of the Corporation and shall be given (1) if mailed, when the notice is deposited in the U.S. mail, postage prepaid, (2) if delivered by courier service, the earlier of when the notice is received or left at such stockholder's address or (3) if given by electronic mail, when directed to such stockholder's electronic mail address unless the stockholder has notified the Corporation in writing or by electronic transmission of an objection to receiving notice by electronic mail. A notice by electronic mail must include a prominent legend that the communication is an important notice regarding the Corporation.

Without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders given by the Corporation under any provision of the DGCL, the Certificate of Incorporation or these bylaws shall be effective if given by a form of electronic transmission consented to by the stockholder to whom the notice is given. Any such consent shall be revocable by the stockholder by written notice or electronic transmission to the Corporation. Notwithstanding the provisions of this paragraph, the Corporation may give a notice by electronic mail in accordance with the first paragraph of this section without obtaining the consent required by this paragraph.

Any notice given pursuant to the preceding paragraph shall be deemed given:

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

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

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

Notwithstanding the foregoing, a notice may not be given by an electronic transmission from and after the time that (1) the Corporation is unable to deliver by such electronic transmission two (2) consecutive notices given by the Corporation and (2) such inability becomes known to the Secretary or an Assistant Secretary of the Corporation or to the transfer agent, or other person responsible for the giving of notice; *provided, however*, that the inadvertent failure to discover such inability shall not invalidate any meeting or other action.

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

## Article IX—Indemnification

### 9.1 Indemnification of Directors and Officers.

The Corporation shall indemnify and hold harmless, to the fullest extent permitted by the DGCL or any other applicable law, as it presently exists or may hereafter be amended, any person who was or is made or is threatened to be made a party or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (a “Proceeding”) by reason of the fact that he or she, or a person for whom he or she is the legal representative, is or was a director or officer of the Corporation or, while serving as a director or officer of the Corporation, is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust, other enterprise or non-profit entity, including service with respect to employee benefit plans (hereinafter, an “indemnitee”), whether the basis of such proceeding is alleged action in an official capacity as director, officer, employee, or agent, or in any other capacity while serving as director, officer, employee or agent, against all liability and loss suffered and expenses (including attorneys’ fees, judgments, fines ERISA excise taxes or penalties and amounts paid in settlement) reasonably incurred by such indemnitee in connection with any such Proceeding; provided that such indemnitee acted in good faith and in a manner such indemnitee reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe such indemnitee’s conduct was unlawful. Notwithstanding the preceding sentence, except as otherwise provided in Section 9.4, the Corporation shall be required to indemnify a person in connection with a Proceeding initiated by such indemnitee only if the Proceeding was authorized in the specific case by the Board.

### 9.2 Indemnification of Others.

The Corporation shall have the power to indemnify and hold harmless, to the fullest extent permitted by the DGCL or any other applicable law, as it presently exists or may hereafter be amended, any employee or agent of the Corporation who was or is made or is threatened to be made a party or is otherwise involved in any Proceeding by reason of the fact that he or she, or a person for whom he or she is the legal representative, is or was an employee or agent of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust, enterprise or non-profit entity, including service with respect to employee benefit plans, against all liability and loss suffered and expenses reasonably incurred by such person in connection with any such Proceeding.

### 9.3 Prepayment of Expenses.

In addition to the obligation to indemnify conferred in Section 9.1, the Corporation shall to the fullest extent not prohibited by the DGCL or any other applicable law pay the expenses (including attorneys' fees) incurred by any indemnitee, and may pay the expenses incurred by any employee or agent of the Corporation, in defending any Proceeding in advance of its final disposition; *provided, however*, that such payment of expenses in advance of the final disposition of the Proceeding shall be made only upon receipt of an undertaking by or on behalf of the person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Article IX- or otherwise.

### 9.4 Determination: Claim.

If a claim for indemnification (following the final disposition of such Proceeding) under this Article IX- is not paid in full within sixty (60) days, or a claim for advancement of expenses under this Article IX- is not paid in full within twenty (20) days, after a written claim therefor has been received by the Corporation the indemnitee may thereafter (but not before) file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim to the fullest extent permitted by law. In any such action the Corporation shall have the burden of proving that the claimant was not entitled to the requested indemnification or payment of expenses under applicable law.

### 9.5 Non-Exclusivity of Rights.

The rights conferred on any person by this Article IX- shall not be exclusive of any other rights which such person may have or hereafter acquire under any statute, provision of the Certificate of Incorporation, these bylaws, agreement, vote of stockholders or disinterested directors or otherwise.

### 9.6 Insurance.

The Corporation shall purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust enterprise or non-profit entity against any liability asserted against him or her and incurred by him or her in any such capacity, or arising out of his or her status as such, whether or not the Corporation would have the power to indemnify him or her against such liability under the provisions of the DGCL.

### 9.7 Other Indemnification.

The Corporation's obligation, if any, to indemnify or advance expenses to any person who was or is serving at its request as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, enterprise or non-profit entity shall be reduced by any amount such person may collect as indemnification or advancement of expenses from such other corporation, partnership, joint venture, trust, enterprise or non-profit enterprise.

#### 9.8 Continuation of Indemnification.

The rights to indemnification and to prepayment of expenses provided by, or granted pursuant to, this Article IX- shall continue notwithstanding that the person has ceased to be a director or officer of the Corporation and shall inure to the benefit of the estate, heirs, executors, administrators, legatees and distributees of such person.

#### 9.9 Amendment or Repeal; Interpretation.

The provisions of this Article IX- shall constitute a contract between the Corporation, on the one hand, and, on the other hand, each individual who serves or has served as a director or officer of the Corporation (whether before or after the adoption of these bylaws), in consideration of such person's performance of such services, and pursuant to this Article IX- the Corporation intends to be legally bound to each such current or former director or officer of the Corporation. With respect to current and former directors and officers of the Corporation, the rights conferred under this Article IX- are present contractual rights and such rights are fully vested, and shall be deemed to have vested fully, immediately upon adoption of these bylaws. With respect to any directors or officers of the Corporation who commence service following adoption of these bylaws, the rights conferred under this provision shall be present contractual rights and such rights shall fully vest, and be deemed to have vested fully, immediately upon such director or officer commencing service as a director or officer of the Corporation. Any repeal or modification of the foregoing provisions of this Article IX- shall not adversely affect any right or protection (i) hereunder of any person in respect of any act or omission occurring prior to the time of such repeal or modification or (ii) under any agreement providing for indemnification or advancement of expenses to an officer or director of the Corporation in effect prior to the time of such repeal or modification.

Any reference to an officer of the Corporation in this Article IX- shall be deemed to refer exclusively to the Chief Executive Officer, the President and the Secretary of the Corporation, or other officer of the Corporation appointed by (x) the Board pursuant to Article V- or (y) an officer to whom the Board has delegated the power to appoint officers pursuant to Article V-, and any reference to an officer of any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise shall be deemed to refer exclusively to an officer appointed by the board of directors (or equivalent governing body) of such other entity pursuant to the certificate of incorporation and bylaws (or equivalent organizational documents) of such other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise. The fact that any person who is or was an employee of the Corporation or an employee of any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise has been given or has used the title of "Vice President" or any other title that could be construed to suggest or imply that such person is or may be an officer of the Corporation or of such other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise shall not result in such person being constituted as, or being deemed to be, an officer of the Corporation or of such other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise for purposes of this Article IX-.

### **Article X—Amendments**

The Board is expressly empowered to adopt, amend or repeal the bylaws of the Corporation. The stockholders also shall have power to adopt, amend or repeal the bylaws of the Corporation; *provided, however,* that such action by stockholders shall require, in addition to any other vote required by the Certificate of Incorporation or applicable law, the affirmative vote of the holders of at least two-thirds of the voting power of all the then-outstanding shares of voting stock of the Corporation with the power to vote generally in an election of directors, voting together as a single class.

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## Article XI—Forum Selection

Unless the Corporation consents in writing to the selection of an alternative forum, (a) the Court of Chancery (the “Chancery Court”) of the State of Delaware (or, in the event that the Chancery Court does not have jurisdiction, the federal district court for the District of Delaware or other state courts of the State of Delaware) shall, to the fullest extent permitted by law, be the sole and exclusive forum for (i) any derivative Proceeding brought on behalf of the Corporation, (ii) any Proceeding asserting a claim of breach of a fiduciary duty owed by any director, officer or stockholder of the Corporation to the Corporation or to the Corporation’s stockholders, (iii) any Proceeding arising pursuant to any provision of the DGCL or the Certificate of Incorporation or these bylaws (as either may be amended from time to time) or (iv) any Proceeding asserting a claim against the Corporation governed by the internal affairs doctrine; and (b) subject to the preceding provisions of this Article XI, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933, as amended, including all causes of action asserted against any defendant to such complaint. If any action the subject matter of which is within the scope of clause (a) of the immediately preceding sentence is filed in a court other than the courts in the State of Delaware (a “Foreign Action”) in the name of any stockholder, such stockholder shall be deemed to have consented to (x) the personal jurisdiction of the state and federal courts in the State of Delaware in connection with any action brought in any such court to enforce the provisions of clause (a) of the immediately preceding sentence and (y) having service of process made upon such stockholder in any such action by service upon such stockholder’s counsel in the Foreign Action as agent for such stockholder.

Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to this Article XI. Notwithstanding the foregoing, the provisions of this Article XI shall not apply to suits brought to enforce any liability or duty created by the Securities Exchange Act of 1934, as amended, or any other claim for which the federal courts of the United States have exclusive jurisdiction.

If any provision or provisions of this Article XI shall be held to be invalid, illegal or unenforceable as applied to any circumstances for any reason whatsoever, (a) the validity, legality and enforceability of such provisions in any other circumstance and of the remaining provisions of this Article XI (including, without limitation, each portion of any paragraph of this Article XI containing any such provision held to be invalid, illegal or unenforceable that is not itself held to be invalid, illegal or unenforceable) shall not in any way be affected or impaired thereby and (b) the application of such provision to other persons or entities and circumstances shall not in any way be affected or impaired thereby.



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## Article XII—Definitions

As used in these bylaws, unless the context otherwise requires, the following terms shall have the following meanings:

An “electronic transmission” means any form of communication, not directly involving the physical transmission of paper, including the use of, or participation in, one or more electronic networks or databases (including one or more distributed electronic networks or databases), that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process.

An “electronic mail” means an electronic transmission directed to a unique electronic mail address (which electronic mail shall be deemed to include any files attached thereto and any information hyperlinked to a website if such electronic mail includes the contact information of an officer or agent of the Corporation who is available to assist with accessing such files and information).

An “electronic mail address” means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the “local part” of the address) and a reference to an internet domain (commonly referred to as the “domain part” of the address), whether or not displayed, to which electronic mail can be sent or delivered.

The term “person” means any individual, general partnership, limited partnership, limited liability company, corporation, trust, business trust, joint stock company, joint venture, unincorporated association, cooperative or association or any other legal entity or organization of whatever nature, and shall include any successor (by merger or otherwise) of such entity.

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**Nogin, Inc.**  
**Certificate of Amendment and Restatement of Bylaws**

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The undersigned hereby certifies that he is the duly elected, qualified, and acting Chief Executive Officer of Nogin, Inc., a Delaware corporation (the "Corporation"), and that the attached Bylaws are a true and correct copy of the Bylaws of the Corporation in effect as of the date of this certificate..

IN WITNESS WHEREOF, the undersigned has hereunto set his hand this 26th day of August, 2022.

/s/ Jan-Christopher Nugent  
\_\_\_\_\_  
Jan-Christopher Nugent  
Co-Chief Executive Officer

**SOFTWARE ACQUISITION GROUP INC. III**  
as Issuer,

THE GUARANTORS PARTY HERETO,  
as Guarantors,

and

**U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION**

as Trustee and Collateral Agent

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INDENTURE

Dated as of August 26, 2022

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7.00 % Convertible Senior Notes due 2026

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Schedules

Schedule A – Accreted Principal Amount
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**INDENTURE**, dated as of August 26, 2022, between SOFTWARE ACQUISITION GROUP INC. III, a Delaware corporation, as issuer (to be renamed “Nogin, Inc.” in connection with the consummation of the transactions contemplated by the Business Combination Agreement) (the “**Company**”), Branded Online, Inc. dba Nogin, a Delaware corporation, and Native Brands Group LLC, a California limited liability company, as guarantors (collectively, the “**Guarantors**” and each, a “**Guarantor**”) and U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION, a national banking association, as trustee (in such capacity, the “**Trustee**”) and as collateral agent (in such capacity, the “**Collateral Agent**”).

Each party to this Indenture (as defined below) agrees as follows for the benefit of the other party and for the equal and ratable benefit of the Holders (as defined below) of the Company’s 7.00% Convertible Senior Notes due 2026 (the “**Notes**”).

## **Article 1. DEFINITIONS; RULES OF CONSTRUCTION**

### **Section 1.01. DEFINITIONS.**

“**Accredited Investor Note**” means the Note initially beneficially owned by Jonathan Huberman, and any Notes issued in exchange therefor or in substitution thereof, which, if in the form of a Global Note, will be identified a separate CUSIP number from Notes that are not Accredited Investor Notes; *provided, however*, that a Note that is an Accredited Investor Note will cease to be an Accredited Investor Note at such time, if any, when such Note ceases to be a Transfer-Restricted Security. The Trustee is under no obligation to determine whether any Note is an Accredited Investor Note and may conclusively rely on an Officer’s Certificate with respect thereto.

“**Accreted Principal Amount**” means the Original Principal Amount plus the principal accreted thereon pursuant to **Section 2.03(B)**.

“**Acquired Debt**” means, with respect to any specified Person:

(1) Indebtedness of any other Person existing at the time such other Person is merged with or into or became a Subsidiary of such specified Person, whether or not such Indebtedness is incurred in connection with, or in contemplation of, such other Person merging with or into, or becoming, a Subsidiary of, such specified Person; and

(2) Indebtedness secured by a Lien encumbering any asset acquired by such specified Person.

“**Additional Interest**” has the meaning ascribed to it in the Subscription Agreement.

“**Affiliate**” has the meaning set forth in Rule 144 as in effect on the Issue Date.

“**Asset Sale**” means:

(1) the sale, lease, conveyance, license or other disposition of any assets or rights (whether in a single transaction or a series of related transactions), *provided* that the sale, lease, conveyance, license or other disposition of all or substantially all of the assets of the Company and its Subsidiaries taken as a whole will be governed by **Article 6**; and



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(2) the issuance of Equity Interests by any of the Company's Subsidiaries or the sale of Equity Interests in any of the Company's Subsidiaries (other than directors' qualifying Equity Interests or Equity Interests required by applicable law to be held by a Person other than the Company or one of its Subsidiaries).

Notwithstanding anything to the contrary in the preceding paragraph, none of the following items will be deemed to be an Asset Sale:

(1) a transfer of assets (including Equity Interests) between or among the Company and the Guarantors;

(2) a transfer of assets from a Subsidiary that is not a Guarantor to the Company, a Guarantor or a Subsidiary that is not a Guarantor;

(3) an issuance of Equity Interests by a Subsidiary of the Company to the Company or a Guarantor, and an issuance of Equity Interests by a Subsidiary of the Company that is not a Guarantor to a Subsidiary of the Company that is not a Guarantor;

(4) any sale or other disposition of damaged, worn-out or obsolete assets or assets otherwise unsuitable or no longer required for use in the ordinary course of the business of the Company and its Subsidiaries (including the abandonment or other disposition of property that is, in the reasonable judgment of the Company, no longer profitable, economically practicable to maintain or useful in the conduct of the business of the Company and its Subsidiaries, taken as a whole);

(5) a Restricted Payment that does not violate Section 3.08;

(6) the sale, lease, sublease, license, sublicense, consignment, conveyance or other disposition of products, services, inventory and other assets in the ordinary course of business, including leases with respect to facilities that are temporarily not in use or pending their disposition (for the avoidance of doubt, licenses, sublicenses and other dispositions of rights in patents, trademarks, copyrights, know-how or other Intellectual Property shall be deemed not to be in the ordinary course);

(7) a disposition of leasehold improvements or leased assets in connection with the termination of any operating lease;

(8) (x) dispositions of receivables in connection with the compromise, settlement or collection thereof in the ordinary course of business or in bankruptcy or similar proceedings and exclusive of factoring or similar arrangements; or (y) the sale or other disposition of Hedging Obligations or other financial instruments in the ordinary course of business;

(9) any foreclosure or any similar action with respect to the property or other assets of the Company or any Subsidiary;

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(10) the sublease or assignment to third parties of leased facilities in the ordinary course of business;

(11) [Reserved];

(12) any surrender or waiver of contract rights or settlement, release, recovery on or surrender of contract, tort or other claims;

(13) the sale or other disposition of cash or Cash Equivalents; and

(14) any (A) non-exclusive license, or (B) licenses that are exclusive solely with respect to a specific geographic territory, in each case, for the licensing of Intellectual Property entered into in the ordinary course of business and in connection with the provision of services by the Company or any of its Subsidiaries or the provision, directly or together with the Company, of services by any third party with whom the Company or any of its Subsidiaries has a commercial arrangement to provide services or technology and spectrum to enable the provision of such services to its customers, within such specific geographic territory; *provided* that, at the time such license is entered into, in the judgment of the Company, the granting of such license does not materially and adversely affect the business or condition (financial or otherwise) of the Company and its Subsidiaries, taken as a whole.

“**Attributable Debt**” in respect of a sale and leaseback transaction means, at the time of determination, the present value of the obligation of the lessee for net rental payments during the remaining term of the lease included in such sale and leaseback transaction, including any period for which such lease has been extended or may, at the option of the lessor, be extended. Such present value shall be calculated using a discount rate equal to the rate of interest implicit in such transaction, determined in accordance with U.S. GAAP; *provided, however*, that if such sale and leaseback transaction results in a Capital Lease Obligation, the amount of Attributable Debt represented thereby will be the amount of liability in respect thereof determined in accordance with the definition of “Capital Lease Obligation.”

“**Authorized Denomination**” means, with respect to a Note, a principal amount minimum denomination equal to \$1,000 or any integral multiple of \$1,000 in excess thereof.

“**Bankruptcy Law**” means Title 11, United States Code, or any similar U.S. federal or state or non-U.S. law for the relief of debtors.

“**Board of Directors**” means the board of directors of the Company or a committee of such board duly authorized to act on behalf of such board.

“**Business Day**” means any day other than a Saturday, a Sunday or any day on which banking institutions or trust companies in the City of New York, New York or the principal office of the Trustee are authorized or obligated by law, regulation or executive order to close or be closed.

“**Business Combination Agreement**” that certain Agreement and Plan of Merger, dated as of February 14, 2022, by and among the Company, Nuevo Merger Sub, Inc. and Branded Online Inc. dba Nogin (“**Target**”), as amended from time to time.

“**Capital Lease Obligation**” means, at the time any determination is to be made, the amount of the liability in respect of a capital lease that would at that time be required to be capitalized on a balance sheet prepared in accordance with U.S. GAAP, and the Stated Maturity thereof shall be the date of the last payment of rent or any other amount due under such lease on or prior to the first date upon which such lease may be prepaid by the lessee without payment of a penalty.

“**Capital Stock**” means, any and all shares, interests, rights to purchase, warrants and options (whether denominated as common stock or preferred stock), equity interests, beneficial, partnership or membership interests, joint venture interests, participations or other ownership or profit interests in or equivalents (regardless of how designated) of or in a Person (other than an individual), whether voting or non-voting.

“**Cash Equivalents**” means:

(1) any evidence of Indebtedness issued or directly and fully guaranteed or insured by the United States or any agency or instrumentality thereof with a final maturity not exceeding one year from the date of acquisition;

(2) deposits, certificates of deposit or acceptances of any financial institution that is a member of the Federal Reserve System and whose unsecured long term debt is rated at least “A” by Standard & Poor’s Ratings, a division of McGraw Hill Financial, Inc. (“**S&P**”), or at least “A2” by Moody’s Investors Service, Inc. (“**Moody’s**”) or any respective successor agency;

(3) commercial paper with a maturity of 365 days or less issued by a corporation (other than an Affiliate of the Company) organized and existing under the laws of the United States of America, any state thereof or the District of Columbia and rated at least “A-1” by S&P and at least “P-1” by Moody’s or any respective successor agency;

(4) repurchase agreements and reverse repurchase agreements relating to marketable direct obligations issued or unconditionally guaranteed by the United States or issued by any agency thereof and backed by the full faith and credit of the United States maturing within 365 days from the date of acquisition;

(5) readily marketable direct obligations issued by any state of the United States or any political subdivision of any such state or any public instrumentality thereof maturing within 365 days from the date of acquisition and, at the time of acquisition, having one of the two highest ratings obtainable from either S&P or Moody’s or any respective successor agency;

(6) demand deposits, savings deposits, time deposits and certificates of deposit of any commercial bank having, or which is the principal banking subsidiary of a bank holding company organized under the laws of the United States, any state thereof or the District of Columbia having, capital and surplus aggregating in excess of \$500,000,000 and a rating of “A” (or such other similar equivalent rating) or higher by at least one “nationally recognized statistical rating organization” (as defined in Section 3(a)(62) of the Exchange Act) with maturities of not more than 365 days from the date of acquisition;

(7) money market funds which invest substantially all of their assets in securities described in the preceding clauses (1) through (6); and

(8) in the case of a Foreign Subsidiary, instruments equivalent to those referred to in clauses (1) through (7) above denominated in a foreign currency, which are (i) substantially equivalent in tenor and readily convertible into United States Dollars, (ii) issued by, or entered into with, foreign persons with credit quality generally accepted by businesses in the jurisdictions in which such Foreign Subsidiary operates and (iii) customarily used by businesses for short-term cash management purposes in any jurisdiction outside of the United States to the extent reasonably required in connection with any business conducted by such Foreign Subsidiary.

“**CFC**” means a “controlled foreign corporation” within the meaning of Section 957 of the Code.

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

“**Code**” means Internal Revenue Code of 1986, as amended.

“**Collateral**” has the meaning ascribed to such term in the Security Documents.

“**Collateral Agent**” means the Person named as such in the first paragraph of this Indenture until a successor replaces it in accordance with the provisions of this Indenture and, thereafter, means such successor.

“**Common Equity**” of any Person means Capital Stock of such Person that is generally entitled (a) to vote in the election of directors of such Person or (b) if such Person is not a corporation, to vote or otherwise participate in the selection of the governing body, partners, managers or others that will control the management or policies of such Person.

“**Common Stock**” means the Class A common stock of Company, par value \$0.0001 per share, at the date of this Indenture, subject to **Section 5.09**.

“**Company**” means the Person named as such in the first paragraph of this Indenture and, subject to **Article 6**, its successors and assigns.

“**Company Order**” means a written request or order signed on behalf of the Company by one (1) of its Officers and delivered to the Trustee.

“**Consolidated EBITDA**” means, with respect to any specified Person for any period, the Consolidated Net Income of such Person and its Subsidiaries for such period (A) plus, without duplication (in each case, solely to the extent deducted in computing Consolidated Net Income):

(1) provision for taxes based on income or profits of such Person and its Subsidiaries and all franchise taxes for such period; *plus*

(2) the Fixed Charges of such Person and its Subsidiaries for such period (other than any Fixed Charges specified in clause (1) of the definition thereof) minus the consolidated interest income of such Person and its Subsidiaries for such period; *plus*

(3) depreciation, amortization (including amortization of intangibles, deferred financing fees, debt incurrence costs, commissions, fees and expenses, but excluding amortization of prepaid cash expenses that were paid in a prior period), depletion and other non-cash expenses or charges (including any write-offs of debt issuance or deferred financing costs or fees and impairment charges and the impact on depreciation and amortization of purchase accounting, but excluding any such non-cash expense to the extent that it represents an accrual of or reserve for cash expenses in any future period or amortization of a prepaid cash expense that was paid in a prior period) of such Person and its Subsidiaries for such period; *plus*

(4) unusual, nonrecurring charges and expenses, whether or not classified as such under GAAP; plus

(5) charges, costs, losses, expenses or reserves related to: (A) any restructuring (including restructuring charges or reserves, whether or not classified as such under GAAP), severance, relocation, consolidation, integration or other similar items, (B) strategic and/or business initiatives, business optimization initiatives (including costs and expenses relating to business optimization programs which, for the avoidance of doubt, shall include implementation of operational and reporting systems and technology initiatives; strategic initiatives; retention; severance; systems establishment costs; systems conversion and integration costs; contract termination costs; recruiting and relocation costs and expenses; costs, expenses and charges incurred in connection with curtailments or modifications to pension and post-retirement employee benefits plans; costs to start-up, pre-opening, opening, closure, transition and/or consolidation of business centers, operations, offices and facilities) including in connection with the SPAC Transactions and any acquisition or other investment consummated prior to the Issue Date and new systems design and implementation, as well as consulting fees and any onetime expense relating to enhanced accounting function, (C) business or facilities (including greenfield facilities) start-up, opening, transition, consolidation, shut-down and closing, (D) signing, retention and completion bonuses, (E) severance, relocation or recruiting, (F) charges and expenses incurred in connection with litigation (including threatened litigation), any investigation or proceeding (or any threatened investigation or proceeding) by a regulatory, governmental or law enforcement body (including any attorney general), and (G) expenses incurred in connection with casualty events or asset sales outside the ordinary course of business, in all cases, whether or not consummated and whether or not classified as such under GAAP; provided that, notwithstanding anything to the contrary, the aggregate amount that may be added back pursuant to this clause (A)(5) may not in the aggregate for any four fiscal quarter period exceed 20% of Consolidated EBITDA for such period (determined without giving effect to any such adjustments pursuant to this clause (A)(5)); *plus*

(6) non-cash items (provided that if any such non-cash item represents an accrual or reserve for potential cash items in any future period, (x) the Company may determine not to add back such non-cash item in the current Test Period, (y) to the extent the Company decides to add back such non-cash expense or charge, the cash payment in respect thereof in such future period will be subtracted from Consolidated EBITDA in such future period), including the following: (A) non-cash expenses in connection with, or resulting from, stock option plans, employee benefit plans or agreements or post-employment benefit plans or agreements, or grants or sales of stock, stock appreciation or similar rights, stock options, restricted stock, preferred stock or other similar rights, (B) non-cash charges for deferred tax asset valuation allowances, (C) any non-cash

impairment charge or asset write-off or write-down related to intangible assets (including goodwill), long-lived assets, and investments in debt and equity securities, (D) any non-cash charges or losses resulting from any purchase accounting adjustment or any step-ups with respect to re-valuing assets and liabilities in connection with the SPAC Transactions or any investments either existing or arising after the Issue Date, (E) the excess of GAAP rent expense over actual cash rent paid during such period due to the use of straight line rent for GAAP purposes and (F) any non-cash interest expense; *provided* that, in no event shall any write-downs or write-offs of accounts receivable be permitted as adjustments under this clause (A)(6); *plus*

(7) all charges, costs, expenses, accruals or reserves in connection with the rollover, acceleration or payout of Equity Interests held by officers or employees and all losses, charges and expenses related to payments made to holders of options or other derivative Equity Interests of such Person or any direct or indirect parent thereof in connection with, or as a result of, any distribution being made to equity holders of such Person or any direct or indirect parent thereof, including (A) payments made to compensate such holders as though they were equity holders at the time of, and entitled to share in, such distribution, and (B) all dividend equivalent rights owed pursuant to any compensation or equity arrangement; *plus*

(8) all (A) costs, fees and expenses relating to the SPAC Transactions, and (B) costs, fees and expenses (including diligence and integration costs) incurred in connection with (x) investments in any Person, acquisitions of the Equity Interests of any Person, acquisitions of all or a material portion of the assets of any Person or constituting a line of business of any Person, and financings related to any of the foregoing or to the capitalization of any Note Party or any Subsidiary or (y) other transactions that are out of the ordinary course of business of such Person and its Subsidiaries in connection with equity issuances, investments, acquisitions, dispositions, recapitalizations, mergers, option buyouts and the incurrence, modification or repayment of Indebtedness (including all consent fees, premium and other amounts payable in connection therewith); in each case of clause (x) and (y), including transactions considered or proposed but not consummated, provided that the amount of such un consummated transactions included pursuant to this clause (A)(8) shall not exceed \$500,000 in any such period; *plus*

(9) Public Company Costs; *plus*

(10) the amount of customary indemnities and reasonable and customary fees and expense reimbursements paid to directors and/or members of advisory boards, including directors of the Company, which, with respect to fees, do not exceed \$500,000 in the aggregate in any such period; *plus*

(11) items reducing Consolidated Net Income to the extent (A) covered by a binding indemnification or similar obligation to the extent actually paid or, so long as such Person and its Subsidiaries have not received a notice of denial from the obligor, such amounts that such Person has made a reasonable determination that there exists reasonable evidence that such amount will in fact be reimbursed within 365 days of the date of such determination (with a deduction in the applicable future period for any amount so added back to the extent a notice of denial is received or such amount is not so reimbursed within such 365 days), (B) paid (directly or indirectly) by a third party that is not a Note Party or a Subsidiary (except to the extent such payment gives rise to reimbursement obligations) or with the proceeds of a contribution to equity capital of such Person by a third party that is not a Note Party or a Subsidiary or (C) such Person has been, directly or indirectly, reimbursed for such item by a third party that is not a Note Party or a Subsidiary; *plus*

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(12) [reserved]; *plus*

(13) [reserved]; *plus*

(14) to the extent covered by insurance and actually reimbursed or, so long as such Person and its Subsidiaries have not received a notice of denial, such amounts that such Person has made a reasonable determination that there exists reasonable evidence that such amount will in fact be reimbursed within 365 days of the date of such determination (with a deduction in the applicable future period for any amount so added back to the extent a notice of denial is received or such amount is not so reimbursed within such 365 days), expenses, charges or losses for such period with respect to liability or casualty events or business interruption; *plus*

(15) any losses from disposed or discontinued operations other than such dispositions and discontinuations in the ordinary course of operations;

(16) [reserved]; *plus*

(17) the effects of purchase accounting, fair value accounting or recapitalization accounting (including the effects of adjustments pushed down to such Person and its Subsidiaries) and the amortization, write-down or write-off of any such amount; *plus*

(B) minus without duplication (in each case, solely to the extent included in computing Consolidated Net Income) any non-cash items increasing such Consolidated Net Income for such period (other than the accrual of revenue in the ordinary course of business or any other such non-cash item to the extent that it represents a reduction in an accrual of or reserve for cash charges or expenses in any future period), in each case, on a consolidated basis and determined in accordance with GAAP.

Notwithstanding the foregoing, Consolidated EBITDA, (a) for the fiscal quarter ended June 30, 2022, will be deemed to be \$(4,561,783), (b) for the fiscal quarter ended March 31, 2022, will be deemed to be \$(7,338,050), (c) for the fiscal quarter ended December 31, 2021, will be deemed to be \$(406,319), and (d) for the fiscal quarter ended September 30, 2021, will be deemed to be \$(858,759).

“**Consolidated Net Income**” means, with respect to any specified Person for any period, the aggregate of the net income (loss) from continuing operations of such Person and its Subsidiaries for such period, on a consolidated basis determined in accordance with U.S. GAAP and without any reduction in respect of preferred stock dividends; *provided that*:

(1) all extraordinary gains and losses and all gains and losses realized in connection with any asset disposition or the disposition of securities, in each case not in the ordinary course of business, or the early extinguishment of Indebtedness or Hedging Obligations, together with any related provision for taxes on any such gain, will be excluded;

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(2) the net income of any Person that is not a Subsidiary or that is accounted for by the equity method of accounting will be included only to the extent of the amount of dividends or similar distributions paid in cash to the specified Person or a Subsidiary of the Person (and the net loss of any such Person shall be included only to the extent that such loss is funded in cash by the specified Person or a Subsidiary thereof);

(3) solely for the purpose of determining the amount available for Restricted Payments under **Section 3.08(A)**, the net income for such period of any Subsidiary (other than any Guarantor) shall be excluded to the extent that the declaration or payment of dividends or similar distributions by such Subsidiary of its net income is not at the date of determination permitted without any prior governmental approval (which has not been obtained) or, directly or indirectly, by the operation of the terms of its charter or any agreement, instrument, judgment, decree, order, statute, rule or governmental regulation applicable to that Subsidiary or its stockholders, unless such restrictions with respect to the payment of dividends or similar distributions have been legally waived; *provided* that the Consolidated Net Income of such Person shall be increased by the amount of dividends or other distributions paid in cash (or to the extent converted to cash) by any such Subsidiary to such Person, to the extent not already included therein;

(4) the cumulative effect of a change in accounting principles, together with any related provision for taxes, will be excluded;

(5) any non-cash compensation charge or expense for such Test Period, including any non-cash costs or expenses resulting from stock option plans, employee benefit plans, compensation charges or post-employment benefit plans, or grants or awards of stock, stock appreciation or similar rights, stock options, restricted stock, preferred stock or other rights, and any cash charges or expenses associated with the rollover, acceleration or payout of Equity Interests by, or to, management of such Person or any of its Subsidiaries in connection with the SPAC Transactions will be excluded;

(6) any non-cash gain or loss for such period from currency translation gains or losses or non-cash net gains or losses related to currency re-measurements of Indebtedness will be excluded;

(7) any unrealized net after-tax income (loss) from Hedging Obligations or cash management obligations and the application of Accounting Standards Codification Topic 815 "Derivatives and Hedging" or from other derivative instruments in the ordinary course will be excluded;

(8) any nonrecurring charges relating to any premium or penalty paid, write off of deferred finance costs or other charges in connection with redeeming or retiring any Indebtedness prior to its Stated Maturity will be excluded; and

(9) earn outs, contingent consideration or deferred purchase obligations in connection with the acquisition of a Permitted Business or assets used in a Permitted Business will be excluded.



“**Conversion Date**” means, with respect to a Note, the first Business Day on which the requirements set forth in **Section 5.02(A)** to convert such Note are satisfied, subject to **Section 5.03(B)**.

“**Conversion Price**” means, as of any time, an amount equal to (A) one thousand dollars (\$1,000) *divided by* (B) the Conversion Rate in effect at such time.

“**Conversion Rate**” initially means 86.9565 shares of Common Stock per \$1,000 principal amount of Notes; *provided, however*, that the Conversion Rate is subject to adjustment pursuant to **Article 5**; *provided, further*, that whenever this Indenture refers to the Conversion Rate as of a particular date without setting forth a particular time on such date, such reference will be deemed to be to the Conversion Rate immediately after the Close of Business on such date.

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

“**Corporate Trust Office**” means the designated office of the Trustee or the Collateral Agent, as the case may be, at which at any particular time this Indenture shall be administered, which office at the date hereof is located at Houston Greenway Plaza, 8 Greenway Plaza, Suite 1100, EX-TX-CGW1, Houston, TX 77046-0892, or such other address as the Trustee or the Collateral Agent, as the case may be, may designate from time to time by notice to the Holders and the Company, or the designated corporate trust office of any successor Trustee or the Collateral Agent, as the case may be (or such other address as such successor Trustee or Collateral Agent, as the case may be, may designate from time to time by notice to the holders and the Company).

“**Daily VWAP**” means, for any VWAP Trading Day, the per share volume-weighted average price of the Common Stock as displayed under the heading “Bloomberg VWAP” on Bloomberg page “NOGN <EQUITY> AQR” (or, if such page is not available, its equivalent successor page) in respect of the period from the scheduled open of trading until the scheduled close of trading of the primary trading session on such VWAP Trading Day (or, if such volume-weighted average price is unavailable, the market value of one share of Common Stock on such VWAP Trading Day, determined, using a volume-weighted average price method, by a nationally recognized independent investment banking firm selected by the Company). The Daily VWAP will be determined without regard to after-hours trading or any other trading outside of the regular trading session.

“**Default**” means any event that is (or, after notice, passage of time or both, would be) an Event of Default.

“**Depository**” means The Depository Trust Company or its successor.

“**Depository Participant**” means any member of, or participant in, the Depository.

“**Depository Procedures**” means, with respect to any conversion, transfer, exchange or transaction involving a Global Note or any beneficial interest therein, the rules and procedures of the Depository applicable to such conversion, transfer, exchange or transaction.

**“Disqualified Stock”** means any Capital Stock that, by its terms (or by the terms of any security into which it is convertible, or for which it is exchangeable, in each case, at the option of the holder of the Capital Stock), or upon the happening of any event, matures or is mandatorily redeemable, pursuant to a sinking fund obligation or otherwise, or redeemable at the option of the holder of the Capital Stock, in whole or in part, on or prior to the earlier of (x) the date that is 91 days after the date on which the Notes mature and (y) the date that is 91 days after the date no Notes remain outstanding; *provided*, that only the portion of the Capital Stock which so matures or is mandatorily redeemable, is so convertible or exchangeable or is so redeemable at the option of the holder thereof prior to such date will be deemed to be Disqualified Stock; *provided, further*, that if such Capital Stock is issued to any employee or to any plan for the benefit of employees of the Company or its Subsidiaries or by any such plan to such employees, such Capital Stock will not constitute Disqualified Stock solely because it may be required to be repurchased by the Company in order to satisfy applicable statutory or regulatory obligations or as a result of such employee’s termination, death or disability. Notwithstanding anything to the contrary in the preceding sentence, any Capital Stock that would constitute Disqualified Stock solely because the holders of the Capital Stock have the right to require the Company to repurchase or redeem such Capital Stock upon the occurrence of a Fundamental Change or an Asset Sale will not constitute Disqualified Stock if the terms of such Capital Stock provide that the Company may not repurchase or redeem any such Capital Stock pursuant to such provisions unless such repurchase or redemption is subject to the redemption or payment in full of the Notes and other Obligations including all accrued interest and fees with respect thereto. The amount of Disqualified Stock deemed to be outstanding at any time for purposes of this Indenture will be the maximum amount that the Company or any and its Subsidiaries may become obligated to pay upon the maturity of, or pursuant to any mandatory repurchase or redemption provisions of, such Disqualified Stock exclusive of accrued dividends (other than the accretion, accumulation or payment-in-kind of dividends).

**“Domestic Subsidiary”** means any Subsidiary that is organized under the laws of the United States of America, any state thereof or the District of Columbia.

**“Effective Price”** means:

(1) in the case of an issuance and sale by the Company of any shares of Common Stock (with respect to a Qualifying Issuance) or a sale by one or more of the Founders of any shares of Common Stock (with respect to a Qualifying Sale), the value of the consideration received or receivable by (or at the direction of) the Company or such Founder(s), respectively, for such shares, expressed as an amount per share of Common Stock; and

(2) in the case of an issuance and sale by the Company of any securities convertible into, or exercisable or exchangeable for, Common Stock (with respect to a Qualifying Issuance) or a sale by one or more of the Founders of any securities convertible into, or exercisable or exchangeable, for Common Stock (with respect to a Qualifying Sale), an amount equal to a fraction whose:

(a) numerator is equal to sum, without duplication, of (x) the value of the aggregate consideration received or receivable by (or at the direction of) the Company or such Founder(s) for the issuance or sale of such securities convertible into, or exercisable or exchangeable for, Common Stock; and (y) the value of the minimum aggregate additional consideration payable pursuant to securities convertible into, or exercisable or exchangeable for, Common Stock; and

(b) denominator is equal to the maximum number of shares of Common Stock underlying such securities convertible into, or exercisable or exchangeable for, Common Stock;

*provided, however, that:*

(w) for purposes of clauses (1) and (2)(a) above, all underwriting commissions, placement agency commissions or similar commissions paid to any broker-dealer by the Company, such Founder(s) and/or any of the affiliates thereof, as applicable, in connection with such issuance or sale (excluding any other fees or expenses incurred by the Company, such Founder(s) and/or any of the affiliates thereof, as applicable) will be added to the aggregate consideration referred to in such clause;

(x) for purposes of clause (2) above, if such minimum aggregate consideration, or such maximum number of shares of Common Stock, is not determinable at the time such securities convertible into, or exercisable or exchangeable for, Common Stock are issued or sold, then the initial consideration payable under such securities convertible into, or exercisable or exchangeable for, Common Stock, or the initial number of shares of Common Stock underlying such securities convertible into, or exercisable or exchangeable for, Common Stock, as applicable, will be used and each time thereafter when such amount of consideration or number of shares becomes determinable or is otherwise adjusted (including pursuant to “anti-dilution” or similar provisions) will be deemed, for purposes of the provision in **Section 5.03(A)(vi)** and without affecting any prior adjustments theretofore made to the Conversion Rate, to be the issuance of additional securities convertible into, or exercisable or exchangeable for, Common Stock;

(y) for purposes of clause (2) above, the surrender, extinguishment, maturity or other expiration of any such securities convertible into, or exercisable or exchangeable for, Common Stock will be deemed not to constitute consideration payable pursuant to such securities convertible into, or exercisable or exchangeable for, Common Stock; and

(z) the “value” of any such consideration will be the fair value thereof, as of the date such securities convertible into, or exercisable or exchangeable for, Common Stock, as applicable, are issued or sold, determined in good faith by the Company (or, in the case of cash denominated in U.S. dollars, the face amount thereof).

“**Equity Interests**” means Capital Stock; *provided, however,* that “Equity Interests” does not include any debt security that is convertible into, or exchangeable for, (a) Capital Stock or (b) Capital Stock and/or cash based on the value of such Capital Stock.

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

“**Excluded Asset**” has the meaning assigned to such term in the Security Agreement.

“**Excluded Subsidiary**” means any of the following: (a) any Subsidiary that is prohibited by (i) applicable requirements of law or (ii) any contractual obligation existing on the Issue Date or on the date any such Subsidiary is acquired (so long in respect of any such contractual prohibition such prohibition is not incurred in contemplation of such acquisition or for the purpose of circumventing the guaranty or security requirements of the Note Documents), in each case so long as such contractual obligation prohibits such subsidiary from guaranteeing the Obligations (after giving effect to any anti-assignment provisions of the UCC) or which would require governmental (including regulatory) consent, approval, license or authorization (unless such consent, approval, license or authorization has been obtained) to provide a Guarantee (unless such governmental consent, approval, license or authorization has been obtained), or for which the provision of a Guarantee would result in a material adverse tax consequence (including as a result of the operation of Section 956 of the Code or any similar law or regulation in any applicable jurisdiction) to the Company or one of its Subsidiaries (or their direct or indirect equity holders) reasonably determined by the Company, (b) any Joint Venture, (c) each Immaterial Subsidiary, (d) any Foreign Subsidiary, (e) any FSHCO, or (f) any not-for-profit Subsidiaries or captive insurance companies designated by the Company from time to time.

“**Existing Indebtedness**” means all Indebtedness of the Company and its Subsidiaries in existence on the Issue Date as listed on Schedule C hereto, until such amounts are repaid.

“**Fair Market Value**” means the value that would be paid by a willing buyer or licensor to an unaffiliated willing seller or licensee in a transaction not involving distress or necessity of either party, reasonably determined in good faith by (unless otherwise provided in this Indenture) the Board of Directors.

“**Fixed Charge Coverage Ratio**” means, with respect to any specified Person for any period, the ratio of the Consolidated EBITDA of such Person for such period to the Fixed Charges of such Person for such period. In the event that the specified Person or any of its Subsidiaries incurs, assumes, acquires, guarantees, repays, repurchases, redeems, defeases or otherwise discharges any Indebtedness (other than (i) ordinary working capital borrowings and (ii) Indebtedness incurred under any revolving credit facility for ordinary working capital purposes unless such Indebtedness has been permanently repaid and has not been replaced) or issues, repurchases or redeems preferred stock subsequent to the commencement of the period for which the Fixed Charge Coverage Ratio is being calculated and on or prior to the date on which the event for which the calculation of the Fixed Charge Coverage Ratio is made (the “**Calculation Date**”), then the Fixed Charge Coverage Ratio will be calculated after giving *pro forma* effect, in the good-faith judgment of the Chief Financial Officer of the Company as set forth in a certificate with supporting calculations delivered to the Trustee, to such incurrence, assumption, guarantee, repayment, repurchase, redemption, defeasance or other discharge of Indebtedness, or such issuance, repurchase or redemption of preferred stock, and the use of the proceeds therefrom, as if the same had occurred at the beginning of the applicable period.

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In addition, for purposes of calculating the Fixed Charge Coverage Ratio:

(1) acquisitions of business entities or property and assets constituting a division or line of business, dispositions of assets outside the ordinary course of business not constituting operations or a business, and incurrences of Indebtedness that have been made or incurred by the specified Person or any of its Subsidiaries, including through investments, mergers or consolidations, or any Person or any of its Subsidiaries acquired by the specified Person or any of its Subsidiaries, and including all related financing transactions and including increases in ownership of Subsidiaries, during the reference period or subsequent to such reference period and on or prior to the Calculation Date, or that are to be made on the Calculation Date, will be given *pro forma* effect, in the good-faith judgment of the Chief Financial Officer of the Company, as if they had occurred on the first day of the reference period determined to be reasonably identifiable, reasonably anticipated to be realized and factually supportable, and otherwise consistent with the definition of Consolidated EBITDA (it being agreed such determinations need not be made in compliance with Regulation S-X or other applicable securities law);

(2) the Consolidated EBITDA attributable to material assets dispositions and discontinued operations, as determined in accordance with GAAP, and operations or businesses (and ownership interests therein) disposed of on or prior to the Calculation Date, will be excluded;

(3) the Fixed Charges attributable to discontinued operations, as determined in accordance with GAAP, and operations or businesses (and ownership interests therein) disposed of on or prior to the Calculation Date, will be excluded, but only to the extent that the obligations giving rise to such Fixed Charges will not be obligations of the specified Person or any of its Subsidiaries following the Calculation Date;

(4) any Person that is a Subsidiary on the Calculation Date will be deemed to have been a Subsidiary at all times during such reference period;

(5) any Person that is not a Subsidiary on the Calculation Date will be deemed not to have been a Subsidiary at any time during such reference period;

(6) if any Indebtedness bears a floating rate of interest, the interest expense on such Indebtedness will be calculated as if the rate in effect on the Calculation Date had been the applicable rate for the entire period (taking into account any Hedging Obligation applicable to such Indebtedness if such Hedging Obligation has a remaining term as of the Calculation Date that exceeds 12 months); and

(7) if any Indebtedness is incurred under a revolving credit facility and is being given *pro forma* effect in such calculation, the interest on such Indebtedness shall be calculated based upon the average daily balance of such Indebtedness during the applicable period except as set forth in the first paragraph of this definition.

“**Fixed Charges**” means, with respect to any specified Person for any period, the sum, without duplication, of:

(1) any scheduled principal payments required for any Indebtedness of such Person and its Subsidiaries for such period; *plus*

(2) the consolidated interest expense of such Person and its Subsidiaries for such period (with all interest on the Notes to be deemed to be paid in cash), whether paid or accrued, including amortization of original issue discount, non-cash interest payments, the interest component of any deferred payment obligations, the interest component of all payments associated with Capital Lease Obligations, imputed interest with respect to Attributable Debt, commissions, discounts, yield and other fees and charges (including interest) incurred in respect of letter of credit or bankers' acceptance financings, and giving the effect of all payments made or received pursuant to Hedging Obligations in respect of interest rates, but excluding the amortization or write-off of debt issuance costs; *provided* that consolidated interest expense shall be calculated without giving effect to (i) the effects of Accounting Standards Codification Topic 815 "Derivatives and Hedging" and related interpretations to the extent such effects would otherwise increase or decrease consolidated interest expense for any purpose under this Indenture as a result of accounting for any embedded derivatives created by the terms of any Indebtedness and (ii) any original issue discount on the Notes issued on the Issue Date; *plus*

(3) the product of (a) all dividends, whether paid or accrued and whether or not in cash, on any series of Disqualified Stock of the Company or preferred stock of any of its Subsidiaries, other than dividends on Equity Interests payable solely in Equity Interests of the Company (other than Disqualified Stock) or payable to the Company or any of its Subsidiaries, and (b) a fraction, the numerator of which is one and the denominator of which is one minus the then-current combined federal, state and local statutory tax rate of such Person, expressed as a decimal, in each case, determined on a consolidated basis in accordance with GAAP; *plus*

(4) the royalty or similar payments or expenses of such Person and its Subsidiaries, whether paid or accrued, in connection with a sale of any royalty owing to such Person and its Subsidiaries or a synthetic royalty or other financing or similar transaction based on revenues and other proceeds.

**"Foreign Subsidiary"** means any Subsidiary that is organized under the laws of a jurisdiction other than the United States of America, any state thereof or the District of Columbia.

**"Founder"** means any of Messrs. Jan-Christopher Nugent and Geoffrey Van Haeren (together with any other "person" or a "group" subject to aggregation or attribution of the Company's share capital with such Founder under Section 13(d) of the Exchange Act).

**"FSHCO"** means any Domestic Subsidiary of the Company that has no material assets other than Equity Interests and, if applicable, Indebtedness in one or more Foreign Subsidiaries of the Borrower that are CFCs or other FSHCOs.

**"Fundamental Change"** means any of the following events:

(A) a "person" or "group" (within the meaning of Section 13(d) of the Exchange Act), other than the Company or its Wholly Owned Subsidiaries, or their respective employee benefit plans files a Schedule TO (or any successor schedule, form or report) or any schedule, form or report under the Exchange Act disclosing that such person or group has become the direct or indirect "beneficial owner" (as defined below) (i) of shares of the Company's Common Equity representing more than fifty percent (50%) of the voting power of all classes of the Company's Common Equity; or (ii) of more than 50% of the outstanding shares of the Common Stock (or such other Common Equity into which the Common Stock has been reclassified);

(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 any 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 or combination 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);

(C) the Company's stockholders approve any plan or proposal for the liquidation or dissolution of the Company; or

(D) the Common Stock ceases to be listed on any of The New York Stock Exchange, The NASDAQ Capital Market, The NASDAQ Global Market or The NASDAQ Global Select Market (or any of their respective successors);

*provided, however*, that a transaction or event described in clause (A) or (B) above will not constitute a Fundamental Change if at least ninety percent (90%) of the consideration received or to be received by the holders of Common Stock (excluding cash payments for fractional shares or pursuant to dissenters rights), in connection with such transaction or event, consists of shares of common stock listed on any of The New York Stock Exchange, The NASDAQ Capital Market, The NASDAQ Global Market or The NASDAQ Global Select Market (or any of their respective successors), or that will be so listed when issued or exchanged in connection with such transaction or event, and such transaction or event constitutes a Common Stock Change Event whose Reference Property consists of such consideration.

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**" and whether shares are "**beneficially owned**" will be determined in accordance with Rule 13d-3 under the Exchange Act.

“**Fundamental Change Repurchase Date**” means the date fixed for the repurchase of any Notes by the Company pursuant to a Repurchase Upon Fundamental Change, which must be a Business Day that is no more than 35, nor less than 20, Business Days after the date the Company sends the Fundamental Change Repurchase Notice.

“**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 4.02(F)(i)** and **Section 4.02(F)(ii)**.

“**Fundamental Change Repurchase Price**” means the cash price payable by the Company to repurchase any Note upon its Repurchase Upon Fundamental Change, calculated pursuant to **Section 4.02(D)**.

“**GAAP**” means generally accepted accounting principles in the United States of America as in effect from time to time, including those set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as approved by a significant segment of the accounting profession. Notwithstanding the foregoing, for purposes of determining compliance with any provision herein, the determination of whether a lease is to be treated as an operating lease or capital lease shall be made without giving effect to any change in accounting for leases pursuant to GAAP resulting from the implementation of proposed Accounting Standards Update (ASU) Leases (Topic 840) issued August 17, 2010, or any successor proposal.

“**Global Note**” means a Note that is represented by a certificate substantially in the form set forth in **Exhibit A**, registered in the name of the Depository or Cede & Co. (or such other name as the Depository shall request), as its nominee, duly executed by the Company and authenticated by the Trustee, and deposited with the Trustee, as custodian for the Depository.

“**Global Note Legend**” means a legend substantially in the form set forth in **Exhibit B-2**.

“**Guarantee**” means the guarantee by each Guarantor of the Company’s obligations under this Indenture, the Notes and the other Note Documents pursuant to **Article 9**.

“**Guarantor**” means each Person named as such in the first paragraph of this Indenture, each other Person that becomes a Guarantor by executing an amended or supplemental indenture pursuant to **Section 3.11**, **Section 8.01(B)** and **Section 9.03** and, subject to **Section 9.04**, its successors and assigns of the foregoing, in each case other than an Excluded Subsidiary.

“**Hedging Obligations**” means, with respect to any specified Person, the obligations of such Person under:

(1) interest rate swap agreements (whether from fixed to floating or from floating to fixed), interest rate cap agreements and interest rate collar agreements;

(2) other agreements or arrangements designed to manage interest rates or interest rate risk; and



(3) other agreements or arrangements designed to protect such Person against fluctuations in currency exchange rates or commodity prices.

“**Holder**” means a person in whose name a Note is registered on the Registrar’s books.

“**Immaterial Subsidiary**” means any Subsidiary of the Company that is not a Material Subsidiary.

“**Indebtedness**” means, with respect to any specified Person, any indebtedness of such Person (excluding accrued expenses and trade payables), whether or not contingent:

(1) in respect of borrowed money;

(2) evidenced by bonds, notes, debentures or similar instruments or letters of credit (or reimbursement agreements in respect thereof);

(3) in respect of letters of credit, banker’s acceptances and similar instruments;

(4) representing Capital Lease Obligations, the balance deferred and unpaid of the purchase price of any property to the extent the same would be required to be shown as a long-term liability on the balance sheet of such person prepared in accordance with GAAP, or Attributable Debt in respect of sale and leaseback transactions;

(5) representing the balance deferred and unpaid of the purchase price of any property or services (including earn-outs) due more than six months after such property is acquired or such services are completed, but excluding (x) any accrued liabilities being contested in good faith by appropriate proceedings promptly instituted and diligently conducted and for which reserves have been taken in accordance with GAAP and (y) accounts payable incurred in the ordinary course of business and not past due by more than 90 days;

(6) representing any Hedging Obligations,

(7) [Reserved],

(8) in respect of any sale of future revenues or synthetic royalty or other financing based on future revenues derived from, and other proceeds arising out of, any product marketed or sold by such Person or any of its Subsidiaries, or

(9) representing any guarantees by such Person of Indebtedness of others.

in each case, if and to the extent any of the preceding items would appear as a liability upon a balance sheet (excluding the footnotes) of the specified Person prepared in accordance with U.S. GAAP. In addition, the term “Indebtedness” includes, (i) to the extent not otherwise included, the guarantee by the specified Person of any Indebtedness of any other Person and (ii) all Indebtedness of others secured by a Lien on any asset of the specified Person (whether or not such Indebtedness is assumed by the specified Person) equal to the lesser of (x) the Fair Market Value of such asset as of the date of determination and (y) the amount of such Indebtedness.

Notwithstanding anything to the contrary in the foregoing paragraph, the term “Indebtedness” will not include (a) other than as set forth in clause (5) above, any earn-out obligations, contingent consideration, purchase price adjustments, deferred purchase money amounts, milestone and/or bonus payments (whether performance or time-based), and royalty, licensing, revenue and/or profit sharing arrangements, in each case, characterized as such and arising expressly out of purchase and sale contracts, development arrangements or licensing arrangements; (b) contingent obligations incurred in the ordinary course of business and not in respect of borrowed money; (c) deferred or prepaid revenues; (d) any Capital Stock other than Disqualified Stock; (e) customary purchase price holdbacks in respect of a portion of the purchase price of an asset to satisfy warranty or other unperformed obligations of the respective seller; (f) deferred compensation; and (g) other than as set forth in clause (5) above, accrued expenses. Indebtedness shall be calculated without giving effect to the effects of Accounting Standards Codification Topic 815 “Derivatives and Hedging” and related interpretations to the extent such effects would otherwise increase or decrease an amount of Indebtedness for any purpose under this Indenture as a result of accounting for any embedded derivatives created by the terms of such Indebtedness. Notwithstanding anything in this Indenture or any other Note Document to the contrary, in no event shall any fee or other compensation arrangement in connection with the issuance of the Notes or the SPAC Transaction constitute Indebtedness.

“**Indenture**” means this Indenture, as amended or supplemented from time to time.

“**Intellectual Property**” means, with respect to any Person, all intellectual property and proprietary rights in any jurisdiction throughout the world, and all corresponding rights, presently or hereafter existing, including: (a) all inventions (whether or not patentable or reduced to practice), all improvements thereto, and all patents, patent applications, industrial designs, industrial design applications, and patent disclosures, together with all reissues, continuations, continuations-in-part, revisions, divisionals, extensions, and reexaminations in connection therewith; (b) all trademarks, trademark applications, tradenames, servicemarks, servicemark applications, trade dress, logos and designs, business names, company names, Internet domain names, and all other indicia of origin, all applications, registrations, and renewals in connection therewith, and all goodwill associated with any of the foregoing; (c) all copyrights and other works of authorship, mask works, database rights and moral rights, and all applications, registrations, and renewals in connection therewith; (d) all trade secrets and proprietary knowhow and confidential information (including technical data, customer and supplier lists, manufacturing processes, pricing and cost information, and business and marketing plans and proposals); (e) all software (including source code, executable code, data, databases, and related documentation); and (f) all rights of publicity, including rights to the use of names, likenesses, images, voices, signatures and biographical information of real persons.

“**Interest Payment Date**” means, with respect to a Note, each March 1 and September 1 of each year, commencing on March 1, 2023 (or commencing on such other date specified in the certificate representing such Note). For the avoidance of doubt, the Maturity Date is an Interest Payment Date.

**“Investment”** means, with respect to any specified Person, all direct or indirect investments by such specified Person in other Persons (including Affiliates) in the forms of loans (including guarantees of Indebtedness or other Obligations), advances or capital contributions (excluding (i) commission, travel and similar advances to officers and employees of such Person made in the ordinary course of business and (ii) extensions of credit to customers or advances, deposits or payment to or with suppliers, lessors or utilities or for workers’ compensation, in each case, that are incurred in the ordinary course of business), or purchases or other acquisitions for consideration of Indebtedness, Capital Stock or other securities. The acquisition by the Company or any Subsidiary of the Company of a Person that holds an Investment in a third Person that was acquired in contemplation of the acquisition of such Person will be deemed to be an Investment by the Company or such Subsidiary in such third Person in an amount equal to the Fair Market Value of the Investments held by the acquired Person in such third Person determined as provided in this Indenture. Except as otherwise provided in this Indenture, the amount of an Investment will be determined at the time the Investment is made and without giving effect to subsequent changes in value but after giving effect (without duplication) to all subsequent reductions in the amount of such Investment as a result of the repayment or disposition thereof for cash, not to exceed the original amount of such Investment.

**“Issue Date”** means August 26, 2022.

**“Joint Venture”** means any entity (i) in which the Company or any of its Subsidiaries owns 50% or less of the Equity Interests of that Company and does not control the Board of Directors or direct the policies of such entity and (ii) for which none of the Company nor its Subsidiaries provide operational support or otherwise operate the business of such Person.

**“Junior Lien Indebtedness”** means any Indebtedness of the Company or any Guarantor which (i) is secured by the Collateral on a Lien that is junior to the Notes pursuant to a Permitted Intercreditor Agreement, (ii) does not mature prior to a date that is at least 91 days after the Maturity Date (as such date may be extended as permitted hereunder), (iii) does not have any scheduled payments of principal prior to its maturity (other than customary mandatory prepayment provisions in connection with assets sales and any change of control solely to the extent any such mandatory prepayment is expressly conditioned on the redemption or payment in full of the Notes and other Obligations including all accrued interest and fees with respect thereto) and (iv) is not secured by any assets of the Company and its Subsidiaries other than the Collateral and is not guaranteed by any other Person other than the Guarantors pursuant to documentation substantially consistent with the Security Documents and the Guarantees, as applicable.

**“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 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 each of at least three (3) nationally recognized independent investment banking firms selected by the Company. Neither the Trustee nor the Conversion Agent will have any duty to determine the Last Reported Sale Price.

**“Lien”** means, with respect to any property, (a) any mortgage, deed of trust, lien (statutory or other), judgment liens, pledge, encumbrance, claim, charge, assignment, hypothecation, deposit arrangement, security interest or encumbrance of any kind or any arrangement to provide priority or preference, including any easement, servitude, right-of-way or other encumbrance on title to real property, in each of the foregoing cases whether voluntary or imposed or arising by operation of law, and any agreement to give any of the foregoing, (b) the interest of a vendor or a lessor under any conditional sale agreement, capital lease or title retention agreement and any lease in the nature thereof and any option, call, trust, contractual, statutory, UCC or similar right relating to such property, (c) in the case of securities, any purchase option, call or similar right of a third party with respect to such securities, and (d) any other arrangement having the effect of providing security.

**“Liquidity”** means, as of any date of determination, cash and Cash Equivalents of the Company and its Subsidiaries on a consolidated basis that is not Restricted and that is held in a deposit account or securities account subject to a perfected security interest in favor of the Collateral Agent, *provided that* account control agreements shall not be required prior to the date that is 45 days after the Issue Date (as the same may be extended by the Trustee in its reasonable discretion).

**“Make-Whole Fundamental Change”** means a Fundamental Change (determined after giving effect to the proviso immediately after clause (D) of the definition thereof, but without regard to the proviso to clause (B)(ii) of such definition).

**“Make-Whole Fundamental Change Conversion Period”** means the period from, and including, the Make-Whole Fundamental Change Effective Date of such Make-Whole Fundamental Change to, and including, the thirty fifth (35th) Trading Day after such Make-Whole Fundamental Change Effective Date (or, if such Make-Whole Fundamental Change also constitutes a Fundamental Change, to, but excluding, the related Fundamental Change Repurchase Date).

**“Make-Whole Fundamental Change Effective Date”** means the date on which such Make-Whole Fundamental Change occurs or becomes effective.

**“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.

**“Material Collateral”** means (i) all Intellectual Property that is material to, or necessary for the operation of, the business of the Company and its Subsidiaries, (ii) the Company’s Intelligent Commerce software solution and any other property material to, or necessary for the operation, of such software including any trade secrets or algorithms associated therewith and (iii) the revenues and proceeds of the foregoing.

“**Material Subsidiary**” means (a) each Subsidiary of the Company that, as of the last day of the fiscal quarter of the Company most recently ended for which financial statements are available, had revenues or total assets for such quarter in excess of 5.0% of the consolidated revenues or total assets, as applicable, of the Company and its Subsidiaries for such quarter and that is designated by the Company as a Material Subsidiary and (b) any group comprising Subsidiaries of the Company that each would not have been a Material Subsidiary under clause (a) but that, taken together, as of the last day of the fiscal quarter of the Company most recently ended for which financial statements are available, had revenues or total assets for such quarter in excess of 10.0% of the consolidated revenues or total assets, as applicable, of the Company and its Subsidiaries for such quarter; provided that if, at any time and from time to time after the Issue Date, Subsidiaries that are not Material Subsidiaries have, in the aggregate, (x) consolidated revenues for such quarter greater than 10.0% of the consolidated revenues of the Company and its Subsidiaries for such quarter or (y) total assets as of the last day of such quarter greater than 10.0% of the total assets of the Company and its Subsidiaries on a consolidated basis then the Company shall, within thirty (30) days of the date on which financial statements for such quarter are furnished pursuant to this Indenture, (i) designate one or more of such Subsidiaries as “Material Subsidiaries” to the extent required such that the foregoing condition ceases to be true and (ii) comply with the provisions of **Section 3.11** with respect to any such Subsidiaries.

“**Maturity Date**” means September 1, 2026.

“**Net Proceeds**” means, with respect to the consummation of any transaction described in **Section 3.09**, the excess, if any, of (i) the sum of cash and Cash Equivalents received by the Company or a Guarantor in connection with such transaction (including any cash or Cash Equivalents received by way of deferred payment pursuant to, or by monetization of, a note receivable or otherwise, but only as and when so received) over (ii) the sum of (A) the reasonable and customary out-of-pocket expenses incurred by such Person in connection with such transaction (including appraisals, survey, brokerage, legal, title and recording or transfer tax expenses and commissions and legal, accounting and investment banking fees, sales commissions and other reasonable and customary fees and expenses) paid by such Person to third parties (other than Affiliates), (B) the taxes required to be paid or reasonably estimated to be payable as a result of such transaction, and (C) any amount subject to an escrow or provided as a reserve against any liabilities in respect of any indemnification obligations or purchase price adjustment associated with any such transaction and which are reasonably expected to be paid, including pension and other post-employment benefit liabilities and liabilities related to environmental matters or against any indemnification obligations associated therewith (provided that, to the extent and at any time such amounts are not paid and are released from such escrow or reserve to the Company or any Guarantor, such amounts shall constitute Net Proceeds).

“**Non-Affiliate Legend**” means a legend substantially in the form set forth in **Exhibit B-3**.

“**Note Agent**” means any Registrar, Paying Agent or Conversion Agent.

“**Note Documents**” means, collectively, this Indenture, the Notes, the Guarantees, the Security Documents and all other documents and instruments executed and delivered in connection herewith, in each case as such agreements may be amended, restated, supplemented or otherwise modified from time to time.

“**Note Party**” means the Company and the Guarantors.

“**Notes**” means the 7.00% Convertible Senior Notes due 2026 issued by the Company pursuant to this Indenture.

“**Obligations**” means any principal (including any accreted amounts), interest, penalties, fees, indemnifications, reimbursements (including reimbursement obligations with respect to letters of credit and bankers’ acceptances), damages and other liabilities payable under the documentation governing any Indebtedness, including interest and fees accruing during the pendency of any bankruptcy, insolvency, receivership or other similar proceeding, regardless of whether allowed or allowable in such proceeding.

“**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 Executive Vice-President of the Company.

“**Officer’s Certificate**” means a certificate that is signed on behalf of the Company by one (1) of its Officers and that meets the requirements of **Section 13.03**.

“**Open of Business**” means 9:00 a.m., New York City time.

“**Opinion of Counsel**” means an opinion in writing signed by legal counsel (including an employee of, or counsel to, the Company or any of its Subsidiaries) reasonably acceptable to the Trustee, that meets the requirements of **Section 13.03**, subject to customary qualifications and exclusions.

“**Order**” means any judgment, decree, verdict, order, consent order, consent decree, writ, declaration or injunction.

“**Original Principal Amount**” means the principal amount of the Notes on the Issue Date, which, on an aggregate basis, is sixty five million five hundred thousand dollars (\$65,500,000).

“**Permitted Business**” means any business conducted by the Company or any of its Subsidiaries on the Issue Date and any business that, in the good faith judgment of the Board of Directors, is similar or reasonably related, ancillary, supplemental or complementary thereto or a reasonable extension, development or expansions thereof.

“**Permitted Liens**” means:

(1) Liens on the Collateral securing any Indebtedness incurred under **Section 3.10(B)(i)**; *provided* that the aggregate principal amount of such Indebtedness outstanding, on a *pro forma* basis, does not exceed the principal amount of the Notes issued on the Issue Date and;

(2) Liens on property of a Person existing at the time such Person becomes a Subsidiary of the Company or is merged with or into or consolidated with the Company or any Subsidiary; *provided*, that such Liens were in existence prior to the contemplation of such Person becoming a Subsidiary of the Company or such merger or consolidation and do not extend to any assets other than those of the Person that becomes a Subsidiary of the Company or is merged into or consolidated with the Company or any Subsidiary of the Company (plus improvements and accessions to such property or proceeds or distributions thereof);

(3) Liens on property (including Capital Stock) existing at the time of acquisition of the property by the Company or any Subsidiary of the Company (plus improvements and accessions to such property or proceeds or distributions thereof); *provided*, that such Liens were in existence prior to such acquisition and not incurred in contemplation of such acquisition and such Liens cannot extend to any other property of the Company or any of its Subsidiaries;

(4) Liens to secure permitted Capital Lease Obligations or purchase money obligations, as permitted to be incurred under **Section 3.10(B)(iii)** and **Section 3.10(B)(iv)**, and encumbering only the assets acquired with or financed by such Indebtedness (plus improvements and accessions to such property or proceeds or distributions thereof);

(5) Liens in the form of licenses or sublicenses under commercial licensing agreements; *provided* that such licenses or sublicenses are permitted pursuant to clause (14) of the second paragraph of the definition of Asset Sale);

(6) Liens in favor of the Company or the Guarantors;

(7) Liens (other than Liens imposed by the Employee Retirement Income Security Act of 1974, as amended) in the ordinary course of business to secure the performance of tenders, statutory obligations (other than excise taxes), insurance, surety, bid, performance, stay, customs and appeal bonds, statutory bonds, bids, leases, government contracts, trade contracts, performance bonds and other similar obligations (in each case, exclusive of obligations for the payment of Indebtedness); *provided*, that, such Liens are for amounts not yet due and payable or delinquent or, to the extent such amounts are so due and payable, such amounts are being contested in good faith by appropriate proceedings for which adequate reserves have been established in accordance with U.S. GAAP, which proceedings (or any Order entered in connection with such proceedings) have the effect of preventing the forfeiture or sale of the property subject to any such Lien;

(8) Liens for taxes, assessments or governmental charges or claims that are not yet delinquent or that are being contested in good faith by appropriate proceedings; *provided*, that any reserve or other appropriate provision as is required in conformity with U.S. GAAP has been made therefor;

(9) any state of facts an accurate survey would disclose, prescriptive easements or adverse possession claims, minor encumbrances, easements or reservations of, or rights of others for, or pursuant to any leases, licenses, rights-of-way or other similar agreements or arrangements, development, air or water rights, sewers, electric lines, telegraph and telephone lines and other utility lines, pipelines, service lines, railroad lines, improvements and structures located on, over or under, any property, drains, drainage ditches, culverts, electric power or gas generating or co-generation, storage and transmission facilities and other similar purposes, zoning or other restrictions as to the use of real property or minor defects in title, which were not incurred to secure payment of Indebtedness and that do not in the aggregate materially adversely affect the value or marketability of said properties or materially impair their use in the operation of the business of the owner or operator of such properties or business;

(10) Liens incurred pursuant to Indebtedness permitted to be incurred under Section 3.10(B)(xxii) and, solely to the extent that the Liens encumber solely the assets financed by such Indebtedness;

(11) Liens incurred or pledges or deposits made in the ordinary course of business in connection with workers' compensation, unemployment insurance and other types of social security and employee health and disability benefits, or casualty-liability insurance or self-insurance; *provided*, that, such Liens are for amounts not yet due and payable or delinquent or, to the extent such amounts are so due and payable, such amounts are being contested in good faith by appropriate proceedings for which adequate reserves have been established in accordance with U.S. GAAP, which proceedings (or any Order entered in connection with such proceedings) have the effect of preventing the forfeiture or sale of the property subject to any such Lien;

(12) judgment and attachment Liens not giving rise to an Event of Default and notices of *lis pendens* and associated rights related to litigation being contested in good faith by appropriate proceedings and for which adequate reserves have been made in conformity with U.S. GAAP;

(13) Liens on assets securing Hedging Obligations permitted under **Section 3.10**;

(14) customary Liens (including pursuant to Treasury Management Arrangements) with respect to money or instruments of the Company or any Subsidiary thereof on deposit with or in possession of such bank;

(15) any obligations or duties affecting any of the property of the Company or any of its Subsidiaries to any municipality or public authority with respect to any franchise, grant, license, or permit that do not materially impair the use of such property for the purposes for which it is held;

(16) any netting or set-off arrangements entered into by the Company or any of its Subsidiaries in the ordinary course of its banking arrangements (including, for the avoidance of doubt, Treasury Management Arrangements) for the purposes of netting debit and credit balances of the Company or any of its Subsidiaries;

(17) Liens imposed by law, which were incurred in the ordinary course of business and do not secure Indebtedness for borrowed money, such as carriers', warehousemen's, materialmen's, landlords', workmen's, suppliers', repairmen's and mechanics' Liens and other similar Liens arising in the ordinary course of business (including customary contractual landlords' liens under operating leases entered into in the ordinary course of business); and (i) which do not in the aggregate materially detract from the value of the property of the Company and its Subsidiaries, taken as a whole, and do not materially impair the use thereof in the operation of the business of the Company and its Subsidiaries, taken as a whole, and (ii) which, if they secure obligations that are then due and unpaid, are being contested in good faith by appropriate proceedings timely initiated and for which adequate reserves have been established in accordance with GAAP, which proceedings (or Orders entered in connection with such proceedings) have the effect of preventing the forfeiture or sale of the property subject to any such Lien;



(18) customary transfer restrictions, purchase options, rights of first refusal and tag, drag and similar rights in joint venture agreements entered into in the ordinary course of business; and

(19) Liens existing as of the Issue Date and Liens to secure any Permitted Refinancing of the Indebtedness with respect thereto; provided that such new Lien shall have the same Lien priority as the original Lien and be limited to all or part of the same property and assets that secured or, under the written agreements pursuant to which the original Lien arose, could secure the original Indebtedness (plus improvements and accessions to, such property or proceeds or distributions thereof);

(20) Liens on earnest money deposits made in connection with an agreement to purchase assets or Capital Stock of a Person, or in connection with an agreement to dispose of any property in a sale;

(21) ground leases in respect of real property on which facilities owned or leased by the Company or any of its Subsidiaries are located;

(22) Liens with respect to Indebtedness permitted to be incurred under **Section 3.10(A)**, which for the avoidance of doubt, shall be junior to the Liens securing the Obligations under this Indenture;

(23) any other Liens, solely to extent not securing Indebtedness for borrowed money, in an amount not to exceed \$1.0 million at any time; and

(24) Liens on any cash deposit made by the Company to the account of a trustee of Indebtedness of the Company, for the benefit of the holders of such Indebtedness, solely in connection with an effective discharge of such Indebtedness; provided that, in each case, such cash is received in a transaction pursuant to **Section 3.08(C)(viii)** for the purpose of such effective discharge of such Indebtedness.

**“Permitted Intercreditor Agreement”** means an intercreditor agreement substantially in the form of **Exhibit F**.

**“Permitted Transferees”** means, with respect to any Person that is a natural Person (and any Permitted Transferee of such Person), (a) such Person’s immediate family, including his or her spouse, ex-spouse, children, step-children, grandchildren and their respective lineal descendants, parent, step- parent, grandparent, domestic partner, former domestic partner, sibling or step-sibling (and any lineal descendant thereof), mother-in-law, father-in-law, son-in-law and daughter-in-law (including adoptive relationships), (b) any trust, partnership, estate planning vehicle or other legal entity the beneficiaries of which are persons referred to in the preceding clause (a) and (c) such Person’s estate, heirs, legatees, distributees, executors and/or administrators upon the death of such Person, or any private foundation or fund that is controlled thereby, and any other Person who was an Affiliate of such Person upon the death of such Person and who, upon such death, directly or indirectly owned Equity Interests in the Company.

**“Permitted Unsecured Indebtedness”** means any unsecured Indebtedness incurred by the Company in the form of one or more series of unsecured notes or loans, provided that,

- (1) such Indebtedness is not secured by any property or assets;
- (2) if such Indebtedness constitutes indebtedness for borrowed money, it shall not mature or have scheduled amortization prior to the date that is ninety-one (91) days after the Maturity Date at the time such Indebtedness is incurred (other than customary offers to repurchase upon a change of control, asset sale or casualty event and customary acceleration rights after an event of default); and
- (3) such Indebtedness is not guaranteed by any Person other than the Company and any Guarantor.

**“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 Indenture.

**“Public Company Costs”** means all initial costs, fees and expenses relating to becoming a public company pursuant to an IPO (including by way of the SPAC Transaction) and other expenses arising out of or incidental to such IPO (whether or not successful) including (a) initial registration and listing fees, (b) costs, fees and expenses (including legal, accounting and other professional fees) relating to compliance with provisions of the Securities Act and the Exchange Act and the rules of securities exchange companies in connection with such IPO and, (c) other costs, fees and expenses (including legal, accounting and other professional fees) incidental to the foregoing.

**“Physical Note”** means a Note (other than a Global Note) that is represented by a certificate substantially in the form set forth in **Exhibit A**, registered in the name of the Holder of such Note and duly executed by the Company and authenticated by the Trustee.

**“Qualified Successor Entity”** means, with respect to a Business Combination Event, a corporation; provided, however, that a limited liability company, limited partnership or other similar entity will also constitute a Qualified Successor Entity with respect to such Business Combination Event if both of the following conditions are satisfied: (1) either (x) such limited liability company, limited partnership or other similar entity, as applicable, is treated as a corporation or is a direct or indirect, Wholly Owned Subsidiary of, and disregarded as an entity separate from, a corporation, in each case for U.S. federal income tax purposes; or (y) the Company has received an opinion of a nationally recognized tax counsel to the effect that such Business Combination Event will not be treated as an exchange under Section 1001 of the Code for Holders or beneficial owners of the Notes; and (2) such Business Combination Event constitutes a Common Stock Change Event whose Reference Property consists solely of any combination of cash in U.S. dollars and shares of common stock or other corporate common equity interests of an entity treated as a corporation for U.S. federal income tax purposes.

**“Qualifying Issuance”** means an issuance and sale by the Company of any shares of Common Stock (or securities convertible into, or exercisable or exchangeable for Common Stock) in a primary offering (whether public or private) at an Effective Price per share of Common Stock (on the gross basis) that is less than the amount equal to (x) then-applicable Conversion Price *divided* by (y) 115%, expressly excluding:

- (i) any issuance of Notes and Common Stock pursuant to this Indenture;
- (ii) any issuance of shares of Common Stock pursuant to any option, warrant, right or convertible or exchangeable security of the Company or its Subsidiary outstanding as of the Issue Date;
- (iii) issuance by the Company of any securities, including shares of Common Stock, as full or partial consideration in connection with a strategic merger, acquisition, consolidation or purchase of all or substantially all of the securities or assets of a corporation or other entity;
- (iv) the issuance or grant of shares of Common Stock or options to purchase shares of Common Stock pursuant to any present or future employee, director or consultant benefit plan or program of, or assumed by, the Company or any of its Subsidiaries (and for purposes of this definition, “consultant” means a consultant that may participate in an “employee benefit plan” in accordance with the definition of such term in Rule 405 under the Securities Act);
- (v) the issuance of any shares of Common Stock pursuant to any present or future plan providing for the reinvestment of dividends or interest payable on the Company’s securities and the investment of additional optional amounts in shares of Common Stock under any such plan; and
- (vi) any issuance of warrants and Common Stock in connection with the SPAC Transactions or the Subscription Agreements.

**“Qualifying Sale”** means a sale by one or more of the Founders of any shares of Common Stock (or securities convertible into, or exercisable or exchangeable for Common Stock) at an Effective Price per share of Common Stock (on a gross basis) that is less than the amount equal to (x) then-applicable Conversion Price *divided* by (y) 115%, expressly excluding:

- (i) any such sale, including any such sale in connection with the SPAC Transactions, the gross offering proceeds of which (and to the extent the gross offering proceeds of which) do not exceed \$20,000,000, taken together with the gross offering proceeds of any other sale that would otherwise be a “Qualifying Sale” by any of the Founders; and
- (ii) any such sale in connection with a plan pursuant to Rule 10b5-1 under the Exchange Act.

**“Registration Statement”** has the meaning ascribed to it in the Subscription Agreement.

“**Regular Record Date**” with respect to any Interest Payment Date, means the February 15 or August 15 (whether or not such day is a Business Day) immediately preceding the applicable March 1 or September 1 Interest Payment Date, respectively.

“**Repurchase Upon Fundamental Change**” means the repurchase of any Note by the Company pursuant to **Section 4.02**.

“**Responsible Officer**” means, when used with respect to the Trustee or the Collateral Agent, as applicable, (A) any officer of the Trustee or the Collateral Agent in its Corporate Trust Office (or any successor group of the Trustee or the Collateral Agent) or any other officer on the Trustee or the Collateral Agent, as applicable, customarily performing functions similar to those performed by any such officers having direct responsibility for the administration of this Indenture; and (B) with respect to a particular corporate trust matter, any other officer to whom any corporate trust matter relating to this Indenture is referred because of his or her knowledge of, and familiarity with, the particular subject and who, in each case, shall have direct responsibility for the administration of this Indenture.

“**Restricted**” means, when referring to cash or Cash Equivalents of the Company or any of the Subsidiaries, that such cash or Cash Equivalents appear (or would be required to appear) as “restricted” on a consolidated balance sheet of the Company or such Subsidiary (unless such appearance is related to a restriction in favor of the Collateral Agent).

“**Restricted Note Legend**” means a legend substantially in the form set forth in **Exhibit B-1A** (in the case of a Note that is not an Accredited Investor Note) or **Exhibit B-1B** (in the case of an Accredited Investor Note).

“**Restricted Stock Legend**” means, with respect to any Conversion Share, a legend substantially to the effect that the offer and sale of such Conversion Share have not been registered under the Securities Act and that such Conversion Share cannot be sold or otherwise transferred except pursuant to a transaction that is registered under the Securities Act or that is exempt from, or not subject to, the registration requirements of the Securities Act.

“**Rule 144**” means Rule 144 under the Securities Act (or any successor rule thereto), as the same may be amended from time to time.

“**Rule 144A**” means Rule 144A under the Securities Act (or any successor rule thereto), as the same may be amended from time to time.

“**Scheduled Trading Day**” means any day that is scheduled to be a Trading Day 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. If the Common Stock is not so listed or traded, then “Scheduled Trading Day” means a Business Day.

“**SEC**” means the U.S. Securities and Exchange Commission.

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

“**Security**” means any Note or Conversion Share.

“**Security Agreement**” means that certain security agreement, dated as of the Issue Date, by and among the Company, the other grantors from time to time party thereto and the Collateral Agent, as amended, supplemented or modified from time to time.

“**Security Documents**” means all security agreements (including the Security Agreement), intercreditor agreements, control agreements, to the extent applicable, collateral assignments, to the extent applicable, collateral agency agreements, or other grants or transfers for security executed and delivered by the Company or any Guarantor creating (or purporting to create) a Lien upon Collateral in favor of the Collateral Agent for the benefit of the Holders to secure the Obligations under this Indenture, in each case, as amended, supplemented, modified, renewed, restated or replaced, in whole or in part, from time to time, in accordance with its terms and the terms of this Indenture.

“**Significant Subsidiary**” means, with respect to any Person, any Subsidiary of such Person that constitutes, or any group of Subsidiaries of such Person that, in the aggregate, would constitute, a “significant subsidiary” (as defined in Rule 1-02(w) of Regulation S-X under the Exchange Act) of such Person.

“**SPAC Transactions**” means the transactions contemplated by the Business Combination Agreement, which for the avoidance of doubt, includes the transactions contemplated by the Subscription Agreement.

“**Special Interest**” means any interest that accrues on any Note pursuant to **Section 7.03**.

“**Standby Capital Facility**” means that certain Standby Capital Support Facility Agreement, dated as of August 18, 2022, by and among B. Riley Principal Investments, LLC, a Delaware limited liability company (“**BRPI**”), ABJ5, LLC, a Delaware limited liability company, the Issuer, and, solely for purposes of Section 10 therein, Target, as the same may be amended, modified or replaced from time to time.

“**Standby Capital Facility Reset Date**” means the earlier of (i) date on which the aggregate sale price received by the Standby Capital Provider for all shares of Common Stock sold pursuant to the Standby Capital Facility equals or exceeds the Standby Capital Support Amount and (ii) May 26, 2023.

“**Standby Capital Provider**” means ABJ5, LLC or any other Person completing sales under the Standby Capital Facility.

“**Standby Capital Support Amount**” means \$12,612,789.25, which amount is the amount specified as the “Standby Capital Support Amount” as defined in the Standby Capital Facility as it existed on August 18, 2022.

“**Standby Capital VWAP Sale Price**” means the volume weighted average price per share of Common Stock for all shares of Common Stock sold by the Standby Capital Provider pursuant to the Standby Capital Facility through (and including) the Standby Capital Facility Reset Date.

“**Stated Maturity**” means, with respect to any installment of interest or principal (including any accreted amounts) on any series of Indebtedness, the date on which the payment of interest or principal (including any accreted amounts), as applicable, was scheduled to be paid in the documentation governing such Indebtedness, and will not include any contingent obligations to repay, redeem or repurchase any such interest or principal (including any accreted amounts) prior to the date originally scheduled for the payment thereof; *provided, however*, that, with respect to **Section 8.03**, the Stated Maturity of any Existing Indebtedness shall be the Stated Maturity as of the Issue Date or a later date to the extent the documents governing such Indebtedness shall have been amended or modified to provide for such later date.

“**Subscription Agreement**” means each Subscription Agreement, dated as of April 19, 2022, among the Company and certain investors of the Initial Notes (the “**Subscribers**”).

“**Subsidiary**” means, with respect to any specified Person:

(1) any corporation, association or other business entity of which more than 50% of the total voting power of shares of Capital Stock entitled (without regard to the occurrence of any contingency and 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 of the corporation, association or other business entity is at the time owned or controlled, directly or indirectly, by such Person or one or more of the other Subsidiaries of such Person (or a combination thereof); and

(2) any partnership (a) the sole general partner or the managing general partner of which is such Person or a Subsidiary of such Person or (b) the only general partners of which are such Person or one or more Subsidiaries of such Person (or any combination thereof) to the extent such partnership is included in the consolidated financial statements of such Person.

Unless otherwise specified, “Subsidiary” means a Subsidiary of the Company. In no event shall any Joint Venture, including, but not limited to IPCO Holdings, LLC and ModCloth Partners, LLC, be considered “Subsidiaries”.

“**Test Period**” means, as of any date of determination, the period of four consecutive fiscal quarters of the Company (taken as one accounting period) ended on the last date of the fiscal quarter in question.

“**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-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) 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, if such Security is an Accredited Investor Note or a Conversion Share issued upon conversion of an Accredited Investor Note, the Company has received such certificates or other documentation or evidence, if any, as the Company, may reasonably require to determine that the Holder or beneficial owner of such Accredited Investor Note or Conversion Share, as applicable, is not, and has not been during the immediately preceding three (3) months, an Affiliate of the Company).

The Trustee is under no obligation to determine whether any Security is a Transfer-Restricted Security and may conclusively rely on an Officer’s Certificate with respect thereto.

“**Treasury Management Arrangement**” means any agreement or other arrangement governing the provision of treasury or cash management services, including deposit accounts, overdraft, overnight draft, credit cards, debit cards, p-cards (including purchasing cards, employee credit card programs and commercial cards), funds transfer, automated clearinghouse, direct debit, zero balance accounts, returned check concentration, controlled disbursement, lockbox, account reconciliation and reporting and trade finance services, netting services, cash pooling arrangements, credit and debit card acceptance or merchant services and other treasury or cash management services.

“**Trust Indenture Act**” means the U.S. Trust Indenture Act of 1939, as amended, and the rules and regulations promulgated thereunder.

“**Trustee**” means the Person named as such in the first paragraph of this Indenture in its capacity as such until a successor replaces it in accordance with the provisions of this Indenture and, thereafter, means such successor.

“**UCC**” means the Uniform Commercial Code (or any successor statute), as in effect from time to time, of the State of New York or of any other state the laws of which are required as a result thereof to be applied in connection with the issue or perfection of security interests.

“**VWAP Market Disruption Event**” means, with respect to any date, (A) the failure by 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, the principal other market on which the Common Stock is then traded, to open for trading during its regular trading session on such date; or (B) the occurrence or existence, for more than one half hour period in the aggregate during the regular trading session, of any 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, and such suspension or limitation occurs or exists at any time before 1:00 p.m., New York City time, on such date.

“**VWAP Trading Day**” means a day on which (A) there is no VWAP Market Disruption Event; and (B) 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. If the Common Stock is not so listed or traded, then “VWAP Trading Day” means a Business Day.

“**Weighted Average Life to Maturity**” means, when applied to any Indebtedness at any date, the number of years obtained by dividing:

(1) the sum of the products obtained by multiplying (a) the amount of each then-remaining installment, sinking fund, serial maturity or other required payments of principal (including any accreted amounts), including payment at final maturity, in respect of such Indebtedness, by (b) the number of years (calculated to the nearest one-twelfth) that will elapse between such date and the making of such payment; by

(2) the then-outstanding principal amount (including any accreted amounts) of such Indebtedness.

“**Wholly Owned Subsidiary**” of any specified Person means, (a) any corporation one hundred percent of whose capital stock (other than directors’ qualifying shares and other nominal shares required to be held by local nationals, in each case to the extent required under applicable Legal Requirements) is at the time owned by such Person and/or one or more Wholly Owned Subsidiaries of such Person and (b) any partnership, association, joint venture, limited liability company or other entity in which such Person and/or one or more Wholly Owned Subsidiaries of such Person have a one hundred percent Equity Interest (other than directors’ qualifying shares and other nominal shares required to be held by local nationals, in each case to the extent required under applicable Legal Requirements) at such time.

#### **Section 1.02. OTHER DEFINITIONS.**

<u>Term</u>	<u>Defined in Section</u>
“ <b>Additional Shares</b> ”	<b>5.07(A)</b>
“ <b>Beneficial Ownership Limitations</b> ”	<b>5.11(D)</b>
“ <b>Business Combination Event</b> ”	<b>6.01(A)</b>
“ <b>Ceiling Conversion Rate</b> ”	<b>5.05(A)(vi)</b>
“ <b>Common Stock Change Event</b> ”	<b>5.09(A)</b>
“ <b>Conversion Agent</b> ”	<b>2.06(A)</b>
“ <b>Conversion Consideration</b> ”	<b>5.03(B)</b>
“ <b>Default Interest</b> ”	<b>2.05(B)</b>



“Defaulted Amount”	2.05(B)
“Event of Default”	7.01(A)
“Expiration Date”	5.05(A)(v)
“Expiration Time”	5.05(A)(v)
“Fundamental Change Notice”	4.02(E)
“Fundamental Change Repurchase Right”	4.02(A)
“General Beneficial Ownership Limitation”	5.11(D)
“Guaranteed Obligations”	9.01(A)(ii)
“Guarantor Business Combination Event”	9.04(A)
“Holder Beneficial Ownership Limitation”	5.11(D)
“Initial Notes”	2.03(A)
“Interest Make-Whole Payment”	5.03(A)(ii)
“Notice of Conversion”	5.02(A)(ii)
“Offer Amount”	3.09
“Paying Agent”	2.06(A)
“Permitted Debt”	3.10(B)
“Permitted Refinancing Indebtedness”	3.10(B)(v)
“Reference Property”	5.09(A)
“Reference Property Unit”	5.09(A)
“refinance”	3.10(B)(v)
“Register”	2.06(B)
“Registrar”	2.06(A)
“Reporting Event of Default”	7.03(A)
“Reset Date”	5.05(A)(vi)
“Specified Courts”	11.07
“Spin-Off”	5.05(A)(iii)(2)
“Spin-Off Valuation Period”	5.05(A)(iii)(2)
“Stated Interest”	2.05(A)
“Successor Guarantor”	9.04(A)
“Successor Person”	5.09(A)
“Tender/Exchange Offer Valuation Period”	5.05(A)(v)
“Threshold Date”	3.09
“Transaction Offer”	3.09

**Section 1.03. RULES OF CONSTRUCTION.**

For purposes of this Indenture:

- (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 Indenture as a whole and not to any particular Article, Section or other subdivision of this Indenture, unless the context requires otherwise;

(H) references to currency mean the lawful currency of the United States of America, unless the context requires otherwise;

(I) the exhibits, schedules and other attachments to this Indenture are deemed to form part of this Indenture;

(J) the term “**interest**,” when used with respect to a Note, includes any Default Interest, Additional Interest and Special Interest, unless the context requires otherwise, or, in the case of Additional Interest, unless the terms of the Subscription Agreement provide otherwise, and any express mention of Default Interest, Additional Interest or Special Interest in any provision hereof shall not be construed as excluding Default Interest, Additional Interest or Special Interest, as applicable, in those provisions hereof where such express mention is not made;

(K) unless otherwise expressly indicated in this Indenture, any reference to the principal amount of the Notes is to the Original Principal Amount of the Notes and references to the Conversion Rate per \$1,000 principal amount of Notes are to the Conversion Rate per \$1,000 Original Principal Amount of the Notes (and not the Accreted Principal Amount of the Notes); and

(L) Notwithstanding anything to the contrary contained in this Indenture or in any other Note Documents, the parties hereto agree that in no event shall the Indenture, any Note Document or any provision thereof be interpreted to prohibit the SPAC Transactions, and the consummation of the SPAC Transactions will not, on its own result in a breach or default under the Indenture.

## **Article 2. THE NOTES**

### **Section 2.01. FORM, DATING AND DENOMINATIONS.**

The Notes and the Trustee’s certificate of authentication will be substantially in the form set forth in **Exhibit A**. The Notes will bear the legends required by **Section 2.09** and may bear notations, legends or endorsements required by law, stock exchange rule or usage or the Depositary. Each Note will be dated as of the date of its authentication.

Except to the extent otherwise provided in a Company Order delivered to the Trustee in connection with the issuance and authentication thereof, the Notes will be issued initially in the form of one or more Global Notes. Global Notes may be exchanged for Physical Notes, and Physical Notes may be exchanged for Global Notes, only as provided in **Section 2.10**.

The Notes will be issuable only in registered form without interest coupons and only in Authorized Denominations.

Each certificate representing a Note will bear a unique registration number that is not affixed to any other certificate representing another outstanding Note.

The terms contained in the Notes constitute part of this Indenture, and, to the extent applicable, the Company, the Trustee and the Collateral Agent, by their execution and delivery of this Indenture, agree to such terms and to be bound thereby; *provided, however*, that, to the extent that any provision of any Note conflicts with the provisions of this Indenture, the provisions of this Indenture will control for purposes of this Indenture and such Note.

**Section 2.02. EXECUTION, AUTHENTICATION AND DELIVERY.**

(A) *Due Execution by the Company.* At least one (1) duly authorized Officer will sign the Notes on behalf of the Company by manual, electronic (e.g., “.pdf”) or facsimile signature. A Note’s validity will not be affected by the failure of any Officer whose signature is on any Note to hold, at the time such Note is authenticated, the same or any other office at the Company.

(B) *Authentication by the Trustee and Delivery.*

(i) No Note will be valid until it is authenticated by the Trustee. A Note will be deemed to be duly authenticated only when an authorized signatory of the Trustee (or a duly appointed authenticating agent) manually signs the certificate of authentication of such Note.

(ii) The Trustee will cause an authorized signatory of the Trustee (or a duly appointed authenticating agent) to manually sign the certificate of authentication of a Note only if (1) the Company delivers such Note to the Trustee; (2) such Note is executed by the Company in accordance with **Section 2.02(A)**; and (3) the Company delivers a Company Order to the Trustee that (a) requests the Trustee to authenticate such Note; and (b) sets forth the name of the Holder of such Note and the date as of which such Note is to be authenticated. If such Company Order also requests the Trustee to deliver such Note to any Holder or to the Depository, then the Trustee will promptly deliver such Note in accordance with such Company Order.

(iii) The Trustee shall have the right to decline to authenticate and deliver any Note: (a) if the Trustee, being advised by counsel, determines that such action may not be taken lawfully; or (b) if the Trustee in good faith shall determine that such action would expose the Trustee to personal liability to Holders of any then outstanding Notes.

(iv) The Trustee may appoint an authenticating agent acceptable to the Company to authenticate Notes. A duly appointed authenticating agent may authenticate Notes whenever the Trustee may do so under this Indenture, and a Note authenticated as provided in this Indenture by such an agent will be deemed, for purposes of this Indenture, to be authenticated by the Trustee. Each duly appointed authenticating agent will have the same rights to deal with the Company as the Trustee would have if it were performing the duties that the authentication agent was validly appointed to undertake.

**Section 2.03. INITIAL NOTES; ACCRETION.**

(A) *Initial Notes.* On the Issue Date, there will be originally issued sixty five million five hundred thousand dollars (\$65,500,000) aggregate principal amount of Notes, subject to the provisions of this Indenture (including **Section 2.02**). Notes issued pursuant to this **Section 2.03(A)**, and any Notes issued in exchange therefor or in substitution thereof, are referred to in this Indenture as the “**Initial Notes.**”

(B) *Accretion.* Commencing on the Issue Date, to, and including, the Maturity Date, the principal amount of the Notes shall accrete on each Interest Payment Date in the manner provided in this Section 2.03(B). Schedule A hereto sets forth the Accreted Principal Amounts per \$1,000 Original Principal Amount of Notes as of the specified dates during the period from the Issue Date through the Maturity Date. If a calculation of the Accreted Principal Amount is required at any given time, the Company will make such calculation determined as set forth on Schedule A, and will provide such calculations to the Trustee (which will have no duty to confirm such calculations) and (upon request) the Holders. The Accreted Principal Amount of the Notes then outstanding shall be due and payable on the Maturity Date.

**Section 2.04. METHOD OF PAYMENT.**

(A) *Global Notes.* The Company will pay, or cause the Paying Agent to pay, the principal (including Accreted Principal Amounts as contemplated by this Indenture) (whether due upon maturity on the Maturity Date or repurchase on a Fundamental Change Repurchase Date or otherwise) of, interest on, and any cash Conversion Consideration (if applicable) for, any Global Note to the Depository as the registered Holder of such Global Note, by wire transfer of immediately available funds no later than the time the same is due as provided in this Indenture.

(B) *Physical Notes.* The Company will pay, or cause the Paying Agent to pay, the principal (including Accreted Principal Amounts as contemplated by this Indenture) (whether due upon maturity on the Maturity Date or repurchase on a Fundamental Change Repurchase Date or otherwise) of, interest on, and any cash Conversion Consideration (if applicable) due upon conversion of, any Physical Note no later than the time the same is due as provided in this Indenture as follows: (i) if the principal amount of such Physical Note is at least five million dollars (\$5,000,000) (or such lower amount as the Company may choose in its sole and absolute discretion) and the Holder of such Physical Note entitled to such payment has delivered to the Paying Agent or the Trustee, no later than the time set forth in the immediately following sentence, a written request that the Company (or the Paying Agent) make such 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 (ii) in all other cases, by check mailed to the address of the Holder of such Physical Note entitled to such payment as set forth in the Register. To be timely, such written request must be so delivered no later than the Close of Business on the following date: (x) with respect to the payment of any interest due on an Interest Payment Date, the immediately preceding Regular 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.

**Section 2.05. ACCRUAL OF INTEREST; DEFAULTED AMOUNTS; WHEN PAYMENT DATE IS NOT A BUSINESS DAY.**

(A) *Accrual of Interest.* Each Note will accrue interest at a rate per annum equal to 7.00% (the **Stated Interest**), plus any Additional Interest and Special Interest on the Notes, if any, that may accrue pursuant to **Section 7.03**. Stated Interest on each Note will (i) accrue from, and including, the most recent date to which Stated Interest has been paid or duly provided for (or, if no Stated Interest has theretofore been paid or duly provided for, the date set forth in the certificate representing such Note as the date from, and including, which Stated Interest will begin to accrue in such circumstance) to, but excluding, the date of payment of such Stated Interest; and (ii) be, subject to **Sections 4.02(D)** and **5.02(D)** (but without duplication of any payment of interest), payable semi-annually in arrears on each Interest Payment Date, beginning on the first Interest Payment Date set forth in the certificate representing such Note, to the Holder of such Note as of the Close of Business on the immediately preceding Regular Record Date. Stated Interest, and, if applicable, Additional Interest and Special Interest on the Notes will be computed on the basis of the Original Principal Amount (and not the Accreted Principal Amount) thereof and a 360-day year comprised of twelve 30-day months.

(B) *Defaulted Amounts.* If the Company fails to pay any amount (a **Defaulted Amount**) payable on a Note on or before the due date therefor as provided in this Indenture or if any Event of Default has occurred and is continuing, then to the extent lawful, interest (**Default Interest**) will accrue on the aggregate Original Principal Amount (and not the Accreted Principal Amount) of the Notes then outstanding and all other outstanding Obligations under this Indenture and the other Note Documents at a rate per annum equal to the rate per annum at which Stated Interest accrues plus 100 basis points, from, and including, such due date or date that such Event of Default occurred (as applicable) to, but excluding, the date of payment of such Defaulted Amount and the cure or waiver of such Event of Default. The Company may pay the Default Interest to the persons who are Holders on a subsequent special record date. The Company shall fix or cause to be fixed any such special record date and payment date in a manner not deemed impractical for the Trustee and shall promptly mail to each Holder (with a copy to the Trustee) a notice that states the special record date, the payment date and the amount of the Default Interest to be paid. Notwithstanding the foregoing, any interest which is paid prior to the expiration of the 30-day period set forth in **Section 7.01(A)(ii)** shall be paid to Holders as of the record date for the Interest Payment Date for which interest has not been paid.

(C) *Delay of Payment when Payment Date is Not a Business Day.* If the due date for a payment on a Note as provided in this Indenture is not a Business Day, then, notwithstanding anything to the contrary in this Indenture or the Notes, such payment may be made on the immediately following Business Day and no interest will accrue 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, regulation or executive order to close or be closed will be deemed not to be a "Business Day."

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**Section 2.06. REGISTRAR, PAYING AGENT AND CONVERSION AGENT.**

(A) *Generally.* The Company will maintain (i) an office or agency in the continental United States where Notes may be presented for registration of transfer or for exchange (the “**Registrar**”); (ii) an office or agency in the continental United States where Notes may be presented for payment (the “**Paying Agent**”); and (iii) an office or agency in the continental United States where Notes may be presented for conversion (the “**Conversion Agent**”). The Company hereby designates the Corporate Trust Office of the Trustee as such offices. If the Company fails to maintain a Registrar, Paying Agent or Conversion Agent, then the Trustee will act as such. For the avoidance of doubt, the Company or any of its Subsidiaries may act as Registrar, Paying Agent or Conversion Agent. Notwithstanding anything to the contrary in this **Section 2.06(A)**, each of the Registrar, Paying Agent and Conversion Agent with respect to any Global Note must at all times be a Person that is eligible to act in that capacity under the Depositary Procedures.

(B) *Duties of the Registrar.* The Registrar will keep a record (the “**Register**”) of the names and addresses of the Holders, the Notes held by each Holder and the transfer, exchange, repurchase and conversion of Notes. Absent manifest error, the entries in the Register will be conclusive and the Company and the Trustee 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.

(C) *Co-Agents; Company’s Right to Appoint Successor Registrars, Paying Agents and Conversion Agents* The Company may appoint one or more co-Registrars, co-Paying Agents and co-Conversion Agents, each of whom will be deemed to be a Registrar, Paying Agent or Conversion Agent, as applicable, under this Indenture. Subject to **Section 2.06(A)**, the Company may change any Registrar, Paying Agent or Conversion Agent (including appointing itself or any of its Subsidiaries to act in such capacity) without notice to any Holder. The Company will notify the Trustee (and, upon request, any Holder) of the name and address of each Note Agent, if any, not a party to this Indenture and will enter into an appropriate agency agreement with each such Note Agent, which agreement will implement the provisions of this Indenture that relate to such Note Agent.

(D) *Initial Appointments.* The Company appoints the Trustee as the initial Paying Agent, the initial Registrar and the initial Conversion Agent. In acting in such capacities under this Indenture and in connection with the Notes, the Trustee in such capacities will act solely as an agent of the Company and will not thereby assume any obligations towards, or relationship of agency or trust for or with, any Holder.

**Section 2.07. PAYING AGENT AND CONVERSION AGENT TO HOLD PROPERTY IN TRUST.**

The Company will require each Paying Agent or Conversion Agent that is not the Trustee to agree in writing that such Note Agent will (A) hold in trust for the benefit of Holders or the Trustee all money and other property held by such Note Agent for payment or delivery due on the Notes; and (B) notify the Trustee in writing of any default by the Company in making any such payment or delivery. The Company, at any time, may, and the Trustee, while any Default continues, may, require a Paying Agent or Conversion Agent to pay or deliver, as applicable, all money and other property held by it to the Trustee, after which payment or delivery, as applicable, such Note Agent (if not the Company or any of its Subsidiaries) will have no further liability for such money or property. If the Company or any of its Subsidiaries acts as Paying Agent or Conversion Agent, then (A) it will segregate and hold in a separate trust fund for the benefit of the Holders or the Trustee all money and other property held by it as Paying Agent or Conversion

Agent; and (B) references in this Indenture or the Notes 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 the Trustee or with respect to the Notes, will be deemed to refer to cash or other property so segregated and held separately, or to the segregation and separate holding of such cash or other property, respectively. Upon the occurrence of any event pursuant to clause (ix) or (x) of **Section 7.01(A)** with respect to the Company (or with respect to any Subsidiary of the Company acting as Paying Agent or Conversion Agent), the Trustee will serve as the Paying Agent or Conversion Agent, as applicable, for the Notes.

**Section 2.08. HOLDER LISTS.**

If the Trustee is not the Registrar, the Company will furnish to the Trustee, no later than seven (7) Business Days before each Interest Payment Date and at such other times as the Trustee may request, a list, in such form and as of such date or time as the Trustee may reasonably require, of the names and addresses of the Holders.

**Section 2.09. LEGENDS.**

(A) *Global Note Legend.* Each Global Note will bear the Global Note Legend (or any similar legend, not inconsistent with this Indenture, required by the Depository for such Global Note).

(B) *Non-Affiliate Legend.* Each Note that is not an Accredited Investor Note will bear the Non-Affiliate Legend.

(C) *Restricted Note Legend.* Subject to **Section 2.12**,

(i) each Note that is a Transfer-Restricted Security will bear the Restricted Note Legend; and

(ii) if a Note is issued in exchange for, in substitution of, or to effect a partial conversion of, another Note (such other Note being referred to as the “old Note” for purposes of this **Section 2.09(C)(ii)**), including pursuant to **Section 2.10(B)**, **2.10(C)**, **2.11** or **2.13**, then such Note will bear the Restricted Note Legend if such old Note bore the Restricted Note 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 such Note need not bear the Restricted Note Legend if such Note does not constitute a Transfer-Restricted Security immediately after such exchange or substitution, or as of such Conversion Date, as applicable.

(D) *Other Legends.* A Note may bear any other legend or text, not inconsistent with this Indenture, as may be required by applicable law or by any securities exchange or automated quotation system on which such Note is traded or quoted.

(E) *Acknowledgment and Agreement by the Holders.* A Holder’s acceptance of any Note bearing any legend required by this **Section 2.09** will constitute such Holder’s acknowledgment of, and agreement to comply with, the restrictions set forth in such legend.

(F) *Restricted Stock Legend.*

(i) Each Conversion Share will bear the Restricted Stock Legend if the Note 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 the Restricted Stock Legend if the Company determines, in its reasonable discretion, that such Conversion Share need not bear the Restricted Stock Legend.

(ii) Notwithstanding anything to the contrary in this **Section 2.09(F)**, a Conversion Share need not bear a Restricted Stock Legend 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 the Restricted Stock Legend; *provided further* that any Conversion Shares underlying any Accredited Investor Note will be identified by a separate CUSIP number from the Conversion Shares underlying Notes that are not Accredited Investor Notes.

**Section 2.10. TRANSFERS AND EXCHANGES; CERTAIN TRANSFER RESTRICTIONS.**

(A) *Provisions Applicable to All Transfers and Exchanges.*

(i) Subject to this **Section 2.10**, Physical Notes and beneficial interests in Global Notes may be transferred or exchanged from time to time. The Registrar will record each such transfer or exchange of Physical Notes in the Register.

(ii) Each Note issued upon transfer or exchange of any other Note (such other Note being referred to as the “old Note” for purposes of this **Section 2.10(A)(ii)**) or portion thereof in accordance with this Indenture will be the valid obligation of the Company, evidencing the same indebtedness, and entitled to the same benefits under this Indenture, as such old Note or portion thereof, as applicable.

(iii) The Company, the Guarantors, the Trustee and the Note Agents will not impose any service charge on any Holder for any transfer, exchange or conversion of Notes, but the Company, the Guarantors, the Trustee, 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 Notes, other than exchanges pursuant to **Section 2.11, 2.17** or **8.05** not involving any transfer.

(iv) Notwithstanding anything to the contrary in this Indenture or the Notes, a Note may not be transferred or exchanged in part unless the portion to be so transferred or exchanged is in an Authorized Denomination.

(v) The Trustee will have no obligation or duty to monitor, determine or inquire as to compliance with any transfer restrictions imposed under this Indenture or applicable law with respect to any Security, other than to require the delivery of such certificates or other documentation or evidence as expressly required by this Indenture and to examine the same to determine substantial compliance as to form with the requirements of this Indenture.



(vi) The Trustee will have no responsibility or obligation to any beneficial owner of a Global Note, a member of, or a participant in, the Depository or other Person with respect to the accuracy of the records of the Depository or its nominee or of any participant or member thereof, with respect to any ownership interest in the Notes or with respect to the delivery to any participant, member, beneficial owner or other Person (other than the Depository) of any notice (including any notice of repurchase) or the payment of any amount or delivery of any Notes (or other security or property) under or with respect to such Notes. All payments to be made to Holders in respect of the Notes will be given or made only to or upon the order of the registered Holders (which is the Depository or its nominee in the case of a Global Note). The rights of beneficial owners in any Global Note will be exercised only through the Depository subject to the applicable Depository Procedures. The Trustee may rely and will be fully protected in relying upon information furnished by the Depository with respect to its members, participants and any beneficial owners. Neither the Trustee nor any Agent will have any responsibility for any action taken or not taken by the Depository.

(vii) Each Note issued upon transfer of, or in exchange for, another Note will bear each legend, if any, required by **Section 2.09**.

(viii) Upon satisfaction of the requirements of this Indenture to effect a transfer or exchange of any Note, 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.

(ix) For the avoidance of doubt, and subject to the terms of this Indenture, as used in this **Section 2.10**, an “exchange” of a Global Note or a Physical Note includes (x) an exchange effected for the sole purpose of removing any Restricted Note Legend affixed to such Global Note or Physical Note; and (y) if such Global Note or Physical Note is identified by a “restricted” CUSIP number, an exchange effected for the sole purpose of causing such Global Note or Physical Note to be identified by an “unrestricted” CUSIP number.

*(B) Transfers and Exchanges of Global Notes.*

(i) Subject to the immediately following sentence, no Global Note may be transferred or exchanged in whole except (x) by the Depository to a nominee of the Depository; (y) by a nominee of the Depository to the Depository or to another nominee of the Depository; or (z) by the Depository or any such nominee to a successor Depository or a nominee of such successor Depository. No Global Note (or any portion thereof) may be transferred to, or exchanged for, a Physical Note; *provided, however*, that a Global Note will be exchanged, pursuant to customary procedures, for one or more Physical Notes if:

(1) (x) the Depositary notifies the Company or the Trustee that the Depositary is unwilling or unable to continue as depositary for such Global Note or (y) the Depositary ceases to be a “clearing agency” registered under Section 17A of the Exchange Act and, in each case, the Company fails to appoint a successor Depositary within ninety (90) days of such notice or cessation;

(2) an Event of Default has occurred and is continuing and the Company, the Trustee or the Registrar has received a written request from the Depositary, or from a holder of a beneficial interest in such Global Note, to exchange such Global Note or beneficial interest, as applicable, for one or more Physical Notes; or

(3) the Company, in its sole discretion, permits the exchange of any beneficial interest in such Global Note for one or more Physical Notes at the request of the owner of such beneficial interest.

(ii) Upon satisfaction of the requirements of this Indenture to effect a transfer or exchange of any Global Note (or any portion thereof):

(1) the Trustee will reflect any resulting decrease of the principal amount of such Global Note by notation on the “Schedule of Exchanges of Interests in the Global Note” forming part of such Global Note (and, if such notation results in such Global Note having a principal amount of zero, the Company may (but is not required to) instruct the Trustee in writing to cancel such Global Note pursuant to **Section 2.15**);

(2) if required to effect such transfer or exchange, then the Trustee will reflect any resulting increase of the principal amount of any other Global Note by notation on the “Schedule of Exchanges of Interests in the Global Note” forming part of such other Global Note;

(3) if required to effect such transfer or exchange, then the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, a new Global Note bearing each legend, if any, required by **Section 2.09**; and

(4) if such Global Note (or such portion thereof), or any beneficial interest therein, is to be exchanged for one or more Physical Notes, then the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Physical Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount of such Global Note to be so exchanged; (y) are registered in such name(s) as the Depositary specifies (or as otherwise determined pursuant to customary procedures); and (z) bear each legend, if any, required by **Section 2.09**.

(iii) Each transfer or exchange of a beneficial interest in any Global Note will be made in accordance with the Depositary Procedures.

(C) *Transfers and Exchanges of Physical Notes.*

(i) Subject to this **Section 2.10**, a Holder of a Physical Note may (x) transfer such Physical Note (or any portion thereof in an Authorized Denomination) to one or more other Person(s); (y) exchange such Physical Note (or any portion thereof in an Authorized Denomination) for one or more other Physical Notes in Authorized Denominations having an aggregate principal amount equal to the aggregate principal amount of the Physical Note (or portion thereof) to be so exchanged; and (z) if then permitted by the Depositary Procedures, transfer such Physical Note (or any portion thereof in an Authorized Denomination) in exchange for a beneficial interest in one or more Global Notes; *provided, however*, that, to effect any such transfer or exchange, such Holder must:

(1) surrender such Physical Note to be transferred or exchanged to the office of the Registrar, together with any endorsements or transfer instruments reasonably required by the Company, the Trustee or the Registrar; and

(2) deliver such certificates, documentation or evidence as may be required pursuant to **Section 2.10(D)**.

(ii) Upon the satisfaction of the requirements of this Indenture to effect a transfer or exchange of any Physical Note (such Physical Note being referred to as the “old Physical Note” for purposes of this **Section 2.10(C)(ii)**) of a Holder (or any portion of such old Physical Note in an Authorized Denomination):

(1) such old Physical Note will be promptly cancelled pursuant to **Section 2.15**;

(2) if such old Physical Note is to be so transferred or exchanged only in part, then the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Physical Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount of such old Physical Note 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 2.09**;

(3) in the case of a transfer:

(a) to the Depositary or a nominee thereof that will hold its interest in such old Physical Note (or such portion thereof) to be so transferred in the form of one or more Global Notes, the Trustee will reflect an increase of the principal amount of one or more existing Global Notes by notation on the “Schedule of Exchanges of Interests in the Global Note” forming part of such Global Note(s), which increase(s) are in Authorized Denominations and aggregate to the principal amount to be so transferred, and which Global Note(s) bear each legend, if any, required by **Section 2.09**; *provided, however*, that if such transfer cannot be so effected by notation on one or more existing Global Notes (whether because no Global Notes bearing each legend, if any, required by **Section 2.09** then exist, because any such increase will result in any Global Note having an aggregate principal amount exceeding the maximum aggregate principal amount permitted by the Depositary or otherwise), then the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Global Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount to be so transferred; and (y) bear each legend, if any, required by **Section 2.09**; and

(b) to a transferee that will hold its interest in such old Physical Note (or such portion thereof) to be so transferred in the form of one or more Physical Notes, the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Physical Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount to be so transferred; (y) are registered in the name of such transferee; and (z) bear each legend, if any, required by **Section 2.09**; and

(4) in the case of an exchange, the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Physical Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount to be so exchanged; (y) are registered in the name of the Person to whom such old Physical Note was registered; and (z) bear each legend, if any, required by **Section 2.09**.

(D) *Requirement to Deliver Documentation and Other Evidence.* If a Holder of any Note that is identified by a “restricted” CUSIP number or that bears a Restricted Note Legend or is a Transfer-Restricted Security requests to:

- (i) cause such Note to be identified by an “unrestricted” CUSIP number;
- (ii) remove such Restricted Note Legend; or
- (iii) register the transfer of such Note to the name of another Person,

then the Company, the Guarantors, the Trustee and the Registrar may refuse to effect such identification, removal or transfer, as applicable, unless there is delivered to the Company, the Guarantors, the Trustee and the Registrar such certificates or other documentation or evidence as the Company, the Guarantors, the Trustee and the Registrar may reasonably require to determine that such identification, removal or transfer, as applicable, complies with the Securities Act and other applicable securities laws.

(E) *Transfers of Notes Subject to Repurchase or Conversion.* Notwithstanding anything to the contrary in this Indenture or the Notes, the Company, the Guarantors, the Trustee and the Registrar may refuse to register the transfer of or exchange any Note that (i) has been surrendered for conversion or (ii) is subject to a Fundamental Change Repurchase Notice validly delivered, and not withdrawn, pursuant to **Section 4.02(F)**, except to the extent that the Company fails to pay the applicable Fundamental Change Repurchase Price when due.

**Section 2.11. EXCHANGE AND CANCELLATION OF NOTES TO BE CONVERTED OR TO BE REPURCHASED PURSUANT TO A REPURCHASE UPON FUNDAMENTAL CHANGE.**

(A) *Partial Conversions of Physical Notes and Partial Repurchases of Physical Notes Pursuant to a Repurchase Upon Fundamental Change* If only a portion of a Physical Note of a Holder is to be converted pursuant to **Article 5** or repurchased pursuant to a Repurchase Upon Fundamental Change, then, as soon as reasonably practicable after such Physical Note is surrendered for such conversion or repurchase, as applicable, the Company will cause such Physical Note to be exchanged, pursuant and subject to **Section 2.10(C)**, for (i) one or more Physical Notes that are in Authorized Denominations and have an aggregate principal amount equal to the principal amount of such Physical Note that is not to be so converted or repurchased, as applicable, and deliver such Physical Note(s) to such Holder; and (ii) a Physical Note having a principal amount equal to the principal amount to be so converted or repurchased, as applicable, which Physical Note will be converted or repurchased, as applicable, pursuant to the terms of this Indenture; *provided, however*, that the Physical Note referred to in this clause (ii) need not be issued at any time after which such principal amount subject to such conversion or repurchase, as applicable, is deemed to cease to be outstanding pursuant to **Section 2.18**.

(B) *Cancellation of Notes that Are Converted and Notes that Are Repurchased Pursuant to a Repurchase Upon Fundamental Change*

(i) *Physical Notes*. If a Physical Note (or any portion thereof that has not theretofore been exchanged pursuant to **Section 2.11(A)**) of a Holder is to be converted pursuant to **Article 5** or repurchased pursuant to a Repurchase Upon Fundamental Change, then, promptly after the later of the time such Physical Note (or such portion) is deemed to cease to be outstanding pursuant to **Section 2.18** and the time such Physical Note is surrendered for such conversion or repurchase, as applicable, (1) such Physical Note will be cancelled pursuant to **Section 2.15**; and (2) in the case of a partial conversion or repurchase, as applicable, the Company will issue, execute and deliver to such Holder, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Physical Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount of such Physical Note that is 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 2.09**.

(ii) *Global Notes*. If a Global Note (or any portion thereof) is to be converted pursuant to **Article 5** or repurchased pursuant to a Repurchase Upon Fundamental Change, then, promptly after the time such Note (or such portion) is deemed to cease to be outstanding pursuant to **Section 2.18**, the Trustee will reflect a decrease of the principal amount of such Global Note in an amount equal to the principal amount of such Global Note to be so converted or repurchased, as applicable, by notation on the "Schedule of Exchanges of Interests in the Global Note" forming part of such Global Note (and, if the principal amount of such Global Note is zero following such notation, cancel such Global Note pursuant to **Section 2.15**).

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**Section 2.12. REMOVAL OF TRANSFER RESTRICTIONS.**

Without limiting the circumstances in which a Restricted Note Legend can be removed, if any Note that bears the Restricted Note Legend is transferred pursuant to the Registration Statement, the Company will cause the Trustee to exchange that Note pursuant to **Sections 2.09(C)(ii) and 2.10(D)** with a Note that does not bear the Restricted Note Legend (and, if such Note is a Global Note, cause such Global Note to be identified by an “unrestricted” CUSIP number in the facilities of the Depository).

**Section 2.13. REPLACEMENT NOTES.**

If a Holder of any Note claims that such Note has been mutilated, lost, destroyed or wrongfully taken, then the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, a replacement Note upon surrender to the Trustee of such mutilated Note, or upon delivery to the Trustee of evidence of such loss, destruction or wrongful taking reasonably satisfactory to the Trustee and the Company. In the case of a lost, destroyed or wrongfully taken Note, the Company and the Trustee may require the Holder thereof to provide such security or indemnity that is satisfactory to the Company and the Trustee to protect the Company, the Trustee and the Collateral Agent from any loss that any of them may suffer if such Note is replaced. The Company may charge for its and the Trustee’s expenses in replacing a Note.

Every replacement Note issued pursuant to this **Section 2.13** will be an additional obligation of the Company and will be entitled to all of the benefits of this Indenture equally and ratably with all other Notes issued under this Indenture, whether or not the destroyed, lost or stolen Note shall be at any time enforceable by anyone, and shall be entitled to all the benefits of this Indenture equally and proportionately with any and all other Notes duly issued hereunder.

**Section 2.14. REGISTERED HOLDERS; CERTAIN RIGHTS WITH RESPECT TO GLOBAL NOTES.**

Only the Holder of a Note will have rights under this Indenture as the owner of such Note. Without limiting the generality of the foregoing, Depository Participants will have no rights as such under this Indenture with respect to any Global Note held on their behalf by the Depository or its nominee, or by the Trustee as its custodian, and the Company, the Guarantors, the Trustee, the Collateral Agent and the Note Agents, and their respective agents, may treat the Depository as the absolute owner of such Global Note for all purposes whatsoever; *provided, however*, that (A) the Holder of any Global Note may grant proxies and otherwise authorize any Person, including Depository Participants and Persons that hold interests in Notes through Depository Participants, to take any action that such Holder is entitled to take with respect to such Global Note under this Indenture or the Notes; and (B) the Company, the Guarantors, the Trustee and the Collateral Agent, and their respective agents, may give effect to any written certification, proxy or other authorization furnished by the Depository.

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**Section 2.15. CANCELLATION.**

The Company may at any time deliver Notes to the Trustee for cancellation. The Registrar, the Paying Agent and the Conversion Agent will forward to the Trustee each Note duly surrendered to them for transfer, exchange, payment or conversion. The Trustee will promptly cancel all Notes so surrendered to it in accordance with its customary procedures. The Company may not originally issue new Notes to replace Notes that it has paid or that have been cancelled upon transfer, exchange, payment or conversion.

**Section 2.16. NOTES HELD BY THE COMPANY OR ITS AFFILIATES.**

Without limiting the generality of **Section 2.18**, in determining whether the Holders of the required aggregate principal amount of Notes have concurred in any direction, waiver or consent, Notes (if any) owned by the Company or any of its Affiliates (including, for the avoidance of doubt, Accredited Investor Notes beneficially owned by any of the Company's Affiliates) will be deemed not to be outstanding; *provided, however*, that, for purposes of determining whether the Trustee or Collateral Agent is protected in relying on any such direction, waiver or consent, only Notes that a Responsible Officer of the Trustee or Collateral Agent, as applicable, actually knows are so owned will be so disregarded.

**Section 2.17. TEMPORARY NOTES.**

Until definitive Notes are ready for delivery, the Company may issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, temporary Notes. Temporary Notes will be substantially in the form of definitive Notes but may have variations that the Company considers appropriate for temporary Notes. The Company will promptly prepare, issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, definitive Notes in exchange for temporary Notes. Until so exchanged, each temporary Note will in all respects be entitled to the same benefits under this Indenture as definitive Notes.

**Section 2.18. OUTSTANDING NOTES.**

(A) *Generally.* The Notes that are outstanding at any time will be deemed to be those Notes that, at such time, have been duly executed and authenticated, excluding those Notes (or portions thereof) that have theretofore been (i) cancelled by the Trustee or delivered to the Trustee for cancellation in accordance with **Section 2.15**; (ii) assigned a principal amount of zero by notation on the "Schedule of Exchanges of Interests in the Global Note" forming part of any a Global Note representing such Note; (iii) paid in full (including upon conversion) in accordance with this Indenture; or (iv) deemed to cease to be outstanding to the extent provided in, and subject to, clause (B), (C) or (D) of this **Section 2.18**.

(B) *Replaced Notes.* If a Note is replaced pursuant to **Section 2.13**, then such Note will cease to be outstanding at the time of its replacement, unless the Trustee and the Company receive proof reasonably satisfactory to them that such Note is held by a "*bona fide* purchaser" under applicable law.

(C) *Maturing Notes and Notes Subject to Repurchase.* If, on a Fundamental Change Repurchase Date or the Maturity Date, the Paying Agent holds money sufficient to pay the aggregate Fundamental Change Repurchase Price or the Accreted Principal Amount, respectively, together, in each case, with the aggregate interest in each case due on such date, then (unless there occurs a Default in the payment of any such amount) (i) the Notes (or portions thereof) to be repurchased, or that mature, on such date will be deemed, as of such date, to cease to be outstanding, except to the extent provided in **Sections 4.02(D)** or **5.02(D)**; and (ii) the rights of the Holders of such Notes (or such portions thereof), as such, will terminate with respect to such Notes (or such portions thereof), other than the right to receive the Fundamental Change Repurchase Price or the Accreted Principal Amount, as applicable, of, and accrued and unpaid interest on, such Notes (or such portions thereof), in each case as provided in this Indenture.

(D) *Notes to Be Converted.* At the Close of Business on the Conversion Date for any Note (or any portion thereof) to be converted, such Note (or such portion) will (unless there occurs a Default in the delivery of the Conversion Consideration or interest due, pursuant to **Sections 5.02** and **5.03**, upon such conversion) be deemed to cease to be outstanding, except to the extent provided in **Section 5.02(B)** and **Section 5.11**.

(E) *Cessation of Accrual of Interest.* Except as provided in **Sections 4.02(D)** or **5.02(D)**, interest will cease to accrue on each Note from, and including, the date that such Note is deemed, pursuant to this **Section 2.18**, to cease to be outstanding, unless there occurs a default in the payment or delivery of any cash or other property due on such Note.

#### **Section 2.19. REPURCHASES BY THE COMPANY.**

Without limiting the generality of **Section 2.15**, the Company or its Subsidiaries may repurchase Notes in open market purchases or in negotiated transactions. In connection with any such repurchase, the Company may appoint a tender agent, in which case such tender agent shall be the Paying Agent in connection with such repurchase. The Company shall cause any Notes repurchased in the open market or otherwise, whether by the Company or its Subsidiaries, to be surrendered to the Trustee for cancellation in accordance with **Section 2.15**.

#### **Section 2.20. CUSIP AND ISIN NUMBERS.**

Subject to **Section 2.12**, the Company may use one or more CUSIP or ISIN numbers to identify any of the Notes, and, if so, the Company and the Trustee will use such CUSIP or ISIN number(s) in notices to Holders as applicable; *provided, however*, that (i) the Trustee makes no representation as to the correctness or accuracy of any such CUSIP or ISIN number; (ii) the effectiveness of any such notice will not be affected by any defect in, or omission of, any such CUSIP or ISIN number; and (iii) the Trustee shall have no liability for any defect in the CUSIP or ISIN numbers as they appear on any Note, notice or elsewhere. The Company will promptly notify the Trustee, in writing, of any change in the CUSIP or ISIN number(s) identifying any Notes.

### **Article 3. COVENANTS**

#### **Section 3.01. PAYMENT ON NOTES.**

(A) *Generally.* The Company will pay or cause to be paid all the principal (including, if expressly provided for herein, the Accreted Principal Amount) of, the Fundamental Change Repurchase Price for, interest on, and other amounts due with respect to, the Notes on the dates and in the manner set forth in this Indenture.



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(B) *Deposit of Funds.* Before 10:00 A.M., New York City time, on each Fundamental Change Repurchase Date or Interest Payment Date, and on the Maturity Date or any other date on which any cash amount is due on the Notes, the Company will deposit, or will cause there to be deposited, with the Paying Agent cash, in funds immediately available on such date, sufficient to pay the cash amount due on the applicable Notes on such date. The Paying Agent will return to the Company, as soon as practicable, any money not required for such purpose.

**Section 3.02. EXCHANGE ACT REPORTS.**

(A) *Generally.* The Company will send to the Trustee copies of all reports that the Company is required to file with or furnish to the SEC pursuant to Section 13(a) or 15(d) of the Exchange Act within fifteen (15) calendar days after the date that the Company is required to file or furnish the same (after giving effect to all applicable grace periods under the Exchange Act); *provided, however,* that the Company need not send to the Trustee any material for which the Company has received, or is seeking in good faith and has not been denied, confidential treatment by the SEC. Any report that the Company files with or furnishes to the SEC through the EDGAR system (or any successor thereto) will be deemed to be sent to the Trustee at the time such report is so filed or furnished via the EDGAR system (or such successor). Upon the request of any Holder, the Company will provide to such Holder a copy of any report that the Company has furnished or filed pursuant to this **Section 3.02(A)**, other than a report that is deemed to be sent to the Trustee pursuant to the preceding sentence.

(B) *Trustee's Disclaimer.* The Trustee need not determine whether the Company has filed any material via the EDGAR system (or such successor). The sending or filing of reports pursuant to **Section 3.02(A)** to the Trustee will be for informational purposes only, and the Trustee's receipt of such reports will not be deemed to constitute actual or constructive notice to the Trustee of any information contained, or determinable from information contained, therein, including the Company's compliance with any of its covenants under this Indenture (as to which the Trustee is entitled to rely exclusively and conclusively on Officer's Certificates). The Trustee shall have no liability or responsibility for the filing, content or timeliness if any report hereunder.

**Section 3.03. RULE 144A INFORMATION.**

If the Company is not subject to Section 13 or 15(d) of the Exchange Act at any time when any Notes or shares of Common Stock issuable upon conversion of the Notes are outstanding and constitute "restricted securities" (as defined in Rule 144), then the Company (or its successor) will promptly provide, to the Trustee and, upon written request, to any Holder, beneficial owner or prospective purchaser of such Notes or shares, the information required to be delivered pursuant to Rule 144A(d)(4) under the Securities Act to facilitate the resale of such Notes or shares pursuant to Rule 144A. The Company (or its successor) will take such further action as any Holder or beneficial owner of such Notes or shares may reasonably request to enable such Holder or beneficial owner to sell such Notes or shares pursuant to Rule 144A.

Delivery of such reports, information and documents to the Trustee is for informational purposes only and the Trustee's receipt of such reports will not constitute actual or constructive notice of any information contained therein or determinable from information contained therein, including the Company's compliance with any of the Company's covenants under this Indenture (as to which the Trustee is entitled to rely exclusively and conclusively on Officer's Certificates).

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**Section 3.04. REGISTRATION RIGHTS; ADDITIONAL INTEREST.**

(A) *Registration Rights.* The Company agrees that the Holders from time to time of Registrable Securities (as defined in the Subscription Agreement) are entitled to the benefits of Sections 5 and 8 of the Subscription Agreement. By its acceptance thereof, the Holder of Registrable Securities will have agreed to be bound by the terms of Sections 5 and 8 of the Subscription Agreement.

(B) *Accrual of Additional Interest.* Additional Interest will accrue on the Notes pursuant to the terms and conditions of the Subscription Agreement, and the Company's obligation to pay such Additional Interest will, without duplication, be deemed to be obligations under this Indenture and the Notes with the same force and effect as if the relevant provisions of the Subscription Agreement were reproduced in the Indenture and the Notes. In no event will Additional Interest, together with any Special Interest that is payable at the Company's election pursuant to **Section 7.03(A)** as the sole remedy for any Reporting Event of Default, accrue on any day on a Note at a combined rate per annum that exceeds one half of one percent (0.50%). For the avoidance of doubt, any Additional Interest that accrues on a Note will be in addition to the Stated Interest that accrues on such Note and, subject to the immediately preceding sentence, in addition to any Special Interest that accrues on such Note pursuant to **Section 7.03(A)**.

(C) *Notice to Trustee and Paying Agent; Trustee's Disclaimer.* If Additional Interest accrues on any Note pursuant to this **Section 3.04**, then, no later than five (5) Business Days before each date on which such Additional Interest is to be paid, the Company will deliver an Officer's Certificate to the Trustee and the Paying Agent stating (i) that the Company is obligated to pay Additional Interest on such Note pursuant to this **Section 3.04** on such date of payment; and (ii) the amount of such Additional Interest that is payable on such date of payment. The Trustee will have no duty to determine whether any Additional Interest is payable or the amount thereof.

**Section 3.05. COMPLIANCE AND DEFAULT CERTIFICATES.**

(A) *Annual Compliance Certificate.* Within ninety (90) days after December 31, 2022 and each fiscal year of the Company ending thereafter, the Company will deliver an Officer's Certificate to the Trustee stating (i) that the signatory thereto has supervised a review of the activities of the Company and its Subsidiaries during such fiscal year with a view towards determining whether any Default or Event of Default has occurred; and (ii) whether, to such signatory's knowledge, a Default or Event of Default has occurred or is continuing (and, if so, describing all such Defaults or Events of Default and what action the Company is taking or proposes to take with respect thereto).

(B) *Default Certificate.* If a Default or Event of Default occurs, then the Company will, within thirty (30) days after its first occurrence, promptly deliver an Officer's Certificate to the Trustee describing the same and what action the Company is taking or proposes to take with respect thereto; *provided, however*, that the Company will not be required to deliver such notice if such Default or Event of Default, as applicable, has been cured within the applicable grace period, if any, provided herein.

**Section 3.06. STAY, EXTENSION AND USURY LAWS.**

To the extent that it may lawfully do so, the Company (A) agrees that it will not at any time insist upon, plead, or in any manner whatsoever claim or take the benefit or advantage of, any stay, extension or usury law (wherever or whenever enacted or in force) that may affect the covenants or the performance of this Indenture; and (B) expressly waives all benefits or advantages of any such law and agrees that it will not, by resort to any such law, hinder, delay or impede the execution of any power granted to the Trustee or the Collateral Agent by this Indenture, but will suffer and permit the execution of every such power as though no such law has been enacted.

**Section 3.07. ACQUISITION OF NOTES BY THE COMPANY AND ITS AFFILIATES.**

Without limiting the generality of **Section 2.18**, Notes that the Company or any of its Subsidiaries have purchased or otherwise acquired will be deemed to remain outstanding (except to the extent provided in **Section 2.16**) until such time as such Notes are delivered to the Trustee for cancellation.

**Section 3.08. RESTRICTED PAYMENTS.**

The Company will not, and will not permit any of its Subsidiaries to, directly or indirectly:

(A) declare or pay any dividend or make any other payment or distribution on or in respect of the Company's or any of its Subsidiary's Equity Interests (including any such payment made in connection with any merger or consolidation involving such Person), except dividends or distributions payable solely in Equity Interests (other than Disqualified Stock) of the Company or such Subsidiary and except dividends or distributions payable solely to the Company or any of its Subsidiaries (and, if such Subsidiary is not a Wholly Owned Subsidiary, to its other Equity Interest Holders on a pro rata basis with respect to the class of Equity Interests on which such dividend or distribution is made, or on a basis that results in the receipt by the Company or any of its Subsidiaries of dividends or distributions of greater value than it would receive on a pro rata basis); or

(B) purchase, redeem or otherwise acquire or retire for value (including in connection with any merger or consolidation involving the Company) any Equity Interests of the Company;

(all such payments and other actions set forth in clauses (A) and (B) above being collectively referred to as "**Restricted Payments**"), unless, at the time of and after giving effect to such Restricted Payment:

- (i) no Default or Event of Default has occurred and is continuing or would occur after giving effect to such Restricted Payment;

(ii) at the time of such Restricted Payment and after giving *pro forma* effect thereto, (x) the Fixed Charge Coverage Ratio shall not be less than 2.00 to 1.00 and (y) the aggregate outstanding Indebtedness of the Company and its Subsidiaries minus cash and Cash Equivalents of the Company and its Subsidiaries that are not Restricted, which for the avoidance of doubt shall not include any cash or Cash Equivalents of the customers of the Company and its Subsidiaries, and that are held in a deposit account or securities account subject to a perfected security interest in favor of the Collateral Agent in accordance with the control requirements under the UCC in an amount not to exceed \$25,000,000 ; and

(iii) such Restricted Payment, together with the aggregate amount of all other Restricted Payments made by the Company and its Subsidiaries since the Issue Date, is less than the sum, without duplication, of:

(1) 50% of the Consolidated Net Income of the Company for the period (taken as one accounting period) from the beginning of the first fiscal quarter commencing after the Issue Date to the end of the Company's most recently completed fiscal quarter for which internal financial statements are available at the time of such Restricted Payment (or, if such Consolidated Net Income for such period is a deficit, less 100% of such deficit); plus

(2) 100% of the aggregate net cash proceeds received by the Company since the Issue Date as a contribution to its common equity capital or from the issue or sale of Equity Interests (other than Disqualified Stock) of the Company that are not otherwise applied or from the issue or sale of convertible or exchangeable Disqualified Stock of the Company or convertible or exchangeable debt securities of the Company, in each case that have been converted into, settled with or exchanged for Equity Interests of the Company (other than (x) Disqualified Stock, (y) Equity Interests and convertible or exchangeable Disqualified Stock or debt securities sold to a Subsidiary of the Company or (z) any Equity Interests the proceeds of which were issued to incur Indebtedness pursuant to **Section 3.10(B)(xvii)**).

(C) Notwithstanding anything to the contrary therein, **Section 3.08** will not prohibit:

(i) the payment of any dividend or distribution on account of Equity Interests or the consummation of any redemption within 60 days after the date of declaration of the dividend or distribution on account of Equity Interests, as the case may be, if at the date of declaration or notice, the dividend, distribution or redemption payment would have complied with the provisions of this **Section 3.08**;

(ii) [Reserved];

(iii) so long as no Default or Event of Default has occurred and is continuing or would result therefrom, the repurchase, redemption or other acquisition or retirement for value of any Equity Interests of the Company or any Subsidiary of the Company held by any current or former officer, director, employee or consultant of the Company, any Subsidiary of the Company, or any Permitted Transferee of the foregoing pursuant to any equity subscription agreement, stock option agreement, shareholders' agreement or similar agreement; *provided* that the aggregate price paid for all such repurchased, redeemed,

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acquired or retired Equity Interests may not exceed \$5,000,000 in the aggregate after the Issue Date; *provided, further*, that such amount may be increased by an amount not to exceed the cash proceeds from the sale of Equity Interests (other than Disqualified Stock) of the Company to officers, directors, employees or consultants of the Company, any of its Subsidiaries or any of its direct or indirect parent companies that occurs after the Issue Date to the extent the cash proceeds from the sale of such Equity Interests have not otherwise been applied;

(iv) the purchase, redemption or other acquisition or retirement for value of Equity Interests (x) deemed to occur upon the exercise or conversion of stock options, warrants, convertible notes or similar rights to acquire Equity Interests to the extent that such Equity Interests represent all or a portion of the exercise, exchange or conversion price of those stock options, warrants, convertible notes or similar rights, or (y) made in lieu of payment of withholding taxes in connection with the vesting of Equity Interests or any exercise or exchange of stock options, warrants, convertible notes or similar rights to acquire such Equity Interests;

(v) [Reserved];

(vi) each Subsidiary of the Company may make Restricted Payments to the Company or any Guarantor or to another Subsidiary of the Company which is the immediate parent of the Subsidiary making such Restricted Payment;

(vii) repurchases of Capital Stock deemed to occur upon the withholding of a portion of the Capital Stock granted or awarded to a current or former director, officer, employee, manager or director of the Company or any of its Subsidiaries (or consultant or advisor or any spouses, former spouses, successors, executors, administrators, heirs, legatees or distributees of any of the foregoing) solely to the extent necessary to pay for the taxes payable by such Person upon such grant or award (or upon the vesting thereof);

(viii) [Reserved];

(ix) [Reserved];

(x) [Reserved];

(xi) [Reserved];

(xii) the repurchase of the Notes upon a Fundamental Change, as contemplated hereunder, and the delivery of the Conversion Consideration due under the terms of the Notes, including the making of any Make-Whole Interest Payment upon a conversion of any Note, whether in cash or shares of the Common Stock;

(xiii) [Reserved];

(xiv) any non-Wholly Owned Subsidiary of the Company may make Restricted Payments (which may be in cash) to its shareholders, members or partners generally, so long as the Company or the Subsidiary which owns the Capital Stock in the Subsidiary making such Restricted Payment receives at least its proportionate share thereof (based upon its relative holding of the Capital Stock in the Subsidiary making such Restricted Payment and taking into account the relative preferences, if any, of the various classes of Capital Stock of such Subsidiary);

(xv) the payment of cash, dividends, distributions, advances or other Restricted Payments by the Company or any of its Subsidiaries in lieu of the issuance of fractional shares of Capital Stock in connection with any dividend or split of, or upon exercise or conversion of warrants, options or other securities exercisable or convertible into, Capital Stock of the Company or in connection with the issuance of any dividend otherwise permitted to be made under this **Section 3.08**.

(D) For purposes of this **Section 3.08**, the Notes will be deemed not to be Equity Interests.

(E) For purposes of determining compliance with this **Section 3.08**, if any Restricted Payment (or portion thereof) would be permitted pursuant to one or more provisions described above, the Company may divide and classify such Restricted Payment in any manner that complies with this covenant and may later divide and reclassify any such Restricted Payment so long as the Restricted Payment (as so divided and/or reclassified) would be permitted to be made in reliance on the applicable exception as of the date of such reclassification.

### **Section 3.09. MATERIAL COLLATERAL.**

Notwithstanding anything to the contrary set forth in this Indenture, (a) in no event shall any Lien be placed on the Material Collateral, other than (i) the Liens in favor of the Collateral Agent as set forth in the Note Documents, or (ii) Permitted Liens, and (b) in the event the Company or any of its Subsidiaries (i) engages in any Asset Sale, Investment or Restricted Payment, in each case, of any interest in any of the Material Collateral to a Person that is not the Company or a Guarantor, (ii) exclusively or coexclusively licenses any Material Collateral to a Person that is not the Company or a Guarantor or (iii) engages in Asset Sales in an aggregate amount in excess of \$5,000,000 after the Issue Date (the date such threshold is satisfied, the "**Threshold Date**"), then in the case of this clause (b) (x) no Default or Event of Default shall be continuing at the time of such transaction and no Default or Event of Default shall result therefrom, (y) at least 75% of the consideration received in connection with any such transaction shall be in the form of cash and Cash Equivalents and shall be for Fair Market Value and (z) the Company shall within five (5) Business Days thereafter make an offer (each, an "**Transaction Offer**") to all Holders of Notes in an amount equal to 100% of the Net Proceeds of such transaction (the "**Offer Amount**"); *provided*, that, with respect to any event described in clause (b)(iii) of this **Section 3.09**, a Transaction Offer shall only be required to be made each time the total amount of all Asset Sales following the Threshold Date result in Net Proceeds in excess of \$2,500,000 in the aggregate and *provided further*, that if the Company or any of its Subsidiaries invest (or commit to invest) the Net Proceeds from such event (or a portion thereof) within twelve (12) months after receipt of such Net Proceeds in assets used or useful in the business of the Company and its Subsidiaries (or, if such Asset Sale is made by a Guarantor, any new assets used or useful in the business of the Company that are acquired from the Net Proceeds of such Asset Sale are held by a Guarantor), then no Transaction Offer or any prepayment of the Notes in connection thereto by the Company shall be required

pursuant to this paragraph with respect to the Net Proceeds so reinvested. The offer price in any Transaction Offer (if required) will be equal to 100% of the Accreted Principal Amount purchased, prepaid or redeemed, plus accrued and unpaid interest on such principal amount to the date of purchase and will be payable in cash. If any Net Proceeds remain after consummation of any Transaction Offer required hereby, the Company may use those Net Proceeds for any purpose not otherwise prohibited by this Indenture. If the Accreted Principal Amount of Notes tendered in or required to be prepaid in connection with such Transaction Offer exceeds the Offer Amount, the Company will select the Notes to be purchased or prepaid on a pro rata basis (subject to adjustment to maintain the authorized minimum denomination of the Notes), based on the amounts tendered or required to be prepaid. Notwithstanding the foregoing, with respect to Global Notes, implementation of the Transaction Offer shall be in accordance with the Depository Procedures.

**Section 3.10. INCURRENCE OF INDEBTEDNESS AND ISSUANCE OF PREFERRED STOCK.**

(A) The Company will not, and will not permit any of its Subsidiaries, in each case, to, directly or indirectly, create, incur, issue, assume, enter into a guarantee of or otherwise become directly or indirectly liable, contingently or otherwise, with respect to (collectively, “incur”) any Indebtedness (including Acquired Debt), and the Company will not issue any Disqualified Stock and will not permit any of its Subsidiaries to issue any Disqualified Stock or any shares of preferred stock; *provided, however*, that the Company and the Subsidiaries may incur Indebtedness or issue Disqualified Stock, and or issue Preferred Stock, in each case, in the form of Permitted Unsecured Indebtedness or Junior Lien Indebtedness in an aggregate amount not to exceed the greater of (x) \$15 million and (y) 50% of Consolidated EBITDA as of the last day of the most recently ended Test Period in the aggregate, so long as no Default or Event of Default has occurred and is continuing or would be caused thereby.

(B) Notwithstanding anything to the contrary therein, **Section 3.10(A)** will not prohibit the incurrence of any of the following items of Indebtedness or the issuance of any of the following Disqualified Stock or Preferred Stock (collectively, “**Permitted Debt**”):

(i) the incurrence by the Company and the Guarantors of Indebtedness represented by the Notes in an amount not to exceed \$65,500,000 and the related Guarantees to be issued on the Issue Date;

(ii) the incurrence by the Company or any of its Subsidiaries of Existing Indebtedness listed on Schedule C hereto;

(iii) (x) the incurrence by the Company or any of its Subsidiaries of Indebtedness represented by either (1) Capital Lease Obligations, or (2) mortgage financings purchase money obligations, in either case of sub-clause (1) or (2), incurred for the purpose of financing or reimbursing all or any part of the purchase price or cost of design, development, construction, installation, expansion, repair or improvement of property (either real or personal), plant or equipment or other fixed or capital assets used or useful in the business of the Company or any of its Subsidiaries (in each case, whether through the direct purchase of such assets or the purchase of Equity Interests of any Person owning such assets), which incurrence occurs within 365 days of such purchase, design, development, construction, installation, expansion, repair or improvement, in an aggregate principal amount, including, without duplication, all Permitted Refinancing Indebtedness thereof or (y) any Indebtedness to finance the acquisition, construction, repair, replacement or improvement of fixed or capital assets (whether through the direct purchase of property or any Person owning such property) in the ordinary course of business, in the case of any Indebtedness incurred pursuant to this clause (iii), not to exceed \$5 million in the aggregate;

(iv) (x) Junior Lien Indebtedness attaching to assets acquired by the Company or any of its Subsidiaries and outstanding on the date on which such assets were acquired by the Company or such Subsidiary, except to the extent incurred in contemplation thereof or to consummate the relevant transaction, (y) Permitted Unsecured Indebtedness or Junior Lien Indebtedness of a Subsidiary incurred and outstanding on the date on which such Subsidiary was acquired by, or merged into, the Company or any Subsidiary, except to the extent incurred in contemplation thereof or to consummate the relevant transaction, in each case of this clause (iv) and (z) other Indebtedness incurred in connection with obtaining, maintaining or renewing client contracts or other arrangements with vendors, service providers, or other similar parties that constitutes Permitted Unsecured Indebtedness, *provided*, that the aggregate principal amount of all Indebtedness incurred under this clause (iv), including, without duplication, all Permitted Refinancing Indebtedness incurred under **Section 3.10(B)(v)** to refinance any Indebtedness incurred pursuant to this clause (iv), does not exceed \$5 million;

(v) Indebtedness constituting an extension or renewal of, replacement of, or substitution for, or issued in exchange for, or the net proceeds of which are used to repay, redeem, repurchase, refinance or refund, including by way of defeasance (all of the above, for purposes of this Section, “**refinance**”) then outstanding Indebtedness (“**Permitted Refinancing Indebtedness**”) in an amount not to exceed the principal amount or liquidation value of the indebtedness so refinanced, plus premiums, fees and expenses; *provided*, that:

(1) [Reserved];

(2) in case the Indebtedness to be refinanced is Indebtedness permitted to be incurred under **Section 3.10(A)**, the new Indebtedness, if secured, shall be Junior Lien Indebtedness;

(3) the new indebtedness does not have a Stated Maturity prior to the Stated Maturity of the Indebtedness to be refinanced, and the Weighted Average Life to Maturity of the new indebtedness is at least equal to the remaining Weighted Average Life to Maturity of the Indebtedness being refinanced;

(4) if the Indebtedness being refinanced is Permitted Unsecured Indebtedness, such Permitted Refinancing Indebtedness shall be Permitted Unsecured Indebtedness;



(5) if the Indebtedness being refinanced is secured Indebtedness, such Permitted Refinancing Indebtedness may only be secured by the same assets securing the Indebtedness being refinanced and shall otherwise be Junior Lien Indebtedness; and

(6) in no event may Indebtedness of the Company or any Guarantor be refinanced pursuant to this clause by means of any Indebtedness of any Subsidiary that is not a Guarantor;

(vi) the incurrence by the Company or any of its Subsidiaries of additional unsecured Indebtedness or Disqualified Stock in an aggregate principal amount (or accreted value, as applicable), including, without duplication, all Permitted Refinancing Indebtedness incurred under **Section 3.10(B)(v)** to refinance any Indebtedness incurred pursuant to this clause, at any time outstanding not to exceed \$5 million;

(vii) the incurrence by the Company or any of its Subsidiaries of intercompany Indebtedness (or the guarantees of any such intercompany Indebtedness) between or among the Company or any of its Subsidiaries; *provided, however*, that:

(1) the aggregate principal amount of intercompany Indebtedness (or the guarantees of any such intercompany Indebtedness) between or among the Company or any of its Subsidiaries must be incurred pursuant to an intercompany note (which may take the form of a grid note) that is pledged to the Collateral Agent, as applicable, in accordance with the terms of the applicable Security Agreement; and

(2) if the Company or any Guarantor is the obligor on such Indebtedness and the payee is not the Company or a Guarantor, then such Indebtedness (other than Indebtedness incurred in the ordinary course of business in connection with the cash or tax management operations of the Company and its Subsidiaries) must be expressly subordinated to the prior payment in full in cash of all Obligations then due with respect to the Notes, in the case of the Company, or the Guarantee, in the case of a Guarantor;

*provided, further*, that (i) any subsequent issuance or transfer of Equity Interests that results in any such Indebtedness being held by a Person other than the Company or a Subsidiary of the Company and (ii) any sale or other transfer of any such Indebtedness to a Person that is not either the Company or a Subsidiary of the Company, will be deemed, in each case, to constitute an incurrence of such Indebtedness by the Company or such Subsidiary, as the case may be, that was not permitted by this **Section 3.10(B)(vii)**;

(viii) the issuance by any of the Company's Subsidiaries to the Company or to any Subsidiary of shares of unsecured preferred stock; *provided, however*, that:

(1) any subsequent issuance or transfer of Equity Interests that results in any such preferred stock being held by a Person other than the Company or a Subsidiary; and

(2) any sale or other transfer of any such preferred stock to a Person that is not the Company or a Subsidiary will be deemed, in each case, to constitute an issuance of such preferred stock by such or a Subsidiary that was not permitted by this clause (viii);

(ix) Hedging Obligations that are not incurred for speculative purposes but for the purpose of (a) fixing or hedging interest rate risk with respect to any Indebtedness that is permitted by the terms of this Indenture to be outstanding; (b) fixing or hedging currency exchange rate risk with respect to any currency exchanges; or (c) fixing or hedging commodity price risk, including the price or cost of raw materials, emission rights, manufactured products or related commodities, with respect to any commodity purchases or sales;

(x) the guarantee by the Company or any of the Guarantors of Indebtedness of the Company or a Guarantor, and the guarantee by any Subsidiary of the Company that is not a Guarantor of Indebtedness of another Subsidiary that is not a Guarantor, in each case, to the extent that the guaranteed Indebtedness was permitted to be incurred by another provision of this **Section 3.10**; *provided* that if the Indebtedness being guaranteed is unsecured, subordinated in right of payment to or *pari passu* with the Notes, then the guarantee must be unsecured, subordinated *or pari passu*, as applicable, in right of payment to the same extent as the Indebtedness guaranteed;

(xi) the incurrence by the Company or any of its Subsidiaries of Indebtedness in respect of workers' compensation claims, unemployment or other insurance or self-insurance obligations, health, disability or other benefits to employees or former employees and their families, bankers' acceptances, letters of credit and similar obligations in the ordinary course of business;

(xii) the incurrence by the Company or any of its Subsidiaries of Indebtedness arising from the honoring by a bank or other financial institution of a check, draft or similar instrument inadvertently drawn against insufficient funds, so long as such Indebtedness is covered within five Business Days;

(xiii) Indebtedness of a Joint Venture to the Company or a Subsidiary and to the other holders of Capital Stock of such joint venture, so long as (A) the percentage of the aggregate amount of such Indebtedness of such Joint Venture owed to such holders of its Capital Stock does not exceed the percentage of the aggregate outstanding amount of the Capital Stock of such Joint Venture held by such holders, and (B) any such Indebtedness of which the Company or any Guarantor is the holder shall be incurred in the form of a physical promissory note in an amount exceeding \$1,000,000 that is pledged to the Collateral Agent as Collateral in accordance with the Security Documents;

(xiv) Indebtedness representing deferred compensation or similar obligation to employees of the Company or any Guarantor or any of their Subsidiaries or incurred in the ordinary course of business;

(xv) Indebtedness consisting of Indebtedness issued by the Company or any Subsidiary or any direct or indirect parent company of the Company to future, current or former officers, directors, employees, consultants and independent contractors thereof, their respective estates, heirs, family members, spouses or former spouses, in each case to finance the purchase or redemption of Capital Stock of the Company or any direct or indirect parent company of the Company to the extent described in **Section 3.08**;

(xvi) customer deposits and advance payments received in the ordinary course of business from customers for goods purchased in the ordinary course of business;

(xvii) the incurrence by the Company or any of its Subsidiaries of Indebtedness arising from customary agreements of the Company or any such Subsidiary providing for indemnification, deferred purchase price, non-cash earn-outs, cash earn-outs, adjustment of purchase price or similar obligations, in each case, incurred or assumed in connection with the acquisition or sale or other disposition of any business, assets or Capital Stock of the Company or any of its Subsidiaries, other than, in the case of any such disposition by the Company or any of its Subsidiaries, guarantees of Indebtedness incurred by any Person acquiring all or any portion of such business, assets or Capital Stock;

(xviii) the incurrence of contingent liabilities arising out of endorsements of checks and other negotiable instruments for deposit or collection in the ordinary course of business;

(xix) the incurrence of Indebtedness in the ordinary course of business under any agreement between the Company or any of its Subsidiaries and any commercial bank or other financial institution, in each case relating to Treasury Management Arrangements;

(xx) unsecured Indebtedness owed to any Person providing property, casualty, liability or other insurance to the Company or any Subsidiary, so long as the amount of such Indebtedness is not in excess of the amount of the unpaid cost of, and shall be incurred only to defer the cost of, the premiums with respect to such insurance for the period in which such Indebtedness is incurred and such Indebtedness is outstanding only for a period not exceeding twelve months;

(xxi) [Reserved];

(xxii) any Indebtedness arising in connection with any factoring arrangements and vendor financings in the ordinary course of business and consistent with past practices; and

(xxiii) contingent liabilities under surety bonds or similar instruments incurred in the ordinary course of business;

(C) For purposes of determining compliance with this **Section 3.10**, in the event that an item of proposed Indebtedness or Disqualified Stock meets the criteria of more than one of the categories of Permitted Debt described in this **Section 3.10**, the Company will be permitted to classify all or a portion of such item of Indebtedness or Disqualified Stock on the date of its incurrence, or later reclassify all or a portion of such item of Indebtedness or Disqualified Stock (based on circumstances existing on the date of such reclassification), in any manner that complies with this covenant. The accrual of interest, the accrual of dividends, the accretion or amortization of original issue discount, the amortization of debt discount, the payment of interest on any Indebtedness in the form of additional Indebtedness, the payment of interest in the form of

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additional shares of preferred Capital Stock or Disqualified Stock, the reclassification of Preferred Stock as Indebtedness due to change in accounting principles, and the payment of dividends on Disqualified Stock in the form of additional shares of the same class of Disqualified Stock will not be deemed to be an incurrence of Indebtedness or an issuance of Disqualified Stock for purposes of this covenant, *provided*, in each such case, that the amount of any such accrual, accretion or payment is included in Fixed Charges of the Company as accrued.

(D) The amount of any Indebtedness outstanding as of any date will be:

- (i) the accreted value of the Indebtedness, in the case of any Indebtedness issued with original issue discount;
- (ii) the aggregate principal amount outstanding, in the case of Indebtedness issued with interest payable in kinds;
- (iii) the principal amount of the Indebtedness, in the case of any other Indebtedness; and
- (iv) in respect of Indebtedness of another Person secured by a Lien on the assets of the specified Person, the lesser of:
  - (1) the Fair Market Value of such assets at the date of determination; and
  - (2) the amount of the Indebtedness of the other Person.

(E) For purposes of determining compliance with any U.S. dollar-denominated restriction on the incurrence of Indebtedness, the U.S. dollar-equivalent principal amount of Indebtedness denominated in a foreign currency shall be calculated based on the relevant currency exchange rate in effect on the date such Indebtedness was incurred, in the case of term Indebtedness, or first committed, in the case of revolving credit Indebtedness; provided that if such Indebtedness is incurred to refinance other Indebtedness denominated in a foreign currency, and such refinancing would cause the applicable U.S. dollar-denominated restriction to be exceeded if calculated at the relevant currency exchange rate in effect on the date of such refinancing, such U.S. dollar-denominated restriction shall be deemed not to have been exceeded so long as the principal amount of such Permitted Refinancing Indebtedness does not exceed the principal amount of such Indebtedness being refinanced. Notwithstanding any other provision of this **Section 3.10**, the maximum amount of Indebtedness that the Company may incur pursuant to this **Section 3.10** shall not be deemed to be exceeded solely as a result of fluctuations in the exchange rate of currencies. The principal amount of any Indebtedness incurred to refinance other Indebtedness, if incurred in a different currency from the Indebtedness being refinanced, shall be calculated based on the currency exchange rate applicable to the currencies in which such Permitted Refinancing Indebtedness is denominated that is in effect on the date of such refinancing.

**Section 3.11. ADDITIONAL GUARANTEES.**

If, after the date of this Indenture, the Company or any Subsidiary of the Company forms or acquires any Subsidiary (other than any Excluded Subsidiary), or any Subsidiary of the Company that is an Excluded Entity ceases to be an Excluded Entity, then the Company shall cause such Subsidiary to, within 45 days (or such longer period as the Collateral Agent may agree in its sole discretion) after the date of such event:

(A) execute and deliver to the Trustee and the Collateral Agent a supplemental indenture in the form attached hereto as **Exhibit C** and a notation of such Guarantee in the form attached as **Exhibit D** hereto pursuant to which such Subsidiary shall unconditionally guarantee all of the Company's Obligations under the Notes and this Indenture on the terms set forth in this Indenture;

(B) execute and deliver all supplements or joinders, as applicable, to the applicable Security Documents in order to grant a Lien in the Collateral owned by such Subsidiary to the same extent as that set forth in this Indenture and the Security Documents and take all actions required by the Security Documents to perfect such Lien; and

(C) deliver to the Trustee and the Collateral Agent an Officers' Certificate and an Opinion of Counsel, each certifying that such supplemental indenture and the other documents described in clause (B) above have been duly authorized, executed and delivered by such Subsidiary and constitute a valid and legally binding and enforceable obligations of such Subsidiary, subject to customary exceptions.

Thereafter, such Subsidiary shall be a Guarantor for all purposes.

**Section 3.12. COLLATERAL.**

The Company shall, and shall cause each Guarantor to, take all actions and execute and deliver all documents or deliverables, including each Security Document, to secure the payment obligations of the Company under the Notes and this Indenture (subject to the provisions of the Security Agreement, as applicable) by Liens on the Collateral in accordance with, within the time periods specified by, and subject to the limitations of **Section 12.02(A)** of this Indenture and the Security Documents.

**Section 3.13. LIQUIDITY COVENANT.**

Commencing with the Test Period ending on the last day of the first full fiscal quarter ended after the Issue Date and until such time when the Company's consolidated revenue (calculated in accordance with U.S. GAAP) is at least \$175,000,000 at the end of any Test Period, the Company shall not permit Liquidity to be less than \$15,000,000 as of the last day of any Test Period. A Responsible Officer of the company shall certify in writing to the Trustee on the last day of each Test Period that the covenant contained in this **Section 3.13** has been satisfied.

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**Section 3.14. COVENANT SUSPENSION.**

Notwithstanding anything to the contrary in this **Article 3**, (i) the foregoing covenants in **Sections 3.08** through **3.13**, **3.16** and **3.17** will immediately and automatically terminate, and any then existing Default or Event of Default in connection therewith will immediately and automatically be deemed cured and (ii) Liens on any property granted to or held by the Collateral Agent under any Note Document or otherwise will be automatically and immediately released and all rights to such property shall revert to the Company and applicable Guarantor, the Company and each Guarantor shall automatically and immediately be released from each of their obligations under the Security Documents and Guarantees with respect to the outstanding Notes and the Collateral Agent agrees, at the sole expense of the Company, to enter into and authorize the filing of the necessary or advisable documents requested by the Company associated therewith and return to the Company and the Guarantors all Collateral in its possession in accordance with **Section 12.04**, upon the occurrence of such time as less than nine million eight hundred and twenty five thousand (\$9,825,000) aggregate principal amount of Notes are outstanding.

**Section 3.15. CERTAIN TAX MATTERS.**

To the extent permitted by applicable law, the Company agrees to file all future tax returns and reports consistent with the position, and not to take any position contrary to the position, that the Conversion Rate adjustment set forth in **Section 5.05(A)(vi)**, if it occurs, is not a taxable event for U.S. federal income tax purposes; *provided* that, parties acknowledge, to the extent the Company has or expects to have accumulated or current earnings and profits and the adjustment may be expected to have the effect of **Section 305(b)(2)** of the Code and the related regulations thereunder (due to the potential "receipt of property by some shareholders") or otherwise qualifies as a deemed distribution under **Section 305(c)** of the Code, such adjustment may result in a taxable event; *provided further*, that, in such event of a taxable deemed dividend to be reported by the Company, the Company shall use reasonable efforts to choose a method of calculation that results in a lower amount of taxable dividend if more than one method of calculation is permissible.

**Section 3.16. PAYMENTS FOR CONSENTS.**

(a) The Company will not, and will not permit any of its Subsidiaries to, directly or indirectly, pay or provide, cause to be paid or provided, any consideration (including, for the sake of clarity, the provision of an opportunity (x) to purchase securities of the Company or any of its Subsidiaries or (y) to fund Indebtedness of the Company or any of its Subsidiaries) to or for the benefit of any Holder for or as an inducement to any consent, waiver or amendment of any of the terms or provisions of this Indenture, any Guarantee or the Notes unless such consideration is offered to be paid or provided and is paid or provided (or, in the case of an opportunity, such opportunity is provided) to all Holders that consent, waive or agree to amend in the time frame set forth in the solicitation documents relating to such consent, waiver or amendment.

(b) Notwithstanding the foregoing, the Company and the Guarantors shall be permitted, in connection with any offer or payment of consideration for, or as an inducement to, any consent, waiver or amendment of any of the terms or provisions of this Indenture, any Guarantee or the Notes, to exclude Holders in any jurisdiction or any category of Holders where (1) the solicitation of such consent, waiver or amendment, including in connection with any tender

or exchange offer, or (2) the payment of the consideration therefor, could reasonably be interpreted as requiring the Company or any Guarantor to file a registration statement, prospectus or similar document under any applicable securities laws or listing requirements (including, but not limited to, the U.S. federal securities laws and the laws of the European Union or any of its member states), which the Company in its sole discretion reasonably determines (acting in good faith) (a) would be materially burdensome (it being understood that it would not be materially burdensome to file the consent documents used in other jurisdictions, any substantially similar documents or any summary thereof with the securities or financial services authorities in such jurisdiction); or (b) such solicitation would otherwise not be permitted under applicable law in such jurisdiction or with respect to such category of Holders.

**Section 3.17. PAYMENTS OF FINANCIAL ADVISORY FEES.**

The Company shall not pay, or permit any of its Subsidiaries to pay, any financial advisory or similar costs, fees and expenses associated with the SPAC Transactions unless (a) the aggregate amount of such costs, fees and expenses, together with the cash portion of the consideration paid in the SPAC Transactions, does not exceed \$40,000,000 and (b) such costs, fees and expenses (i) if paid in cash, at the time of such payment and after giving *pro forma* effect thereto, the aggregate outstanding Indebtedness of the Company and its Subsidiaries minus cash and Cash Equivalents of the Company and its Subsidiaries (which for the avoidance of doubt shall not include any cash and Cash Equivalents of, or amounts in respect of security deposits or prepayments received from, the customers of the Company and its Subsidiaries) that are not Restricted and that are held in a deposit account or securities account subject to a perfected security interest in favor of the Collateral Agent in accordance with the control requirements under the UCC does not exceed \$10,000,000, and (ii) if paid in shares of Common Stock, the value of each such share of Common Stock is equal to the greater of (x) the then current per share market price of such Common Stock at the time of payment and (y) \$5.00.

**Article 4. REPURCHASE**

**Section 4.01. NO SINKING FUND.**

No sinking fund is required to be provided for the Notes.

**Section 4.02. RIGHT OF HOLDERS TO REQUIRE THE COMPANY TO REPURCHASE NOTES UPON A FUNDAMENTAL CHANGE.**

(A) *Right of Holders to Require the Company to Repurchase Notes Upon a Fundamental Change* Subject to the other terms of this **Section 4.02**, if a Fundamental Change occurs, then each Holder will have the right (the "**Fundamental Change Repurchase Right**") to require the Company to repurchase such Holder's Notes (or any portion thereof in an Authorized Denomination) on the Fundamental Change Repurchase Date for such Fundamental Change for a cash purchase price equal to the Fundamental Change Repurchase Price.

(B) *Repurchase Prohibited in Certain Circumstances.* If the principal amount of the Notes has been accelerated pursuant to **Section 7.02** and such acceleration has not been rescinded on or before the Fundamental Change Repurchase Date (including as a result of the payment of the related Fundamental Change Repurchase Price and any related interest pursuant to the proviso to **Section 4.02(D)** on the Fundamental Change Repurchase Date), then (i) the Company may not repurchase any Notes pursuant to this **Section 4.02**; and (ii) the Company will cause any Notes theretofore surrendered for such Repurchase Upon Fundamental Change to be returned to the Holders thereof (or, if applicable with respect to Global Notes, cancel any instructions for book-entry transfer to the Company, the Trustee or the Paying Agent of the applicable beneficial interest in such Notes in accordance with the Depository Procedures).

(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 five (35), nor less than twenty (20), Business Days after the date the Company sends the related Fundamental Change Notice pursuant to **Section 4.02(E)**.

(D) *Fundamental Change Repurchase Price.* The Fundamental Change Repurchase Price for any Note to be repurchased upon a Repurchase Upon Fundamental Change following a Fundamental Change is an amount in cash equal to (A) on or before September 26, 2023, 100% of the Original Principal Amount of such Note plus accrued and unpaid interest on such Note (for the avoidance of doubt, accruing as set forth in **Section 2.05(A)**) to, but excluding, the Fundamental Change Repurchase Date for such Fundamental Change or (B) after September 26, 2023, 100% of the Accreted Principal Amount of such Note plus accrued and unpaid interest on such Note (for the avoidance of doubt, accruing as set forth in **Section 2.05(A)**) to, but excluding, the Fundamental Change Repurchase Date for such Fundamental Change; *provided, however*, that if such Fundamental Change Repurchase Date is after a Regular Record Date and on or before the next Interest Payment Date, then (i) the Holder of such Note at the Close of Business on such Regular Record Date will be entitled, notwithstanding such Repurchase Upon Fundamental Change, to receive, on or, at the Company's election, before such Interest Payment Date, the unpaid interest that would have accrued on such Note to, but excluding, such Interest Payment Date (assuming, solely for these purposes, that such Note remained outstanding through such Interest Payment Date, if such Fundamental Change Repurchase Date is before such Interest Payment Date); and (ii) the Fundamental Change Repurchase Price will not include accrued and unpaid interest on such Note to, but excluding, such Fundamental Change Repurchase Date. For the avoidance of doubt, if an Interest Payment Date is not a Business Day within the meaning of **Section 2.05(C)** and such Fundamental Change Repurchase Date occurs on the Business Day immediately after such Interest Payment Date, then (x) accrued and unpaid interest on Notes to, but excluding, such Interest Payment Date will be paid, in accordance with **Section 2.05(C)**, on the next Business Day to Holders as of the Close of Business on the immediately preceding Regular Record Date; and (y) the Fundamental Change Repurchase Price will include interest on Notes to be repurchased from, and including, such Interest Payment Date to, but excluding, the Fundamental Change Repurchase Date.

(E) *Fundamental Change Notice.* On or before the twentieth (20th) calendar day after the effective date of a Fundamental Change, the Company will send to each Holder, the Trustee, the Conversion Agent and the Paying Agent a notice of such Fundamental Change (a "**Fundamental Change Notice**"). Substantially contemporaneously, the Company will issue a press release through such national newswire service as the Company then uses (or publish the same through such other widely disseminated public medium as the Company then uses, including its website) containing the information set forth in the Fundamental Change Notice.



Such 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 Notes pursuant to this **Section 4.02**, 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 \$1,000 principal amount of Notes for such Fundamental Change (and, if such Fundamental Change Repurchase Date is after a Regular Record Date and on or before the next Interest Payment Date, the amount, manner and timing of the interest payment payable pursuant to the proviso to **Section 4.02(D)**);
- (vi) the name and address of the Paying Agent and the Conversion Agent;
- (vii) the Conversion Rate in effect on the date of such Fundamental Change Notice and a description and quantification of any adjustments to the Conversion Rate that may result from such Fundamental Change (including pursuant to **Section 5.07**);
- (viii) that Notes 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;
- (ix) that Notes (or any portion thereof) 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 Indenture; and
- (x) the CUSIP and ISIN numbers, if any, of the Notes.

Neither the failure to deliver a Fundamental Change Notice nor any defect in a Fundamental Change Notice will limit the Fundamental Change Repurchase Right of any Holder or otherwise affect the validity of any proceedings relating to any Repurchase Upon Fundamental Change.

*(F) Procedures to Exercise the Fundamental Change Repurchase Right*

(i) *Delivery of Fundamental Change Repurchase Notice and Notes to Be Repurchased.* To exercise its Fundamental Change Repurchase Right for a Note 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 Note; and

(2) such Note, duly endorsed for transfer (if such Note is a Physical Note) or by book-entry transfer (if such Note is a Global Note).  
The Paying Agent will promptly deliver to the Company a copy of each Fundamental Change Repurchase Notice that it receives.

(ii) *Contents of Fundamental Change Repurchase Notices* Each Fundamental Change Repurchase Notice with respect to a Note must state:

- (1) if such Note is a Physical Note, the certificate number of such Note;
- (2) the principal amount of such Note to be repurchased, which must be an Authorized Denomination; and
- (3) that such Holder is exercising its Fundamental Change Repurchase Right with respect to such principal amount of such Note;

*provided, however*, that if such Note is a Global Note, then such Fundamental Change Repurchase Notice must comply with the Depository Procedures (and any such Fundamental Change Repurchase Notice delivered in compliance with the Depository Procedures will be deemed to satisfy the requirements of this **Section 4.02(F)**).

(iii) *Withdrawal of Fundamental Change Repurchase Notice* A Holder that has delivered a Fundamental Change Repurchase Notice with respect to a Note 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 Note is a Physical Note, the certificate number of such Note;
- (2) the principal amount of such Note to be withdrawn, which must be an Authorized Denomination; and
- (3) the principal amount of such Note, if any, that remains subject to such Fundamental Change Repurchase Notice, which must be an Authorized Denomination;

*provided, however*, that if such Note is a Global Note, then such withdrawal notice must comply with the Depository Procedures (and any such withdrawal notice delivered in compliance with the Depository Procedures will be deemed to satisfy the requirements of this **Section 4.02(F)**).

Upon receipt of any such withdrawal notice with respect to a Note (or any portion thereof), the Paying Agent will (x) promptly deliver a copy of such withdrawal notice to the Company; and (y) if such Note is surrendered to the Paying Agent, cause such Note (or such portion thereof in accordance with **Section 2.11**, treating such Note as having been then surrendered for partial repurchase in the amount set forth in such withdrawal notice as remaining subject to repurchase) to be returned to the Holder thereof (or, if applicable with respect to any Global Note, cancel any instructions for book-entry transfer to the Company, the Trustee or the Paying Agent of the applicable beneficial interest in such Note in accordance with the Depository Procedures).

(G) *Payment of the Fundamental Change Repurchase Price* Without limiting the Company's obligation to deposit the Fundamental Change Repurchase Price within the time proscribed by **Section 3.01(B)**, the Company will cause the Fundamental Change Repurchase Price for a Note (or portion thereof) to be repurchased pursuant to a Repurchase Upon Fundamental Change to be paid to the Holder thereof on or before the later of (i) the applicable Fundamental Change Repurchase Date; and (ii) the date (x) such Note is delivered to the Paying Agent (in the case of a Physical Note) or (y) the Depository Procedures relating to the repurchase, and the delivery to the Paying Agent, of such Holder's beneficial interest in such Note to be repurchased are complied with (in the case of a Global Note). For the avoidance of doubt, interest payable pursuant to the proviso to **Section 4.02(D)** on any Note to be repurchased pursuant to a Repurchase Upon Fundamental Change must be paid pursuant to such proviso regardless of whether such Note is delivered or such Depository Procedures are complied with pursuant to the first sentence of this **Section 4.02(G)**.

(H) *Compliance with Applicable Securities Laws*. To the extent applicable, the Company will comply in all material respects with all federal and state securities laws in connection with a Repurchase Upon Fundamental Change (including complying with Rules 13e-4 and 14e-1 under the Exchange Act and filing any required Schedule TO (or any successor schedule, form or report), to the extent applicable) so as to permit effecting such Repurchase Upon Fundamental Change in the manner set forth in this Indenture; *provided*, however, that, to the extent that the Company's obligations to offer to repurchase and to repurchase Notes pursuant to this **Section 4.02** conflict with any federal and/or state securities law or regulation that is applicable to the Company and enacted after the Issue Date, the Company's compliance with such law or regulation will not be considered to be a Default of those obligations

(I) *Repurchase in Part*. Subject to the terms of this **Section 4.02**, Notes may be repurchased pursuant to a Repurchase Upon Fundamental Change in part, but only in Authorized Denominations. Provisions of this **Section 4.02** applying to the repurchase of a Note in whole will equally apply to the repurchase of a permitted portion of a Note.

#### **Section 4.03. NO REDEMPTION RIGHT.**

The Company does not have the right to redeem the Notes at its election.

### **Article 5. CONVERSION**

#### **Section 5.01. RIGHT TO CONVERT.**

(A) *Generally*. Subject to the provisions of this **Article 5**, each Holder may, at its option, convert such Holder's Notes into Conversion Consideration.

(B) *Conversions in Part.* Subject to the terms of this Indenture, Notes may be converted in part, but only in Authorized Denominations. Provisions of this **Article 5** applying to the conversion of a Note in whole will equally apply to conversions of a permitted portion of a Note.

(C) *When Notes May Be Converted.*

(i) *Generally.* Subject to **Section 5.01(C)(ii)**, a Holder may convert its Notes at any time until the Close of Business on the second (2nd) Scheduled Trading Day immediately before the Maturity Date.

(ii) *Limitations and Closed Periods.* Notwithstanding anything to the contrary in this Indenture or the Notes:

(1) Notes may be surrendered for conversion only after the Open of Business and before the Close of Business on a day that is a Business Day;

(2) in no event may any Note be converted after the Close of Business on the second (2nd) Scheduled Trading Day immediately before the Maturity Date; and

(3) if a Fundamental Change Repurchase Notice is validly delivered pursuant to **Section 4.02(F)** with respect to any Note, then such Note may not be converted, except to the extent (a) such notice is withdrawn in accordance with **Section 4.02(F)**; or (b) the Company fails to pay the Fundamental Change Repurchase Price for such Note in accordance with this Indenture.

(D) *Accretion.* Upon conversion pursuant to this **Section 5.01**, the remaining Accreted Principal Amount in excess of the Original Principal Amount converted shall be deemed to be extinguished.

## **Section 5.02. CONVERSION PROCEDURES.**

(A) *Generally.*

(i) *Global Notes.* To convert a beneficial interest in a Global Note that is convertible pursuant to **Section 5.01**, the owner of such beneficial interest must (1) comply with the Depositary Procedures for converting such beneficial interest (at which time such conversion will become irrevocable, subject to **Section 5.11(E)(i)**); and (2) pay any amounts due pursuant to **Section 5.02(D)**.

(ii) *Physical Notes.* To convert all or a portion of a Physical Note that is convertible pursuant to **Section 5.01**, the Holder of such Note must (1) complete, manually sign and deliver to the Conversion Agent the notice of conversion attached to such Physical Note or a facsimile of such notice of conversion; (2) deliver such Physical Note to the Conversion Agent (at which time such conversion will become irrevocable, subject to **Section 5.11(E)(i)**); (3) furnish any endorsements and transfer documents that the Company or the Conversion Agent may require; and (4) pay any amounts due pursuant to **Section 5.02(D)** (a notice pursuant to the Depositary Procedures as set forth in **Section 5.02(A)(i)** or a notice of conversion attached to a Physical Note as set forth in this **Section 5.02(A)(ii)**, a “**Notice of Conversion**”).

(B) *Effect of Converting a Note.* At the Close of Business on the Conversion Date for a Note (or any portion thereof) to be converted, such Note (or such portion) will (unless there occurs a Default in the delivery of the Conversion Consideration or interest due, pursuant to **Section 5.03(B)** or **5.02(D)**, upon such conversion) be deemed to cease to be outstanding (and, for the avoidance of doubt, no Person will be deemed to be a Holder of such Note (or such portion thereof) as of the Close of Business on such Conversion Date), except to the extent provided in **Section 5.02(D)**.

(C) *Holder of Record of Conversion Shares.* The Person in whose name any share of Common Stock is issuable upon conversion of any Note 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.

(D) *Interest Payable upon Conversion in Certain Circumstances.* If the Conversion Date of a Note is after a Regular Record Date and before the next Interest Payment Date, then the Holder of such Note at the Close of Business on such Regular Record Date will be entitled, notwithstanding such conversion, to receive, on or, at the Company's election, before such Interest Payment Date, the unpaid interest that would have accrued on such Note to, but excluding, such Interest Payment Date (assuming, solely for these purposes, that such Note remained outstanding through such Interest Payment Date).

(E) *Taxes and Duties.* If a Holder converts a Note, 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 such conversion; *provided, however*, that if any tax or duty is due because such Holder requested such shares to be registered in a name other than such Holder's name, then such Holder will pay such tax or duty and, until having received a sum sufficient to pay such tax or duty, the Conversion Agent may refuse to deliver any such shares to be issued in a name other than that of such Holder.

(F) *Conversion Agent to Notify Company of Conversions.* If any Note is submitted for conversion to the Conversion Agent or the Conversion Agent receives any written notice of conversion with respect to a Note, then the Conversion Agent will promptly (and, in any event, no later than the Business Day following the date the Conversion Agent receives such Note or notice) notify the Company and the Trustee of such occurrence, together with any other information reasonably requested by the Company, and will cooperate with the Company to determine the Conversion Date for such Note.

### **Section 5.03. SETTLEMENT UPON CONVERSION.**

(A) *Conversion Consideration.*

(i) *Generally.* Subject to **Section 5.03(A)(iii)** and **Section 5.03(A)(iv)**, the type and amount of consideration due in respect of each \$1,000 principal amount of the Original Principal Amount of a Note to be converted will be (together with any Interest Make-Whole Payments that may be due pursuant to **Section 5.03(A)(ii)**, the "Conversion Consideration") (1) a number of shares of Common Stock equal to the Conversion Rate in effect on the Conversion Date for such conversion and (2) if the applicable Conversion Date occurs after a Regular Record Date and before the next Interest Payment Date, an amount in cash equal to the accrued and unpaid interest such Note to, but excluding, the Conversion Date.

(ii) *Interest Make-Whole Payment.*

(1) If a Conversion Date with respect to any Note occurs on or after August 26, 2023 and prior to the Regular Record Date immediately before the Maturity Date, the Company shall make an interest make-whole payment (an “**Interest Make-Whole Payment**”) to the converting Holder equal to the remaining scheduled payments of interest that would have been made on the Note to be converted had such Note remained outstanding from the Conversion Date through the Maturity Date; *provided* that if any such Conversion Date occurs after the Close of Business on a Regular Record Date and prior to the Open of Business on the Interest Payment Date corresponding to such Regular Record Date, the Company will not pay the portion of the Interest Make-Whole Payment corresponding to the interest to, but not including, such Interest Payment Date to any such converting Holder and will instead pay the full amount of such interest to, but not including such Interest Payment Date, on such Interest Payment Date to the Holder of record on such Regular Record Date.

(2) The Company will satisfy its obligation to pay any Interest Make-Whole Payment, at its election, in cash or shares Common Stock (together with cash in lieu of any fractional share as set forth in **Section 5.03(A)(iii)**); *provided* that the Company may only elect to make any Interest Make-Whole Payment in shares of Common Stock to the extent that such shares are not subject to restrictions on transfer under the Securities Act by Persons other than Affiliates of the Company, whether based on an effective registration statement covering such shares or on an applicable exemption from such registration requirement for resale thereof. Subject to the proviso in the immediately preceding sentence, the Company initially elects to settle any Interest Make-Whole Payment in shares of Common Stock (together with cash in lieu of any fractional share as set forth in **Section 5.03(A)(iii)**). In order to make an election to pay any Interest Make-Whole Payment in cash or in Common Shares (together with cash in lieu of any fractional share as set forth in **Section 5.03(A)(iii)**), the Company may send a notice of such election to the Trustee and the Conversion Agent no more than once per fiscal quarter of the Company, and such election shall become effective for conversions of Notes with a Conversion Date on or after the first day of the fiscal quarter of the Company immediately following delivery of such notice. If the Company does not make such election the payment of any Interest Make-Whole Payment shall be in shares Common Stock (together with cash in lieu of any fractional share as set forth in **Section 5.03(A)(iii)**).

(3) If the Company makes an Interest Make-Whole Payment in shares of Common Stock, then the number of shares of Common Stock (together with cash in lieu of any fractional share as set forth in **Section 5.03(A)(iii)**) that a Holder will receive will be equal to:

(I) for a conversion of a Note with a Conversion Date on or after August 26, 2023 and prior to August 26, 2024, (x) the dollar amount of the Interest Make-Whole Payment owed to such Holder *divided by* (y) the greater of (a) the arithmetic average of the Daily VWAP for the five (5) VWAP Trading Days ending on the VWAP Trading Day immediately preceding the Conversion Date and (b) the Conversion Price; and

(II) for a conversion of a Note with a Conversion Date on or after August 26, 2024 and prior to the Regular Record Date immediately before the Maturity Date, (x) the dollar amount of the Interest Make-Whole Payment owed to such Holder *divided by* (y) the arithmetic average of the Daily VWAP for the five (5) VWAP Trading Days ending on the VWAP Trading Day immediately preceding the Conversion Date.

(iii) *Cash in Lieu of Fractional Shares.* If the number of shares of Common Stock deliverable pursuant to **Section 5.03(A)(i)** upon such conversion is not a whole number, then such number will be rounded down to the nearest whole number and the Company will deliver, in addition to the other consideration due upon such conversion, cash in lieu of the related fractional share in an amount equal to the product of (1) such fraction and (2) the Daily VWAP on the Conversion Date for such conversion (or, if such Conversion Date is not a VWAP Trading Day, the immediately preceding VWAP Trading Day). If the number of shares of Common Stock deliverable in respect of an Interest Make-Whole Payment, if any, upon a conversion of a Note is not a whole number, then such number will be rounded down to the nearest whole number and the Company will deliver, in addition to the other consideration due upon such conversion, cash in lieu of the related fractional share of Common Stock in an amount equal to the product of (x) such fraction and (y) the arithmetic average of the Daily VWAP for the five (5) VWAP Trading Days ending on the VWAP Trading Day immediately preceding the Conversion Date

(iv) *Conversion of Multiple Notes by a Single Holder.* If a Holder converts more than one (1) Note on a single Conversion Date, then the Conversion Consideration due in respect of such conversion will (in the case of any Global Note, to the extent permitted by, and practicable under, the Depository Procedures) be computed based on the total principal amount of Notes converted on such Conversion Date by such Holder.

(B) *Delivery of the Conversion Consideration.* Except as set forth in **Sections 5.05(D)** and **5.09**, the Company will pay or deliver, as applicable, the Conversion Consideration (including any Interest Make-Whole Payment) due upon the conversion of any Note to the Holder on the second (2nd) Business Day immediately after the Conversion Date for such conversion; *provided, however*, that for any Note with a Conversion Date that is after the Regular Record Date immediately before the Maturity Date, then, solely for purposes of such conversion, (x) the Company will deliver the Conversion Consideration due upon such conversion on the Maturity Date (or, if the Maturity Date is not a Business Day, the next Business Day); and (y) the Conversion Date will instead be deemed to be the second (2nd) Business Day immediately before the Maturity Date.

(C) *Deemed Payment of Principal and Interest; Settlement of Accrued Interest Notwithstanding Conversion* If a Holder converts a Note, then the Company will not adjust the Conversion Rate to account for any accrued and unpaid interest on such Note, and, except as provided in **Section 5.02(D)** and **Section 5.03(A)(ii)**, the Company's delivery of the Conversion Consideration due in respect of such conversion will be deemed to fully satisfy and discharge the Company's obligation to pay the principal (and the Accreted Principal Amount) of, and accrued and unpaid interest, if any, on, such Note to, but excluding the Conversion Date. As a result, except as provided in **Section 5.02(D)**, any accrued and unpaid interest on a converted Note will be deemed to be paid in full upon payment of the Conversion Consideration rather than cancelled, extinguished or forfeited.

**Section 5.04. SHARES TO BE FULLY PAID.**

The Company shall provide, free from preemptive rights, out of its authorized but unissued shares or shares held in treasury, sufficient shares of Common Stock to provide for conversion of the Notes from time to time as such Notes are presented for conversion (assuming delivery of the greater of (i) prior to the first anniversary of the Issue Date, the maximum number of Additional Shares pursuant to **Section 5.07** and that at the time of computation of such number of shares, all such Notes would be converted by a single Holder and (ii) after the first anniversary of the Issue Date, (x) the maximum Interest Make-Whole Payment, assuming the Ceiling Conversion Rate, in shares of Common Stock pursuant to **Section 5.03(A)(ii)** or (y) the maximum number of Additional Shares pursuant to **Section 5.07**, and that at the time of computation of such number of shares, all such Notes would be converted by a single Holder). Each Conversion Share, if any, delivered upon conversion of any Note will be duly authorized, validly issued, fully paid, non-assessable 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 the Holder of such Note or the Person to whom such Conversion Share 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 Conversion Share, when delivered upon conversion of any Note, to be admitted for listing on such exchange or quotation on such system.

**Section 5.05. ADJUSTMENTS TO THE CONVERSION RATE.**

(A) *Events Requiring an Adjustment to the Conversion Rate.* The Conversion Rate will be adjusted from time to time as follows:

(i) *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 5.09** will apply), then the Conversion Rate will be adjusted based on the following formula:

$$CR_1 = CR_0 \times \frac{OS_1}{OS_0}$$



where:

CR<sub>0</sub> = the Conversion Rate in effect immediately before the Open of Business on the Ex-Dividend Date for such dividend or distribution, or immediately before the Open of Business on the effective date of such stock split or stock combination, as applicable;

CR<sub>1</sub> = the Conversion Rate in effect immediately after the Open of Business on such Ex-Dividend Date or effective date, as applicable;

OS<sub>0</sub> = the number of shares of Common Stock outstanding immediately before the Open of Business on such Ex-Dividend Date or effective date, as applicable, without giving effect to such dividend, distribution, stock split or stock combination; and

OS<sub>1</sub> = 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 5.05(A)(i)** is declared or announced, but not so paid or made, then the Conversion Rate will be readjusted, effective as of the date the Board of Directors determines not to pay such dividend or distribution or to effect such stock split or stock combination, to the Conversion Rate that would then be in effect had such dividend, distribution, stock split or stock combination not been declared or announced.

(ii) *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 **Sections 5.05(A)(iii)(1)** and **5.05(F)** 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 Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{OS + X}{OS + Y}$$

where:

CR<sub>0</sub> = the Conversion Rate in effect immediately before the Open of Business on the Ex-Dividend Date for such distribution;

CR<sub>1</sub> = the Conversion Rate in effect immediately after the Open of Business on such Ex-Dividend Date;

OS = the number of shares of Common Stock outstanding immediately before the Open of Business on such Ex-Dividend Date;

X = the total number of shares of Common Stock issuable pursuant to such rights, options or warrants; and

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.

To the extent such rights, options or warrants are not so distributed, the Conversion Rate will be readjusted to the Conversion Rate that would then be in effect had the increase to the Conversion Rate 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 Rate will be readjusted to the Conversion Rate that would then be in effect had the increase to the Conversion Rate 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 5.05(A)(ii)** and **Section 5.08**, 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.

(iii) *Spin-Offs and Other Distributed Property.*

(1) *Distributions Other than Spin-Offs.* If the Company distributes shares of its Capital Stock, evidences of its indebtedness or other assets or property of the Company, or rights, options or warrants to acquire Capital Stock of the Company or other securities, to all or substantially all holders of the Common Stock, excluding:

(u) dividends, distributions, rights, options or warrants for which an adjustment to the Conversion Rate is required pursuant to **Section 5.05(A)(i)** or **5.05(A)(ii)**;

(v) dividends or distributions paid exclusively in cash for which an adjustment to the Conversion Rate is required pursuant to **Section 5.05(A)(iv)**;

(w) rights issued or otherwise distributed pursuant to a stockholder rights plan, except to the extent provided in **Section 5.05(F)**;

(x) Spin-Offs for which an adjustment to the Conversion Rate is required pursuant to **Section 5.05(A)(iii)(2)**;

(y) a distribution solely pursuant to a tender offer or exchange offer for shares of Common Stock, as to which **Section 5.05(A)(v)** will apply; and

(z) a distribution solely pursuant to a Common Stock Change Event, as to which **Section 5.09** will apply,

then the Conversion Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{SP}{SP - FMV}$$

where:

CR<sub>0</sub> = the Conversion Rate in effect immediately before the Open of Business on the Ex-Dividend Date for such distribution;

CR<sub>1</sub> = the Conversion Rate in effect immediately after the Open of Business on such Ex-Dividend 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 such Ex-Dividend Date; and

FMV = the fair market value (as determined by the Board of Directors), as of such Ex-Dividend 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 Rate, each Holder will receive, for each \$1,000 principal amount of Notes held by such Holder on the record date for such distribution, 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 if such Holder had owned, on such record date, a number of shares of Common Stock equal to the Conversion Rate in effect on such record date.

To the extent such distribution is not so paid or made, the Conversion Rate will be readjusted to the Conversion Rate that would then be in effect had the adjustment been made on the basis of only the distribution, if any, actually made or paid.

(2) *Spin-Offs*. If the Company distributes or dividends shares of Capital Stock of any class or series, or similar equity interests, of or relating to an Affiliate, a 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 5.09** will apply; or (y) a tender offer or exchange offer for shares of Common Stock, as to which **Section 5.05(A)(v)** 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 (a “**Spin-Off**”), then the Conversion Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{FMV + SP}{SP}$$

where:

- CR<sub>0</sub> = the Conversion Rate in effect immediately before the Close of Business on the last Trading Day of the Spin-Off Valuation Period for such Spin-Off;
- CR<sub>1</sub> = the Conversion Rate in effect immediately after the Close of Business on the last Trading Day of the Spin-Off Valuation Period;
- 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 Spin-Off over the ten (10) consecutive Trading Day period (the “**Spin-Off Valuation Period**”) beginning on, and including, the Ex-Dividend Date for such Spin-Off (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 shares or units of such Capital Stock or equity interests distributed per share of Common Stock in such Spin-Off; and
- SP = the average of the Last Reported Sale Prices per share of Common Stock for each Trading Day in the Spin-Off Valuation Period.

Notwithstanding anything to the contrary in this **Section 5.05(A)(iii)(2)**, if the Conversion Date for a Note occurs during the Spin-Off Valuation Period for such Spin-Off, then, solely for purposes of determining the Conversion Consideration for such conversion, such Spin-Off Valuation Period will be deemed to consist of the Trading Days occurring in the period from, and including, the Ex-Dividend Date for such Spin-Off to, and including, such Conversion Date.

To the extent any dividend or distribution of the type set forth in this **Section 5.05(A)(iii)(2)** is declared but not made or paid, the Conversion Rate will be readjusted to the Conversion Rate 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.

(iv) *Cash Dividends or Distributions*. If any cash dividend or distribution is made to all or substantially all holders of Common Stock, then the Conversion Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{SP}{SP - D}$$

where:

CR<sub>0</sub> = the Conversion Rate in effect immediately before the Open of Business on the Ex-Dividend Date for such dividend or distribution;

CR<sub>1</sub> = the Conversion Rate in effect immediately after the Open of Business on such Ex-Dividend Date;

SP = the Last Reported Sale Price per share of Common Stock on the Trading Day immediately before such Ex-Dividend Date; 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 Rate, each Holder will receive, for each \$1,000 principal amount of Notes held by such Holder on the record date for such dividend or distribution, at the same time and on the same terms as holders of Common Stock, the amount of cash that such Holder would have received if such Holder had owned, on such record date, a number of shares of Common Stock equal to the Conversion Rate in effect on such record date.

To the extent such dividend or distribution is declared but not made or paid, the Conversion Rate will be readjusted to the Conversion Rate 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.

(v) *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 Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{AC + (SP \times OS_1)}{SP \times OS_0}$$

where:

CR<sub>0</sub> = the Conversion Rate in effect immediately before the Close of Business on the last Trading Day of the Tender/Exchange Offer Valuation Period for such tender or exchange offer;

CR<sub>1</sub> = the Conversion Rate in effect immediately after the Close of Business on the last Trading Day of the Tender/Exchange Offer Valuation Period;

AC = the aggregate value (determined as of the time (the “**Expiration Time**”) such tender or exchange offer expires 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;

OS<sub>0</sub> = 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);

OS<sub>1</sub> = 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); and

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;

*provided, however,* that the Conversion Rate will in no event be adjusted down pursuant to this **Section 5.05(A)(v)**, except to the extent provided in the immediately following paragraph. Notwithstanding anything to the contrary in this **Section 5.05(A)(v)**, if the Conversion Date for a Note occurs during the Tender/Exchange Offer Valuation Period for such tender or exchange offer, then, solely for purposes of determining the Conversion Consideration for such conversion, such Tender/Exchange Offer Valuation Period will be deemed to consist of the Trading Days occurring in the period from, and including, the Trading Day immediately after the Expiration Date to, and including, such Conversion Date.

To the extent such tender or exchange offer is announced but not consummated (including as a result of the Company 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 Rate will be readjusted to the Conversion Rate 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.

(vi) *Conversion Rate Reset.*

(1) On September 26, 2023, the Conversion Rate shall be replaced, with effect from (and including) September 26, 2023, by the greater of (a) the then current Conversion Rate, (b) the quotient of (i) \$1,000 and (ii) 115% of the arithmetic average of the Daily VWAPs during the 10 consecutive VWAP Trading Days ending on, and including, the VWAP Trading Day immediately preceding September 26, 2023 (which quotient will be rounded to the nearest 1/10,000), but in no event shall such quotient exceed 173.9130 (the “**Ceiling Conversion Rate**,” which rate is subject to adjustment in the same manner and at the same time that the Conversion Rate is adjusted pursuant to **Article 5** (exclusive of this **Section 5.05(A)(vi)**)).

(2) On September 26, 2024, the Conversion Rate shall be replaced, with effect from (and including) September 26, 2024, by the greater of (a) the then current Conversion Rate, (b) the quotient of (i) \$1,000 and (ii) 115% of the arithmetic average of the Daily VWAPs during the 10 consecutive VWAP Trading Days ending on, and including, the VWAP Trading Day immediately preceding September 26, 2024 (which quotient will be rounded to the nearest 1/10,000), but in no event shall such quotient exceed the Ceiling Conversion Rate.

(3) If on any date (the “**Reset Date**”) before August 26, 2024 (x) the Company completes a Qualifying Issuance or (y) any of the Founders files a Schedule TO (or any successor schedule, form or report) or any schedule, form or report under the Exchange Act disclosing that such Founder has completed a Qualifying Sale, the Conversion Rate shall be replaced, with effect from (and including) the Reset Date, by the greater of (a) the then current Conversion Rate and (b) the quotient of (i) \$1,000 and (ii) 115% of the gross offering price per share of the Common Stock sold in such transaction (which quotient will be rounded to the nearest 1/10,000); *provided* that if a Qualifying Issuance or Qualifying Sale as contemplated by clauses (x) or (y) occurs on or before August 26, 2023, the related Reset Date shall be August 27, 2023.

(4) If a Qualifying Issuance or a Qualifying Sale resulted in an adjustment to the Conversion Rate pursuant to **Section 5.05(A)(vi)(3)** and included the issuance or sale, as applicable, of the securities convertible into, or exercisable or exchangeable for Common Stock, the issuance of shares of Common Stock pursuant to any such securities convertible into, or exercisable or exchangeable for Common Stock will not constitute an additional issuance or sale of shares of Common Stock for the purposes of **Section 5.05(A)(vi)(3)**.

(5) On August 27, 2023, the Conversion Rate shall be replaced, with effect from (and including) such date, by the greater of (a) the then current Conversion Rate and (b) if the Standby Capital VWAP Sale Price is less than or equal to \$7.50 (which amount is subject to adjustment in the same manner and at the same time as the Conversion Price is adjusted as a result of the operation of **Section 5.05(A)** (which amount, in the event of an adjustment to the Conversion Rate pursuant to **Section 5.05(A)(vi)**, shall be adjusted by multiplying such amount by a fraction, the numerator of which is the Conversion Rate immediately prior to such adjustment and the denominator of which is the Conversion Rate immediately after such adjustment)), the quotient of (i) \$1,000 and (ii) the Standby Capital VWAP Sale Price (which quotient will be rounded to the nearest 1/10,000). Promptly, and in any event within four business days after the Standby Capital Facility Reset Date, the Company shall file a Current Report on Form 8-K disclosing any adjustment to the Conversion Rate made pursuant to this **Section 5.05(A)(vi)(5)**. During each quarter through (and including) the quarter in which the Standby Capital Facility Reset Date occurs, the Company shall disclose in its Quarterly Reports on Form 10-Q the volume weighted average price of all shares of Common Stock sold by the Standby Capital Provider pursuant to the Standby Capital Facility until the aggregate sale price for all such shares equals or exceeds the Standby Capital Support Amount.

(6) Notwithstanding anything herein to the contrary, in the event multiple adjustments made pursuant to this **Section 5.05(A)(vi)** are to become effective on the same date, the Conversion Rate will be reset on such date to the greatest Conversion Rate calculated pursuant to all such adjustments made pursuant to this **Section 5.05(A)(vi)**.

(B) *No Adjustments in Certain Cases.*

(i) *Where Holders Participate in the Transaction or Event Without Conversion.* Notwithstanding anything to the contrary in **Section 5.05(A)**, the Company will not be obligated to adjust the Conversion Rate on account of a transaction or other event otherwise requiring an adjustment pursuant to **Section 5.05(A)** (other than a stock split or combination of the type set forth in **Section 5.05(A)(i)**, a tender or exchange offer of the type set forth in **Section 5.05(A)(v)** or, for the avoidance of doubt, a Qualifying Issuance) if each Holder participates, at the same time and on the same terms as holders of Common Stock, and solely by virtue of being a Holder of Notes, in such transaction or event without having to convert such Holder's Notes and as if such Holder held a number of shares of Common Stock equal to the product of (i) the Conversion Rate in effect on the related record date; and (ii) the aggregate principal amount (expressed in thousands) of Notes held by such Holder on such date.



(ii) *Certain Events*. The Company will not be required to adjust the Conversion Rate except as provided in **Section 5.05** or **Section 5.07**. Without limiting the foregoing, the Company will not be obligated to adjust the Conversion Rate on account of:

(1) except as otherwise provided in **Section 5.05**, the sale of shares of Common Stock for a purchase price that is less than the market price per share of Common Stock or less than the Conversion Price;

(2) the issuance of any shares of Common Stock pursuant to any present or future plan providing for the reinvestment of dividends or interest payable on the Company's securities and the investment of additional optional amounts in shares of Common Stock under any such plan;

(3) the issuance of any shares of Common Stock or options or rights to purchase shares of Common Stock pursuant to any present or future employee, director or consultant benefit plan or program of, or assumed by, the Company or any of its Subsidiaries;

(4) the issuance of any shares of Common Stock pursuant to any option, warrant, right or convertible or exchangeable security of the Company outstanding as of the Issue Date;

(5) solely a change in the par value of the Common Stock; or

(6) accrued and unpaid interest, if any, on the Notes.

(C) *[Reserved.]*

(D) *Adjustments Not Yet Effective*. Notwithstanding anything to the contrary in this Indenture or the Notes, if:

(i) the record date, effective date or Expiration Time for any event that requires an adjustment to the Conversion Rate pursuant to **Section 5.05(A)** has occurred on or before the Conversion Date for such conversion, but an adjustment to the Conversion Rate for such event has not yet become effective as of such Conversion Date, as applicable;

(ii) the Conversion Consideration due upon such conversion includes any whole shares of Common Stock; and

(iii) such shares are not entitled to participate in such event (because they were not held on the related record date or otherwise),

then, solely for purposes of such conversion, the Company will, without duplication, give effect to such adjustment on such Conversion Date. In such case, if the date on which the Company is otherwise required to deliver the consideration due upon such conversion is before the first date on which the amount of such adjustment can be determined, then the Company will delay the settlement of such conversion until the second (2nd) Business Day after such first date.

(E) *Conversion Rate Adjustments where Converting Holders Participate in the Relevant Transaction or Event* Notwithstanding anything to the contrary in this Indenture or the Notes, if:

- (i) a Conversion Rate adjustment for any dividend or distribution becomes effective on any Ex-Dividend Date pursuant to **Section 5.05(A)**;
- (ii) the Conversion Date for such conversion occurs on or after such Ex-Dividend Date and on or before the related record date;
- (iii) the Conversion Consideration due upon such conversion includes any whole shares of Common Stock, in each case based on a Conversion Rate that is adjusted for such dividend or distribution; and
- (iv) such shares would be entitled to participate in such dividend or distribution (including pursuant to **Section 5.02(C)**),

then such Conversion Rate adjustment will not be given effect for such conversion and the shares of Common Stock issuable upon such conversion based on such unadjusted Conversion Rate will not be entitled to participate in such dividend or distribution, but there will be added, to the Conversion Consideration otherwise due upon such conversion, the same kind and amount of consideration that would have been delivered in such dividend or distribution with respect to such shares of Common Stock had such shares been entitled to participate in such dividend or distribution.

(F) *Stockholder Rights Plans*. If any shares of Common Stock are to be issued upon conversion of any Note and, at the time of such conversion, the Company has in effect any stockholder rights plan, then the Holder of such Note will be entitled to receive, in addition to, and concurrently with the delivery of, the Conversion Consideration otherwise payable under this Indenture 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 Rate will be adjusted pursuant to **Section 5.05(A)(iii)(1)** 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 to all holders of the Common Stock, subject to potential readjustment in accordance with the last paragraph of **Section 5.05(A)(iii)(1)**.

(G) *Limitation on Effecting Transactions Resulting in Certain Adjustments*. The Company will not engage in or be a party to any transaction or event that would require the Conversion Rate to be adjusted pursuant to **Section 5.05(A)** or **Section 5.07** to an amount that would result in the Conversion Price per share of Common Stock being less than the par value per share of Common Stock.

(H) *Equitable Adjustments to Prices*. Whenever any provision of this Indenture requires the Company to calculate the average of the Last Reported Sale Prices, Daily VWAPs, sale prices, volume weighted average prices, or any function thereof, over a period of multiple days (including to calculate an adjustment to the Conversion Rate), the Company will make proportionate adjustments, if any, to such calculations to account for any adjustment to the Conversion Rate pursuant to **Section 5.05(A)(i)** that becomes effective, or any event requiring such an adjustment to the Conversion Rate where the Ex-Dividend Date or effective date, as applicable, of such event occurs, at any time during such period.

(I) *Calculation of Number of Outstanding Shares of Common Stock* For purposes of **Section 5.05(A)**, the number of shares of Common Stock outstanding at any time will (i) include shares issuable in respect of scrip certificates issued in lieu of fractions of shares of Common Stock; and (ii) exclude shares of Common Stock held in the Company's treasury (unless the Company pays any dividend or makes any distribution on shares of Common Stock held in its treasury).

(J) *Calculations*. All calculations with respect to the Conversion Rate and adjustments thereto will be made to the nearest 1/10,000th of a share of Common Stock (with 5/100,000ths rounded upward).

(K) *Notice of Conversion Rate Adjustments*. Upon the effectiveness of any adjustment to the Conversion Rate pursuant to **Section 5.05(A)**, the Company will promptly send written notice to the Holders, the Trustee and the Conversion Agent containing (i) a brief description of the transaction or other event on account of which such adjustment was made; (ii) the Conversion Rate in effect immediately after such adjustment; and (iii) the effective time of such adjustment.

**Section 5.06. VOLUNTARY ADJUSTMENTS.**

(A) *Generally*. To the extent permitted by law and applicable stock exchange rules, the Company, from time to time, may (but is not required to) increase the Conversion Rate by any amount if (i) the Board of Directors determines that such increase is either (x) in the best interest of the Company; or (y) 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; (ii) such increase is in effect for a period of at least twenty (20) Business Days; and (iii) such increase is irrevocable during such period.

(B) *Notice of Voluntary Increases*. If the Board of Directors determines to increase the Conversion Rate pursuant to **Section 5.06(A)**, then, no later than the first Business Day of the related twenty (20) Business Day period referred to in **Section 5.06(A)**, the Company will send notice to each Holder, the Trustee and the Conversion Agent of such increase, the amount thereof and the period during which such increase will be in effect.

**Section 5.07. ADJUSTMENTS TO THE CONVERSION RATE IN CONNECTION WITH A MAKE-WHOLE FUNDAMENTAL CHANGE.**

(A) *Generally*. If a Make-Whole Fundamental Change occurs and the Conversion Date for the conversion of a Note occurs during the related Make-Whole Fundamental Change Conversion Period, then, subject to this **Section 5.07**, the Conversion Rate applicable to such conversion will be increased by a number of shares (the "**Additional Shares**") set forth in the table below corresponding (after interpolation as provided in, and subject to, the provisions below) to the Make-Whole Fundamental Change Effective Date and the Stock Price of such Make-Whole Fundamental Change:

**Make-Whole  
Fundamental  
Change Effective**

Date	Stock Price												
	\$9.00	\$10.00	\$10.50	\$11.50	\$12.50	\$15.00	\$17.00	\$20.00	\$30.00	\$50.00	\$100.00	\$175.00	\$320.00
August 26, 2022	24.1546	23.0440	21.4162	18.8357	16.8840	13.5613	11.7753	9.8410	6.2613	3.4092	1.2765	0.3939	0.0000
September 1, 2023	24.1546	19.6400	17.9657	15.4287	13.6224	10.7727	9.3294	7.7955	4.9723	2.7218	1.0365	0.3306	0.0000
September 1, 2024	24.1546	16.5200	14.5924	11.8530	10.0936	7.7133	6.6506	5.5585	3.5563	1.9590	0.7618	0.2545	0.0000
September 1, 2025	24.1546	13.5140	10.9514	7.5991	5.8176	4.1160	3.5429	2.9690	1.9060	1.0560	0.4187	0.1465	0.0000
September 1, 2026	24.1546	13.0430	8.2819	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000

If such Make-Whole Fundamental Change Effective Date or Stock Price is not set forth in the table above, then:

(i) if such Stock Price is between two Stock Prices in the table above or the Make-Whole Fundamental Change Effective Date is between two dates in the table above, then the number of Additional Shares will be determined by straight-line interpolation between the numbers of Additional Shares set forth for the higher and lower Stock Prices in the table above or the earlier and later dates in the table above, based on a 365- or 366-day year, as applicable; and

(ii) if the Stock Price is greater than \$320.00 (subject to adjustment in the same manner as the Stock Prices set forth in the column headings of the table above are adjusted pursuant to **Section 5.07(B)**), or less than \$9.00 (subject to adjustment in the same manner), per share, then no Additional Shares will be added to the Conversion Rate.

Notwithstanding anything to the contrary in this Indenture or the Notes, in no event will the Conversion Rate be increased to an amount that exceeds 111.1111 shares of Common Stock per \$1,000 principal amount of Notes, which amount is subject to adjustment in the same manner as, and at the same time and for the same events for which, the Conversion Rate is required to be adjusted pursuant to **Section 5.05(A)** (which amount, in the event of an adjustment to the Conversion Rate pursuant to **Section 5.05(A)(vi)**, shall be adjusted by multiplying such amount by a fraction, the numerator of which is the Conversion Rate immediately after such adjustment and the denominator of which is the Conversion Rate immediately prior to such adjustment).

Notwithstanding anything to the contrary in this Indenture or the Notes, if an Interest Make-Whole Payment is due in respect of a converted Note entitled to Additional Shares pursuant to this **Section 5.07**, the Holder of such Note shall be entitled to receive the greater of the Interest Make-Whole Payment or such Additional Shares, but not both; *provided* that the arithmetic average of the Daily VWAP for the five (5) VWAP Trading Days ending on the VWAP Trading Day immediately preceding the Conversion Date shall be used to determine the value of such Additional Shares for this purpose.

(B) *Adjustment of Stock Prices and Number of Additional Shares* The Stock Prices in the first row (*i.e.*, the column headers) of the table set forth in **Section 5.07(A)** will be adjusted in the same manner as, and at the same time and for the same events for which, the Conversion Price is adjusted as a result of the operation of **Section 5.05(A)** (which amount, in the event of an adjustment to the Conversion Rate pursuant to **Section 5.05(A)(vi)**, shall be adjusted by

multiplying such amount by a fraction, the numerator of which is the Conversion Rate immediately prior to such adjustment and the denominator of which is the Conversion Rate immediately after such adjustment). The numbers of Additional Shares in the table set forth in **Section 5.07(A)** will be adjusted in the same manner as, and at the same time and for the same events for which, the Conversion Rate is adjusted pursuant to **Section 5.05(A)** (which amount, in the event of an adjustment to the Conversion Rate pursuant to **Section 5.05(A)(vi)**, shall be adjusted by multiplying such amount by a fraction, the numerator of which is the Conversion Rate immediately after such adjustment and the denominator of which is the Conversion Rate immediately prior to such adjustment).

(C) *Notice of the Occurrence of a Make-Whole Fundamental Change* The Company will notify the Holders, the Trustee and the Conversion Agent in writing of each Make-Whole Fundamental Change in accordance with **Section 5.08**.

**Section 5.08. NOTICE OF THE OCCURRENCE OF CERTAIN CORPORATE EVENTS.**

If the Company elects to (I) distribute, to all or substantially all holders of Common Stock, any rights, options or warrants (other than rights issued pursuant to a stockholder rights plan, so long as such rights have not separated from the Common Stock and are not exercisable until the occurrence of a triggering event, except that such rights will be deemed to be distributed under this clause (I) upon their separation from the Common Stock or upon the occurrence of such triggering event) entitling them, 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 (determined in the manner set forth in the third paragraph of **Section 5.05(A)(ii)**); or (II) distribute, to all or substantially all holders of Common Stock, assets or securities of the Company or rights to purchase the Company's securities, which distribution per share of Common Stock has a value, as reasonably determined by the Board of Directors, exceeding ten percent (10%) of the Last Reported Sale Price per share of Common Stock on the Trading Day immediately before the date such distribution is announced, then, in either case, (x) the Company will send notice of such distribution to the Holders, the Trustee and the Conversion Agent at least twenty five (25) Scheduled Trading Days before the Ex-Dividend Date for such distribution (or, if later in the case of any such separation of rights issued pursuant to a stockholder rights plan or the occurrence of any such triggering event under a stockholder rights plan, as soon as reasonably practicable after the Company becomes aware that such separation or triggering event has occurred or will occur). If a Fundamental Change, Make-Whole Fundamental Change (other than a Make-Whole Fundamental Change pursuant to clause (B) of the definition thereof) or Common Stock Change Event occurs (other than a merger or other business combination transaction that is effected solely to change the Company's jurisdiction of incorporation and that does not constitute a Fundamental Change or a Make-Whole Fundamental Change), then, in each

case, then, no later than the effective date thereof, the Company will send notice to the Holders, the Trustee and the Conversion Agent of such transaction or event and such effective date.

**Section 5.09. EFFECT OF COMMON STOCK CHANGE EVENT.**

(A) *Generally.* If there occurs any:

(i) 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 and (z) stock splits and stock combinations that do not involve the issuance of any other series or class of securities);

(ii) consolidation, merger, combination or binding or statutory share exchange involving the Company;

(iii) 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

(iv) 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 Indenture or the Notes,

(1) from and after the effective time of such Common Stock Change Event, (I) the Conversion Consideration due upon conversion of any Note, and the conditions to any such conversion, will be determined in the same manner as if each reference to any number of shares of Common Stock in this **Article 5** (or in any related definitions) were instead a reference to the same number of Reference Property Units and (II) for purposes of the definitions of “Fundamental Change” and “Make-Whole Fundamental Change,” references to “Common Stock” and the Company’s “Common Equity” will be deemed to refer to the Common Equity, if any, forming part of such Reference Property;

(2) if such Reference Property Unit consists entirely of cash, then (I) each conversion of any Note with a Conversion Date that occurs on or after the effective date of such Common Stock Change Event will be settled entirely in cash in an amount, per \$1,000 principal amount of such Note being converted, equal to the product of (x) the Conversion Rate in effect on such Conversion Date (as may be increased by any Additional Shares pursuant to **Section 5.07**); and (y) the amount of cash constituting such Reference Property Unit, together with an Interest Make-Whole Payment, if applicable, which shall be payable solely in cash (regardless of whether the Company elected to settle Interest Make-Whole Payments in cash in accordance with **Section 5.03(A)(ii)**) and (II) the Company will settle each such conversion no later than the second (2nd) Business Day after the relevant Conversion Date; and

(3) for these purposes, (I) the Daily VWAP of any Reference Property Unit or portion thereof that consists of a class of Common Equity securities will be determined by reference to the definition of “Daily VWAP,” substituting, if applicable, the Bloomberg page for such class of securities in such definition; and (II) the Daily VWAP of any Reference Property Unit or portion thereof that does not consist of a class of Common Equity securities, and the Last Reported Sale Price of any Reference Property Unit or portion thereof that does not consist of a class of securities, will be the fair value of such Reference Property Unit or portion thereof, as applicable, determined in good faith by the Company (or, in the case of cash denominated in U.S. dollars, the face amount thereof).

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 Holders, the Trustee and the Conversion Agent (if other than the Trustee) of such weighted average as soon as practicable after such determination is made.

At or before the effective time of such Common Stock Change Event, the Company and the resulting, surviving or transferee Person (if not the Company) of such Common Stock Change Event (the “**Successor Person**”) will execute and deliver to the Trustee a supplemental indenture pursuant to **Section 8.01(F)**, which supplemental indenture will (x) provide for subsequent conversions of Notes in the manner set forth in this **Section 5.09**; (y) provide for subsequent adjustments to the Conversion Rate pursuant to **Section 5.05(A)** in a manner consistent with this **Section 5.09**; and (z) contain such other provisions, if any, that the Company reasonably determines are appropriate to preserve the economic interests of the Holders and to give effect to the provisions of this **Section 5.09(A)**. If the Reference Property includes shares of stock or other securities or assets (other than cash) of a Person other than the Successor Person, then such other Person will also execute such supplemental indenture and such supplemental indenture will contain such additional provisions, if any, that the Company reasonably determines are appropriate to preserve the economic interests of the Holders.

(B) *Notice of Common Stock Change Events.* The Company will provide notice of each Common Stock Change Event in the manner provided in **Section 5.08**.

(C) *Compliance Covenant.* The Company will not become a party to any Common Stock Change Event unless its terms are consistent with this **Section 5.09**.

#### **Section 5.10. RESPONSIBILITY OF TRUSTEE AND CONVERSION AGENT**

The Trustee and Conversion Agent shall not at any time be under any duty or responsibility to any Holder to determine the Conversion Rate (or any adjustment thereto) or whether any facts exist that may require any adjustment (including any increase) of the Conversion Rate, or with respect to the nature or extent or calculation of any such adjustment when made, or with respect

to the method employed, or herein or in any supplemental indenture provided to be employed, in making the same. The Trustee and Conversion Agent shall not be accountable with respect to the validity or value (or the kind or amount) of any shares of Common Stock, or of any securities, property or cash that may at any time be issued or delivered upon the conversion of any Note; and the Trustee and Conversion Agent make no representations with respect thereto. Neither the Trustee nor any Conversion Agent shall be responsible for any failure of the Company to issue, transfer or deliver any shares of Common Stock or stock certificates or other securities or property or cash upon the surrender of any Note for the purpose of conversion or to comply with any of the duties, responsibilities or covenants of the Company contained in this Article. Without limiting the generality of the foregoing, neither the Trustee nor any Conversion Agent shall be under any responsibility to (a) determine whether a supplemental indenture needs to be entered into or (b) determine the correctness of any provisions contained in any supplemental indenture entered into pursuant to Section 5.09 relating either to the kind or amount of shares of stock or securities or property (including cash) receivable by Holders upon the conversion of their Notes after any event referred to in such Section 5.09 or to any adjustment to be made with respect thereto, but, subject to the provisions of Section 11.01, may accept (without any independent investigation) as conclusive evidence of the correctness of any such provisions, and shall be protected in relying upon, the Officer's Certificate (which the Company will be obligated to deliver to the Trustee and the Conversion Agent prior to the execution of any such supplemental indenture) with respect thereto. Neither the Trustee nor the Conversion Agent shall be responsible for determining whether any event contemplated by Section 5.01 has occurred that makes the Notes eligible for conversion or no longer eligible therefor until the Company has delivered to the Trustee and the Conversion Agent the notices referred to in Section 5.01 with respect to the commencement or termination of such conversion rights, on which notices the Trustee and the Conversion Agent may conclusively rely.

**Section 5.11. BENEFICIAL OWNERSHIP LIMITATIONS.**

(A) Notwithstanding anything to the contrary in this Indenture, no Holder will be entitled to receive shares of Common Stock upon conversion of Notes (including as part of any Interest Make-Whole Payment), and no conversion of Notes shall take place, to the extent (but only to the extent) that such receipt (or conversion) would cause such Holder and its affiliates (as defined in Rule 12b-2 under the Exchange Act) and associates (as defined in Rule 12b-2 under the Exchange Act), in each case together with any other persons whose beneficial ownership would be aggregated with such Person for purposes of Section 13(d) of the Exchange Act (including any "group" of which such Person is a member) to beneficially own shares of Common Stock in excess of the Beneficial Ownership Limitations. For purposes of the foregoing sentence, the number of shares of Common Stock beneficially owned by the Holder and its affiliates (as defined in Rule 12b-2 under the Exchange Act) shall include the number of shares of Common Stock issuable upon conversion of any Notes (including as part of any Interest Make-Whole Payment) with respect to which such determination is being made, but shall exclude the number of shares of Common Stock which are issuable upon (1) conversion of the remaining, unconverted principal amount of Notes beneficially owned by the Holder, its affiliates (as defined in Rule 12b-2 under the Exchange Act), its associates (as defined in Rule 12b-2 under the Exchange Act) or any other persons whose beneficial ownership would be aggregated with any of the foregoing Person for purposes of Section 13(d) of the Exchange Act (including any "group" of which such Person is a member) and (2) exercise, conversion or exchange of the unexercised, unconverted or



unexchanged portion of any other securities of the Company subject to a limitation on exercise, conversion or exchange analogous to the limitation contained herein beneficially owned by the Holder, its affiliates (as defined in Rule 12b-2 under the Exchange Act), its associates (as defined in Rule 12b-2 under the Exchange Act) or any other persons whose beneficial ownership would be aggregated with any of the foregoing Person for purposes of Section 13(d) of the Exchange Act (including any “group” of which such Person is a member). Except as set forth in the preceding sentence, for purposes of this provision, beneficial ownership shall be calculated in accordance with Section 13(d) of the Exchange Act, and a determination as to any “group” status as contemplated above shall be determined in accordance with Section 13(d) of the Exchange Act. Any purported delivery of shares of Common Stock upon conversion of the Notes (including as part of any Interest Make-Whole Payment) held by any converting Holder shall be void and have no effect to the extent (but only to the extent) that such delivery would result in such converting Holder exceeding the Beneficial Ownership Limitations in violation of this **Section 5.11**. Solely for the purpose of this **Section 5.11**, in the case of Global Notes, “Holder” shall mean a person that holds a beneficial interest in the Notes and not the Depository or its nominee.

(B) To the extent that the limitation contained in this **Section 5.11** applies, the determination of whether any Notes are convertible (in relation to other securities beneficially owned by the Holder) and of which principal amount of such Notes are convertible shall be in the sole discretion of the Holder, and, unless otherwise indicated in connection with the Notice of Conversion, the submission of a Notice of Conversion shall be deemed to be the Holder’s determination of whether any Notes may be converted (in relation to other securities beneficially owned by the Holder) and which principal amount such Notes are convertible, in each case subject to the Beneficial Ownership Limitations. To ensure compliance with this restriction, unless otherwise indicated in connection with the Notice of Conversion, the Holder shall be deemed to represent to the Company each time it delivers a Notice of Conversion that such Notice of Conversion has not violated the restrictions set forth in this **Section 5.11** and the Company shall have no obligation to verify or confirm the accuracy of such determination.

(C) For purposes of this **Section 5.11**, in determining the number of outstanding shares of Common Stock, the Holder may rely on the number of outstanding shares of Common Stock as stated in the most recent of the following: (1) the Company’s most recent periodic or annual report filed with the SEC, as the case may be, (2) a more recent public announcement by the Company, or (3) a more recent written notice by the Company or the Company’s transfer agent to such Holder setting forth the number of shares of Common Stock outstanding. Upon the written or oral request of a Holder, the Company shall within two Trading Days confirm in writing to the Holder the number of shares of Common Stock then outstanding. In any case, the number of outstanding shares of Common Stock shall be determined after giving effect to the exercise, conversion or exchange of securities of the Company, including the Notes, by the Holder since the date as of which such number of outstanding shares of Common Stock was reported.

(D) The “**General Beneficial Ownership Limitation**” shall be 9.9% of the number of shares of Common Stock outstanding immediately after giving effect to the issuance of shares of Common Stock issuable upon conversion of any Notes held by the Holder. Any Holder, upon written notice to the Company, may elect a beneficial ownership limit as to such Holder (but not as to any other Holder) (such limit, a “**Holder Beneficial Ownership Limitation**” and together with the General Beneficial Ownership Limitation, the “**Beneficial Ownership Limitations**”) that

is less than or equal to 9.9%. Any Holder Beneficial Ownership Limitation will be effective as of the date specified in such notice, which shall not be earlier than (i) the date such notice is delivered to the Company in the event such notice decreases the Beneficial Ownership Limitations applicable to such Holder, and (ii) 61 days after the date such notice is delivered to the Company in all other cases.

(E) Any Notes surrendered for conversion for which shares of Common Stock are not delivered due to the Beneficial Ownership Limitations shall not be extinguished and, such Holder may either:

(i) request return of the Notes surrendered by such Holder for conversion, after which the Company shall deliver such Notes to such Holder within two Trading Days after receipt of such request; or

(ii) certify to the Company that the Person (or Persons) receiving shares of Common Stock upon conversion is not, and would not, as a result of such conversion, become the beneficial owner of shares of Common Stock outstanding at such time in excess of the applicable Beneficial Ownership Limitations, after which the Company shall cause to be delivered any such shares of Common Stock withheld on account of such applicable Beneficial Ownership Limitations by the later of (x) the date such shares were otherwise due to such Person (or Persons) and (y) two Trading Days after receipt of such certification; *provided, however*, until such time as the affected Holder gives such notice, no Person shall be deemed to be the shareholder of record with respect to the shares of Common Stock otherwise deliverable upon conversion in excess of any applicable Beneficial Ownership Limitations. Upon delivery of such notice, the provisions under **Article 5** shall apply to the shares of Common Stock to be delivered pursuant to such notice.

(F) Neither the Trustee nor the Conversion Agent shall have any duty to monitor Beneficial Ownership Limitations or to monitor the Company's or any Holder's compliance with this **Section 5.11**.

## **Article 6. SUCCESSORS**

### **Section 6.01. WHEN THE COMPANY MAY MERGE, ETC.**

(A) *Generally*. The Company will not dissolve, consolidate with or merge with or into, or (directly, or indirectly through one or more of its Subsidiaries) sell, lease or otherwise transfer, including through licensing, in one transaction or a series of transactions, all or substantially all of the assets of the Company and its Subsidiaries, taken as a whole, to another Person (a "**Business Combination Event**"), unless:

(i) the resulting, surviving or transferee Person either (x) is the Company or (y) if not the Company, is a Qualified Successor Entity duly organized and existing under the laws of the United States of America, any State thereof or the District of Columbia that expressly assumes (by executing and delivering to the Trustee, at or before the effective time of such Business Combination Event, a supplemental indenture pursuant to **Section 8.01(E)**) all of the Company's obligations under this Indenture and the Notes, and the Qualified Successor Entity will take such action (or agree to take such action) and deliver such agreements, instruments, or documents as may be necessary or appropriate to cause any property or assets that constitute Collateral owned by or transferred to the Qualified Successor Entity to be subject to the Liens of the Collateral Agent in the manner and to the extent required under this Indenture;

(ii) immediately after giving effect to such Business Combination Event, no Default or Event of Default will have occurred and be continuing; and

(iii) the Company or the Qualified Successor Entity, if not the Company, shall have delivered to the Trustee and the Collateral Agent an Officer's Certificate and Opinion of Counsel, each stating that (i) such Business Combination Event (and, if applicable, the related supplemental indenture) complies with **Section 6.01(A)**; and (ii) all conditions precedent to such Business Combination Event provided in this Indenture have been satisfied.

**Section 6.02. QUALIFIED SUCCESSOR ENTITY SUBSTITUTED.**

At the effective time of any Business Combination Event that complies with **Section 6.01**, the Qualified Successor Entity (if not the Company) will succeed to, and may exercise every right and power of, the Company under this Indenture and the Notes with the same effect as if such Qualified Successor Entity had been named as the Company in this Indenture and the Notes, and, except in the case of a lease, the predecessor Company will be discharged from its obligations under this Indenture and the Notes.

**Article 7. DEFAULTS AND REMEDIES**

**Section 7.01. EVENTS OF DEFAULT.**

(A) *Definition of Events of Default.* "**Event of Default**" means the occurrence of any of the following:

(i) a default in the payment when due (whether at maturity or Repurchase Upon Fundamental Change or otherwise) of the principal (including the Accreted Principal Amount) of, or Fundamental Change Repurchase Price for, any Note;

(ii) a default for thirty (30) consecutive days in the payment when due of interest on any Note;

(iii) the Company's failure to deliver, when required by this Indenture, a Fundamental Change Notice, or a notice pursuant to **Section 5.08**;

(iv) a default in the Company's obligation to convert a Note in accordance with **Article 5**, including the payment or delivery of any applicable Interest Make-Whole Payment, upon the exercise of the conversion right with respect thereto, if such default is not cured within three (3) Business Days after its occurrence;

(v) a default in the Company's obligations under **Section 6.01(A)**;

(vi) a default in the Company's obligations under any of **Section 3.08** through **Section 3.13** or in any Guarantor's obligations under **Section 9.04** or the Note Parties' Obligations under **Sections 12.1** and **12.2**, where such default is not cured or waived within thirty (30) days after notice to the Company by the Trustee, or to the Company and the Trustee by Holders of at least twenty five percent (25%) of the aggregate principal amount of Notes then outstanding, which notice must specify such default, demand that it be remedied and state that such notice is a "Notice of Default";

(vii) a default in any of the Company's obligations or agreements, or in any Guarantor's obligations or agreements, under this Indenture or the Note Documents (other than a default set forth in clause (i), (ii), (iii), (iv), (v) or (vi) of this **Section 7.01(A)**) where such default is not cured or waived within sixty (60) days after notice to the Company by the Trustee, or to the Company and the Trustee by Holders of at least twenty five percent (25%) of the aggregate principal amount of Notes then outstanding, which notice must specify such default, demand that it be remedied and state that such notice is a "Notice of Default";

(viii) a default by the Company or any of the Company's Subsidiaries, with respect to any one or more mortgages, agreements or other instruments under which there is outstanding, or by which there is secured or evidenced, any indebtedness for money borrowed of at least five million dollars (\$5,000,000) (or its foreign currency equivalent) in the aggregate of the Company or any of the Company's Subsidiaries, whether such indebtedness exists as of the Issue Date or is thereafter created, where such default:

(1) constitutes a failure to pay the principal, or premium or interest on, any of such indebtedness when due and payable at its stated maturity, upon required repurchase, upon declaration of acceleration or otherwise; or

(2) results in such indebtedness becoming or being declared due and payable before its stated maturity;

(ix) any Guarantee ceases to be in full force and effect except as otherwise expressly provided in this Indenture or any Guarantor denies or disaffirms its obligations under its Guarantee;

(x) one or more final judgments being rendered against the Company or any of the Company's Subsidiaries for the payment of at least five million dollars (\$5,000,000) (or its foreign currency equivalent) in the aggregate (excluding any amounts covered by insurance), where such judgment is not discharged or stayed within sixty (60) days after (i) the date on which the right to appeal the same has expired, if no such appeal has commenced; or (ii) the date on which all rights to appeal have been extinguished;

(xi) the Company, the Guarantors or any of their Significant Subsidiaries, pursuant to or within the meaning of any Bankruptcy Law, either:

(1) commences a voluntary case or proceeding;

- (2) consents to the entry of an order for relief against it in an involuntary case or proceeding;
  - (3) consents to the appointment of a custodian of it or for any substantial part of its property;
  - (4) makes a general assignment for the benefit of its creditors;
  - (5) takes any comparable action under any foreign Bankruptcy Law; or
  - (6) generally is not paying its debts as they become due; or
- (xii) a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that either:
- (1) is for relief against the Company, the Guarantors or any of its Significant Subsidiaries in an involuntary case or proceeding;
  - (2) appoints a custodian of the Company, the Guarantors, or any of their Significant Subsidiaries, or for any substantial part of the property of the Company or any of its Significant Subsidiaries;
  - (3) orders the winding up or liquidation of the Company, the Guarantors, or any of their Significant Subsidiaries; or
  - (4) grants any similar relief under any foreign Bankruptcy Law,

and, in each case under this **Section 7.01(A)(xi)**, such order or decree remains unstayed and in effect for at least sixty (60) days.

(xiii) any material provision of any Note Document shall for any reason cease to be valid and binding on or enforceable against the Company or any of its Subsidiaries, or the Company or any of its Subsidiaries shall so state in writing or bring an action to limit its obligations or liabilities thereunder except (i) as permitted by the Note Documents, (ii) resulting from the satisfaction of the Obligations (other than contingent obligations that have yet to accrue) under this Indenture, (iii) resulting from acts or omissions of the Trustee or Collateral Agent or (iv) resulting from the application of applicable law;

(xiv) any Security Document, after delivery thereof pursuant hereto, shall for any reason fail or cease to create, or should be asserted by a Note Party not to create, a valid and perfected and, except to the extent expressly permitted by the terms hereof or thereof, first priority Lien in favor of the Collateral Agent for the benefit of the Holders on any Collateral purported to be covered thereby, other than (A) to the extent resulting from the failure of the Trustee or the Collateral Agent or any of their agents or bailees to maintain possession or control of Collateral, or (B) as to Collateral consisting of real property to the extent that (1) such losses are covered by a title insurance policy for the benefit of the Collateral Agent or (2) a deficiency arose through no fault of a Note Party, in the case of each of clause (A) and (B), to the extent such deficiencies are (1) corrected with reasonable diligence upon obtaining knowledge thereof and (2) do not materially adversely affect the security interest of the Holders in the Collateral; or

(B) *Cause Irrelevant*. Each of the events set forth in **Section 7.01(A)** will constitute an Event of Default regardless of the cause thereof or whether voluntary or involuntary or effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body.

**Section 7.02. ACCELERATION.**

(A) *Automatic Acceleration in Certain Circumstances*. If an Event of Default set forth in Section 7.01(A)(x) or 7.01(A)(xi) occurs with respect to the Company or any Guarantor (and not solely with respect to a Significant Subsidiary of the Company or any Guarantor), then the Accreted Principal Amount of, and all accrued and unpaid interest on, all of the Notes then outstanding will immediately become due and payable without any further action or notice by any Person.

(B) *Optional Acceleration*. Subject to **Section 7.03**, if an Event of Default (other than an Event of Default set forth in Section 7.01(A)(x) or 7.01(A)(xi) with respect to the Company or any Guarantor and not solely with respect to a Significant Subsidiary of the Company or any Guarantor) occurs and is continuing, then the Trustee, by notice to the Company, or Holders of at least twenty five percent (25%) of the aggregate principal amount of Notes then outstanding, by notice to the Company and the Trustee, may declare the Accreted Principal Amount of, and all accrued and unpaid interest on, all of the Notes then outstanding to become due and payable immediately.

(C) *Rescission of Acceleration*. Notwithstanding anything to the contrary in this Indenture or the Notes, the Holders of a majority of the aggregate principal amount of the Notes then outstanding, by notice to the Company and the Trustee, may, on behalf of all Holders, rescind any acceleration of the Notes and its consequences if (i) such rescission would not conflict with any judgment or decree of a court of competent jurisdiction; and (ii) all existing Events of Default (except the non-payment of the Accreted Principal Amount of, or interest on, the Notes that has become due solely because of such acceleration) have been cured or waived. No such rescission will affect any subsequent Default or impair any right consequent thereto.

(D) Subject to the provisions of **Section 11.01** and the Security Documents, the Trustee may (but shall not be obligated to), in its sole discretion and without the consent of the Holders, during the continuance of any Event of Default, direct, on behalf of the Holders, the Collateral Agent to take all actions it deems necessary or appropriate in order to:

- (i) foreclose upon or otherwise enforce any or all of the Liens granted pursuant to the Security Documents;
- (ii) enforce any of the terms of the Security Documents to which the Collateral Agent or the Trustee is a party; or

(iii) collect and receive payment of any and all Obligations hereunder.

At the Company's sole cost and expense, the Trustee is hereby authorized and empowered and directed by each Holder of Notes (by its acceptance thereof) to institute and maintain, or direct the Collateral Agent to institute and maintain, such suits and proceedings as it may deem reasonably expedient to protect or enforce the Security Documents or the Liens granted thereunder or to prevent any impairment of Collateral by any acts that may be unlawful or in violation of the Security Documents or this Indenture, and such suits and proceedings as the Trustee may deem reasonably expedient, at the Company's sole cost and expense, to preserve or protect its interests and the interests of the Holders in the Collateral, including power to institute and maintain suits or proceedings to restrain the enforcement of or compliance with any legislative or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid if the enforcement of, or compliance with, such enactment, rule or order would impair the Liens granted pursuant to the Security Documents or be prejudicial to the interests of Holders or the Trustee.

**Section 7.03. SOLE REMEDY FOR A FAILURE TO REPORT.**

(A) *Generally.* Notwithstanding anything to the contrary in this Indenture or the Notes, the Company may elect that the sole remedy for any Event of Default (a "Reporting Event of Default") pursuant to **Section 7.01(A)(vi)** arising from the Company's failure to comply with **Section 3.02** will, for each of the two hundred and seventy (270) calendar days on which a Reporting Event of Default has occurred and is continuing, consist exclusively of the accrual of Special Interest on the Notes. If the Company has made such an election, then (i) the Notes will be subject to acceleration pursuant to **Section 7.02** on account of the relevant Reporting Event of Default from, and including, the two hundred and seventy first (271st) calendar day on which a Reporting Event of Default has occurred and is continuing or if the Company fails to pay any accrued and unpaid Special Interest when due; and (ii) Special Interest will cease to accrue on any Notes from, and including, the earlier of (x) the date such Reporting Event of Default is cured or waived and (y) such two hundred and seventy first (271st) calendar day.

(B) *Amount and Payment of Special Interest.* Any Special Interest that accrues on a Note pursuant to **Section 7.03(A)** will be payable in arrears on the same dates and in the same manner as the Stated Interest on such Note and will accrue at a rate per annum equal to one quarter of one percent (0.25%) of the principal amount thereof for the first one hundred and eighty (180) days on which Special Interest accrues and, thereafter, at a rate per annum equal to one half of one percent (0.50%) of the principal amount thereof for the duration of the period on which Special Interest accrues; *provided, however,* that in no event will Special Interest payable at the Company's election pursuant to **Section 7.03(A)** as the sole remedy for any Reporting Event of Default, together with any Additional Interest that may accrue pursuant to **Section 3.04**, accrue on any day on a Note at a combined rate per annum that exceeds one half of one percent (0.50%). For the avoidance of doubt, any Special Interest that accrues on a Note pursuant to **Section 7.03(A)** will be in addition to the Stated Interest that accrues on such Note and in addition to any Additional Interest that accrues on such Note.

(C) *Notice of Election.* To make the election set forth in **Section 7.03(A)**, the Company must send to the Holders, the Trustee and the Paying Agent, before the date on which each Reporting Event of Default first occurs, a notice that (i) briefly describes the report(s) that the Company failed to file with or furnish to the SEC; (ii) states that the Company is electing that the sole remedy for such Reporting Event of Default consist of the accrual of Special Interest pursuant to **Section 7.03(A)**; and (iii) briefly describes the periods during which and rate at which Special Interest will accrue and the circumstances under which the Notes will be subject to acceleration on account of such Reporting Event of Default.

(D) *Notice to Trustee and Paying Agent; Trustee's Disclaimer.* If Special Interest accrues on any Note pursuant to **Section 7.03(A)**, then, no later than five (5) Business Days before each date on which such Special Interest is to be paid, the Company will deliver an Officer's Certificate to the Trustee and the Paying Agent stating (i) that the Company is obligated to pay Special Interest on such Note pursuant to **Section 7.03(A)** on such date of payment; and (ii) the amount of such Special Interest that is payable on such date of payment. The Trustee will have no duty to determine whether any Special Interest is payable or the amount thereof.

(E) *No Effect on Other Events of Default.* No election pursuant to this **Section 7.03** with respect to a Reporting Event of Default will affect the rights of any Holder with respect to any other Event of Default, including with respect to any other Reporting Event of Default.

#### **Section 7.04. OTHER REMEDIES.**

(A) *Trustee May Pursue All Remedies.* If an Event of Default occurs and is continuing, then the Trustee and the Collateral Agent may pursue any available remedy to collect the payment of any amounts due with respect to the Notes or to enforce the performance of any provision of this Indenture, the Notes or the Security Documents.

(B) *Procedural Matters.* The Trustee may maintain a proceeding even if it does not possess any of the Notes or does not produce any of them in such proceeding. A delay or omission by the Trustee or any Holder in exercising any right or remedy following an Event of Default will not impair the right or remedy or constitute a waiver of, or acquiescence in, such Event of Default. All remedies will be cumulative to the extent permitted by law.

#### **Section 7.05. WAIVER OF PAST DEFAULTS.**

An Event of Default pursuant to clauses (i), (ii), (iv), (v) or (vi) of **Section 7.01(A)** (that, in the case of clauses (v) or (vi) only, results from a Default under any covenant that cannot be amended without the consent of each affected Holder), and a Default that could lead to such an Event of Default, can be waived only with the consent of each affected Holder. An Event of Default pursuant to clause (xii) of **Section 7.01(A)** arising from the release of all or substantially all of the Collateral from the Liens securing the Notes (other than in accordance with the Note Documents), and a Default that could lead to such an Event of Default, can be waived only with the consent of Holders of at least 75% in aggregate principal amount of the Notes then outstanding. Each other Default or Event of Default may be waived, on behalf of all Holders, by the Holders of a majority of the aggregate principal amount of the Notes then outstanding. If an Event of Default is so waived, then it will cease to exist. If a Default is so waived, then it will be deemed to be cured and any Event of Default arising therefrom will be deemed not to occur. However, no such waiver will extend to any subsequent or other Default or Event of Default or impair any right arising therefrom.



**Section 7.06. CONTROL BY MAJORITY.**

Holders of a majority in aggregate principal amount of the Notes then outstanding may direct the time, method and place of conducting any proceeding for exercising any remedy available to the Trustee or exercising any trust or power conferred on it. However, the Trustee may refuse to follow any direction that conflicts with law, this Indenture or the Notes, or that, subject to **Section 11.01**, the Trustee determines may be unduly prejudicial to the rights of other Holders (it being understood that the Trustee does not have an affirmative duty to ascertain whether or not any such direction is unduly prejudicial to any Holders) or may involve the Trustee in liability, unless the Trustee is offered security and indemnity satisfactory to the Trustee against any loss, liability or expense to the Trustee that may result from the Trustee's following such direction.

**Section 7.07. LIMITATION ON SUITS.**

No Holder may pursue any remedy with respect to this Indenture or the Notes (except to enforce (x) its rights to receive the Accreted Principal Amount of, or Fundamental Change Repurchase Price for, or interest on, any Notes; or (y) the Company's obligations to convert any Notes pursuant to **Article 5**), unless:

(A) such Holder has previously delivered to the Trustee notice that an Event of Default is continuing;

(B) Holders of at least twenty five percent (25%) in aggregate principal amount of the Notes then outstanding deliver a written request to the Trustee to pursue such remedy;

(C) such Holder or Holders offer and, if requested, provide to the Trustee security and indemnity satisfactory to the Trustee against any loss, liability or expense to the Trustee that may result from the Trustee's following such request;

(D) the Trustee does not comply with such request within sixty (60) calendar days after its receipt of such request and such offer of security or indemnity; and

(E) during such sixty (60) calendar day period, Holders of a majority in aggregate principal amount of the Notes then outstanding do not deliver to the Trustee a direction that is inconsistent with such request.

A Holder of a Note may not use this Indenture to prejudice the rights of another Holder or to obtain a preference or priority over another Holder. The Trustee will have no duty to determine whether any Holder's use of this Indenture complies with the preceding sentence.

**Section 7.08. ABSOLUTE RIGHT OF HOLDERS TO INSTITUTE SUIT FOR THE ENFORCEMENT OF THE RIGHT TO RECEIVE PAYMENT AND CONVERSION CONSIDERATION.**

Notwithstanding anything to the contrary in this Indenture or the Notes (but without limiting **Section 8.01**), the right of each Holder of a Note to bring suit for the enforcement of any payment or delivery, as applicable, of the Accreted Principal Amount of, or Fundamental Change Repurchase Price for, or any interest on, or the Conversion Consideration due pursuant to **Article 5** upon conversion of, such Note on or after the respective due dates therefor provided in this Indenture and the Notes, will not be impaired or affected without the consent of such Holder.

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**Section 7.09. COLLECTION SUIT BY TRUSTEE.**

The Trustee will have the right, upon the occurrence and continuance of an Event of Default pursuant to clause (i), (ii) or (iv) of **Section 7.01(A)**, to recover judgment in its own name and as trustee of an express trust against the Company for the total unpaid or undelivered principal (including the Accreted Principal Amount) of, or Fundamental Change Repurchase Price for, or interest on, or Conversion Consideration due pursuant to **Article 5** upon conversion of, the Notes, as applicable, and, to the extent lawful, any Default Interest on any Defaulted Amounts, and such further amounts sufficient to cover the costs and expenses of collection, including compensation provided for in **Section 11.06**.

**Section 7.10. TRUSTEE MAY FILE PROOFS OF CLAIM.**

The Trustee has the right to (A) file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of the Trustee and the Collateral Agent, as applicable, and the Holders allowed in any judicial proceedings relative to the Company (or any other obligor upon the Notes) or its creditors or property and (B) collect, receive and distribute any money or other property payable or deliverable on any such claims. Each Holder authorizes any custodian in such proceeding to make such payments to the Trustee, the Collateral Agent, and, if the Trustee consents to the making of such payments directly to the Holders, to pay to the Trustee and the Collateral Agent any amount due to the Trustee and the Collateral Agent, as applicable, for the reasonable compensation, expenses, disbursements and advances of the Trustee, and its agents and counsel, and any other amounts payable to the Trustee pursuant to **Section 11.06**. To the extent that the payment of any such compensation, expenses, disbursements, advances and other amounts out of the estate in such proceeding, is denied for any reason, payment of the same will be secured by a lien (senior to the rights of Holders) on, and will be paid out of, any and all distributions, dividends, money, securities and other properties that the Holders may be entitled to receive in such proceeding (whether in liquidation or under any plan of reorganization or arrangement or otherwise). Nothing in this Indenture will be deemed to authorize the Trustee to authorize, consent to, accept or adopt on behalf of any Holder any plan of reorganization, arrangement, adjustment or composition affecting the Notes or the rights of any Holder, or to authorize the Trustee to vote in respect of the claim of any Holder in any such proceeding.

**Section 7.11. PRIORITIES.**

The Trustee or the Collateral Agent will pay or deliver in the following order any money or other property that it collects pursuant to this **Article 7**:

*First:* to the Trustee and the Collateral Agent, in their capacity as such, and their agents and attorneys for amounts due to the Trustee and the Collateral Agent under this Indenture and the Security Documents, including payment of all fees, compensation, expenses and liabilities incurred, and all advances made, by the Trustee or the Collateral Agent and the costs and expenses of collection;

*Second:* to Holders for unpaid amounts or other property due on the Notes, including the Accreted Principal Amount of, or Fundamental Change Repurchase Price for, or any interest on, or any Conversion Consideration due upon conversion of, the Notes, ratably, and without preference or priority of any kind, according to such amounts or other property due and payable on all of the Notes; and

*Third:* to the Company or such other Person as a court of competent jurisdiction directs.

The Trustee or the Collateral Agent may fix a record date and payment date for any payment or delivery to the Holders pursuant to this **Section 7.11**, in which case the Trustee or the Collateral Agent will instruct the Company to, and the Company will deliver in writing, at least fifteen (15) calendar days before such record date, to each Holder and the Trustee or the Collateral Agent a notice stating such record date, such payment date and the amount of such payment or nature of such delivery, as applicable.

**Section 7.12. UNDERTAKING FOR COSTS.**

In any suit for the enforcement of any right or remedy under this Indenture or the Notes or in any suit against the Trustee for any action taken or omitted by it as Trustee, a court, in its discretion, may (A) require the filing by any litigant party in such suit of an undertaking to pay the costs of such suit, and (B) assess reasonable costs (including reasonable attorneys' fees) against any litigant party in such suit, having due regard to the merits and good faith of the claims or defenses made by such litigant party; *provided, however*, that this **Section 7.12** does not apply to any suit by the Trustee, any suit by a Holder pursuant to **Section 7.08** or any suit by one or more Holders of more than ten percent (10%) in aggregate principal amount of the Notes then outstanding.

**Article 8. AMENDMENTS, SUPPLEMENTS AND WAIVERS**

**Section 8.01. WITHOUT THE CONSENT OF HOLDERS.**

Notwithstanding anything to the contrary in **Section 8.02**, the Company, the Guarantors, the Trustee and the Collateral Agent may amend or supplement this Indenture, the Notes or the Guarantees without the consent of any Holder to:

- (A) cure any ambiguity, mistake or correct any omission, defect or inconsistency in this Indenture or the Notes;
- (B) add guarantees with respect to the Company's obligations under this Indenture or the Notes;
- (C) secure the Notes or any Guarantee;

(D) add to the Company's or any Guarantor's covenants or Events of Default for the benefit of the Holders or surrender any right or power conferred on the Company;

(E) provide for the assumption of the Company's or any Guarantor's obligations under this Indenture and the Notes pursuant to, and in compliance with, **Article 6** and **Article 9**, as applicable;

(F) enter into supplemental indentures pursuant to, and in accordance with, **Section 5.09** in connection with a Common Stock Change Event;

(G) irrevocably elect to settle Interest Make-Whole Payments with cash or shares of Common Stock (together with cash in lieu of any fractional share as set forth in **Section 5.03(A)(iii)**; *provided, however*, that no such election will affect any Interest Make-Whole Payment settlement method theretofore elected (or deemed to be elected) with respect to any Note pursuant to **Section 5.03(A)(ii)**;

(H) evidence or provide for the acceptance of the appointment, under this Indenture, of a successor Trustee, a successor Collateral Agent or successor Paying Agent hereunder pursuant to the requirements hereof or to provide for the accession by the Trustee to any Note Documents;

(I) increase the Conversion Rate;

(J) comply with any requirement of the SEC in connection with any qualification of this Indenture or any supplemental indenture under the Trust Indenture Act, as then in effect;

(K) comply with the rules of the Depository in a manner that does not adversely affect the rights of any Holder;

(L) make any other change to this Indenture or the Notes that does not, individually or in the aggregate with all other such changes, adversely affect the rights of the Holders, as such, in any material respect; or

(M) enter into supplemental indentures pursuant to, and in accordance with, **Section 3.11**.

**Section 8.02. WITH THE CONSENT OF HOLDERS.**

(A) *Generally*. Subject to **Sections 8.01, 7.05** and **7.08** and the immediately following sentence, the Company, the Guarantors, the Trustee and the Collateral Agent may, with the consent of the Holders of at least 75% in aggregate principal amount of the Notes then outstanding, amend or supplement this Indenture, the Notes or the Guarantees or waive compliance with any provision of this Indenture, the Notes or the Guarantees. Notwithstanding anything to the contrary in the foregoing sentence, but subject to **Section 8.01**, without the consent of each affected Holder, no amendment or supplement to this Indenture, the Notes or the Guarantees, or waiver of any provision of this Indenture, the Notes or the Guarantees, may:

(i) reduce the principal, or change the stated maturity, of any Note;

(ii) reduce the Accreted Principal Amount or Fundamental Change Repurchase Price for any Note or change the times at which, or the circumstances under which, the Notes may or will be repurchased by the Company;

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- (iii) reduce the rate, or extend the time for the payment, of interest on any Note;
  - (iv) make any change that adversely affects the conversion rights of any Note, including to the Conversion Rate and any adjustments thereto, or amend or modify the definition of “Fundamental Change” or the other definitions used in such definition;
  - (v) impair the absolute rights of any Holder set forth in **Section 7.08** (as such section is in effect on the Issue Date);
  - (vi) change the ranking of the Notes or the Guarantees;
  - (vii) other than in accordance with the provisions of this Indenture, (x) modify any Guarantee or release any Guarantee or a Guarantor from its Obligations under this Indenture, in each case, in any manner materially adverse to the Holders, or (y) release all or substantially all of the Collateral from the Collateral Agent’s Lien;
  - (viii) make any Note payable in money, or at a place of payment, other than that stated in this Indenture or the Note;
  - (ix) reduce the amount of Notes whose Holders must consent to any amendment, supplement, waiver or other modification;
  - (x) subordinate (x) the Liens securing any of the Notes to the Liens securing any other Indebtedness or other obligations or (y) the Notes in contractual right of payment to any other Indebtedness or other obligations;
  - (xi) amend or waive the provisions of **Section 3.11**; or
  - (xii) make any direct or indirect change to any amendment, supplement, waiver or modification provision of this Indenture or the Notes that requires the consent of each affected Holder.

For the avoidance of doubt, (1) pursuant to clauses (i), (ii), (iii), (iv) and (v) of this **Section 8.02(A)**, no amendment or supplement to this Indenture or the Notes, or waiver of any provision of this Indenture or the Notes, may change the amount or type of consideration due on any Note (whether on an Interest Payment Date, Fundamental Change Repurchase Date or the Maturity Date or upon conversion, or otherwise), or the date(s) or time(s) such consideration is payable or deliverable, as applicable, without the consent of each affected Holder and (2) no amendment or supplement to this Indenture or the Notes, or waiver of any provision of this Indenture or the Notes shall, or shall have the effect of, releasing all or substantially all of the Collateral from the Liens securing the Notes (other than in accordance with the Note Documents), without the consent of Holders of not less than 66 2/3% of the aggregate principal amount of the Notes then outstanding.

(B) *Holdings Need Not Approve the Particular Form of any Amendment.* A consent of any Holder pursuant to this **Section 8.02** need approve only the substance, and not necessarily the particular form, of the proposed amendment, supplement or waiver.

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**Section 8.03. NOTICE OF AMENDMENTS, SUPPLEMENTS AND WAIVERS.**

As soon as reasonably practicable after any amendment, supplement or waiver pursuant to **Section 8.01** or **8.02** becomes effective, the Company will send to the Holders and the Trustee notice that (A) describes the substance of such amendment, supplement or waiver in reasonable detail and (B) states the effective date thereof; *provided, however*, that the Company will not be required to provide such notice to the Holders if such amendment, supplement or waiver is included in a periodic report filed by the Company with the SEC within four (4) Business Days of its effectiveness. The failure to send, or the existence of any defect in, such notice will not impair or affect the validity of such amendment, supplement or waiver.

**Section 8.04. REVOCATION, EFFECT AND SOLICITATION OF CONSENTS; SPECIAL RECORD DATES; ETC.**

(A) *Revocation and Effect of Consents.* The consent of a Holder of a Note to an amendment, supplement or waiver will bind (and constitute the consent of) each subsequent Holder of any Note to the extent the same evidences any portion of the same indebtedness as the consenting Holder's Note, subject to the right of any Holder of a Note to revoke (if not prohibited pursuant to **Section 8.04(B)**) any such consent with respect to such Note by delivering notice of revocation to the Trustee before the time such amendment, supplement or waiver becomes effective.

(B) *Special Record Dates.* The Company may, but is not required to, fix a record date for the purpose of determining the Holders entitled to consent or take any other action in connection with any amendment, supplement or waiver pursuant to this **Article 8**. If a record date is fixed, then, notwithstanding anything to the contrary in **Section 8.04(A)**, only Persons who are Holders as of such record date (or their duly designated proxies) will be entitled to give such consent, to revoke any consent previously given or to take any such action, regardless of whether such Persons continue to be Holders after such record date; *provided, however*, that no such consent will be valid or effective for more than one hundred and twenty (120) calendar days after such record date.

(C) *Solicitation of Consents.* For the avoidance of doubt, each reference in this Indenture or the Notes to the consent of a Holder will be deemed to include any such consent obtained in connection with a repurchase of, or tender or exchange offer for, any Notes.

(D) *Effectiveness and Binding Effect.* Each amendment, supplement or waiver pursuant to this **Article 8** will become effective in accordance with its terms and, when it becomes effective with respect to any Note (or any portion thereof), will thereafter bind every Holder of such Note (or such portion).

**Section 8.05. NOTATIONS AND EXCHANGES.**

If any amendment, supplement or waiver changes the terms of a Note, then the Trustee (at the direction of the Company) or the Company may, in its discretion, require the Holder of such Note to deliver such Note to the Trustee so that the Trustee may place an appropriate notation prepared by the Company on such Note and return such Note to such Holder. Alternatively, at its discretion, the Company may, in exchange for such Note, issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, a new Note that reflects the changed terms. The failure to make any appropriate notation or issue a new Note pursuant to this **Section 8.05** will not impair or affect the validity of such amendment, supplement or waiver.

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**Section 8.06. TRUSTEE TO EXECUTE SUPPLEMENTAL INDENTURES.**

The Trustee and the Collateral Agent, as applicable, will execute and deliver any amendment or supplemental indenture authorized pursuant to this **Article 8**; *provided, however*, that the Trustee and the Collateral Agent need not (but may, in its sole and absolute discretion) execute or deliver any such amendment or supplemental indenture that the Trustee or the Collateral Agent, as applicable, concludes adversely affects its rights, duties, liabilities or immunities. In executing any amendment or supplemental indenture, the Trustee and the Collateral Agent, as applicable, will be entitled to receive, and (subject to **Sections 11.01** and **11.02**) will be fully protected in relying on, in addition to the documents required by **Section 13.02**, an Officer's Certificate and an Opinion of Counsel stating that (A) the execution and delivery of such amendment or supplemental indenture is authorized or permitted by this Indenture; and (B) in the case of the Opinion of Counsel, such amendment or supplemental indenture is the legal, valid and obligation of the Company (and any Guarantor) and binding and enforceable against each in accordance with its terms.

**Article 9. Guarantees**

**Section 9.01. GUARANTEES.**

(A) *Generally*. By its execution of this Indenture (including by any amended or supplemental indenture), each Guarantor acknowledges and agrees that it receives substantial benefits from the Company and that such Guarantor is providing its Guarantee for good and valuable consideration, including such substantial benefits. Subject to this **Article 9**, each of the Guarantors hereby, as a primary obligor and not merely as surety, jointly and severally, fully and unconditionally guarantees, to each Holder of a Note authenticated and delivered by the Trustee and to the Trustee, the Collateral Agent and their successors and assigns, regardless of the validity or enforceability of this Indenture, the Notes or the obligations of the Company under this Indenture or the Notes, that:

(i) the principal (including the Accreted Principal Amount) of, premium, if any, interest on, and any Conversion Consideration for, the Notes and such other Obligations will be promptly paid in full when due, whether at maturity, by acceleration, on a Fundamental Change Repurchase Date or otherwise, and interest on the overdue principal (including the Accreted Principal Amount) of, any interest on, or any Conversion Consideration for, the Notes, if lawful, and all other obligations of the Company to the Holders or the Trustee under this Indenture or the Notes, will be promptly paid or delivered in full or performed, as applicable, in each case in accordance with this Indenture and the Notes; and

(ii) in case of any extension of time of payment or renewal of any Notes or any of such other obligations, that the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at stated maturity, by acceleration, on a Fundamental Change Repurchase Date or otherwise, (clause (i) and (ii) collectively, the “**Guaranteed Obligations**”), in each case subject to **Section 9.02**.

Upon the failure of any payment when due of any amount so guaranteed, and upon the failure of any performance so guaranteed, for whatever reason, the Guarantors will be jointly and severally obligated to pay or perform, as applicable, the same immediately. Each Guarantor agrees that this is a guarantee of payment and not a guarantee of collection.

(B) *Guarantee Is Unconditional; Waiver of Diligence, Presentment, Etc.* Each Guarantor agrees that its Guarantee of the Guaranteed Obligations is unconditional, regardless of the validity or enforceability of this Indenture, the Notes or the obligations of the Company under this Indenture or the Notes, the absence of any action to enforce the same, any waiver or consent by any Holder with respect to any provisions of this Indenture or the Notes, the recovery of any judgment against the Company or any other Guarantor, any action to enforce the same or any other circumstance that might otherwise constitute a legal or equitable discharge or defense of a Guarantor other than payment or performance in full of Guaranteed Obligations (other than contingent obligations that have yet to accrue). Each Guarantor waives diligence, presentment, requirements for any demand or notice hereunder including any of the following: (i) any demand for payment or performance and protest and notice of protest; (ii) any notice of acceptance; (iii) any presentment, demand, protest or further notice or other requirements of any kind with respect to any Obligation (including any accrued but unpaid interest thereon) becoming immediately due and payable; and (iv) any other notice in respect of any Obligation or any part thereof, and any defense arising by reason of any disability or other defense of the Company or any Guarantor. Each Guarantor further unconditionally and irrevocably agrees not to (x) enforce or otherwise exercise any right of subrogation or any right of reimbursement or contribution or similar right against the Company or any Guarantor by reason of any Document or any payment made thereunder or (y) assert any claim, defense, setoff or counterclaim it may have against the Company or any other Guarantor or set off any of its obligations to the Company or any other Guarantor against obligations of such Guarantor to the Company or such other Guarantor. No obligation of any Guarantor hereunder shall be discharged other than by complete payment or performance of the Guaranteed Obligations (other than contingent obligations that have yet to accrue) in accordance with this Indenture and the Notes. Each Guarantor further waives any right such Guarantor may have under any applicable requirement of law to require the Trustee, the Collateral Agent, or any Holder to seek recourse first against the Company or any of its Subsidiaries or any other Person, or to realize upon any Collateral for any of the Obligations, as a condition precedent to enforcing such Guarantor’s liability and obligations under this **Article 9**.

(C) *Reinstatement of Guarantee Upon Return of Payments.* If any Holder, the Trustee, or the Collateral Agent is required by any court or otherwise to return, to the Company, the Guarantors or any custodian, trustee, liquidator or other similar official acting in relation to the Company or the Guarantors, any amount paid or delivered by the Company, or any Guarantor to the Trustee, the Collateral Agent, or such Holder, this Guarantee, to the extent theretofore discharged, will be reinstated in full force and effect.



(D) *Subrogation*. Each Guarantor agrees that any right of subrogation, reimbursement or contribution it may have in relation to the Holders or in respect of any Guaranteed Obligations will be subordinated to, and will not be enforceable until payment in full and performance of, all Guaranteed Obligations. Each Guarantor further agrees that, as between the Guarantors, on the one hand, and the Holders, the Trustee and the Collateral Agent, on the other hand, (i) the maturity of the Guaranteed Obligations may be accelerated as provided in **Article 7**, notwithstanding any stay, injunction or other prohibition preventing such acceleration in respect of the Guaranteed Obligations; and (ii) if any Guaranteed Obligations are accelerated pursuant to **Article 7**, then such Guaranteed Obligations will, whether or not due and payable, immediately become due and payable by the Guarantors. Each Guarantor will have the right to seek contribution from any non-paying Guarantor, but only if the exercise of such right does not impair the rights of the Holders under any Guarantee.

**Section 9.02. LIMITATION ON GUARANTOR LIABILITY.**

Each Guarantor, and, by its acceptance of any Note, each Holder, confirms that each Guarantor and the Holders intend that the Guarantee of each Guarantor not constitute a fraudulent transfer or conveyance for purposes of Bankruptcy Law, the Uniform Fraudulent Conveyance Act, the Uniform Fraudulent Transfer Act or any similar federal or state law to the extent applicable to any Guarantee. Each of the Trustee, the Holders and each Guarantor irrevocably agrees that the obligations of each Guarantor under its Guarantee will be limited to the maximum amount that will, after giving effect to such maximum amount and all other contingent and fixed liabilities of such Guarantor that are relevant under such laws, and after giving effect to any collections from, rights to receive contribution from or payments made by or on behalf of any other Guarantor in respect of the obligations of such other Guarantor under its Guarantee, result in the obligations of such Guarantor under its Guarantee not constituting a fraudulent transfer or fraudulent conveyance under federal or state law and not otherwise being void or voidable under any similar laws affecting the rights of creditors generally.

**Section 9.03. EXECUTION AND DELIVERY OF GUARANTEE.**

The execution by each Guarantor of this Indenture (or by an amended or supplemental indenture pursuant to **Section 8.01(B)**) evidences the Guarantee of such Guarantor, and the delivery of any Note by the Trustee after its authentication constitutes due delivery of each Guarantee on behalf of each Guarantor. A Guarantee's validity will not be affected by the failure of any officer of a Guarantor executing this Indenture or any such amended or supplemental indenture on such Guarantor's behalf to hold, at the time any Note is authenticated, the same or any other office at each Guarantor, and each Guarantee will be valid and enforceable even if no notation, certificate or other instrument is set upon or attached to, or otherwise executed and delivered to the Holder of, any Note.

**Section 9.04. WHEN GUARANTORS MAY MERGE, ETC.**

(A) *Generally*. No Guarantor will consolidate with or merge with or into, or sell, lease or otherwise transfer, in one transaction or a series of transactions, all or substantially all of the assets of such Guarantor and its Subsidiaries, taken as a whole, to another Person (other than the Company or another Guarantor) (a "**Guarantor Business Combination Event**"), unless (1) the resulting, surviving or transferee Person (the "**Successor Guarantor**") is such Guarantor or, if not such Guarantor, expressly assumes (by executing and delivering to the Trustee, at or before the

effective time of such Guarantor Business Combination Event, a supplemental indenture substantially in the form of **Exhibit C** all of such Guarantor's obligations under this Indenture and the Notes; *provided* that (a) such surviving Guarantor shall be incorporated or organized under the laws of the United States of America, any State thereof or the District of Columbia and (b) no Default or Event of Default shall exist, or would result from such Guarantor Business Combination Event or (2) the transaction is in compliance with **Section 3.10**.

Notwithstanding the foregoing, any Guarantor may merge, consolidate, amalgamate or wind up with or into, or transfer all or part of its properties and assets to, the Company without regard to the requirements set forth in this **Section 9.04(A)**.

(B) *Delivery of Officer's Certificate and Opinion of Counsel to the Trustee.* Before the effective time of any Guarantor Business Combination Event, the Company will deliver to the Trustee an Officer's Certificate and Opinion of Counsel, each stating that (i) such Guarantor Business Combination Event (and, if applicable, the related supplemental indenture substantially in the form of **Exhibit C**) complies with **Section 9.04(A)**; and (ii) all conditions precedent to such Guarantor Business Combination Event provided in this Indenture have been satisfied.

(C) *Successor Guarantor Substituted.* At the effective time of any Guarantor Business Combination Event that complies with **Section 9.04(A)** and **Section 9.04(B)**, the Successor Guarantor (if not the applicable Guarantor) will succeed to, and may exercise every right and power of, such Guarantor under this Indenture and the Notes with the same effect as if such Successor Guarantor had been named as a Guarantor in this Indenture and the Notes, and, except in the case of a lease, the predecessor Guarantor will be discharged from its obligations under this Indenture and the Notes.

#### **Section 9.05. APPLICATION OF CERTAIN PROVISIONS OF THE GUARANTORS.**

(A) *Officer's Certificates and Opinions of Counsel.* Upon any request or application by any Guarantor to the Trustee to take any action under this Indenture, the Trustee will be entitled to receive an Officer's Certificate and an Opinion of Counsel pursuant to **Section 13.02** with the same effect as if each reference to the Company in **Section 13.02** or in the definitions of "Officer," "Officer's Certificate" or "Opinion of Counsel" were instead a reference to such Guarantor.

(B) *Company Order.* A Company Order may be given by any Guarantor with the same effect as if each reference to the Company in the definitions of "Company Order" or "Officer" were instead a reference to such Guarantor.

(C) *Notices and Demands.* Any notice or demand that this Indenture requires or permits to be given by the Trustee, or by any Holders, to the Company may instead be given to any Guarantor.

#### **Section 9.06. RELEASE OF GUARANTEES.**

Any Guarantee by a Guarantor shall be automatically and unconditionally released and discharged, and no further action by such Guarantor, the Company or the Trustee is required for the release of such Guarantor's Guarantee, upon:

(A) (i)(1) any sale, exchange, transfer or other disposition (by merger, consolidation, amalgamation, dividend, distribution or otherwise) of all of the Capital Stock of such Guarantor or all or substantially all of the assets of such Guarantor, in each case, if such sale, exchange, transfer or other disposition is not prohibited by the applicable provisions of this Indenture and, (a) such sale, exchange, transfer or other disposition is in compliance with **Section 3.09** or (b) unless such sale, exchange, transfer or other disposition is with or to the Company, the surviving or transferee Person expressly assumes such Guarantor's obligations in accordance with **Section 9.04**;

(2) the merger, consolidation or amalgamation of any Guarantor with and into the Company, or upon the liquidation of a Guarantor following the transfer of all of its assets to the Company; or

(3) the merger, consolidation or amalgamation of any Guarantor with and into a Subsidiary of the Company where such Subsidiary is the surviving Person, if such merger, consolidation or amalgamation is not prohibited by the applicable provisions of this Indenture and such Subsidiary expressly assumes such Guarantor's obligations in accordance with **Section 9.04**; and

(ii) the Company and such Guarantor delivering to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that all conditions precedent provided for in this Indenture relating to such transaction and release have been complied with; and

(B) the application of the covenant suspension provision set forth in **Section 3.14** of this Indenture.

#### **Article 10. SATISFACTION AND DISCHARGE**

##### **Section 10.01. TERMINATION OF COMPANY'S OBLIGATIONS.**

This Indenture will be discharged, and will cease to be of further effect as to all Notes issued under this Indenture, when:

(A) all Notes then outstanding (other than Notes replaced pursuant to **Section 2.13**) have (i) been delivered to the Trustee for cancellation; or (ii) become due and payable (whether on a Fundamental Change Repurchase Date, the Maturity Date, upon conversion or otherwise) for an amount of cash or Conversion Consideration, as applicable, that has been fixed;

(B) the Company has caused there to be irrevocably deposited with the Trustee, or with the Paying Agent (or, with respect to Conversion Consideration, the Conversion Agent), in each case for the benefit of the Holders, or has otherwise caused there to be delivered to the Holders, cash (or, with respect to Notes to be converted, Conversion Consideration) sufficient to satisfy all amounts or other property due on all Notes then outstanding (other than Notes replaced pursuant to **Section 2.13**);

(C) the Company has paid all other amounts payable by it under this Indenture; and

(D) the Company has delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that the conditions precedent to the discharge of this Indenture have been satisfied;

*provided, however*, that **Article 10** and **Section 13.01** will survive such discharge and, until no Notes remain outstanding, **Section 2.15** and the obligations of the Trustee, the Collateral Agent, the Paying Agent and the Conversion Agent with respect to money or other property deposited with them will survive such discharge.

At the Company's request, the Trustee will acknowledge the satisfaction and discharge of this Indenture.

**Section 10.02. REPAYMENT TO COMPANY.**

Subject to applicable unclaimed property law, the Trustee, the Paying Agent and the Conversion Agent will promptly notify the Company if there exists (and, at the Company's request, promptly deliver to the Company) any cash, Conversion Consideration or other property held by any of them for payment or delivery on the Notes that remain unclaimed two (2) years after the date on which such payment or delivery was due. After such delivery to the Company, the Trustee, the Paying Agent and the Conversion Agent will have no further liability to any Holder with respect to such cash, Conversion Consideration or other property, and Holders entitled to the payment or delivery of such cash, Conversion Consideration or other property must look to the Company for payment as a general creditor of the Company.

**Section 10.03. REINSTATEMENT.**

If the Trustee, the Paying Agent or the Conversion Agent is unable to apply any cash or other property deposited with it pursuant to **Section 9.01** because of any legal proceeding or any order or judgment of any court or other governmental authority that enjoins, restrains or otherwise prohibits such application, then the discharge of this Indenture pursuant to **Section 9.01** will be rescinded; *provided, however*, that if the Company thereafter pays or delivers any cash or other property due on the Notes to the Holders thereof, then the Company will be subrogated to the rights of such Holders to receive such cash or other property from the cash or other property, if any, held by the Trustee, the Paying Agent or the Conversion Agent, as applicable.

**Article 11. TRUSTEE**

**Section 11.01. DUTIES OF THE TRUSTEE.**

(A) If an Event of Default has occurred and is continuing of which a Responsible Officer of the Trustee has actual knowledge, the Trustee will exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in its exercise, as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs; *provided* that the Trustee will be under no obligation to exercise any of the rights or powers under this Indenture at the request or direction of any of the Holders unless such Holders have offered, and if requested, *provided*, to the Trustee indemnity or security satisfactory to Trustee against any loss, liability or expense that might be incurred by it in compliance with such request or direction.

(B) Except during the continuance of an Event of Default:

(i) the duties of the Trustee will be determined solely by the express provisions of this Indenture, and the Trustee need perform only those duties that are specifically set forth in this Indenture and no others, and no implied covenants or obligations will be read into this Indenture against the Trustee; and

(ii) in the absence of bad faith or willful misconduct on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon Officer's Certificates or Opinions of Counsel that are provided to the Trustee and conform to the requirements of this Indenture. However, the Trustee will examine the certificates and opinions to determine whether or not they conform to the requirements of this Indenture, but shall have no affirmative duty to confirm or verify the accuracy of mathematical calculations or other facts stated therein.

(C) The Trustee may not be relieved from liabilities for its gross negligence or willful misconduct as determined by a final non-appealable order of a court of competent jurisdiction, except that:

(i) this paragraph will not limit the effect of **Section 11.01(B)**;

(ii) the Trustee will not be liable for any error of judgment made in good faith by a Responsible Officer, unless it is proved that the Trustee was grossly negligent in ascertaining the pertinent facts; and

(iii) the Trustee will not be liable with respect to any action it takes or omits to take in good faith in accordance with a direction received by it pursuant to **Section 7.06**.

(D) Each provision of this Indenture that in any way relates to the Trustee is subject to this **Section 11.01** and **Section 11.02**, regardless of whether such provision so expressly provides.

(E) No provision of this Indenture will require the Trustee to expend or risk its own funds or incur any liability.

(F) The Trustee will not be liable for interest on any money received by it, except as the Trustee may agree in writing with the Company. Money held in trust by the Trustee need not be segregated from other funds, except to the extent required by law.

(G) Unless a Responsible Officer of the Trustee has received notice from the Company that the Company is required to pay Additional Interest or has elected to pay Special Interest on the Notes, the Trustee may assume no Additional Interest or Special Interest, as applicable, is payable.

**Section 11.02. RIGHTS OF THE TRUSTEE.**

(A) The Trustee may conclusively rely on any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, judgment, bond, debenture, note, other evidence of indebtedness or other paper or document that it believes to be genuine and signed or presented by the proper Person, and the Trustee need not investigate any fact or matter stated in such document.

(B) Before the Trustee acts or refrains from acting, it may require an Officer's Certificate, an Opinion of Counsel or both. The Trustee will not be liable for any action it takes or omits to take in good faith in reliance on such Officer's Certificate or Opinion of Counsel. The Trustee may consult with counsel; and the advice of such counsel, or any Opinion of Counsel, will constitute full and complete authorization and protection of the Trustee to take or omit to take any action in good faith in reliance thereon without liability.

(C) The Trustee may act through its attorneys and agents and will not be responsible for the misconduct or negligence of any such agent appointed with due care. No Depository shall be deemed an agent of the Trustee and the Trustee shall not be responsible for any act or omission by any Depository.

(D) The Trustee will not be liable for any action it takes or omits to take in good faith and that it believes to be authorized or within the rights or powers vested in it by this Indenture.

(E) Unless otherwise specifically provided in this Indenture, any demand, request, direction or notice from the Company will be sufficient if signed by an Officer of the Company.

(F) Neither the Trustee nor the Collateral Agent need exercise any rights or powers vested in it by this Indenture at the request or direction of any Holder unless such Holder has offered, and if requested, provided to the Trustee or the Collateral Agent, as applicable, security or indemnity satisfactory to the Trustee against any costs, loss, liability or expense that it may incur in complying with such request or direction.

(G) The Trustee will not be responsible or liable for any punitive, special, indirect, incidental or consequential loss or damage of any kind whatsoever (including lost profits), even if the Trustee has been advised of the likelihood of such loss or damage and regardless of the form of action.

(H) The Trustee will not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, judgment, bond, debenture or other paper or document, but the Trustee, in its discretion, may make such further inquiry or investigation into such facts or matters as it may see fit and will incur no liability of any kind by reason of such inquiry or investigation.

(I) The Trustee will not be required to give any bond or surety in respect of the execution of the trusts, powers, and duties under this Indenture.

(J) The permissive rights of the Trustee enumerated herein will not be construed as obligations or duties. The Trustee undertakes to perform such duties and only such duties as are specifically and expressly set forth in this Indenture.

(K) The Trustee may request that the Company deliver an Officer's Certificate setting forth the names of individuals and titles of officers authorized at such time to take specified actions pursuant to this Indenture, which Officer's Certificate may be signed by any Person authorized to sign an Officer's Certificate, including any Person specified as so authorized in any such certificate previously delivered and not superseded.

(L) Neither the Trustee nor the Collateral Agent will be deemed to have notice of any Default or Event of Default (except in the case of a Default or Event of Default in payment of scheduled principal (including, the Accreted Principal Amount) of, or Fundamental Change Repurchase Price for, or interest on, any Note) unless written notice of any event that is in fact such a Default or Event of Default (and stating the occurrence of a Default or Event of Default) is actually received by the a Responsible Officer of the Trustee or the Collateral Agent at the Corporate Trust Office of the Trustee or the Collateral Agent, and such notice references the Notes, the Company and this Indenture and states that it is a notice of Default or Event of Default.

(M) Notwithstanding anything to the contrary in this Indenture, other than this Indenture, the Notes and the Security Documents, the Trustee will have no duty to know or inquire as to the performance or nonperformance of any provision of any other agreement, instrument, or contract, nor will the Trustee be responsible for, nor chargeable with, knowledge of the terms and conditions of any other agreement, instrument, or contract, whether or not a copy of such agreement has been provided to the Trustee.

**Section 11.03. INDIVIDUAL RIGHTS OF THE TRUSTEE.**

The Trustee, in its individual or any other capacity, may become the owner or pledgee of any Note and may otherwise deal with the Company or any of its Affiliates with the same rights that it would have if it were not Trustee; *provided, however*, that if the Trustee acquires a “conflicting interest” (within the meaning of Section 310(b) of the Trust Indenture Act), then it must eliminate such conflict within ninety (90) days or resign as Trustee. The rights, privileges, protections, immunities and benefits given to the Trustee, including its right to be compensated, reimbursed and indemnified, are extended to, and will be enforceable by, the Trustee in each of its capacities under this Indenture, the Collateral Agent, each Note Agent, custodian and other Person retained to act under this Indenture.

**Section 11.04. TRUSTEE’S DISCLAIMER.**

The Trustee will not be (A) responsible for, and makes no representation as to, the validity or adequacy of this Indenture or the Notes; (B) accountable for the Company’s use of the proceeds from the Notes or any money paid to the Company or upon the Company’s direction under any provision of this Indenture; (C) responsible for the use or application of any money received by any Paying Agent other than the Trustee; and (D) responsible for any statement or recital in this Indenture, the Notes or any other document relating to the sale of the Notes or this Indenture, other than the Trustee’s certificate of authentication.

**Section 11.05. NOTICE OF DEFAULTS.**

If a Default or Event of Default occurs and is continuing and is actually known to a Responsible Officer of the Trustee (in accordance with **Section 11.02(L)**), then the Trustee will send Holders a notice of such Default or Event of Default within ninety (90) days after it occurs or, if it is not actually known to a Responsible Officer of the Trustee at such time, promptly (and

in any event within ten (10) Business Days) after it becomes actually known to a Responsible Officer (in accordance with **Section 11.02(L)**); *provided, however*, that, except in the case of a Default or Event of Default in the payment of the principal (including the Accreted Principal Amount) of, or interest, if any, on, any Note, the Trustee may withhold such notice if and for so long as it in good faith determines that withholding such notice is in the interests of the Holders.

**Section 11.06. COMPENSATION AND INDEMNITY.**

(A) The Company will, from time to time, pay the Trustee (acting in any capacity hereunder) reasonable compensation for its acceptance of this Indenture and services under this Indenture, as separately agreed by the Company and the Trustee. The Trustee's compensation will not be limited by any law on compensation of a trustee of an express trust. In addition to the compensation for the Trustee's services, the Company will reimburse the Trustee promptly upon request for all reasonable disbursements, advances and expenses incurred or made by it under this Indenture, including the reasonable compensation, disbursements and expenses of the Trustee's agents and counsel.

(B) The Company and the Guarantors, jointly and severally, will indemnify and hold harmless the Trustee (acting in any capacity hereunder) against any and all losses, liabilities or expenses (including attorneys' fees and expenses) incurred by it arising out of or in connection with the acceptance or administration of its duties as the Trustee under this Indenture, including the costs and expenses of enforcing this Indenture (including attorneys' fees and expenses) against the Company (including this **Section 11.06**) and defending itself against any claim (whether asserted by the Company, any Holder or any other Person) or liability in connection with the exercise or performance of any of its powers or duties under this Indenture, except to the extent any such loss, liability or expense may be attributable to its gross negligence or willful misconduct as determined by a court of competent jurisdiction in a final and non-appealable decision. The Trustee will promptly notify the Company of any claim for which it may seek indemnity (other than any claim brought by the Company), but the Trustee's failure to so notify the Company will not relieve the Company of its obligations under this **Section 11.06(B)**, except to the extent the Company is materially prejudiced by such failure. The Company will defend such claim, and the Trustee will cooperate in such defense at the expense of the Company. If the Trustee is advised by counsel that it may have defenses available to it that are in conflict with the defenses available to the Company, or that there is an actual or potential conflict of interest, then the Trustee may retain separate counsel, and the Company will pay the reasonable fees and expenses of such counsel (including the reasonable fees and expenses of counsel to the Trustee incurred in evaluating whether such a conflict exists). The Company need not pay for any settlement of any such claim made without its consent, which consent will not be unreasonably withheld. The indemnification provided in this **Section 11.06** will extend to the officers, directors, agents and employees of the Trustee and any successor Trustee under this Indenture.

(C) The obligations of the Company under this **Section 11.06** will survive the resignation or removal of the Trustee and the discharge of this Indenture.

(D) To secure the Company's payment obligations in this **Section 11.06**, the Trustee will have a lien prior to the Notes on all money or property held or collected by the Trustee or the Collateral Agent, except that held in trust to pay principal (including the Accreted Principal Amount) of, or interest on, particular Notes, which lien will survive the discharge of this Indenture.



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(E) If the Trustee or the Collateral Agent incurs expenses or renders services after an Event of Default pursuant to clause (ix) or (x) of **Section 7.01(A)** occurs, then such expenses and the compensation for such services (including the fees and expenses of its agents and counsel) are intended to constitute administrative expenses for purposes of priority under any Bankruptcy Law.

**Section 11.07. REPLACEMENT OF THE TRUSTEE.**

(A) Notwithstanding anything to the contrary in this **Section 11.07**, a resignation or removal of the Trustee, and the appointment of a successor Trustee, will become effective only upon such successor Trustee's acceptance of appointment as provided in this **Section 11.07**.

(B) The Trustee may resign at any time and be discharged from its duties and obligations hereunder at any time by giving no less than thirty (30) calendar days' prior written notice of such resignation to the Company. The Holders of a majority in aggregate principal amount of the Notes then outstanding may remove the Trustee by providing no less than thirty (30) calendar days' prior written notice to the Trustee and the Company. The Company may remove the Trustee if:

- (i) the Trustee fails to comply with **Section 11.09**;
- (ii) the Trustee is adjudged to be bankrupt or insolvent or an order for relief is entered with respect to the Trustee under any Bankruptcy Law;
- (iii) a custodian or public officer takes charge of the Trustee or its property; or
- (iv) the Trustee becomes incapable of acting.

(C) If the Trustee resigns or is removed, or if a vacancy exists in the office of Trustee for any reason, then (i) the Company will promptly appoint a successor Trustee; and (ii) at any time within one (1) year after the successor Trustee takes office, the Holders of a majority in aggregate principal amount of the Notes then outstanding may appoint a successor Trustee to replace such successor Trustee appointed by the Company.

(D) If a successor Trustee does not take office within sixty (60) days after the retiring Trustee resigns or is removed, then the retiring Trustee (at the Company's expense), the Company or the Holders of at least ten percent (10%) in aggregate principal amount of the Notes then outstanding may petition any court of competent jurisdiction for the appointment of a successor Trustee.

(E) If the Trustee, after written request by a Holder of at least six (6) months, fails to comply with **Section 11.09**, then such Holder may petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor Trustee.

(F) A successor Trustee will deliver a written acceptance of its appointment to the retiring Trustee and to the Company, upon which notice the resignation or removal of the retiring Trustee will become effective and the successor Trustee will have all the rights, powers and duties of the Trustee under this Indenture. The successor Trustee will send notice of its succession to Holders. The retiring Trustee will, upon payment of all amounts due to it under this Indenture, promptly transfer all property held by it as Trustee to the successor Trustee, which property will, for the avoidance of doubt, be subject to the lien provided for in **Section 11.06(D)**.

**Section 11.08. SUCCESSOR TRUSTEE BY MERGER, ETC.**

If the Trustee consolidates, merges or converts into, or transfers all or substantially all of its corporate trust business to, another corporation, then such corporation will become the successor Trustee under this Indenture and will have and succeed to the rights, powers, duties, immunities and privileges of its predecessor without any further act or the execution or filing of any instrument or paper.

**Section 11.09. ELIGIBILITY; DISQUALIFICATION.**

There will at all times be a Trustee under this Indenture that is a corporation organized and doing business under the laws of the United States of America or of any state thereof, that is authorized under such laws to exercise corporate trustee power, that is subject to supervision or examination by federal or state authorities and that has a combined capital and surplus of at least \$50.0 million as set forth in its most recent published annual report of condition.

**Article 12. COLLATERAL AND SECURITY**

**Section 12.01. SECURITY DOCUMENTS**

The due and punctual payment of the principal (including the Accreted Principal Amount) of, premium, if any, and interest on the Notes and the Guaranteed Obligations when and as the same shall be due and payable, subject to any applicable grace period, whether on an Interest Payment Date, by acceleration, purchase, repurchase or otherwise, and interest on the overdue principal (including the Accreted Principal Amount) of, premium, if any, and interest on the Notes and the performance of all other obligations of the Company and the Guarantors to the Holders, the Collateral Agent or the Trustee under this Indenture shall be secured by the Collateral pursuant to the terms of the Security Documents. The Security Documents shall provide for the grant by the Company and the Guarantors party thereto to the Collateral Agent of security interests in the Collateral subject to Permitted Liens.

**Section 12.02. RECORDING AND OPINIONS**

(A) The Company shall, and shall cause each of the Guarantors to, at its sole cost and expense, take or cause to be taken such actions as may be required by the Security Documents or applicable law (including the filing of UCC amendments and continuations), to perfect, maintain (with the priority required under the Security Documents), preserve and protect the valid and enforceable, perfected (except as expressly provided herein or therein) security interests in and on all the Collateral granted by the Security Documents in favor of the Collateral Agent for the benefit of the Holders as security for the obligations under this Indenture, the Notes, any Guarantees and the Security Documents, prior to the rights of all third Persons and subject to no other Liens, in each case other than Permitted Liens. The Company shall from time to time promptly pay all financing and continuation statement recording and/or filing fees, charges and recording and similar expenses relating to this Indenture, the Security Documents and any amendments hereto or thereto and any other instruments of further assurance required pursuant hereto or thereto.

(B) The Company shall furnish to the Collateral Agent, at such times as would be required by Section 314(b) of the Trust Indenture Act if this Indenture were qualified thereunder, commencing August 26, 2022, an Opinion of Counsel to the effect that, either (i) other than actions that have been taken, no further action was necessary to maintain the perfection of the security interest in the Collateral described in both the applicable UCC-1 financing statement and the Security Agreement and for which perfection under the UCC of the Company's or applicable Guarantor's jurisdiction of organization may occur by the filing of a UCC-1 financing statement with the appropriate filing office of the applicable party's jurisdiction of organization or (ii) if any actions are so required to be taken, to specify such actions.

(C) The Company will deliver to the Trustee copies of all documents delivered to the Collateral Agent pursuant to the Security Documents, and the Company will, and will cause each Guarantor to, do or cause to be done all such acts and things as may be required by the provisions of the Security Documents to assure and confirm to the Trustee that the Collateral Agent holds for the benefit of the Trustee and the Holders duly created, enforceable and perfected Liens to the extent required by this Indenture and the Security Documents, as from time to time constituted.

**Section 12.03. RELEASE OF COLLATERAL**

(A) The Liens of the Collateral Agent created by the Security Documents shall not at any time be released on all or any portion of the Collateral from the Liens created by the Security Documents unless such release is in accordance with the provisions of this Indenture and the applicable Security Documents.

(B) The release of any Collateral from the Liens created by the Security Documents shall not be deemed to impair the security under this Indenture in contravention of the provisions hereof if and to the extent the Collateral is released pursuant to this Indenture and the Security Documents. The Company and the Guarantors shall not be required to comply with Section 314(d) of the Trust Indenture Act in connection with any release of Collateral. For the avoidance of doubt, the automatic release of any current assets constituting Collateral in connection with the sale, lease or other similar disposition of such inventory of the Company and the Guarantors in the ordinary course of business shall not require delivery of any reports, certificates, opinions or other formal documentation.

**Section 12.04. SPECIFIED RELEASES OF COLLATERAL**

(A) Collateral shall be released from the Liens created by the Security Documents at any time or from time to time in accordance with the provisions of the Security Documents or as provided in this Indenture. The Liens securing the Collateral shall be automatically released without the need for further action by any Person under any one or more of the following circumstances:

(i) in part, as to any property that is sold, transferred, disbursed or otherwise disposed of by the Company or any Guarantor (other than to the Company or any Guarantor) in a transaction not prohibited by this Indenture and in compliance with Section 3.09 at the time of such sale, transfer, disbursement or disposition;

- (ii) in whole or in part, with the consent of the Holders of the requisite percentage of Notes in accordance with the provisions in **Section 8.02**;
- (iii) in whole with respect to the Collateral of any Guarantor, upon the release of the Guarantee of such Guarantor in accordance with this Indenture;
- (iv) in whole or in part, as applicable, as to all or any portion of the Collateral which has been taken by eminent domain, condemnation or similar circumstances; and
- (v) in part, in accordance with the applicable provisions of the Security Documents.

(B) Upon the request of the Company pursuant to an Officer's Certificate and Opinion of Counsel confirming that all conditions precedent hereunder and under the Security Documents, if any, have been met, and any instruments of termination, satisfaction or release prepared by the Company or the Guarantors, as the case may be, the Collateral Agent, without the consent of any Holder or the Trustee and at the expense of the Company or the Guarantors, shall execute, deliver and acknowledge and/or authorize the filing by Company or the Guarantors of such instruments or releases (in form reasonably satisfactory to the Collateral Agent) reasonably requested by the Company in order to evidence the release from the Liens created by the Security Documents of any Collateral permitted to be released pursuant to this Indenture, the Security Documents, any such release to be made without any recourse, representation or warranty of the Collateral Agent.

**Section 12.05. RELEASE UPON SATISFACTION AND DISCHARGE OR AMENDMENT**

(A) The Liens on all Collateral granted under the Security Documents that secure the Notes and the Guarantees shall be automatically terminated and released without the need for further action by any Person:

- (i) upon the full and final payment and performance of the Company's and the Guarantors' respective obligations under this Indenture, the Notes and the Guarantees (other than contingent obligations that have yet to accrue);
- (ii) upon satisfaction and discharge of this Indenture as described under Article 10; or
- (iii) with the written consent of Holders of 66 2/3% of the aggregate principal amount of the Notes then outstanding;
- (iv) upon a sale, disposition, or otherwise, a transfer of property subject to such Lien as part of, or in connection with, a transaction that is not prohibited by the terms of the Note Documents to any Person that is not a Note Party; or
- (v) upon the applicable property becoming an Excluded Asset;
- (vi) upon any Person becoming an Excluded Subsidiary, as to the assets owned by such Excluded Subsidiary (or with respect to which such Excluded Subsidiary has rights); or
- (vii) upon the application of the covenant suspension provision set forth in

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**Section 3.14** of this Indenture.

(B) Upon the request of the Company contained in an Officer's Certificate and Opinion of Counsel confirming that all conditions precedent hereunder and under the Security Documents have been met, any instruments of termination, satisfaction or release prepared by the Company or the Guarantors, as the case may be, the Collateral Agent, without the consent of any Holder or the Trustee and at the expense of the Company or the Guarantors, shall execute, deliver and acknowledge and/or authorize the filing by the Company or the Guarantors of such instruments or releases to evidence the release from the Liens created by the Security Documents of any Collateral permitted to be released pursuant to this Indenture, or the Security Documents, any such release to be made without any recourse, representation or warranty of the Collateral Agent and to be in a form reasonably acceptable to the Collateral Agent.

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**Section 12.06. FORM AND SUFFICIENCY OF RELEASE AND SUBORDINATION**

In the event that the Company or any Guarantor has sold, exchanged, or otherwise disposed of or proposes to sell, exchange or otherwise dispose of any portion of the Collateral that may be sold, exchanged or otherwise disposed of by the Company or such Guarantor to any Person other than the Company or a Guarantor, and the Company or such Guarantor requests, pursuant to an Officer's Certificate and Opinion of Counsel confirming that all conditions precedent hereunder and under the Security Documents to the release of such Collateral have been met, that (a) the Trustee or Collateral Agent furnish a written disclaimer, release or quit-claim of any interest in such property under this Indenture and the Security Documents, or, (b) to the extent applicable to such Collateral, take all action that is necessary or reasonably requested by the Company in writing (in each case at the expense of the Company) to release and reconvey to the Company or such Guarantor, without recourse, such Collateral or deliver such Collateral in its possession to the Company or such Guarantor, the Trustee and the Collateral Agent, as applicable, shall execute, acknowledge (without any recourse, representation and warranty) and deliver to and/or authorize the filing by the Company or such Guarantor (in the form prepared by the Company at the Company's sole expense) such an instrument (in form reasonably satisfactory to the Collateral Agent) promptly or take such other action so requested, including deliver to the Company or such Guarantor applicable Collateral in Collateral Agent's possession after satisfaction of the conditions set forth herein for delivery of any such release.

**Section 12.07. PURCHASER PROTECTED**

No purchaser or grantee of any property or rights purported to have been released from the Lien of this Indenture or of the Security Documents shall be bound to ascertain the authority of the Trustee or the Collateral Agent, as applicable, to execute the release or to inquire as to the existence of any conditions herein prescribed for the exercise of such authority; nor shall any purchaser or grantee of any property or rights permitted by this Indenture to be sold or otherwise disposed of by the Company be under any obligation to ascertain or inquire into the authority of the Company to make such sale or other disposition.

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**Section 12.08. AUTHORIZATION OF ACTIONS TO BE TAKEN BY THE COLLATERAL AGENT UNDER THE SECURITY DOCUMENTS**

(A) Subject to the provisions of the applicable Security Documents, each Holder, by acceptance of the Notes, appoints U.S. Bank Trust Company, National Association as Collateral Agent consents to the terms of and agrees that the Collateral Agent shall, and the Collateral Agent is hereby authorized and directed to, execute and deliver the Security Documents to which it is a party and all agreements, documents and instruments incidental thereto, binding the Holders to the terms thereof, and act in accordance with the terms thereof. For the avoidance of doubt, the Collateral Agent shall have no discretion under this Indenture or the Security Documents and whenever reference is made in this Indenture to any action by, consent, designation, specification, requirement or approval of, notice, request or other communication from, or other direction given or action to be undertaken or to be (or not to be) suffered or omitted by the Collateral Agent or to any election, decision, opinion, acceptance, use of judgment, expression or satisfaction or other exercise of discretion, rights or remedies to be made (or not to be made) by the Collateral Agent, it is understood in all cases that the Collateral Agent shall not be required to make or give and shall be fully protected in not making or giving any determination, consent, approval, request or direction without the written direction of the Holders of at least 50% in aggregate principal amount of then outstanding Notes, the Trustee or the Company, as applicable. This provision is intended solely for the benefit of the Collateral Agent and its successors and permitted assigns and is not intended to and will not entitle the other parties hereto to any defense, claim or counterclaim, or confer any rights or benefits on any party hereto. Further, the Collateral Agent shall be under no obligation to exercise any of its rights and powers under this Indenture at the request or direction of any Holders, unless such Holder shall have offered to the Collateral Agent security and indemnity satisfactory to the Collateral Agent against any loss, cost, liability or expense which might be incurred by the Collateral Agent in compliance with such direction or request and then only to the extent required by the terms of this Indenture.

(B) No provision of this Indenture or the Security Documents shall require the Collateral Agent to expend or risk its own funds or otherwise incur any financial liability in the performance of any of its duties hereunder or thereunder or to take or omit to take any action hereunder or thereunder or take any action at the request or direction of Holders or the Trustee if it shall have reasonable grounds for believing that repayment of such funds is not assured to it. Notwithstanding anything to the contrary contained in this Indenture or the Security Documents, in the event the Collateral Agent is entitled or required to commence an action to foreclose or otherwise exercise its remedies to acquire control or possession of the Collateral, the Collateral Agent shall not be required to commence any such action or exercise any remedy or take any such other action if the Collateral Agent has determined that the Collateral Agent may incur personal liability as a result of the presence at, or release on or from, the Collateral or such property, of any hazardous substances unless the Collateral Agent has received security or indemnity from the Holders in an amount and in a form satisfactory to the Collateral Agent in its sole discretion, protecting the Collateral Agent from all such liability. The Collateral Agent shall at any time be entitled to cease taking any action described in this clause if it no longer reasonably deems any indemnity, security or undertaking from the Company or the Holders to be sufficient.

(C) So long as an Event of Default is not continuing, the Company may direct the Collateral Agent in writing in connection with any action required or permitted by this Indenture or the Security Documents. During the continuance of an Event of Default, the Trustee, or the requisite Holders pursuant to Section 7.05, may direct the Collateral Agent in connection with any action required or permitted by this Indenture or the Security Documents.

(D) The Collateral Agent shall not be deemed to have knowledge or notice of the occurrence of any Default or Event of Default, unless the Collateral Agent shall have received written notice from the Trustee, a Holder or the Company referring to this Indenture, describing such Default or Event of Default and stating that such notice is a "notice of default." The Collateral Agent shall take such action with respect to such Default or Event of Default as may be requested by the Trustee or the Holders of at least 50% in aggregate principal amount of then outstanding Notes subject to this Article 12.

**Section 12.09. AUTHORIZATION OF RECEIPT OF FUNDS BY THE TRUSTEE UNDER THE SECURITY DOCUMENTS.** The Collateral Agent is authorized to receive any funds for the benefit of itself, the Trustee and the Holders distributed under the Security Documents and to make further distributions of such funds to itself, the Trustee and the Holders in accordance with the provisions of Section 7.11 and the other provisions of this Indenture. Such funds shall be held on deposit by the Trustee without investment (unless otherwise provided in this Indenture), and the Trustee shall have no liability for interest or other compensation thereon.

**Section 12.10. ACTION BY THE COLLATERAL AGENT.** Beyond the exercise of reasonable care in the custody thereof, the Collateral Agent shall have no duty as to any Collateral in its possession or control or in the possession or control of any agent or bailee or any income thereon or as to preservation of rights against prior parties or any other rights pertaining thereto. The Collateral Agent shall be deemed to have exercised reasonable care in the custody of the Collateral in its possession if the Collateral is accorded treatment substantially equal to that which the Collateral Agent accords its own property and shall not be liable or responsible for any loss or diminution in the value of any of the Collateral, by reason of the act or omission of any carrier, forwarding agency or other agent or bailee selected by the Collateral Agent in good faith and with reasonable care.

Neither the Trustee nor Collateral Agent shall be responsible for (i) the existence, genuineness or value of any of the Collateral; (ii) the validity, perfection, priority or enforceability of the Liens intended to be created by this Indenture or the Security Documents in any of the Collateral, whether impaired by operation of law or by reason of any action or omission to act on its part hereunder (except to the extent such action or omission constitutes gross negligence or willful misconduct on the part of the Collateral Agent (as determined by a final non-appealable order of a court of competent jurisdiction not subject to appeal)); (iii) the sufficiency of the Collateral; (iv) the validity of the title of the Company and the Guarantors to any of the Collateral; (v) insuring the Collateral; (vi) any action taken or omitted to be taken by it under or in connection with this Indenture or the transactions contemplated hereby (except for its own gross negligence or willful misconduct as determined by a final nonappealable order of a court of competent jurisdiction) or (vii) any recital, statement, representation, warranty, covenant or agreement made by the Company or any Affiliate of the Company, or any officer or Affiliate thereof, contained in this Indenture or in any certificate, report, statement or other document referred to or provided for in, or received by the Collateral Agent under or in connection with, this Indenture. The Company and the Guarantors shall be responsible for the maintenance of the Collateral and for the payment of taxes, charges or assessments upon the Collateral. For the avoidance of doubt, nothing herein



shall require the Collateral Agent or the Trustee to file financing statements or continuation statements, or be responsible for maintaining the security interests purported to be created and described herein (except for the safe custody of any Collateral in its possession and the accounting for moneys actually received by it under this Indenture or the Security Documents) and such responsibility shall be solely that of the Company. The Collateral Agent shall not be under any obligation to the Trustee or any Holder to ascertain or to inquire as to the observance or performance of any of the agreements contained in, or conditions of, this Indenture or to inspect the properties, books, or records of the Company or any of its Affiliates.

**Section 12.11. COMPENSATION AND INDEMNITY.**

(A) The Company shall pay to the Collateral Agent from time to time compensation as shall be agreed to in writing by the Company and the Collateral Agent for its acceptance of this Indenture, the Security Documents and services hereunder. The Company shall reimburse the Collateral Agent promptly upon request for all reasonable disbursements, advances and reasonable and documented out-of-pocket expenses incurred or made by it in connection with Collateral Agent's duties under this Indenture and the Security Documents, including the reasonable compensation, disbursements and expenses of the Collateral Agent's agents and counsel, except any disbursement, advance or expense as may be attributable to the Collateral Agent's willful misconduct or gross negligence.

(B) The Company and the Guarantors shall, jointly and severally, indemnify the Collateral Agent and any predecessor Collateral Agent and each of their agents, employees, officers and directors for, and hold them harmless against, any and all losses, liabilities, claims, damages or expenses (including the fees and expenses of counsel to the Collateral Agent and any environmental liabilities) incurred by it arising out of or in connection with the acceptance or administration of its duties under this Indenture and the Security Documents, including (i) any claim relating to the grant to the Collateral Agent of any Lien in any property or assets of the Company or the Guarantors and (ii) the costs and expenses of enforcing this Indenture and the Security Documents against the Company and the Guarantors (including this Section 12.11) and defending itself against or investigating any claim (whether asserted by the Company, the Guarantors, any Holder or any other Person) or liability in connection with the exercise or performance of any of its powers or duties hereunder or thereunder, except to the extent any such loss, liability, claim, damage or expense shall have been determined by a court of competent jurisdiction to have been attributable to its willful misconduct or gross negligence. The Collateral Agent shall notify the Company promptly of any claim for which it may seek indemnity. Failure by the Collateral Agent to so notify the Company shall not relieve the Company or the Guarantors of their obligations hereunder, except to the extent the Company or the Guarantors are materially prejudiced thereby. At the Collateral Agent's sole discretion, the Company and the Guarantors shall defend any claim or threatened claim asserted against the Collateral Agent, with counsel reasonably satisfactory to the Collateral Agent, and the Collateral Agent shall cooperate in the defense at the Company's and the Guarantors' expense. The Collateral Agent may have one separate U.S. counsel (and one separate foreign counsel in each applicable non-U.S. jurisdiction) and the Company and the Guarantors shall pay the reasonable fees and expenses of such counsel. The Company and the Guarantors need not pay for any settlement made without their consent, which consent shall not be unreasonably withheld.

(C) The Collateral Agent shall be entitled to all rights, privileges, immunities and protections of the Trustee set forth in this Indenture whether or not expressly stated therein, including but not limited to the right to be compensated, reimbursed and indemnified under Section 11.06, in the acceptance, execution, delivery and performance of the Security Documents as though fully set forth therein. Notwithstanding any provision to the contrary contained elsewhere in this Indenture or the Security Documents, the Collateral Agent shall not have any duties or responsibilities, except those expressly set forth in this Indenture or the Security Documents to which the Collateral Agent is a party, nor shall the Collateral Agent have or be deemed to have any fiduciary relationship with the Trustee, any Holder or the Company, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Indenture or the Security Documents or otherwise exist against the Collateral Agent. Without limiting the generality of the foregoing sentence, the use of the term "agent" in this Indenture with reference to the Collateral Agent is not intended to connote any fiduciary or other implied (or express) obligations arising under agency doctrine of any applicable law. Instead, such term is used merely as a matter of market custom, and is intended to create or reflect only an administrative relationship between independent contracting parties.

(D) The obligations of the Company and the Guarantors under this Section 12.11 shall survive the satisfaction and discharge of this Indenture and the resignation, removal or replacement of the Collateral Agent.

(E) To secure the Company's payment obligations in this **Section 12.11**, the Collateral Agent will have a lien prior to the Notes on all money or property held or collected by the Collateral Agent, except that held in trust to pay principal (including the Accreted Principal Amount) of, or interest on, particular Notes, which lien will survive the discharge of this Indenture.

**Section 12.12. POST-CLOSING COLLATERAL.** To the extent the Company and the Guarantors are not able to execute and deliver all Security Documents required in connection with the creation and perfection of the Liens of the Collateral Agent on the Collateral (to the extent required by this Indenture or such Security Documents) on or prior to the Issue Date, the Company and the Guarantors will use their commercially reasonable efforts to have all security interests in the Collateral duly created and enforceable and perfected, to the extent required by this Indenture or such Security Documents, within the time period required by the Security Documents.

### **Article 13. MISCELLANEOUS**

#### **Section 13.01. NOTICES.**

Any notice or communication by the Company or the Trustee (including in its capacity as the Collateral Agent or any Note Agent) to the other will be deemed to have been duly given if in writing and delivered in person or by first class mail (registered or certified, return receipt requested), facsimile transmission, electronic transmission or other similar means of unsecured electronic communication or overnight air courier guaranteeing next day delivery, or to the other's address, which initially is as follows:

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If to the Company:

Nogin, Inc.  
1775 Flight Way STE 400  
Tustin, CA 92782  
Attention: Jan Nugent; Geoffrey Van Haeren  
Email: [jnugent@nogin.com](mailto:jnugent@nogin.com); [gvanhaeren@nogin.com](mailto:gvanhaeren@nogin.com)

With a copy (which will not constitute notice) to:

Latham & Watkins LLP  
811 Main Street, Suite 3700  
Houston, TX 77002  
Attention: Ryan J. Maierson; John M. Greer; Ryan J. Lynch  
Email: [ryan.maierson@lw.com](mailto:ryan.maierson@lw.com); [john.greer@lw.com](mailto:john.greer@lw.com); [ryan.lynych@lw.com](mailto:ryan.lynych@lw.com)

If to the Trustee or the Collateral Agent:

U.S. Bank Trust Company, National Association  
Houston Greenway Plaza  
8 Greenway Plaza, Suite 1100  
EX-TX-CGW1 Attention Alejandro Hoyos, Vice President, Corporate Trust  
Telephone: (713)212-7576  
Email: [Alejandro.hoyos@usbank.com](mailto:Alejandro.hoyos@usbank.com)

The Company, the Trustee or the Collateral Agent, by notice to the other, may designate additional or different addresses (including facsimile numbers and electronic addresses) for subsequent notices or communications.

All notices and communications (other than those sent to Holders) will be deemed to have been duly given: (A) at the time delivered by hand, if personally delivered; (B) five (5) Business Days after being deposited in the mail, postage prepaid, if mailed; (C) when receipt acknowledged, if transmitted by facsimile, electronic transmission or other similar means of unsecured electronic communication; and (D) the next Business Day after timely delivery to the courier, if sent by overnight air courier guaranteeing next day delivery.

All notices or communications required to be made to a Holder pursuant to this Indenture must be made in writing and will be deemed to be duly sent or given in writing if mailed by first class mail, certified or registered, return receipt requested, or by overnight air courier guaranteeing next day delivery, to its address shown on the Register; *provided, however*, that a notice or communication to a Holder of a Global Note may, but need not, instead be sent pursuant to the Depository Procedures (in which case, such notice will be deemed to be duly sent or given in writing). The failure to send a notice or communication to a Holder, or any defect in such notice or communication, will not affect its sufficiency with respect to any other Holder. All notices, approvals, consents, requests and any communications hereunder must be in writing (provided that any communication sent to Trustee hereunder must be in the form of a document that is signed manually or by way of a digital signature), in English, and signatures of the parties hereto transmitted by facsimile, PDF or other electronic transmission (including any electronic signature

complying with the U.S. federal ESIGN Act of 2000, e.g., www.docusign.com) will constitute effective execution and delivery of this Indenture as to the other parties hereto and will be deemed to be their original signatures for all purposes; provided, notwithstanding anything to the contrary set forth herein, the Trustee is under no obligation to agree to accept electronic signatures in any form or format unless expressly agreed to by the Trustee pursuant to procedures approved by the Trustee. The Company agrees to assume all risks arising out of the use of digital signatures and electronic methods to submit communications to Trustee or the Collateral Agent, including the risk of the Trustee or the Collateral Agent acting on unauthorized instructions, and the risk of interception and misuse by third parties.

The Trustee and the Collateral Agent shall have the right to accept and act upon any notice, instruction, or other communication, including any funds transfer instruction, (each, a “**Notice**”) received pursuant to this Indenture by electronic transmission (including by e-mail, facsimile transmission, web portal or other electronic methods) and shall not have any duty to confirm that the person sending such Notice is, in fact, a person authorized to do so. Electronic signatures believed by the Trustee or the Collateral Agent to comply with the ESIGN Act of 2000 or other applicable law (including electronic images of handwritten signatures and digital signatures provided by DocuSign, Orbit, Adobe Sign or any other digital signature provider identified by any other party hereto and acceptable to the Trustee or the Collateral Agent, as applicable) shall be deemed original signatures for all purposes. Each other party to this Indenture assumes all risks arising out of the use of electronic signatures and electronic methods to send Notices to the Trustee or the Collateral Agent, including the risk of the Trustee or the Collateral Agent acting on an unauthorized Notice and the risk of interception or misuse by third parties. Notwithstanding the foregoing, the Trustee may in any instance and in its sole discretion require that a Notice in the form of an original document bearing a manual signature be delivered to the Trustee in lieu of, or in addition to, any such electronic Notice.

If the Trustee is then acting as the Depository’s custodian for the Notes, then, at the reasonable request of the Company to the Trustee, the Trustee will cause any notice prepared by the Company to be sent to any Holder(s) pursuant to the Depository Procedures, *provided* such request is evidenced in a Company Order delivered, together with the text of such notice, to the Trustee at least two (2) Business Days before the date such notice is to be so sent. For the avoidance of doubt, such Company Order need not be accompanied by an Officer’s Certificate or Opinion of Counsel. The Trustee will not have any liability relating to the contents of any notice that it sends to any Holder pursuant to any such Company Order.

If a notice or communication is mailed or sent in the manner provided above within the time prescribed, it will be deemed to have been duly given, whether or not the addressee receives it.

Notwithstanding anything to the contrary in this Indenture or the Notes, (A) whenever any provision of this Indenture requires a party to send notice to another party, no such notice need be sent if the sending party and the recipient are the same Person acting in different capacities; and (B) whenever any provision of this Indenture requires a party to send notice to more than one receiving party, and each receiving party is the same Person acting in different capacities, then only one such notice need be sent to such Person.

**Section 13.02. DELIVERY OF OFFICER'S CERTIFICATE AND OPINION OF COUNSEL AS TO CONDITIONS PRECEDENT.**

Upon any request or application by the Company to the Trustee or the Collateral Agent to take any action under this Indenture (other than the Opinion of Counsel described in (B) with respect to the initial authentication of Notes under this Indenture), the Company will furnish to the Trustee or the Collateral Agent, as applicable:

(A) an Officer's Certificate in form and substance reasonably satisfactory to the Trustee or the Collateral Agent, as applicable, that complies with **Section 13.03** and states that, in the opinion of the signatory thereto, all conditions precedent and covenants, if any, provided for in this Indenture relating to such action have been satisfied; and

(B) an Opinion of Counsel in form and substance reasonably satisfactory to the Trustee or the Collateral Agent, as applicable, that complies with **Section 13.03** and states that, in the opinion of such counsel, all such conditions precedent and covenants, if any, have been satisfied.

**Section 13.03. STATEMENTS REQUIRED IN OFFICER'S CERTIFICATE AND OPINION OF COUNSEL.**

Each Officer's Certificate (other than an Officer's Certificate pursuant to **Section 3.05**) or Opinion of Counsel with respect to compliance with a covenant or condition provided for in this Indenture will include:

(A) a statement that the signatory thereto has read such covenant or condition;

(B) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained therein are based;

(C) a statement that, in the opinion of such signatory, he, she or it has made such examination or investigation as is necessary to enable him, her or it to express an informed opinion as to whether or not such covenant or condition has been satisfied; and

(D) a statement as to whether, in the opinion of such signatory, such covenant or condition has been satisfied.

**Section 13.04. RULES BY THE TRUSTEE, THE REGISTRAR, THE PAYING AGENT, THE CONVERSION AGENT AND THE COLLATERAL AGENT.**

The Trustee may make reasonable rules for action by or at a meeting of Holders. The Registrar, Paying Agent, Conversion Agent and Collateral Agent each may make reasonable rules and set reasonable requirements for its functions.

**Section 13.05. NO PERSONAL LIABILITY OF DIRECTORS, OFFICERS, EMPLOYEES AND STOCKHOLDERS.**

No past, present or future director, officer, employee, incorporator or stockholder of the Company or any Guarantor, as such, will have any liability for any obligations of the Company or any Guarantor under this Indenture, the Notes or the Guarantees or for any claim based on, in respect of, or by reason of, such obligations or their creation. By accepting any Note, each Holder waives and releases all such liability. Such waiver and release are part of the consideration for the issuance of the Notes.

**Section 13.06. GOVERNING LAW; WAIVER OF JURY TRIAL.**

THIS INDENTURE, THE GUARANTEES AND THE NOTES, AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS INDENTURE, THE GUARANTEES OR THE NOTES, WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK. EACH OF THE COMPANY, THE GUARANTORS, THE TRUSTEE, THE COLLATERAL AGENT AND THE HOLDERS OF THE NOTES BY THEIR ACCEPTANCE THEREOF IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS INDENTURE, THE NOTES, THE GUARANTEES OR THE TRANSACTIONS CONTEMPLATED BY THIS INDENTURE, THE NOTES OR THE GUARANTEES.

**Section 13.07. SUBMISSION TO JURISDICTION.**

Any legal suit, action or proceeding arising out of or based upon this Indenture or the transactions contemplated by this Indenture shall be instituted only in the federal courts of the United States of America located in the City of New York or the courts of the State of New York, in each case located in the City of New York (collectively, the "**Specified Courts**"), and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding. Service of any process, summons, notice or document by mail (to the extent allowed under any applicable statute or rule of court) to such party's address set forth in **Section 13.01** will be effective service of process for any such suit, action or proceeding brought in any such court. Each of the Company, the Trustee, the Collateral Agent and each Holder (by its acceptance of any Note) irrevocably and unconditionally waives any objection to the laying of venue of any suit, action or other proceeding in the Specified Courts and irrevocably and unconditionally waives and agrees not to plead or claim any such suit, action or other proceeding has been brought in an inconvenient forum.

**Section 13.08. No ADVERSE INTERPRETATION OF OTHER AGREEMENTS.**

Neither this Indenture nor the Notes may be used to interpret any other indenture, note, loan or debt agreement of the Company or its Subsidiaries or of any other Person, and no such indenture, note, loan or debt agreement may be used to interpret this Indenture or the Notes.

**Section 13.09. SUCCESSORS.**

All agreements of the Company in this Indenture and the Notes will bind its successors. All agreements of the Trustee and the Collateral Agent in this Indenture will bind its successors.

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**Section 13.10. FORCE MAJEURE.**

The Trustee, the Collateral Agent and each Note Agent will not incur any liability for not performing or for any delay in performing any act or fulfilling any duty, obligation or responsibility under this Indenture or the Notes by reason of any occurrence beyond its control (including any act or provision of any present or future law or regulation or governmental authority, act of God, earthquakes, fires, floods, sabotage, epidemics, pandemics, riots, interruptions loss or malfunction of utilities, computer (hardware or software) or communications service, accidents, acts of war, civil or military unrest, labor disputes, acts of civil or military authority or governmental actions, local or national disturbance or disaster, act of terrorism or unavailability of the Federal Reserve Bank wire or facsimile or other wire or communication facility).

**Section 13.11. U.S.A. PATRIOT ACT.**

The Company acknowledges that, in accordance with Section 326 of the U.S.A. PATRIOT Act, the Trustee and the Collateral Agent, like all financial institutions, in order to help fight the funding of terrorism and money laundering, is required to obtain, verify and record information that identifies each person or legal entity that establishes a relationship or opens an account with the Trustee and the Collateral Agent. The Company agrees to provide the Trustee and the Collateral Agent with such information as it may request to enable the Trustee to comply with the U.S.A. PATRIOT Act.

**Section 13.12. CALCULATIONS.**

The Company will be responsible for making all calculations called for under this Indenture or the Notes, including determinations of the Last Reported Sale Price, the Accreted Principal Amount, any Interest Make-Whole Payment, accrued interest on the Notes (including Special Interest and Additional Interest) and the Conversion Rate, and adjustments thereto. None of the Trustee, the Paying Agent, the Registrar nor the Conversion Agent will have any liability or responsibility for any calculation under this Indenture or in connection with the Notes, any information used in connection with such calculation or any determination made in connection with a conversion.

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 its calculations in writing to the Trustee and the Conversion Agent, and each of the Trustee and the Conversion Agent may rely conclusively on the accuracy of the Company's calculations without independent verification. The Trustee will promptly forward a copy of each such schedule to a Holder upon its written request therefor.

**Section 13.13. SEVERABILITY; ENTIRE AGREEMENT.**

If a court of competent jurisdiction declares any provision of this Indenture or the Notes is invalid, illegal or unenforceable, then the validity, legality and enforceability of the remaining provisions of this Indenture or the Notes will not in any way be affected or impaired thereby. This Indenture and the exhibits hereto set forth the entire agreement and understanding of the parties related to this transaction and supersede all prior agreements and understandings, written or oral.

**Section 13.14. COUNTERPARTS.**

The parties may sign any number of copies of this Indenture. Each signed copy will be an original, and all of them together represent the same agreement. Delivery of an executed counterpart of this Indenture by facsimile, electronically in portable document format or in any other format will be effective as delivery of a manually executed counterpart.

**Section 13.15. TABLE OF CONTENTS, HEADINGS, ETC.**

The table of contents and the headings of the Articles and Sections of this Indenture have been inserted for convenience of reference only, are not to be considered a part of this Indenture and will in no way modify or restrict any of the terms or provisions of this Indenture.

**Section 13.16. WITHHOLDING TAXES.**

Each Holder of a Note agrees, and each beneficial owner of an interest in a Global Note, by its acquisition of such interest, is deemed to agree (1) to provide upon reasonable request or as required under applicable law, tax forms or other documentation (including any applicable Internal Revenue Service Form W-8/W-9 as well as certifications indicating eligibility for the portfolio interest exemption) reasonably satisfactory to the Company or other applicable withholding agent to establish an exemption from U.S. withholding tax on payments and deliveries hereunder as well as an exemption from, or a reduction in the rate of, U.S. withholding that may apply to any constructive dividend (e.g., under Section 305(c) of the Code), and (2) that, if a Holder is deemed to have received a distribution subject to tax as a result of an adjustment or the non-occurrence of an adjustment to the Conversion Rate or is otherwise subject to any withholding tax, (A) then the Company or other applicable withholding agent, as applicable, may, at its option, withhold or set off any applicable withholding taxes or backup withholding on behalf of such Holder or beneficial owner against interest and payments upon conversion, repurchase or maturity of the Notes, and (B) if the Company or other applicable withholding agent pays any such withholding taxes or backup withholding on behalf of such Holder or beneficial owner, then the Company or such withholding agent, as applicable, may, at its option, withhold from or set off such payments against payments of cash or the delivery of other Conversion Consideration on such Note, any payments on the Common Stock or sales proceeds received by, or other funds or assets of, such Holder or the beneficial owner of such Note.

*[The Remainder of This Page Intentionally Left Blank; Signature Page Follows]*



IN WITNESS WHEREOF, the parties to this Indenture have caused this Indenture to be duly executed as of the date first written above.

SOFTWARE ACQUISITION GROUP INC. III

By: /s/ Jonathan Huberman  
Name: Jonathan Huberman  
Title: Chairman, Chief Executive Officer and  
Chief Financial Officer

BRANDED ONLINE, INC.

By: /s/ Jan-Christopher Nugent  
Name: Jan-Christopher Nugent  
Title: Chief Executive Officer

NATIVE BRANDS GROUP LLC

By: /s/ Geoffrey Van Haeren  
Name: Geoffrey Van Haeren  
Title: President

U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION, AS  
TRUSTEE

By: /s/ Alejandro Hoyos  
Name: Alejandro Hoyos  
Title: Vice President

[Signature Page to Indenture]

FORM OF NOTE

[Insert Global Note Legend, if applicable]

[Insert Restricted Note Legend, if applicable]

[Insert Non-Affiliate Legend, if applicable]

[Insert Original Issue Discount Legend]

**SOFTWARE ACQUISITION GROUP INC. III****7.00% Convertible Senior Note due 2026**

CUSIP No.: [ ]<sup>1</sup>  
ISIN No.: [ ]<sup>2</sup>

Certificate No. [ ]

Software Acquisition Group Inc. III, a Delaware corporation, for value received, promises to pay to [Cede & Co.], or its registered assigns, the principal sum of Accreted Principal Amount per \$1,000 Original Principal Amount of this Note [(as such Original Principal Amount is revised by the attached Schedule of Exchanges of Interests in the Global Note)]<sup>3</sup> on September 1, 2026 and to pay interest thereon, as provided in the Indenture referred to below, until the Accreted Principal Amount and all accrued and unpaid interest are paid or duly provided for.

Interest Payment Dates: March 1 and September 1 of each year, commencing on March 1, 2023.

Regular Record Dates: February 15 and August 15 (whether or not a Business Day).

Additional provisions of this Note are set forth on the other side of this Note.

**[The Remainder of This Page Intentionally Left Blank; Signature Page Follows]**

<sup>1</sup> Insert for Global Notes only.

<sup>2</sup> Insert for Global Notes only.

<sup>3</sup> Insert bracketed language for Global Notes only.

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**IN WITNESS WHEREOF**, Software Acquisition Group Inc. III has caused this instrument to be duly executed as of the date set forth below.

**SOFTWARE ACQUISITION GROUP INC. III**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name:  
Title:

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TRUSTEE'S CERTIFICATE OF AUTHENTICATION

U.S. Bank Trust Company, National Association, as Trustee, certifies that this is one of the Notes referred to in the within-mentioned Indenture.

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Authorized Signatory

SOFTWARE ACQUISITION GROUP INC. III

7.00% Convertible Senior Note due 2026

This Note is one of a duly authorized issue of notes of SOFTWARE ACQUISITION GROUP INC. III, a Delaware corporation (the “**Company**”), designated as its 7.00% Convertible Senior Notes due 2026 (the “**Notes**”), all issued or to be issued pursuant to an indenture, dated as of August 26, 2022 (as the same may be amended from time to time, the “**Indenture**”), among the Company, the Guarantors party thereto and U.S. Bank Trust Company, National Association, as trustee. Capitalized terms used in this Note without definition have the respective meanings ascribed to them in the Indenture.

The Indenture sets forth the rights and obligations of the Company, the Trustee and the Holders and the terms of the Notes. Notwithstanding anything to the contrary in this Note, to the extent that any provision of this Note conflicts with the provisions of the Indenture, the provisions of the Indenture will control.

1. **Interest.** This Note will accrue interest at a rate and in the manner set forth in Section 2.05 of the Indenture. Stated Interest on this Note will begin to accrue from, and including, August 26, 2022.

2. **Maturity.** This Note will mature on September 1, 2026, unless earlier repurchased or converted.

3. **Method of Payment.** Cash amounts due on this Note will be paid in the manner set forth in Section 2.04 of the Indenture.

4. **Accretion.** Commencing on the Issue Date, to, but, and including, the Maturity Date, the principal amount of this Note shall accrete in the manner provided in **Section 2.03(B)** of the Indenture.

5. **Persons Deemed Owners.** The Holder of this Note will be treated as the owner of this Note for all purposes.

6. **Denominations; Transfers and Exchanges.** All Notes will be in registered form, without coupons, in principal amounts equal to any Authorized Denominations. Subject to the terms of the Indenture, the Holder of this Note may transfer or exchange this Note by presenting it to the Registrar and delivering any required documentation or other materials.

7. **Right of Holders to Require the Company to Repurchase Notes upon a Fundamental Change** If a Fundamental Change occurs, then each Holder will have the right to require the Company to repurchase such Holder’s Notes (or any portion thereof in an Authorized Denomination) for cash in the manner, and subject to the terms, set forth in Section 4.02 of the Indenture.

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8. **No Redemption Right.** The Company does not have the right to redeem the Notes at its election.

9. **Conversion.** The Holder of this Note may convert this Note into Conversion Consideration in the manner, and subject to the terms, set forth in Article 5 of the Indenture.

10. **When the Company May Merge, Etc.** Article 6 of the Indenture places limited restrictions on the Company's ability to be a party to a Business Combination Event.

11. **Defaults and Remedies.** If an Event of Default occurs, then the Accreted Principal Amount of, and all accrued and unpaid interest on, all of the Notes then outstanding may (and, in certain circumstances, will automatically) become due and payable in the manner, and subject to the terms, set forth in Article 7 of the Indenture.

12. **Registration Rights.** The Holder of this Note is entitled to registration rights as set forth in the Subscription Agreement. Each Holder shall be entitled to receive Additional Interest in certain circumstances, all as set forth in the Subscription Agreement and Section 3.04 of the Indenture.

13. **Amendments, Supplements and Waivers.** The Company and the Trustee may amend or supplement the Indenture or the Notes or waive compliance with any provision of the Indenture or the Notes in the manner, and subject to the terms, set forth in Section 7.05 and Article 8 of the Indenture.

14. **No Personal Liability of Directors, Officers, Employees and Stockholders.** No past, present or future director, officer, employee, incorporator or stockholder of the Company, as such, will have any liability for any obligations of the Company under the Indenture or the Notes or for any claim based on, in respect of, or by reason of, such obligations or their creation. By accepting any Note, each Holder waives and releases all such liability. Such waiver and release are part of the consideration for the issuance of the Notes.

15. **Authentication.** No Note will be valid until it is authenticated by the Trustee. A Note will be deemed to be duly authenticated only when an authorized signatory of the Trustee (or a duly appointed authenticating agent) manually signs the certificate of authentication of such Note.

16. **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).

17. **Governing Law.** THIS NOTE, AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS NOTE, WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

\* \* \*

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To request a copy of the Indenture, which the Company will provide to any Holder at no charge, please send a written request to the following address:

Nogin, Inc.  
1775 Flight Way STE 400  
Tustin, CA 92782  
Attention: Jan Nugent; Geoffrey Van Haeren

**SCHEDULE OF EXCHANGES OF INTERESTS IN THE GLOBAL NOTE<sup>4</sup>**

ORIGINAL PRINCIPAL AMOUNT OF THIS GLOBAL NOTE: \$[ ]

The following exchanges, transfers or cancellations of this Global Note have been made:

Date	Amount of Increase (Decrease) in Original Principal Amount of this Global Note	Original Principal Amount of this Global Note After Such Increase (Decrease)	Signature of Authorized Signatory of Trustee

<sup>4</sup> Insert for Global Notes only.



**NOTICE OF CONVERSION**  
**SOFTWARE ACQUISITION GROUP INC. III**

7.00% Convertible Senior Notes due 2026

Subject to the terms of the Indenture, by executing and delivering this Notice of Conversion, the undersigned Holder of the Note identified below directs the Company to convert (check one):

the entire principal amount of

\$ \_\_\_\_\_<sup>5</sup> aggregate principal amount of

the Note identified by CUSIP No. \_\_\_\_\_ and Certificate No. \_\_\_\_\_.

The undersigned acknowledges that if the Conversion Date of a Note to be converted is after a Regular Record Date and before the next Interest Payment Date, then such Note, when surrendered for conversion, must, in certain circumstances, be accompanied with an amount of cash equal to the interest that would have accrued on such Note to, but excluding, such Interest Payment Date.

Date: \_\_\_\_\_

\_\_\_\_\_  
(Legal Name of Holder)

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

Name:

Title:

Signature Guaranteed:

\_\_\_\_\_  
Participant in a Recognized Signature  
Guarantee Medallion Program

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

Authorized Signatory

<sup>5</sup> \_\_\_\_\_  
Must be an Authorized Denomination.

**FUNDAMENTAL CHANGE REPURCHASE NOTICE**

**SOFTWARE ACQUISITION GROUP INC. III**

7.00% Convertible Senior Notes due 2026

Subject to the terms of the Indenture, by executing and delivering this Fundamental Change Repurchase Notice, the undersigned Holder of the Note identified below is exercising its Fundamental Change Repurchase Right with respect to (check one):

the entire principal amount of

\$ \_\_\_\_\_<sup>6</sup> aggregate principal amount of

the Note identified by CUSIP No. \_\_\_\_\_ and Certificate No. \_\_\_\_\_.

The undersigned acknowledges that this Note, 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:

Signature Guaranteed:

\_\_\_\_\_  
Participant in a Recognized Signature  
Guarantee Medallion Program

By: \_\_\_\_\_  
Authorized Signatory

<sup>6</sup> \_\_\_\_\_  
Must be an Authorized Denomination.

**ASSIGNMENT FORM**

**SOFTWARE ACQUISITION GROUP INC. III**

7.00% Convertible Senior Notes due 2026

Subject to the terms of the Indenture, the undersigned Holder of the within Note assigns to:

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

Address: \_\_\_\_\_

Social security or tax identification number: \_\_\_\_\_

the within Note and all rights thereunder irrevocably appoints:

as agent to transfer the within Note on the books of the Company. The agent may substitute another to act for him/her.

Date: \_\_\_\_\_

\_\_\_\_\_  
(Legal Name of Holder)

By: \_\_\_\_\_  
Name:  
Title:

Signature Guaranteed:

\_\_\_\_\_  
Participant in a Recognized Signature  
Guarantee Medallion Program

By: \_\_\_\_\_  
Authorized Signatory

TRANSFEROR ACKNOWLEDGMENT

If the within Note bears a Restricted Note Legend, the undersigned further certifies that (check one):

- 1.  Such Transfer is being made to the Company or a Subsidiary of the Company.
- 2.  Such Transfer is being made pursuant to, and in accordance with, a registration statement that is effective under the Securities Act at the time of the Transfer.
- 3.  Such Transfer is being made pursuant to, and in accordance with, Rule 144A under the Securities Act, and, accordingly, the undersigned further certifies that the within Note is being transferred to a Person that the undersigned reasonably believes is purchasing the within Note for its own account, or for one or more accounts with respect to which such Person exercises sole investment discretion, and such Person and each such account is a "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act in a transaction meeting the requirements of Rule 144A. **If this item is checked, then the transferee must complete and execute the acknowledgment contained on the next page**
- 4.  Such Transfer is being made pursuant to, and in accordance with, any other available exemption from the registration requirements of the Securities Act (including, if available, the exemption provided by Rule 144 under the Securities Act).

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Legal Name of Holder)

By: \_\_\_\_\_  
Name:  
Title:

Signature Guaranteed:  
  
\_\_\_\_\_  
(Participant in a Recognized Signature  
Guarantee Medallion Program)

By: \_\_\_\_\_  
Authorized Signatory

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TRANSFeree ACKNOWLEDGMENT

The undersigned represents that it is purchasing the within Note for its own account, or for one or more accounts with respect to which the undersigned exercises sole investment discretion, and that the undersigned and each such account is a "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act. The undersigned acknowledges that the transferor is relying, in transferring the within Note on the exemption from the registration and prospectus-delivery requirements of the Securities Act of 1933, as amended, provided by Rule 144A and that the undersigned has received such information regarding the Company as the undersigned has requested pursuant to Rule 144A.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Name of Transferee)

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

Name:

Title:

FORM OF RESTRICTED NOTE LEGEND

(Notes other than Accredited Investor Notes)

THE OFFER AND SALE OF THIS NOTE AND THE SHARES OF CLASS A COMMON STOCK ISSUABLE UPON CONVERSION OF THIS NOTE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND THIS NOTE AND SUCH SHARES MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT IN ACCORDANCE WITH THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF OR THEREOF OR OF A BENEFICIAL INTEREST HEREIN OR THEREIN, THE ACQUIRER:

- (1) REPRESENTS THAT IT AND ANY ACCOUNT FOR WHICH IT IS ACTING IS A "QUALIFIED INSTITUTIONAL BUYER" (WITHIN THE MEANING OF RULE 144A UNDER THE SECURITIES ACT) AND THAT IT EXERCISES SOLE INVESTMENT DISCRETION WITH RESPECT TO EACH SUCH ACCOUNT, AND
- (2) AGREES FOR THE BENEFIT OF SOFTWARE ACQUISITION GROUP INC. III (THE "COMPANY") THAT IT WILL NOT OFFER, SELL, PLEDGE OR OTHERWISE TRANSFER THIS NOTE AND THE SHARES OF CLASS A COMMON STOCK ISSUABLE UPON CONVERSION OF THIS NOTE OR ANY BENEFICIAL INTEREST HEREIN, EXCEPT ONLY:
  - (A) TO THE COMPANY OR ANY SUBSIDIARY THEREOF;
  - (B) PURSUANT TO A REGISTRATION STATEMENT THAT IS EFFECTIVE UNDER THE SECURITIES ACT;
  - (C) TO A QUALIFIED INSTITUTIONAL BUYER IN COMPLIANCE WITH RULE 144A UNDER THE SECURITIES ACT;
  - (D) PURSUANT TO RULE 144 UNDER THE SECURITIES ACT; OR
  - (E) PURSUANT TO ANY OTHER EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

BEFORE THE REGISTRATION OF ANY SALE OR TRANSFER IN ACCORDANCE WITH (2)(C), (D) OR (E) ABOVE, THE COMPANY, THE TRUSTEE AND THE REGISTRAR RESERVE THE RIGHT TO REQUIRE THE DELIVERY OF SUCH CERTIFICATES OR OTHER DOCUMENTATION OR EVIDENCE AS THEY MAY REASONABLY REQUIRE IN ORDER TO DETERMINE THAT THE PROPOSED SALE OR TRANSFER IS BEING MADE IN COMPLIANCE WITH THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS.

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THIS NOTE AND THE SHARES OF COMMON STOCK, IF ANY, ISSUABLE UPON CONVERSION OF THIS NOTE SHALL BE ENTITLED TO THE BENEFITS OF THAT CERTAIN SUBSCRIPTION AGREEMENT, DATED APRIL 19, 2022, AMONG SOFTWARE ACQUISITION GROUP INC. III AND THE SUBSCRIBERS (AS DEFINED IN THE INDENTURE, DATED AS OF AUGUST 26, 2022, AMONG THE COMPANY, THE GUARANTORS PARTY THERETO AND U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION, AS TRUSTEE AND COLLATERAL AGENT).

B1A-2

FORM OF RESTRICTED NOTE LEGEND

(Accredited Investor Notes)

THE OFFER AND SALE OF THIS NOTE AND THE SHARES OF CLASS A COMMON STOCK ISSUABLE UPON CONVERSION OF THIS NOTE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND THIS NOTE AND SUCH SHARES MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT IN ACCORDANCE WITH THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF OR THEREOF (OR OF A BENEFICIAL INTEREST HEREIN OR THEREIN), THE ACQUIRER AGREES FOR THE BENEFIT OF SOFTWARE ACQUISITION GROUP INC. III (THE "COMPANY") THAT IT WILL NOT OFFER, SELL, PLEDGE OR OTHERWISE TRANSFER THIS NOTE AND THE SHARES OF CLASS A COMMON STOCK ISSUABLE UPON CONVERSION OF THIS NOTE OR ANY BENEFICIAL INTEREST HEREIN OR THEREIN, EXCEPT ONLY:

- (A) TO THE COMPANY OR ANY SUBSIDIARY THEREOF;
- (B) PURSUANT TO A REGISTRATION STATEMENT THAT IS EFFECTIVE UNDER THE SECURITIES ACT;
- (C) TO A QUALIFIED INSTITUTIONAL BUYER IN COMPLIANCE WITH RULE 144A UNDER THE SECURITIES ACT;
- (D) PURSUANT TO RULE 144 UNDER THE SECURITIES ACT; OR
- (E) PURSUANT TO ANY OTHER EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

BEFORE THE REGISTRATION OF ANY SALE OR TRANSFER IN ACCORDANCE WITH (C), (D) OR (E) ABOVE, THE COMPANY, THE TRUSTEE AND THE REGISTRAR RESERVE THE RIGHT TO REQUIRE THE DELIVERY OF SUCH CERTIFICATES OR OTHER DOCUMENTATION OR EVIDENCE AS THEY MAY REASONABLY REQUIRE IN ORDER TO DETERMINE THAT THE PROPOSED SALE OR TRANSFER IS BEING MADE IN COMPLIANCE WITH THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS.



FORM OF GLOBAL NOTE LEGEND

THIS IS A GLOBAL NOTE WITHIN THE MEANING OF THE INDENTURE HEREINAFTER REFERRED TO AND IS REGISTERED IN THE NAME OF THE DEPOSITARY OR A NOMINEE OF THE DEPOSITARY, WHICH MAY BE TREATED BY THE COMPANY, THE TRUSTEE AND ANY AGENT THEREOF AS THE OWNER AND HOLDER OF THIS NOTE FOR ALL PURPOSES.

UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY ("DTC") TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT HEREON IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL SINCE THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.

TRANSFERS OF THIS GLOBAL NOTE WILL BE LIMITED TO TRANSFERS IN WHOLE, BUT NOT IN PART, TO NOMINEES OF DTC, OR TO A SUCCESSOR THEREOF OR SUCH SUCCESSOR'S NOMINEE, AND TRANSFERS OF PORTIONS OF THIS GLOBAL NOTE WILL BE LIMITED TO TRANSFERS MADE IN ACCORDANCE WITH THE RESTRICTIONS SET FORTH IN ARTICLE 2 OF THE INDENTURE HEREINAFTER REFERRED TO.

FORM OF NON-AFFILIATE LEGEND

NO AFFILIATE (AS DEFINED IN RULE 144 UNDER THE SECURITIES ACT) OF THE COMPANY OR PERSON THAT HAS BEEN AN AFFILIATE (AS DEFINED IN RULE 144 UNDER THE SECURITIES ACT) OF THE COMPANY DURING THE THREE IMMEDIATELY PRECEDING MONTHS MAY PURCHASE, OTHERWISE ACQUIRE OR OWN THIS SECURITY OR A BENEFICIAL INTEREST HEREIN.

B3-1

FORM OF ORIGINAL ISSUE DISCOUNT LEGEND

THIS NOTE WILL BE TREATED AS ISSUED WITH ORIGINAL ISSUE DISCOUNT FOR U.S. FEDERAL INCOME TAX PURPOSES (“OID”). HOLDERS MAY OBTAIN THE ISSUE PRICE, THE AMOUNT OF OID, THE ISSUE DATE AND THE YIELD TO MATURITY BY SUBMITTING A WRITTEN REQUEST TO: NOGIN, INC. 1775 FLIGHT WAY STE 400 TUSTIN, CA 92782, ATTENTION: JAN NUGENT; GEOFFREY VAN HAEREN.

## FORM OF SUPPLEMENTAL INDENTURE

## TO BE DELIVERED BY SUBSEQUENT GUARANTORS

[\_\_\_\_\_] Supplemental Indenture (this "Supplemental Indenture"), dated as of \_\_\_\_\_ among Software Acquisition Group Inc. III (the "Company"), \_\_\_\_\_ (the "Guaranteeing Subsidiary"), a subsidiary of the Company, and U.S. Bank Trust Company, National Association, as trustee (the "Trustee").

## WITNESSETH

WHEREAS, the Company has heretofore executed and delivered to the Trustee an indenture (as amended, modified or supplemented from time to time, the "Indenture"), dated as of August 26, 2022, providing for the issuance of an unlimited aggregate principal amount of 7.00% Convertible Senior Notes due 2026 (the "Notes");

WHEREAS, the Indenture provides that under certain circumstances the Guaranteeing Subsidiary may execute and deliver to the Trustee a supplemental indenture pursuant to which the Guaranteeing Subsidiary shall unconditionally guarantee all of the Company's Obligations under the Notes and the Indenture on the terms and conditions set forth herein and under the Indenture (the "Guarantee"); and

WHEREAS, pursuant to Section 8.01(b) of the Indenture, the Trustee is authorized to execute and deliver this Supplemental Indenture without the consent of Holders.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties mutually covenant and agree for the equal and ratable benefit of the Holders as follows:

Capitalized Terms. Capitalized terms used herein without definition shall have the meanings assigned to them in the Indenture.

Agreement to Guarantee. The Guaranteeing Subsidiary hereby agrees to be a Guarantor under the Indenture and to be bound by the terms of the Indenture applicable to Guarantors, including Article 9 thereof.

Execution and Delivery. The Guaranteeing Subsidiary agrees that the Guarantee shall remain in full force and effect notwithstanding the absence of the endorsement of any notation of such Guarantee on the Notes.

Governing Law. THIS SUPPLEMENTAL INDENTURE WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

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Counterparts. The parties may sign any number of copies of this Supplemental Indenture. Each signed copy, which may be delivered by facsimile or PDF transmission, shall be an original, but all of them together represent the same agreement. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes. Signatures of the parties hereto transmitted by facsimile, PDF or other electronic transmission (including any electronic signature complying with the U.S. federal ESIGN Act of 2000, e.g., www.docusign.com) will constitute effective execution and delivery of this Supplemental Indenture as to the other parties hereto will be deemed to be their original signatures for all purposes.

Effect of Headings. The Section headings herein are for convenience only and shall not affect the construction hereof.

The Trustee. The Trustee shall not be responsible in any manner whatsoever for or in respect of the validity or sufficiency of this Supplemental Indenture or for or in respect of the recitals contained herein, all of which recitals are made solely by the Guaranteeing Subsidiary.

Ratification of Indenture; Supplemental Indenture Part of Indenture. Except as expressly amended hereby, the Indenture is in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder heretofore or hereafter authenticated and delivered shall be bound hereby.

Representations and Warranties by Guaranteeing Subsidiary. The Guaranteeing Subsidiary hereby represents and warrants to the Trustee that this Supplemental Indenture has been duly and validly executed and delivered by it and constitutes its legal, valid and binding obligation, enforceable against it in accordance with its terms and the terms of the Indenture.

[Signature pages follow]

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IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed, all as of the date first above written.

SOFTWARE ACQUISITION GROUP INC. III

By: \_\_\_\_\_  
Name:  
Title:

[GUARANTEEING SUBSIDIARY]

By: \_\_\_\_\_  
Name:  
Title:

U.S. BANK TRUST COMPANY, NATIONAL  
ASSOCIATION, as Trustee

By: \_\_\_\_\_  
Name:  
Title:

## FORM OF NOTATION OF GUARANTEE

For value received, each Guarantor (which term includes any successor Person under the Indenture) has, jointly and severally, unconditionally guaranteed, to the extent set forth in the Indenture and subject to the provisions in the Indenture dated as of August 26, 2022 (the "**Indenture**") among Software Acquisition Group Inc. III (the "**Company**"), the Guarantors party thereto and U.S. Bank Trust Company, National Association, as trustee (the "**Trustee**") and U.S. Bank Trust Company, National Association, as collateral agent (the "**Collateral Agent**"), (a) the due and punctual payment of the principal (including the Accreted Principal Amount) of, premium, if any, and interest on, the Notes, whether at maturity, by acceleration or otherwise, the due and punctual payment of interest on overdue principal (including the Accreted Principal Amount) of and interest on the Notes, if any, if lawful, and the due and punctual performance of all other obligations of the Company to the Holders or the Trustee or the Collateral Agent all in accordance with the terms of the Indenture, the Notes, the Guarantees and any Security Documents and (b) in case of any extension of time of payment or renewal of any Notes or any of such other obligations, that the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at stated maturity, by acceleration or otherwise. The obligations of the Guarantors to the Holders and to the Trustee and the Collateral Agent pursuant to the Indenture, the Notes, the Guarantees and any Security Documents are expressly set forth in Article 9 of the Indenture, and reference is hereby made to the Indenture for the precise terms of the Guarantee.

Capitalized terms used but not defined herein have the meanings given to them in the Indenture.

[GUARANTORS]

By: \_\_\_\_\_  
Name:  
Title:

Schedule D-1

**WARRANT AGREEMENT**

This agreement (this "Agreement") is made as of August 26, 2022 between Software Acquisition Group Inc. III, a Delaware corporation (such corporation to be renamed "Nogin, Inc. in connection with the consummation of the transactions contemplated by the Merger Agreement (as defined below)) (the "Company"), with offices at 1980 Festival Plaza Drive, Suite 300, Las Vegas, Nevada 89135, and Continental Stock Transfer & Trust Company, a limited purpose trust company, with offices at 1 State Street, 30th Floor, New York, New York 10004, as warrant agent (the "Warrant Agent," also referred to herein as the "Transfer Agent").

WHEREAS, on February 14, 2022, the Company, Nuevo Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of the Company ("Merger Sub"), and Branded Online, Inc. dba Nogin, a Delaware corporation ("Nogin"), entered into that certain Agreement and Plan of the Merger (the "Merger Agreement");

WHEREAS, upon the terms and subject to the conditions of the Merger Agreement, Merger Sub will merge with and into Nogin (the "Merger") with Nogin continuing as the surviving company after the Merger as a direct, wholly owned subsidiary of the Company;

WHEREAS, the Company entered into Convertible Note Subscription Agreements (the "Note Agreements") with certain subscribers, pursuant to which such subscribers will purchase \$65.0 million aggregate principal amount of 7.00% Convertible Senior Notes due 2026 (the "Notes") and 1,385,705 warrants, bearing the legend set forth in Exhibit B hereto (the "PIPE Warrants"). Each whole PIPE Warrant entitles the holder thereof to purchase one share of Class A common stock of the Company, par value \$0.0001 per share ("Common Stock"), for \$11.50 per share, subject to adjustment as described herein. Only whole Warrants are exercisable. A holder of the PIPE Warrants will not be able to exercise any fraction of a Warrant; and

WHEREAS, the Company desires the Warrant Agent to act on behalf of the Company, and the Warrant Agent is willing to so act, in connection with the issuance, transfer, exchange, redemption, and exercise of the PIPE Warrants; and

WHEREAS, the Company desires to provide for the form and provisions of the PIPE Warrants, the terms upon which they shall be issued and exercised, and the respective rights, limitation of rights, and immunities of the Company, the Warrant Agent, and the holders of the PIPE Warrants; and

WHEREAS, all acts and things have been done and performed which are necessary to make the PIPE Warrants, when executed on behalf of the Company and countersigned by or on behalf of the Warrant Agent, as provided herein, the valid, binding, and legal obligations of the Company, and to authorize the execution and delivery of this Agreement.

NOW, THEREFORE, in consideration of the mutual agreements herein contained, the parties hereto agree as follows:

1. Appointment of Warrant Agent. The Company hereby appoints the Warrant Agent to act as agent for the Company for the PIPE Warrants, and the Warrant Agent hereby accepts such appointment and agrees to perform the same in accordance with the terms and conditions set forth in this Agreement.



2. Warrants.

2.1 Form of Warrant. Each PIPE Warrant shall be issued in registered form only, shall be in substantially the form of Exhibit A hereto, the provisions of which are incorporated herein and shall be signed by, or bear the facsimile signature of, the Chairman of the Board of Directors or Chief Executive Officer and the Chief Financial Officer, Treasurer, Secretary or Assistant Secretary of the Company and shall bear a facsimile of the Company's seal. In the event the person whose facsimile signature has been placed upon any PIPE Warrant shall have ceased to serve in the capacity in which such person signed the PIPE Warrant before such PIPE Warrant is issued, it may be issued with the same effect as if he or she had not ceased to be such at the date of issuance.

2.2 Uncertificated Warrants. Notwithstanding anything herein to the contrary, any PIPE Warrant may be issued in uncertificated or book-entry form through the Warrant Agent and/or the facilities of The Depository Trust Company or other book-entry depository system, in each case as determined by the Board of Directors of the Company or by an authorized committee thereof. Any PIPE Warrant so issued shall have the same terms, force and effect as a certificated PIPE Warrant that has been duly countersigned by the Warrant Agent in accordance with the terms of this Agreement.

2.3 Effect of Countersignature. Except with respect to uncertificated PIPE Warrants as described above, unless and until countersigned by the Warrant Agent pursuant to this Agreement, a PIPE Warrant shall be invalid and of no effect and may not be exercised by the holder thereof.

2.4 Registration.

2.4.1 Warrant Register. The Warrant Agent shall maintain books ("Warrant Register") for the registration of original issuance and the registration of transfer of the PIPE Warrants. Upon the initial issuance of the PIPE Warrants, the Warrant Agent shall issue and register the PIPE Warrants in the names of the respective holders thereof in such denominations and otherwise in accordance with instructions delivered to the Warrant Agent by the Company.

2.4.2 Registered Holder. Prior to due presentment for registration of transfer of any PIPE Warrant, the Company and the Warrant Agent may deem and treat the person in whose name such PIPE Warrant is then registered in the Warrant Register ("registered holder") as the absolute owner of such PIPE Warrant and of each PIPE Warrant represented thereby (notwithstanding any notation of ownership or other writing on the Warrant certificate made by anyone other than the Company or the Warrant Agent), for the purpose of any exercise thereof, and for all other purposes, and neither the Company nor the Warrant Agent shall be affected by any notice to the contrary.

3. Terms and Exercise of Warrants.

3.1 Warrant Price. Each whole PIPE Warrant shall, when countersigned by the Warrant Agent (except with respect to uncertificated Warrants), entitle the registered holder thereof, subject to the provisions of such PIPE Warrant and of this Agreement, to purchase from the Company the number of shares of Common Stock stated therein, at the price of \$11.50 per share, subject to the adjustments provided in Section 4 hereof and in the last sentence of this Section 3.1. The term "Warrant Price" as used in this Agreement refers to the price per share at which the shares of Common Stock may be purchased at the time a PIPE Warrant is exercised. The Company in its sole discretion may lower the Warrant Price at any time prior to the Expiration Date (as defined below) for a period of not less than twenty (20) Business Days; provided, that the Company shall provide at least twenty (20) days' prior written notice of such reduction to registered holders of the PIPE Warrants and, provided further that any such reduction shall be applied consistently to all of the PIPE Warrants.

3.2 Duration of Warrants. A PIPE Warrant may be exercised only during the period commencing on the later of 30 days after the date hereof and terminating at 5:00 p.m., New York City time on the earlier to occur of (i) five years from the date hereof, (ii) the Redemption Date as provided in Section 6.2 of this Agreement and (iii) the liquidation of the Company ("Expiration Date"). The period of time from the date the PIPE Warrants will first become exercisable until the expiration of the PIPE Warrants shall hereafter be referred to as the "Exercise Period." Except with respect to the right to receive the Redemption Price (as set forth in Section 6 hereunder), as applicable, each PIPE Warrant not exercised on or before the Expiration Date shall become void, and all rights thereunder and all rights in respect thereof under this Agreement shall cease at 5:00 p.m., New York City time, on the Expiration Date. The Company in its sole discretion may extend the duration of the PIPE Warrants by delaying the Expiration Date; provided, however, that the Company will provide at least twenty (20) days' prior written notice of any such extension to registered holders and, provided further that any such extension shall be applied consistently to all of the PIPE Warrants.

3.3 Exercise of Warrants.

3.3.1 Payment. Subject to the provisions of the PIPE Warrant and this Agreement, a PIPE Warrant, when countersigned by the Warrant Agent, may be exercised by the registered holder thereof by surrendering it, at the office of the Warrant Agent, or at the office of its successor as Warrant Agent, in the Borough of Manhattan, City and State of New York, with the subscription form, as set forth in the PIPE Warrant, duly executed, and by paying in full the Warrant Price for each full share of Common Stock as to which the PIPE Warrant is exercised and any and all applicable taxes due in connection with the exercise of the PIPE Warrant, the exchange of the PIPE Warrant for the shares of Common Stock and the issuance of such shares of Common Stock, as follows:

(a) in lawful money of the United States, by good certified check or wire payable to the Warrant Agent;

(b) in the event of redemption pursuant to Section 6 hereof in which the Company's management has elected to force all holders of PIPE Warrants to exercise such PIPE Warrants on a "cashless basis," by surrendering the PIPE Warrants for that number of shares of Common Stock equal to the quotient obtained by dividing (x) the product of the number of shares of Common Stock underlying the PIPE Warrants, multiplied by the difference between the Warrant Price and the "Fair Market Value" (defined below) by (y) the Fair Market Value. Solely for purposes of this Section 3.3.1(b), the "Fair Market Value" shall mean the average reported last sale price of the Common Stock for the ten (10) trading days immediately following the date on which the notice of redemption is sent to holders of the PIPE Warrants pursuant to Section 6 hereof; or

(c) in the event the registration statement required by Section 7.4 hereof is not effective and current within sixty (60) Business Days after the date hereof, by surrendering such PIPE Warrants for that number of shares of Common Stock equal to the quotient obtained by dividing (x) the product of the number of shares of Common Stock underlying the PIPE Warrants, multiplied by the difference between the exercise price of the PIPE Warrants and the "Fair Market Value" by (y) the Fair Market Value; provided, however, that no cashless exercise shall be permitted unless the Fair Market Value is equal to or higher than the exercise price. Solely for purposes of this Section 3.3.1(c), the "Fair Market Value" shall mean the average reported last sale price of the Common Stock for the ten (10) trading days ending on the third (3rd) trading day prior to the date on which notice of exercise of the PIPE Warrant is sent to the Warrant Agent.

3.3.2 Issuance of Shares of Common Stock. As soon as practicable after the exercise of any PIPE Warrant and the clearance of the funds in payment of the Warrant Price (if any), the Company shall issue to the registered holder of such PIPE Warrant a certificate or certificates, or book entry position, for the number of shares of Common Stock to which he, she or it is entitled, registered in such name or names as may be directed by him, her or it, and if such PIPE Warrant shall not have been exercised in full, a new countersigned PIPE Warrant, or book entry position, for the number of shares as to which such PIPE Warrant shall not have been exercised. Notwithstanding the foregoing, in no event will the Company be required to net cash settle the PIPE Warrant exercise. No PIPE Warrant shall be exercisable for cash and the Company shall not be obligated to issue shares of Common Stock upon exercise of a PIPE Warrant unless the Common Stock issuable upon such PIPE Warrant exercise has been registered, qualified or deemed to be exempt under the securities laws of the state of residence of the registered holder of the PIPE Warrants. In the event that the condition in the immediately preceding sentence is not satisfied with respect to a PIPE Warrant, the holder of such PIPE Warrant shall not be entitled to exercise such PIPE Warrant for cash and such PIPE Warrant may have no value and expire worthless. PIPE Warrants may not be exercised by, or securities issued to, any registered holder in any state in which such exercise would be unlawful.

3.3.3 Valid Issuance. All shares of Common Stock issued upon the proper exercise of a PIPE Warrant in conformity with this Agreement shall be validly issued, fully paid and nonassessable.

3.3.4 Date of Issuance. Each person in whose name any book entry position or certificate for shares of Common Stock is issued shall for all purposes be deemed to have become the holder of record of such shares on the date on which the PIPE Warrant, or book entry position representing such PIPE Warrant, was surrendered and payment of the Warrant Price was made, irrespective of the date of delivery of such certificate, except that, if the date of such surrender and payment is a date when the share transfer books of the Company or book entry system of the Warrant Agent are closed, such person shall be deemed to have become the holder of such shares at the close of business on the next succeeding date on which the share transfer books or book entry system are open.

3.3.5 Maximum Percentage. A holder of a PIPE Warrant may notify the Company in writing in the event it elects to be subject to the provisions contained in this subsection 3.3.5; however, no holder of a PIPE Warrant shall be subject to this subsection 3.3.5 unless he, she or it makes such election. If the election is made by a holder, the Warrant Agent shall not effect the exercise of the holder's PIPE Warrant, and such holder shall not have the right to exercise such PIPE Warrant, to the extent that after giving effect to such exercise, such person (together with such person's affiliates), to the Warrant Agent's actual knowledge, would beneficially own in excess of 9.8% (the "Maximum Percentage") of the shares of Common Stock outstanding immediately after giving effect to such exercise. For purposes of the foregoing sentence, the aggregate number of shares of Common Stock beneficially owned by such person and its affiliates shall include the number of shares of Common Stock issuable upon exercise of the PIPE Warrant with respect to which the determination of such sentence is being made, but shall exclude shares of Common Stock that would be issuable upon (x) exercise of the remaining, unexercised portion of the PIPE Warrant beneficially owned by such person and its affiliates and (y) exercise or conversion of the unexercised or unconverted portion of any other securities of the Company beneficially owned by such person and its affiliates (including, without limitation, any convertible notes, including the Notes, or convertible preferred stock or warrants) subject to a limitation on conversion or exercise analogous to the limitation contained herein. Except as set forth in the preceding sentence, for purposes of this paragraph, beneficial ownership shall be calculated in accordance with Section 13(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). For purposes of the PIPE Warrant, in determining the number of outstanding shares of Common Stock, the holder may rely on the number of outstanding shares of Common Stock as reflected in (1) the Company's most recent annual report on Form 10-K, quarterly report on Form 10-Q, current report on Form 8-K or other public filing with the SEC as the case may be, (2) a more recent public announcement by the Company or (3) any other notice by the Company or the Transfer Agent setting forth the number of shares of Common Stock outstanding. For any reason at any time, upon the written request of the holder of the PIPE Warrant, the Company shall, within two (2) Business Days, confirm orally and in writing to such holder the number of shares of Common Stock then outstanding. In any case, the number of outstanding shares of Common Stock shall be determined after giving effect to the conversion or exercise of equity securities of the Company by the holder and its affiliates since the date as of which such number of outstanding shares of Common Stock was reported. By written notice to the Company, the holder of a PIPE Warrant may from time to time increase or decrease the Maximum Percentage applicable to such holder to any other percentage specified in such notice; provided, however, that any such increase shall not be effective until the sixty-first (61st) day after such notice is delivered to the Company.

4. Adjustments.

4.1 Stock Dividends: Split Ups. If after the date hereof, the number of outstanding shares of Common Stock is increased by a stock dividend payable in shares of Common Stock, or by a split up of shares of Common Stock, or other similar event, then, on the effective date of such stock dividend, split up or similar event, the number of shares of Common Stock issuable on exercise of each PIPE Warrant shall be increased in proportion to such increase in outstanding shares of Common Stock.

4.2 Aggregation of Shares. If after the date hereof, the number of outstanding shares of Common Stock is decreased by a consolidation, combination, reverse stock split or reclassification of shares of Common Stock or other similar event, then, on the effective date of such consolidation, combination, reverse stock split, reclassification or similar event, the number of shares of Common Stock issuable on exercise of each PIPE Warrant shall be decreased in proportion to such decrease in outstanding shares of Common Stock.

4.3 Extraordinary Dividends. If the Company, at any time while the PIPE Warrants are outstanding and unexpired, pays to all or substantially all of the holders of the Common Stock a dividend or make a distribution in cash, securities or other assets of such shares of Common Stock (or other shares into which the PIPE Warrants are convertible), other than (a) as described in Section 4.1 above or (b) Ordinary Cash Dividends (as defined below) (any such non-excluded event being referred to herein as an "Extraordinary Dividend"), then the Warrant Price shall be decreased, effective immediately after the effective date of such Extraordinary Dividend, by the amount of cash and/or the fair market value (as determined by the Company's board of directors (the "Board"), in good faith) of any securities or other assets paid on each share of Common Stock in respect of such Extraordinary Dividend. For purposes of this Section 4.3, "Ordinary Cash Dividends" means any cash dividend or cash distribution which, when combined on a per share basis, with the per share amounts of all other cash dividends and cash distributions paid on the Common Stock during the 365-day period ending on the date of declaration of such dividend or distribution to the extent it does not exceed \$0.50 (which amount shall be adjusted to appropriately reflect any of the events referred to in other subsections of this Section 4 and excluding cash dividends or cash distributions that resulted in an adjustment to the Warrant Price or to the number of shares of Common Stock issuable on exercise of each PIPE Warrant).

4.4 Adjustments in Exercise Price. Whenever the number of shares of Common Stock purchasable upon the exercise of the PIPE Warrants is adjusted, as provided in Sections 4.1 and 4.2 above, the Warrant Price shall be adjusted (to the nearest cent) by multiplying such Warrant Price immediately prior to such adjustment by a fraction (x) the numerator of which shall be the number of shares of Common Stock purchasable upon the exercise of the PIPE Warrants immediately prior to such adjustment, and (y) the denominator of which shall be the number of shares of Common Stock so purchasable immediately thereafter.

4.5 Replacement of Securities upon Reorganization, etc. In case of any reclassification or reorganization of the outstanding shares of Common Stock (other than a change covered by Section 4.1, 4.2 or 4.3 hereof or that solely affects the par value of the Common Stock), or in the case of any merger or consolidation of the Company with or into another corporation (other than a consolidation or merger in which the Company is the continuing corporation and that does not result in any reclassification or reorganization of the outstanding Common Stock), or in the case of any sale or conveyance to another corporation or entity of the assets or other property of the Company as an entirety or substantially as an entirety in connection with which the Company is dissolved, the PIPE Warrant holders shall thereafter have the right to purchase and receive, upon the basis and upon the terms and conditions specified in the PIPE Warrants and in lieu of the shares of Common Stock of the Company immediately theretofore purchasable and receivable upon the exercise of the rights represented thereby, the kind and amount of shares of stock or other securities or property (including cash) receivable upon such reclassification, reorganization, merger or consolidation, or upon a dissolution following any such sale or transfer, that the PIPE Warrant

holder would have received if such PIPE Warrant holder had exercised his, her or its PIPE Warrant(s) immediately prior to such event. If any reclassification also results in a change in the Common Stock covered by Section 4.1, 4.2 or 4.3, then such adjustment shall be made pursuant to Sections 4.1, 4.2, 4.3, 4.4 and this Section 4.5. The provisions of this Section 4.5 shall similarly apply to successive reclassifications, reorganizations, mergers or consolidations, sales or other transfers. In no event will the Warrant Price be reduced to less than the par value per share issuable upon exercise of the PIPE Warrant.

4.6 [Reserved].

4.7 Notices of Changes in Warrant. Upon every adjustment of the Warrant Price or the number of shares issuable upon exercise of a PIPE Warrant, the Company shall give written notice thereof to the Warrant Agent, which notice shall state the Warrant Price resulting from such adjustment and the increase or decrease, if any, in the number of shares purchasable at such price upon the exercise of a PIPE Warrant, setting forth in reasonable detail the method of calculation and the facts upon which such calculation is based. Upon the occurrence of any event specified in Sections 4.1, 4.2, 4.3, 4.4 or 4.5, then, in any such event, the Company shall give written notice to each PIPE Warrant holder, at the last address set forth for such holder in the Warrant Register, of the record date or the effective date of the event. Failure to give such notice, or any defect therein, shall not affect the legality or validity of such event.

4.8 No Fractional Warrants or Shares. Notwithstanding any provision contained in this Agreement to the contrary, the Company shall not issue fractional shares upon exercise of PIPE Warrants. If, by reason of any adjustment made pursuant to this Section 4, the holder of any PIPE Warrant would be entitled, upon the exercise of such PIPE Warrant, to receive a fractional interest in a share, the Company shall, upon such exercise, round up to the nearest whole number of shares of Common Stock to be issued to the PIPE Warrant holder.

4.9 Form of Warrant. The form of PIPE Warrant need not be changed because of any adjustment pursuant to this Section 4, and PIPE Warrants issued after such adjustment may state the same Warrant Price and the same number of shares as is stated in the PIPE Warrants initially issued pursuant to this Agreement. However, the Company may at any time in its sole discretion make any change in the form of PIPE Warrant that the Company may deem appropriate and that does not affect the substance thereof, and any PIPE Warrant thereafter issued or countersigned, whether in exchange or substitution for an outstanding PIPE Warrant or otherwise, may be in the form as so changed.

4.10 Other Events. In case any event shall occur affecting the Company as to which none of the provisions of preceding subsections of this Section 4 are strictly applicable, but which would require an adjustment to the terms of the PIPE Warrants in order to (i) avoid an adverse impact on the PIPE Warrants and (ii) effectuate the intent and purpose of this Section 4, then, in each such case, the Company shall appoint a firm of independent public accountants, investment banking or other appraisal firm of recognized national standing, which shall give its opinion as to whether or not any adjustment to the rights represented by the PIPE Warrants is necessary to effectuate the intent and purpose of this Section 4 and, if they determine that an adjustment is necessary, the terms of such adjustment. The Company shall adjust the terms of the PIPE Warrants in a manner that is consistent with any adjustment recommended in such opinion.

4.11 No Adjustment. For the avoidance of doubt, no adjustment shall be made to the terms of the PIPE Warrants solely as a result of an adjustment to the conversion ratio of the Class B Common Stock into shares of Common Stock or the conversion of the shares of Class B Common Stock into shares of Common Stock, in each case, pursuant to the Company's Amended and Restated Certificate of Incorporation, as further amended from time to time.

5. Transfer and Exchange of Warrants.

5.1 Registration of Transfer. The Warrant Agent shall register the transfer, from time to time, of any outstanding PIPE Warrant upon the Warrant Register, upon surrender of such PIPE Warrant for transfer, properly endorsed with signatures, in the case of certificated PIPE Warrants, properly guaranteed and accompanied by appropriate instructions for transfer. Upon any such transfer, a new PIPE Warrant representing an equal aggregate number of PIPE Warrants shall be issued and the old PIPE Warrant shall be cancelled by the Warrant Agent. In the case of certificated PIPE Warrants, the PIPE Warrants so cancelled shall be delivered by the Warrant Agent to the Company from time to time upon request.

5.2 Procedure for Surrender of Warrants. PIPE Warrants may be surrendered to the Warrant Agent, either in certificated form or in book entry position, together with a written request for exchange or transfer, and thereupon the Warrant Agent shall issue in exchange therefor one or more new PIPE Warrants, or book entry positions, as requested by the registered holder of the PIPE Warrants so surrendered, representing an equal aggregate number of PIPE Warrants; provided, however, that in the event that a PIPE Warrant surrendered for transfer bears a restrictive legend, the Warrant Agent shall not cancel such PIPE Warrant and issue new PIPE Warrants in exchange therefor until the Warrant Agent has received an opinion of counsel for the Company stating that such transfer may be made and indicating whether the new PIPE Warrants must also bear a restrictive legend.

5.3 Fractional Warrants. The Warrant Agent shall not be required to effect any registration of transfer or exchange which will result in the issuance of a warrant certificate or book-entry position for a fraction of a PIPE Warrant.

5.4 Service Charges. No service charge shall be made for any exchange or registration of transfer of PIPE Warrants.

5.5 Warrant Execution and Countersignature. The Warrant Agent is hereby authorized to countersign and to deliver, in accordance with the terms of this Agreement, the PIPE Warrants required to be issued pursuant to the provisions of this Section 5, and the Company, whenever required by the Warrant Agent, will supply the Warrant Agent with Warrants duly executed on behalf of the Company for such purpose.

6. Redemption.

6.1 Redemption. Not less than all of the outstanding PIPE Warrants may be redeemed, at the option of the Company, at any time during the Exercise Period, at the office of the Warrant Agent, upon the notice referred to in Section 6.2, at the price of \$0.01 per PIPE Warrant ("Redemption Price"), provided that the last sales price of the Common Stock equals or

exceeds \$18.00 per share (subject to adjustment in accordance with Section 4 hereof) (the “Redemption Trigger Price”), on each of twenty (20) trading days within any thirty (30) trading day period commencing after the PIPE Warrants become exercisable and ending on the third trading day prior to the date on which notice of redemption is given and provided that either (i) there is an effective registration statement covering the shares of Common Stock issuable upon exercise of the PIPE Warrants, and a current prospectus relating thereto, available throughout the 30-day redemption period or (ii) the Company has elected to require the exercise of the PIPE Warrants on a “cashless basis” pursuant to Section 3.3.1(b) and there is an effective registration statement covering the resale of the shares of Common Stock issuable upon exercise of the PIPE Warrants on a cashless basis, and a current prospectus relating thereto.

6.2 Date Fixed for, and Notice of, Redemption. In the event the Company shall elect to redeem all of the PIPE Warrants that are subject to redemption, the Company shall fix a date for the redemption (the “Redemption Date”). Notice of redemption shall be mailed by first class mail, postage prepaid, by the Company not less than thirty (30) days prior to the Redemption Date to the registered holders of the PIPE Warrants to be redeemed at their last addresses as they shall appear on the registration books. Any notice mailed in the manner herein provided shall be conclusively presumed to have been duly given whether or not the registered holder received such notice.

6.3 Exercise After Notice of Redemption. The PIPE Warrants may be exercised, for cash (or on a “cashless basis” in accordance with Section 3 of this Agreement) at any time after notice of redemption shall have been given by the Company pursuant to Section 6.2 hereof and prior to the Redemption Date. In the event the Company determines to require all holders of PIPE Warrants to exercise their PIPE Warrants on a “cashless basis” pursuant to Section 3.3.1(b), the notice of redemption will contain the information necessary to calculate the number of shares of Common Stock to be received upon exercise of the PIPE Warrants, including the “Fair Market Value” in such case. On and after the Redemption Date, the record holder of the PIPE Warrants shall have no further rights except to receive, upon surrender of the PIPE Warrants, the Redemption Price.

7. Other Provisions Relating to Rights of Holders of Warrants.

7.1 No Rights as Stockholder. A PIPE Warrant does not entitle the registered holder thereof to any of the rights of a stockholder of the Company, including, without limitation, the right to receive dividends, or other distributions, exercise any preemptive rights to vote or to consent or to receive notice as stockholders in respect of the meetings of stockholders or the election of directors of the Company or any other matter.

7.2 Lost, Stolen, Mutilated, or Destroyed Warrants. If any PIPE Warrant is lost, stolen, mutilated, or destroyed, the Company and the Warrant Agent may on such terms as to indemnity or otherwise as they may in their discretion impose (which shall, in the case of a mutilated PIPE Warrant, include the surrender thereof), issue a new PIPE Warrant of like denomination, tenor, and date as the PIPE Warrant so lost, stolen, mutilated, or destroyed. Any such new PIPE Warrant shall constitute a substitute contractual obligation of the Company, whether or not the allegedly lost, stolen, mutilated, or destroyed PIPE Warrant shall be at any time enforceable by anyone.



7.3 Reservation of Shares of Common Stock. The Company shall at all times reserve and keep available a number of its authorized but unissued shares of Common Stock that will be sufficient to permit the exercise in full of all outstanding PIPE Warrants issued pursuant to this Agreement.

7.4 Registration of Shares of Common Stock. The Company agrees that as soon as practicable after the date hereof, but in no event later than fifteen (15) Business Days after the date hereof, it shall use its best efforts to file with the SEC a post-effective amendment to the Registration Statement or a new registration statement for the registration, under the Act, of the shares of Common Stock issuable upon exercise of the PIPE Warrants, and it shall use its best efforts to take such action as is necessary to register or qualify for sale, in those states in which the PIPE Warrants were initially offered by the Company and in those states where holders of PIPE Warrants then reside, the shares of Common Stock issuable upon exercise of the PIPE Warrants, to the extent an exemption is not available. The Company will use its best efforts to cause the same to become effective and to maintain the effectiveness of such registration statement until the expiration of the PIPE Warrants in accordance with the provisions of this Agreement. If any such registration statement has not been declared effective by the 60th Business Day following the date hereof, holders of the PIPE Warrants shall have the right, during the period beginning on the 61st Business Day after the date hereof and ending upon such registration statement being declared effective by the SEC, and during any other period when the Company shall fail to have maintained an effective registration statement covering the shares of Common Stock issuable upon exercise of the PIPE Warrants, to exercise such PIPE Warrants on a "cashless basis" as determined in accordance with Section 3.3.1(c). The Company shall provide the Warrant Agent with an opinion of counsel for the Company (which shall be an outside law firm with securities law experience) stating that (i) the exercise of the PIPE Warrants on a cashless basis in accordance with this Section 7.4 is not required to be registered under the Act and (ii) the shares of Common Stock issued upon such exercise will be freely tradable under U.S. federal securities laws by anyone who is not an affiliate (as such term is defined in Rule 144 under the Act) of the Company and, accordingly, will not be required to bear a restrictive legend. For the avoidance of any doubt, unless and until all of the PIPE Warrants have been exercised on a cashless basis, the Company shall continue to be obligated to comply with its registration obligations under the first three sentences of this Section 7.4.

8. Concerning the Warrant Agent and Other Matters.

8.1 Payment of Taxes. The Company will from time to time promptly pay all taxes and charges that may be imposed upon the Company or the Warrant Agent in respect of the issuance or delivery of shares of Common Stock upon the exercise of PIPE Warrants, but the Company shall not be obligated to pay any transfer taxes in respect of the PIPE Warrants or such shares.

8.2 Resignation, Consolidation, or Merger of Warrant Agent.

8.2.1 Appointment of Successor Warrant Agent. The Warrant Agent, or any successor to it hereafter appointed, may resign its duties and be discharged from all further duties and liabilities hereunder after giving sixty (60) days' notice in writing to the Company. If the office of the Warrant Agent becomes vacant by resignation or incapacity to act or otherwise, the Company shall appoint in writing a successor Warrant Agent in place of the Warrant Agent. If

the Company shall fail to make such appointment within a period of thirty (30) days after it has been notified in writing of such resignation or incapacity by the Warrant Agent or by the holder of the PIPE Warrant (who shall, with such notice, submit his PIPE Warrant for inspection by the Company), then the holder of any PIPE Warrant may apply to the Supreme Court of the State of New York for the County of New York for the appointment of a successor Warrant Agent at the Company's cost. Any successor Warrant Agent, whether appointed by the Company or by such court, shall be a corporation organized and existing under the laws of the State of New York, in good standing and having its principal office in the Borough of Manhattan, City and State of New York, and authorized under such laws to exercise corporate trust powers and subject to supervision or examination by federal or state authority. After appointment, any successor Warrant Agent shall be vested with all the authority, powers, rights, immunities, duties, and obligations of its predecessor Warrant Agent with like effect as if originally named as Warrant Agent hereunder, without any further act or deed; but if for any reason it becomes necessary or appropriate, the predecessor Warrant Agent shall execute and deliver, at the expense of the Company, an instrument transferring to such successor Warrant Agent all the authority, powers, and rights of such predecessor Warrant Agent hereunder; and upon request of any successor Warrant Agent the Company shall make, execute, acknowledge, and deliver any and all instruments in writing for more fully and effectually vesting in and confirming to such successor Warrant Agent all such authority, powers, rights, immunities, duties, and obligations.

8.2.2 Notice of Successor Warrant Agent. In the event a successor Warrant Agent shall be appointed, the Company shall give notice thereof to the predecessor Warrant Agent and the Transfer Agent for the shares of Common Stock not later than the effective date of any such appointment.

8.2.3 Merger or Consolidation of Warrant Agent. Any corporation into which the Warrant Agent may be merged or with which it may be consolidated or any corporation resulting from any merger or consolidation to which the Warrant Agent shall be a party shall be the successor Warrant Agent under this Agreement without any further act.

### 8.3 Fees and Expenses of Warrant Agent.

8.3.1 Remuneration. The Company agrees to pay the Warrant Agent reasonable remuneration for its services as such Warrant Agent hereunder and will reimburse the Warrant Agent upon demand for all expenditures that the Warrant Agent may reasonably incur in the execution of its duties hereunder.

8.3.2 Further Assurances. The Company agrees to perform, execute, acknowledge, and deliver or cause to be performed, executed, acknowledged, and delivered all such further and other acts, instruments, and assurances as may reasonably be required by the Warrant Agent for the carrying out or performing of the provisions of this Agreement.

### 8.4 Liability of Warrant Agent.

8.4.1 Reliance on Company Statement. Whenever in the performance of its duties under this Agreement, the Warrant Agent shall deem it necessary or desirable that any fact or matter be proved or established by the Company prior to taking or suffering any action hereunder, such fact or matter (unless other evidence in respect thereof be herein specifically

prescribed) may be deemed to be conclusively proved and established by a statement signed by the Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, President, Secretary or Chairman of the Board of Directors of the Company and delivered to the Warrant Agent. The Warrant Agent may rely upon such statement for any action taken or suffered in good faith by it pursuant to the provisions of this Agreement.

8.4.2 Indemnity. The Warrant Agent shall be liable hereunder only for its own fraud, gross negligence, willful misconduct or bad faith. The Company agrees to indemnify the Warrant Agent and save it harmless against any and all liabilities, including judgments, costs and reasonable counsel fees, for anything done or omitted by the Warrant Agent in the execution of this Agreement except as a result of the Warrant Agent's fraud, gross negligence, willful misconduct, or bad faith.

8.4.3 Exclusions. The Warrant Agent shall have no responsibility with respect to the validity of this Agreement or with respect to the validity or execution of any PIPE Warrant (except its countersignature thereof); nor shall it be responsible for any breach by the Company of any covenant or condition contained in this Agreement or in any PIPE Warrant; nor shall it be responsible to make any adjustments required under the provisions of Section 4 hereof or responsible for the manner, method, or amount of any such adjustment or the ascertaining of the existence of facts that would require any such adjustment; nor shall it by any act hereunder be deemed to make any representation or warranty as to the authorization or reservation of any shares of Common Stock to be issued pursuant to this Agreement or any PIPE Warrant or as to whether any shares of Common Stock will, when issued, be valid and fully paid and nonassessable.

8.5 Acceptance of Agency. The Warrant Agent hereby accepts the agency established by this Agreement and agrees to perform the same upon the terms and conditions herein set forth and among other things, shall account promptly to the Company with respect to Warrants exercised and concurrently account for, and pay to the Company, all monies received by the Warrant Agent for the purchase of shares of Common Stock through the exercise of Warrants.

## 9. Miscellaneous Provisions.

9.1 Successors. All the covenants and provisions of this Agreement by or for the benefit of the Company or the Warrant Agent shall bind and inure to the benefit of their respective successors and assigns.

9.2 Notices. Any notice, statement or demand authorized by this Agreement to be given or made by the Warrant Agent or by the holder of any PIPE Warrant to or on the Company shall be sufficiently given when so delivered if by hand or overnight delivery or if sent by certified mail or private courier service within five (5) days after deposit of such notice, postage prepaid, addressed (until another address is filed in writing by the Company with the Warrant Agent), as follows:

Nogin, Inc.  
1775 Flight Way STE 400  
Tustin, California 92782  
Attn: Jan Nugent; Geoffrey Van Haeren

With a copy to:

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Latham & Watkins LLP  
811 Main Street, Suite 3700  
Houston, Texas 77002  
Attention: Ryan J. Maieron  
John M. Greer  
Ryan J. Lynch

Any notice, statement or demand authorized by this Agreement to be given or made by the holder of any PIPE Warrant or by the Company to or on the Warrant Agent shall be sufficiently given when so delivered if by hand or overnight delivery or if sent by certified mail or private courier service within five days after deposit of such notice, postage prepaid, addressed (until another address is filed in writing by the Warrant Agent with the Company), as follows:

Continental Stock Transfer & Trust Company  
1 State Street, 30th Floor  
New York, New York 10004  
Attn: Compliance Department

9.3 Applicable Law and Exclusive Forum. The validity, interpretation, and performance of this Agreement and of the PIPE Warrants shall be governed in all respects by the laws of the State of New York, without giving effect to conflicts of law principles that would result in the application of the substantive laws of another jurisdiction. Subject to applicable law, the Company hereby agrees that any action, proceeding or claim against it arising out of or relating in any way to this Agreement, including under the Act, shall be brought and enforced in the courts of the State of New York or the United States District Court for the Southern District of New York, and irrevocably submits to such jurisdiction, which jurisdiction shall be exclusive forum for any such action, proceeding or claim. The Company hereby waives any objection to such exclusive jurisdiction and that such courts represent an inconvenient forum. Notwithstanding the foregoing, the provisions of this paragraph will not apply to suits brought to enforce any liability or duty created by the Exchange Act or any other claim for which the federal district courts of the United States of America are the sole and exclusive forum.

Any person or entity purchasing or otherwise acquiring any interest in the PIPE Warrants shall be deemed to have notice of and to have consented to the forum provisions in this Section 9.3. If any action, the subject matter of which is within the scope the forum provisions above, is filed in a court other than a court located within the State of New York or the United States District Court for the Southern District of New York (a "foreign action") in the name of any warrant holder, such warrant holder shall be deemed to have consented to: (x) the personal jurisdiction of the state and federal courts located within the State of New York or the United States District Court for the Southern District of New York in connection with any action brought in any such court to enforce the forum provisions (an "enforcement action"), and (y) having service of process made upon such warrant holder in any such enforcement action by service upon such warrant holder's counsel in the foreign action as agent for such warrant holder.

9.4 Persons Having Rights under this Agreement. Nothing in this Agreement expressed and nothing that may be implied from any of the provisions hereof is intended, or shall be construed, to confer upon, or give to, any person or corporation other than the parties hereto and the registered holders of the PIPE Warrants any right, remedy, or claim under or by reason of this Agreement or of any covenant, condition, stipulation, promise, or agreement hereof. All covenants, conditions, stipulations, promises, and agreements contained in this Agreement shall be for the sole and exclusive benefit of the parties hereto and their successors and assigns and of the registered holders of the PIPE Warrants.

9.5 Examination of the Warrant Agreement. A copy of this Agreement shall be available at all reasonable times at the office of the Warrant Agent in the Borough of Manhattan, City and State of New York, for inspection by the registered holder of any PIPE Warrant. The Warrant Agent may require any such holder to submit his PIPE Warrant for inspection by it.

9.6 Counterparts. This Agreement may be executed in any number of original or facsimile counterparts and each of such counterparts shall for all purposes be deemed to be an original, and all such counterparts shall together constitute but one and the same instrument.

9.7 Effect of Headings. The section headings herein are for convenience only and are not part of this Agreement and shall not affect the interpretation thereof.

9.8 Amendments. This Agreement may be amended by the parties hereto without the consent of any registered holder for the purpose of (i) curing any ambiguity or to correct any mistake, including to conform the provisions hereof to the description of the terms of the PIPE Warrants and this Agreement set forth in the Prospectus, or curing, correcting or supplementing any defective provision contained herein, or (ii) adding or changing any other provisions with respect to matters or questions arising under this Agreement as the parties may deem necessary or desirable and that the parties deem shall not adversely affect the interest of the registered holders. All other modifications or amendments, including any amendment to increase the Warrant Price or shorten the Exercise Period, shall require the written consent or vote of the registered holders of at least a majority of the then outstanding PIPE Warrants. Notwithstanding the foregoing, the Company may lower the Warrant Price or extend the duration of the Exercise Period pursuant to Sections 3.1 and 3.2, respectively, without the consent of the registered holders.

9.9 Trust Account Waiver. The Warrant Agent acknowledges and agrees that it shall not make any claims or proceed against the trust account established by the Company in connection with the Company's initial public offering (as more fully described in the Registration Statement on Form S-1 (File No. 333-523230)) ("Trust Account"), including by way of set-off, and shall not be entitled to any funds in the Trust Account under any circumstance. In the event that the Warrant Agent has a claim against the Company under this Agreement, the Warrant Agent will pursue such claim solely against the Company and not against the property held in the Trust Account.

9.10 Severability. This Agreement shall be deemed severable, and the invalidity or unenforceability of any term or provision hereof shall not affect the validity or enforceability of this Agreement or of any other term or provision hereof. Furthermore, in lieu of any such invalid or unenforceable term or provision, the parties hereto intend that there shall be added as a part of this Agreement a provision as similar in terms to such invalid or unenforceable provision as may be possible and be valid and enforceable.

**Exhibit A** – Form of Warrant Certificate



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IN WITNESS WHEREOF, this Agreement has been duly executed by the parties hereto as of the day and year first above written.

**SOFTWARE ACQUISITION GROUP INC. III**

By: /s/ Jonathan S. Huberman  
Name: Jonathan S. Huberman  
Title: Chief Executive Officer

**CONTINENTAL STOCK TRANSFER & TRUST  
COMPANY, as Warrant Agent**

By: /s/ Douglas Reed  
Name: Douglas Reed  
Title: Vice President

*[Signature Page to Warrant Agreement]*

Number

**Warrants**

**THIS WARRANT SHALL BE VOID IF NOT EXERCISED PRIOR TO  
THE EXPIRATION OF THE EXERCISE PERIOD PROVIDED FOR  
IN THE WARRANT AGREEMENT DESCRIBED BELOW**

**Software Acquisition Group Inc. III**  
*Incorporated Under the Laws of the State of Delaware*

CUSIP [     ]

**Warrant Certificate**

*This Warrant Certificate certifies that* [     ], or registered assigns, is the registered holder of [     ] warrant(s) (the "**Warrants**" and each, a "**Warrant**") to purchase shares of Class A common stock, \$0.0001 par value ("**Common Stock**"), of Software Acquisition Group Inc. III, a Delaware corporation (the "**Company**"). Each Warrant entitles the holder, upon exercise during the period set forth in the Warrant Agreement referred to below, to receive from the Company that number of fully paid and nonassessable shares of Common Stock as set forth below, at the exercise price (the "**Exercise Price**") as determined pursuant to the Warrant Agreement, payable in lawful money (or through "**cashless exercise**" as provided for in the Warrant Agreement) of the United States of America upon surrender of this Warrant Certificate and payment of the Exercise Price at the office or agency of the Warrant Agent referred to below, subject to the conditions set forth herein and in the Warrant Agreement. Defined terms used in this Warrant Certificate but not defined herein shall have the meanings given to them in the Warrant Agreement.

Each whole Warrant is initially exercisable for one fully paid and non-assessable share of Common Stock. Fractional shares shall not be issued upon exercise of any Warrant. If, upon the exercise of Warrants, a holder would be entitled to receive a fractional interest in a share of Common Stock, the Company shall, upon exercise, round down to the nearest whole number the number of shares of Common Stock to be issued to the Warrant holder. The number of shares of Common Stock issuable upon exercise of the Warrants is subject to adjustment upon the occurrence of certain events as set forth in the Warrant Agreement.

The initial Exercise Price per one share of Common Stock for any Warrant is equal to \$11.50 per share. The Exercise Price is subject to adjustment upon the occurrence of certain events as set forth in the Warrant Agreement.

Subject to the conditions set forth in the Warrant Agreement, the Warrants may be exercised only during the Exercise Period and to the extent not exercised by the end of such Exercise Period, such Warrants shall become void. The Warrants may be redeemed, subject to certain conditions, as set forth in the Warrant Agreement.



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Reference is hereby made to the further provisions of this Warrant Certificate set forth on the reverse hereof and such further provisions shall for all purposes have the same effect as though fully set forth at this place.

This Warrant Certificate shall not be valid unless countersigned by the Warrant Agent, as such term is used in the Warrant Agreement. This Warrant Certificate shall be governed by and construed in accordance with the internal laws of the State of New York.

SOFTWARE ACQUISITION GROUP INC. III

By: \_\_\_\_\_  
Name: Jonathan S. Huberman  
Title: Chief Executive Officer and Chief Financial Officer

CONTINENTAL STOCK TRANSFER & TRUST  
COMPANY, as Warrant Agent

By: \_\_\_\_\_  
Name:  
Title:

[Form of Warrant Certificate]

[Reverse]

The Warrants evidenced by this Warrant Certificate are part of a duly authorized issue of Warrants entitling the holder on exercise to receive [ ] shares of Common Stock and are issued or to be issued pursuant to a Warrant Agreement dated as of [ ], 2022 (the "**Warrant Agreement**"), duly executed and delivered by the Company to Continental Stock Transfer & Trust Company, a New York corporation, as warrant agent (the "**Warrant Agent**"), which Warrant Agreement is hereby incorporated by reference in and made a part of this instrument and is hereby referred to for a description of the rights, limitation of rights, obligations, duties and immunities thereunder of the Warrant Agent, the Company and the holders (the words "**holders**" or "**holder**" meaning the Registered Holders or Registered Holder, respectively) of the Warrants. A copy of the Warrant Agreement may be obtained by the holder hereof upon written request to the Company. Defined terms used in this Warrant Certificate but not defined herein shall have the meanings given to them in the Warrant Agreement.

Warrants may be exercised at any time during the Exercise Period set forth in the Warrant Agreement. The holder of Warrants evidenced by this Warrant Certificate may exercise them by surrendering this Warrant Certificate, with the form of Election to Purchase set forth hereon properly completed and executed, together with payment of the Exercise Price as specified in the Warrant Agreement (or through "*cashless exercise*" as provided for in the Warrant Agreement) at the principal corporate trust office of the Warrant Agent. In the event that upon any exercise of Warrants evidenced hereby the number of Warrants exercised shall be less than the total number of Warrants evidenced hereby, there shall be issued to the holder hereof or his, her or its assignee, a new Warrant Certificate evidencing the number of Warrants not exercised.

Notwithstanding anything else in this Warrant Certificate or the Warrant Agreement, no Warrant may be exercised unless at the time of exercise (i) a registration statement covering the issuance of the shares of Common Stock to be issued upon exercise is effective under the Securities Act and (ii) a prospectus thereunder relating to the shares of Common Stock is current, except through "*cashless exercise*" as provided for in the Warrant Agreement.

The Warrant Agreement provides that upon the occurrence of certain events the number of shares of Common Stock issuable upon exercise of the Warrants set forth on the face hereof may, subject to certain conditions, be adjusted. If, upon exercise of a Warrant, the holder thereof would be entitled to receive a fractional interest in a share of Common Stock, the Company shall, upon exercise, round down to the nearest whole number of shares of Common Stock to be issued to the holder of the Warrant.

Warrant Certificates, when surrendered at the principal corporate trust office of the Warrant Agent by the Registered Holder thereof in person or by legal representative or attorney duly authorized in writing, may be exchanged, in the manner and subject to the limitations provided in the Warrant Agreement, but without payment of any service charge, for another Warrant Certificate or Warrant Certificates of like tenor evidencing in the aggregate a like number of Warrants.

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Upon due presentation for registration of transfer of this Warrant Certificate at the office of the Warrant Agent a new Warrant Certificate or Warrant Certificates of like tenor and evidencing in the aggregate a like number of Warrants shall be issued to the transferee(s) in exchange for this Warrant Certificate, subject to the limitations provided in the Warrant Agreement, without charge except for any tax or other governmental charge imposed in connection therewith.

The Company and the Warrant Agent may deem and treat the Registered Holder(s) hereof as the absolute owner(s) of this Warrant Certificate (notwithstanding any notation of ownership or other writing hereon made by anyone), for the purpose of any exercise hereof, of any distribution to the holder(s) hereof, and for all other purposes, and neither the Company nor the Warrant Agent shall be affected by any notice to the contrary. Neither the Warrants nor this Warrant Certificate entitles any holder hereof to any rights of a stockholder of the Company.

Election to Purchase

(To Be Executed Upon Exercise of Warrant)

The undersigned hereby irrevocably elects to exercise the right, represented by this Warrant Certificate, to receive [ ] shares of Common Stock and herewith tenders payment for such shares of Common Stock to the order of Software Acquisition Group Inc. III (the "**Company**") in the amount of \$[ ] in accordance with the terms hereof. The undersigned requests that a certificate for such shares of Common Stock be registered in the name of [ ], whose address is [ ] and that such shares of Common Stock be delivered to [ ] whose address is [ ]. If said [ ] number of shares of Common Stock is less than all of the shares of Common Stock purchasable hereunder, the undersigned requests that a new Warrant Certificate representing the remaining balance of such shares of Common Stock be registered in the name of [ ], whose address is [ ] and that such Warrant Certificate be delivered to [ ], whose address is [ ].

In the event that the Warrant is to be exercised on a "cashless" basis pursuant to Section 7.4 of the Warrant Agreement, the number of shares of Common Stock that this Warrant is exercisable for shall be determined in accordance with Section 7.4 of the Warrant Agreement.

In the event that the Warrant may be exercised, to the extent allowed by the Warrant Agreement, through cashless exercise (i) the number of shares of Common Stock that this Warrant is exercisable for would be determined in accordance with the relevant section of the Warrant Agreement which allows for such cashless exercise and (ii) the holder hereof shall complete the following: The undersigned hereby irrevocably elects to exercise the right, represented by this Warrant Certificate, through the cashless exercise provisions of the Warrant Agreement, to receive shares of Common Stock. If said number of shares is less than all of the shares of Common Stock purchasable hereunder (after giving effect to the cashless exercise), the undersigned requests that a new Warrant Certificate representing the remaining balance of such shares of Common Stock be registered in the name of [ ], whose address is [ ] and that such Warrant Certificate be delivered to [ ], whose address is [ ].

[Signature Page Follows]

Date: [ ], 2022

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Tax Identification Number)

Signature Guaranteed:

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THE SIGNATURE(S) SHOULD BE GUARANTEED BY AN ELIGIBLE GUARANTOR INSTITUTION THE SIGNATURE(S) SHOULD BE GUARANTEED BY AN ELIGIBLE GUARANTOR INSTITUTION (BANKS, STOCKBROKERS, SAVINGS AND LOAN ASSOCIATIONS AND CREDIT UNIONS WITH MEMBERSHIP IN AN APPROVED SIGNATURE GUARANTEE MEDALLION PROGRAM, PURSUANT TO S.E.C. RULE 17Ad-15 UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED).

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**EXHIBIT B**  
**LEGEND**

THE SECURITIES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY STATE SECURITIES LAWS, AND MAY NOT BE OFFERED, SOLD, TRANSFERRED OR OTHERWISE DISPOSED OF UNLESS REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND ANY APPLICABLE STATE SECURITIES LAWS OR AN EXEMPTION FROM REGISTRATION IS AVAILABLE.

**AMENDED AND RESTATED REGISTRATION RIGHTS AGREEMENT**

**BY AND AMONG**

**NOGIN, INC.,**

**THE SPONSOR HOLDERS SIGNATORY HERETO**

**AND**

**THE LEGACY NOGIN HOLDERS SIGNATORY HERETO**

**DATED AUGUST 26, 2022**

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## AMENDED AND RESTATED REGISTRATION RIGHTS AGREEMENT

This AMENDED AND RESTATED REGISTRATION RIGHTS AGREEMENT, dated as of August 26, 2022 (this "Agreement"), is made and entered into by and among Nogin, Inc. (formerly known as Software Acquisition Group Inc. III), a Delaware corporation (the "Company"), each equityholder designated as a Sponsor Holder on Schedule A hereto (each a "Sponsor Holder" and collectively, the "Sponsor Holders"), and each equityholder designated as a Legacy Nogin Holder on Schedule B hereto (each a "Legacy Nogin Holder" and, collectively, the "Legacy Nogin Holders" and, together with Sponsor Holders, the "Holders").

### RECITALS

**WHEREAS**, the Company, Nuevo Merger Sub, Inc., a Delaware corporation ("Merger Sub"), and Branded Online, Inc., a Delaware corporation ("Legacy Nogin"), are party to that certain Agreement and Plan of Merger, dated as of February 14, 2022 and as amended as of April 19, 2022 (as amended, the "Merger Agreement"), pursuant to which, on the effective date of the merger, Merger Sub merged with and into Legacy Nogin (the "Merger"), with Legacy Nogin surviving the Merger as a wholly owned subsidiary of the Company;

**WHEREAS**, pursuant to the Merger Agreement and in connection with the Merger, the Legacy Nogin Holders received shares of Common Stock (as defined herein) on the effective date of the Merger (the "Merger Shares");

**WHEREAS**, the Sponsor Holders held an aggregate of 5,701,967 shares of Class B common stock of the Company, par value \$0.0001 per share, immediately prior to the consummation of the Merger, which, upon the consummation of the Merger, have automatically been converted into 5,701,967 shares of Common Stock (the "Sponsor Shares");

**WHEREAS**, the Sponsor Holders currently hold 9,982,754 private placement warrants (the "Private Placement Warrants") to purchase shares of Common Stock at an exercise price of \$11.50 per share;

**WHEREAS**, the Company, Software Acquisition Holdings III LLC and the parties listed under Holder on the signature page thereto are parties to that certain Registration Rights Agreement, dated as of July 28, 2021 (the "Prior Agreement"); and

**WHEREAS**, in connection with the consummation of the Merger, the parties to the Prior Agreement desire to amend and restate the Prior Agreement in its entirety as set forth herein, and the parties hereto desire to enter into this Agreement pursuant to which the Company shall grant the Holders certain registration rights with respect to the Registrable Securities (as defined below) on the terms and conditions set forth in this Agreement;

**NOW, THEREFORE**, in consideration of the premises and the mutual premises and covenants contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged,

**IT IS AGREED** as follows:

**1. DEFINITIONS**

As used in this Agreement, the following terms shall have the following meanings:

“Affiliate” of any specified Person means any other Person directly or indirectly controlling or controlled by, or under common control with, such specified Person; provided that for purposes of this Agreement no Holder shall be deemed to be an Affiliate of any other Holder solely as a result of such Holder’s ownership of securities in the Company.

“Agreement” shall have the meaning set forth in the Preamble hereof.

“Blackout Period” shall have the meaning set forth in Section 2(e)(ii) of this Agreement.

“Block Trade” shall mean an offering and/or sale of Registrable Securities by any Holder on a block trade or underwritten basis (whether firm commitment or otherwise) without substantial marketing efforts prior to pricing, including, without limitation, a same day trade, overnight trade or similar transaction and without a lock-up agreement of more than sixty days to which the Company is a party (including, for the avoidance of doubt, any lock-up or clear market covenant contained in the underwriting agreement for such transaction).

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

“Business Day” shall mean any day except Saturday, Sunday or any days on which banks are generally not open for business in New York, New York.

“Commission” means the Securities and Exchange Commission.

“Common Stock” means the common stock, par value \$0.0001 per share, of the Company.

“Company” shall have the meaning set forth in the Preamble hereof.

“Demanding Holder” shall have the meaning set forth in Section 2(a)(iv) hereof.

“Exchange” shall have the meaning set forth in Section 5(c) of this Agreement.

“Exchange Act” shall mean the Securities Exchange Act of 1934, as amended (or any corresponding provision of succeeding law) and the rules and regulations thereunder.

“FINRA” shall mean the Financial Industry Regulatory Authority.

“Holder” shall have the meaning set forth in the Preamble hereof.

“Legacy Nogin” shall have the meaning set forth in the Recitals hereof.

“Legacy Nogin Holders” shall have the meaning set forth in the Preamble hereof.

“Liabilities” shall have the meaning set forth in Section 4(a)(i) of this Agreement.

“Maximum Threshold” shall have the meaning set forth in Section 2(a)(v) hereof.

“Merger” shall have the meaning set forth in the Recitals hereof.

“Merger Agreement” shall have the meaning set forth in the Recitals hereof.

“Merger Shares” shall have the meaning set forth in the Recitals hereof.

“Merger Sub” shall have the meaning set forth in the Preamble hereof.

“Minimum Takedown Threshold” shall have the meaning set forth in Section 2(a)(iv) hereof.

“Misstatement” means an untrue statement of a material fact or an omission to state a material fact required to be stated in a Registration Statement or Prospectus or necessary to make the statements in a Registration Statement or Prospectus (in the case of a Prospectus, in the light of the circumstances under which they were made) not misleading.

“Non-Holder Securities” shall have the meaning set forth in Section 2(a)(v) hereof.

“Other Coordinated Offering” shall have the meaning set forth in Section 2(c)(i) hereof.

“Person” shall mean any individual, partnership, corporation, limited liability company, joint venture, association, trust, unincorporated organization or other governmental or legal entity.

“Piggyback Registration” shall have the meaning set forth in Section 2(b)(i) hereof.

“Prior Agreement” shall have the meaning set forth in the Recitals hereof.

“Private Placement Warrants” shall have the meaning set forth in the Recitals hereof.

“Prospectus” means the prospectus or prospectuses included in any Registration Statement (including without limitation, any prospectus subject to completion and a prospectus that includes any information previously omitted from a prospectus filed as part of an effective registration statement in reliance upon Rule 430A promulgated under the Securities Act and any term sheet filed pursuant to Rule 434 under the Securities Act), as amended or supplemented by any prospectus supplement with respect to the terms of the offering of any portion of Registrable Securities covered by such Registration Statement and by all other amendments and supplements to the prospectus, including post-effective amendments and all material incorporated by reference or deemed to be incorporated by reference in such prospectus or prospectuses.

“Registrable Securities” shall mean (a) the Sponsor Shares, (b) the Private Placement Warrants (including any shares of Common Stock issued or issuable upon the exercise of the Private Placement Warrants), (c) any outstanding shares of Common Stock or Warrants held by a Holder as of the effective date of the Merger (including the Merger Shares), (d) any shares of Common Stock that may be acquired by Holders upon the exercise of a Warrant or other right to acquire Common Stock held by a Holder as of the date of this Agreement, (e) any shares of Common Stock or Warrants (including any shares of Common Stock issued or issuable upon the exercise of any such Warrant) of the Company otherwise acquired or owned by a Holder following the date hereof to the extent that such securities are “restricted securities” (as defined in Rule 144)

or are otherwise held by an “affiliate” (as defined in Rule 144) of the Company, and (f) any other equity security of the Company or any of its subsidiaries issued or issuable with respect to any securities referenced in clauses (a) through (e) above by way of a stock dividend or stock split or in connection with a recapitalization, merger, consolidation, spin-off, reorganization or similar transaction; provided, however, that such Registrable Securities shall cease to be Registrable Securities with respect to any Holder upon the earliest to occur of (a) when such Registrable Securities shall have been sold, transferred, disposed of or exchanged by such Holder in a transaction effected in accordance with, or exempt from, the registration requirements of the Securities Act, (b) the date on which such Registrable Securities can be sold by such Holder in accordance with Rule 144 without volume limitations or current public information reporting requirements and (c) the date on which such securities shall have ceased to be outstanding.

“Registration Statement” means any registration statement of the Company filed with the Commission under the Securities Act which covers any Registrable Securities pursuant to the provisions of this Agreement, including the Prospectus, amendments and supplements to such Registration Statement, including post-effective amendments, all exhibits and all materials incorporated by reference or deemed to be incorporated by reference in such Registration Statement.

“Sale Expenses” shall mean (a) the fees and disbursements of counsel and independent public accountants for the Company incurred in connection with the Company’s performance of or compliance with this Agreement, including the expenses of any special audits or “comfort” letters required by or incident to such performance and compliance, and any premiums and other costs of policies of insurance obtained by the Company against liabilities arising out of the sale of any securities, (b) all filing and stock exchange fees, all fees and expenses of complying with securities or “blue sky” laws (including any legal investment memoranda related thereto), all fees and expenses of custodians, transfer agents and registrars, all printing and producing expenses, messenger and delivery expenses, (c) expenses relating to any analyst or Holder presentations or any “road shows” undertaken in connection with the marketing or selling of Registrable Securities, (d) fees and expenses in connection with any review by FINRA of the underwriting arrangements or other terms of the offering, and all fees and expenses of any “qualified independent underwriter,” and (e) costs of any selling agreements and other documents in connection with the offering, sale or delivery of Registrable Securities; provided, however, that “Sale Expenses” shall not include any out-of-pocket expenses of any Holder (other than as set forth in clause (b) above), transfer taxes, underwriting or brokerage commissions or discounts associated with effecting any sales of Registrable Securities that may be offered, which expenses shall be borne by such Holder.

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

“Shelf Registration Statement” shall have the meaning set forth in Section 2(a)(i) hereof.

“Shelf Takedown Limit” shall have the meaning set forth in Section 2(a)(iv) hereof.

“Sponsor Holders” shall have the meaning set forth in the Preamble hereof.

“Sponsor Shares” shall have the meaning set forth in the Recitals hereof.

“Subsequent Shelf Registration” shall have the meaning set forth in Section 2(a)(ii) hereof.

“Suspension Period” shall have the meaning set forth in Section 2(e)(i) hereof.

“Termination Date” shall have the meaning set forth in Section 5(a) hereof.

“Underwritten Offering” shall mean a sale of securities of the Company to an underwriter or underwriters for reoffering to the public.

“Underwritten Shelf Takedown” shall have the meaning set forth in Section 2(a)(iv) hereof.

“Warrants” shall mean the warrants of the Company, including the Private Placement Warrants, with each whole warrant entitling the holder to purchase one share of Common Stock.

“Withdrawal Notice” shall have the meaning set forth in Section 2(a)(vi) hereof.

## 2. REGISTERED OFFERINGS

### (a) *Registration Rights.*

(i) *Shelf Registration.* Subject to Section 3(c), the Company agrees to file within fifteen (15) Business Days after the date of this Agreement, a shelf Registration Statement on Form S-1, or such other form under the Securities Act then available to the Company, providing for the resale of all Registrable Securities (determined as of two business days prior to such filing) pursuant to Rule 415, from time to time (a “Shelf Registration Statement”). The Company shall use commercially reasonable efforts to cause such Shelf Registration Statement to be declared effective by the Commission as soon as practicable after the filing thereof. The Shelf Registration Statement shall provide for the resale from time to time, and pursuant to any method or combination of methods legally available (including, without limitation, an Underwritten Offering, a direct sale to purchasers or a sale through brokers or agents) to the Holders of any and all Registrable Securities. Following the filing of the Shelf Registration Statement, the Company shall use its commercially reasonable efforts to convert the Shelf Registration Statement on Form S-1 (and any Subsequent Shelf Registration) to a Registration Statement on Form S-3 as soon as practicable after the Company is eligible to use Form S-3.

(ii) *Subsequent Shelf Registration.* If any Shelf Registration Statement (as defined below) ceases to be effective under the Securities Act for any reason at any time while Registrable Securities are still outstanding, the Company shall, subject to Section 2(e), use its commercially reasonable efforts to as promptly as is reasonably practicable cause such Shelf Registration Statement to again become effective under the Securities Act (including obtaining the prompt withdrawal of any order suspending the effectiveness of such Shelf Registration Statement), and shall use its commercially reasonable efforts to as promptly as is reasonably practicable amend such Shelf Registration Statement in a manner reasonably expected to result in the withdrawal of any order suspending the effectiveness of such Shelf Registration Statement or file an additional registration statement as a Shelf Registration Statement (a “Subsequent Shelf Registration”) registering the resale of all Registrable Securities (determined as of two business days prior to such filing), and pursuant to any method or combination of methods legally available to, and requested by, any Holder named therein. If a Subsequent Shelf Registration is filed, the Company shall use its commercially reasonable efforts to (i) cause such Subsequent Shelf Registration to become effective under the Securities Act as promptly as is reasonably practicable

after the filing thereof (it being agreed that the Subsequent Shelf Registration shall be an automatic shelf registration statement (as defined in Rule 405 promulgated under the Securities Act) if the Company is a well-known seasoned issuer (as defined in Rule 405 promulgated under the Securities Act) at the most recent applicable eligibility determination date) and (ii) keep such Subsequent Shelf Registration continuously effective, available for use and in compliance with the provisions of the Securities Act until such time as there are no longer any Registrable Securities. Any such Subsequent Shelf Registration shall be on Form S-3 to the extent that the Company is eligible to use such form. Otherwise, such Subsequent Shelf Registration shall be on another appropriate form.

(iii) *Additional Registrable Securities.* In the event that any Holder holds Registrable Securities that are not registered for resale on a delayed or continuous basis, the Company, upon request of a Holder that holds at least five percent (5.0%) of the Registrable Securities, shall promptly use its commercially reasonable efforts to cause the resale of such Registrable Securities to be covered by either, at the Company's option, the Shelf Registration Statement (including by means of a post-effective amendment) or a Subsequent Shelf Registration and cause the same to become effective as soon as practicable after such filing and such Shelf Registration Statement or Subsequent Shelf Registration shall be subject to the terms hereof; provided, however, that the Company shall only be required to cause such Registrable Securities to be so covered twice per calendar year.

(iv) *Requests for Underwritten Shelf Takedowns.* At any time and from time to time when an effective Shelf Registration Statement is on file with the Commission, any one or more Holders (any of the Holders being, in such case, a "Demanding Holder") may request to sell all or any portion of its Registrable Securities in an Underwritten Offering that is registered pursuant to the Shelf Registration Statement (each, an "Underwritten Shelf Takedown"); provided in each case that the Company shall only be obligated to effect an Underwritten Offering if such offering shall include Registrable Securities proposed to be sold by the Demanding Holder(s) with a total offering price reasonably expected to exceed, in the aggregate, \$35.0 million (the "Minimum Takedown Threshold"). All requests for Underwritten Shelf Takedowns shall be made by giving written notice to the Company, which shall specify the approximate number of Registrable Securities proposed to be sold in the Underwritten Shelf Takedown. Promptly (but in any event within ten (10) days) after receipt of a request for Underwritten Shelf Takedown, the Company shall give written notice of the Underwritten Shelf Takedown to all other Holders. The Company shall have the right to select the underwriters for such offering (which shall consist of one or more reputable nationally recognized investment banks), subject to the initial Demanding Holder's prior approval (which shall not be unreasonably withheld, conditioned or delayed). The Holders may collectively demand up to four (4) Underwritten Shelf Takedowns pursuant to this Section 2(a)(iv) (the "Shelf Takedown Limit") and the Holders may collectively demand no more than two (2) Underwritten Shelf Takedowns pursuant to this Section 2(a)(iv) in any 12-month period. Notwithstanding anything to the contrary in this Agreement, the Company may effect any Underwritten Shelf Takedown pursuant to any then effective Registration Statement, including a Form S-3, that is then available for such offering.

(v) *Reduction of Underwritten Shelf Takedown.* If, in connection with an Underwritten Offering that is effectuated for the account of stockholders of the Company, including pursuant to Section 2(a)(iv) hereof, in which Registrable Securities are included, the managing underwriters of such Underwritten Offering advise the Company in writing that, in their opinion and in consultation with the Company, the number of shares of Common Stock, including any Registrable Securities, requested to be included in such Underwritten Offering exceeds the number that can be sold in such Underwritten Offering and/or that the number of Registrable Securities proposed to be included in any such Underwritten Offering would adversely affect the price per share of the Company's equity securities to be sold in such Underwritten Offering (such maximum number of securities or Registrable Securities, as applicable, the "Maximum Threshold"), then the number of shares of Common Stock to be included in such Underwritten Offering shall be allocated among the Holders and holders of Non-Holder Securities as follows: (A) first, the shares comprised of Registrable Securities, pro rata, based on the amount of such Common Stock initially requested to be included by the Holders or as such Holders may otherwise agree, that can be sold without exceeding the Maximum Threshold; (B) second, to the extent that the Maximum Threshold has not been reached under the foregoing clause (A), the shares of Common Stock of a Holder of the Company's securities other than Registrable Securities ("Non-Holder Securities") that either (1) the Company is obligated to include pursuant to written contractual rights entered into prior to or on the date hereof or (2) such other contractual rights governing the applicable Non-Holder Securities, pro rata, based on the amount of such Common Stock initially requested to be included by the holders of Non-Holder Securities or as such holders of Non-Holder Securities may otherwise agree, that can be sold without exceeding the Maximum Threshold; (C) third, to the extent that the Maximum Threshold has not been reached under the foregoing clause (A), Non-Holder Securities that the Company is obligated to include pursuant to written contractual rights entered into after the date hereof that do not comply with clause (B)(2) above, that can be sold without exceeding the Maximum Threshold; and (C) fourth, to the extent that the Maximum Threshold has not been reached under the foregoing clauses (A), (B) and (C), the shares of Common Stock or other securities that the Company desires to sell that can be sold without exceeding the Maximum Threshold.

(vi) *Withdrawal.* Prior to the filing of the applicable "red herring" prospectus or prospectus supplement used for marketing such Underwritten Shelf Takedown, a majority-in-interest of the Demanding Holders initiating an Underwritten Shelf Takedown shall have the right to withdraw from such Underwritten Shelf Takedown for any or no reason whatsoever upon written notification (a "Withdrawal Notice") to the Company and the underwriter or underwriters (if any) of their intention to withdraw from such Underwritten Shelf Takedown; provided that any Holder may elect to have the Company continue an Underwritten Shelf Takedown if the Minimum Takedown Threshold would still be satisfied by the Registrable Securities proposed to be sold in the Underwritten Shelf Takedown by the Holders. If withdrawn, a demand for an Underwritten Shelf Takedown shall constitute a demand for an Underwritten Shelf Takedown for purposes of Section 2(a)(iv), unless the Holder reimburses the Company for all Sale Expenses with respect to such Underwritten Shelf Takedown; provided that, if a Holder elects to continue an Underwritten Shelf Takedown pursuant to the proviso in the immediately preceding sentence, such Underwritten Shelf Takedown shall instead count as an Underwritten Shelf Takedown demanded by the Holders for purposes of Section 2(a)(iv). Following the receipt of any Withdrawal Notice, the Company shall promptly forward such Withdrawal Notice to any other Holders that had elected to participate in such Underwritten Shelf Takedown. Notwithstanding anything to the contrary in this Agreement, the Company shall be responsible for the Sale Expenses incurred in connection with a Underwritten Shelf Takedown prior to its withdrawal under this Section 2(a)(vi), other than if a Demanding Holder elects to pay such Sale Expenses pursuant to the second sentence of this Section 2(a)(vi).

(b) *Piggyback Rights.*

(i) *Right to Piggyback.* If the Company or any Holder proposes to conduct a registered offering of, or if the Company proposes to file a Registration Statement under the Securities Act with respect to the Registration of, equity securities, or securities or other obligations exercisable or exchangeable for, or convertible into equity securities, for its own account or for the account of stockholders of the Company (or by the Company and by the stockholders of the Company including, without limitation, an Underwritten Shelf Takedown pursuant to Section 2(a)(iv) hereof), other than a Registration Statement (or any registered offering with respect thereto) (i) filed in connection with any employee stock option or other benefit plan, (ii) pursuant to a Registration Statement on Form S-4 (or similar form that relates to a transaction subject to Rule 145 under the Securities Act or any successor rule thereto), (iii) for an offering of debt that is convertible into equity securities of the Company, (iv) for a dividend reinvestment plan or (v) for a rights offering, then the Company shall give written notice of such proposed offering to all of the Holders of Registrable Securities as soon as practicable but not less than ten (10) days before the anticipated filing date of such Registration Statement or, in the case of an Underwritten Offering pursuant to a Shelf Registration Statement, the applicable “red herring” prospectus or prospectus supplement used for marketing such offering, which notice shall (A) describe the amount and type of securities to be included in such offering, the intended method(s) of distribution, and the name of the proposed managing underwriter or underwriters, if any, in such offering, and (B) offer to all of the Holders of Registrable Securities the opportunity to include in such registered offering such number of Registrable Securities as such Holders may request in writing within five (5) days after receipt of such written notice (such Registration, a “Piggyback Registration”). Subject to Section 2(b)(ii), the Company shall cause such Registrable Securities to be included in such Piggyback Registration and, if applicable, shall use its commercially reasonable efforts to cause the managing underwriter or underwriters of such Piggyback Registration to permit the Registrable Securities requested by the Holders pursuant to this Section 2(b)(i) to be included therein on the same terms and conditions as any similar securities of the Company included in such Registration and to permit the sale or other disposition of such Registrable Securities in accordance with the intended method(s) of distribution thereof. The inclusion of any Holder’s Registrable Securities in a Piggyback Registration shall be subject to such Holder’s agreement to enter into an underwriting agreement in customary form with the Underwriter(s) selected for such Underwritten Offering by the Company.

(ii) *Reduction of Offering.* If the managing underwriter or underwriters in an Underwritten Offering that is to be a Piggyback Registration advises the Company and the Holders of Registrable Securities participating in the Piggyback Registration in writing that the dollar amount or number of shares of Common Stock or other equity securities that the Company desires to sell, taken together with (i) the shares of Common Stock or other equity securities, if any, as to which Registration or a registered offering has been demanded pursuant to separate written contractual arrangements with persons or entities other than the Holders of Registrable Securities hereunder, (ii) the Registrable Securities as to which registration has been requested pursuant to Section 2(b) hereof, and (iii) the shares of Common Stock or other equity securities, if any, as to which Registration or a registered offering has been requested pursuant to separate written contractual piggy-back registration rights of other stockholders of the Company, exceeds the Maximum Number of Securities, then:



(A) If the Registration or registered offering is initiated by the Company primarily for its own account, the number of shares of Common Stock to be included in such Underwritten Offering shall be allocated as follows: (A) first, the shares of Common Stock or other securities to be sold by the Company; (B) second, to the extent that the Maximum Threshold has not been reached under the foregoing clause (A), the Registrable Securities of Holders exercising their rights to register their Registrable Securities hereunder; and (C) third, to the extent that the Maximum Threshold has not been reached under the foregoing clauses (A) and (B), Non-Holder Securities that the Company is obligated to include pursuant to separate written contractual rights that can be sold without exceeding the Maximum Threshold;

(B) If the Registration or registered offering is initiated for the account of stockholders of the Company other than the Holders of Registrable Securities, the number of shares of Common Stock to be included in such Underwritten Offering shall be allocated as follows: (A) first, the shares comprised of Registrable Securities and the Non-Holder Securities that either (1) the Company is obligated to include pursuant to written contractual rights entered into prior to or on the date hereof or (2) such other contractual rights governing the applicable Non-Holder Securities provide that the Holder's participation rights in such offering are *pari passu* with respect to registration cutbacks in the same fashion as set forth in this clause (A), pro rata, based on the amount of such Common Stock initially requested to be included by the Holders or holders of Non-Holder Securities or as such Holder or holders of Non-Holder Securities may otherwise agree, that can be sold without exceeding the Maximum Threshold; (B) second, to the extent that the Maximum Threshold has not been reached under the foregoing clause (A), Non-Holder Securities that the Company is obligated to include pursuant to written contractual rights entered into after the date hereof that do not comply with clause (A)(2) above, that can be sold without exceeding the Maximum Threshold; and (C) third, to the extent that the Maximum Threshold has not been reached under the foregoing clauses (A) and (B), the shares of Common Stock or other securities that the Company desires to sell that can be sold without exceeding the Maximum Threshold; and

(C) If the Registration or registered offering is pursuant to a request by Holder(s) of Registrable Securities pursuant to Section 2(a)(iv) hereof, then the Company shall include in any such Registration or registered offering securities pursuant to Section 2(a)(v).

(iii) *Withdrawal*. Any Holder of Registrable Securities (other than a Demanding Holder, whose right to withdrawal from an Underwritten Shelf Takedown, and related obligations, shall be governed by Section 2(a)(vi)) shall have the right to withdraw from a Piggyback Registration for any or no reason whatsoever upon written notification to the Company and the underwriter or underwriters (if any) of his, her or its intention to withdraw from such Piggyback

Registration prior to the effectiveness of the Registration Statement filed with the Commission with respect to such Piggyback Registration or, in the case of a Piggyback Registration pursuant to a Shelf Registration Statement, the filing of the applicable “red herring” prospectus or prospectus supplement with respect to such Piggyback Registration used for marketing such transaction. The Company (whether on its own determination or as the result of a request for withdrawal by persons pursuant to separate written contractual obligations) may withdraw a Registration Statement filed with the Commission in connection with a Piggyback Registration (which, in no circumstance, shall include the Shelf) at any time prior to the effectiveness of such Registration Statement. Notwithstanding anything to the contrary in this Agreement (other than Section 2(a)(vi)), the Company shall be responsible for the Sale Expenses incurred in connection with the Piggyback Registration prior to its withdrawal under this Section 2(b)(iii).

(iv) *Unlimited Piggyback Registration Rights*. For purposes of clarity, subject to Section 2(a)(vi), any Piggyback Registration effected pursuant to Section 2(b) hereof shall not be counted as a demand for an Underwritten Shelf Takedown under Section 2(a)(iv) hereof.

(c) *Block Trades; Other Coordinated Offerings*.

(i) *Block Trades*. Notwithstanding the foregoing, at any time and from time to time when an effective Shelf Registration Statement is on file with the Commission, if a Demanding Holder wishes to engage in (A) a Block Trade or (B) an “at the market” or similar registered offering through a broker, sales agent or distribution agent, whether as agent or principal (an “Other Coordinated Offering”), in each case with a total offering price reasonably expected to exceed, in the aggregate, either (x) \$35.0 million or (y) all remaining Registrable Securities held by the Demanding Holder, then notwithstanding the time periods provided for in Section 2(a)(iv), such Demanding Holder shall notify the Company of the Block Trade or Other Coordinated Offering at least five (5) business days prior to the day such offering is to commence and the Company shall as expeditiously as possible use its commercially reasonable efforts to facilitate such Block Trade or Other Coordinated Offering; provided that the Demanding Holders representing a majority of the Registrable Securities wishing to engage in the Block Trade or Other Coordinated Offering shall use commercially reasonable efforts to work with the Company and any underwriters or placement agents or sales agents prior to making such request in order to facilitate preparation of the registration statement, prospectus and other offering documentation related to the Block Trade or Other Coordinated Offering; provided further that in the case of such underwritten Block Trade or Other Coordinated Offering, only such Holder shall have a right to notice of and to participate in such offering.

(ii) *Withdrawal*. Prior to the filing of the applicable “red herring” prospectus or prospectus supplement used in connection with a Block Trade or Other Coordinated Offering, a majority-in-interest of the Demanding Holders initiating such Block Trade or Other Coordinated Offering shall have the right to submit a Withdrawal Notice to the Company and the underwriter or underwriters or placement agents or sales agents (if any) of their intention to withdraw from such Block Trade or Other Coordinated Offering. If withdrawn, a demand for a Block Trade or Other Coordinated Offering shall constitute a demand for an Underwritten Shelf Takedown, unless the Holder reimburses the Company for all Sale Expenses with respect to such Block Trade or Other Coordinated Offering.

(iii) *Cap on Block Trades and Other Coordinated Offerings.* Any Registration effected pursuant to this Section 2(c) shall be deemed an Underwritten Shelf Takedown and counted towards the Shelf Takedown Limit. Notwithstanding anything to the contrary in this Agreement, Section 2(b) hereof shall not apply to a Block Trade or Other Coordinated Offering initiated by a Demanding Holder pursuant to this Agreement.

(d) *Continued Effectiveness.* The Company shall use commercially reasonable efforts to keep any Registration Statement continuously effective for the period beginning on the date on which such Registration Statement is declared effective and ending on the date that all of Registrable Securities registered under the Registration Statement cease to be Registrable Securities. During the period that such Registration Statement is effective, the Company shall use commercially reasonable efforts to supplement or make amendments to the Registration Statement, if required by the Securities Act or if reasonably requested by Holder (whether or not required by the form on which the securities are being registered), including to reflect any specific plan of distribution or method of sale, and shall use its commercially reasonable efforts to have such supplements and amendments declared effective, if required, as soon as practicable after filing.

(e) *Suspension Period; Blackout Period.*

(i) *Misstatement.* Upon receipt of written notice from the Company that a Registration Statement or Prospectus contains a Misstatement, each of the Holders shall forthwith discontinue disposition of Registrable Securities until it has received copies of a supplemented or amended Prospectus correcting the Misstatement (it being understood that the Company hereby covenants to prepare and file such supplement or amendment as soon as practicable after the time of such notice), or until it is advised in writing by the Company that the use of the Prospectus may be resumed (any such period, a "Suspension Period").

(ii) *Other Suspension.* Notwithstanding any provision of this Agreement to the contrary, if the Board determines in good faith that any use of a Registration Statement or Prospectus hereunder involving Registrable Securities would (i) reasonably be expected to, in the good faith judgment of the majority of the Board, after consultation with counsel to the Company, materially impede, delay or interfere with, or require premature disclosure of, any material financing, offering, acquisition, disposition, merger, corporate reorganization, segment reclassification or discontinuance of operations that is required to be reflected in pro forma or restated financial statements that amends historical financial statements of the Company, or other significant transaction or any negotiations, discussions or pending proposals with respect thereto, involving the Company or any of its subsidiaries; (ii) require the inclusion in such Registration Statement of financial statements that are unavailable to the Company for reasons beyond the Company's control; or (iii) require, after consultation with counsel to the Company, the disclosure of material non-public information, the disclosure of which would (x) not be required to be made if a Registration Statement were not being used and (y) reasonably be expected to materially and adversely affect the Company, then the Company shall be entitled to suspend, for not more than sixty (60) consecutive days (any such period, a "Blackout Period"), but in no event (A) more than three (3) times in any consecutive twelve (12) month period (which periods may be successive) and (B) for more than an aggregate of one hundred twenty (120) days in any rolling twelve (12) month period, commencing on the date of this Agreement, the use of any Registration Statement or Prospectus and shall not be required to amend or supplement the Registration Statement, any related Prospectus or any document incorporated therein by reference. The Company promptly will give written notice of any such Blackout Period to the Holders.

(f) *Sale Expenses.* All Sale Expenses of any Holder incurred in connection with Section 2 and Section 3 shall be borne by the Company. It is acknowledged by the Holders that the Holders shall bear all incremental selling expenses relating to the sale of Registrable Securities, such as underwriters' or agents' commissions and discounts, brokerage fees, Underwriter marketing costs and, other than as set forth in the definition of "Sale Expenses," all reasonable fees and expenses of any legal counsel representing the Holders.

(g) *Market Stand-Off.* In connection with any Underwritten Offering of equity securities of the Company (other than a Block Trade or Other Coordinated Offering), each Holder that holds greater than five percent (5%) of the outstanding Common Stock or is an executive officer or director of the Company that is given an opportunity to participate in the Underwritten Offering pursuant to the terms of this Agreement agrees that it shall not transfer any shares of Common Stock or other equity securities of the Company (other than those included in such offering pursuant to this Agreement), without the prior written consent of the Company, during the 90-day period beginning on the date of pricing of such offering or such shorter period during which the Company agrees not to conduct an underwritten primary offering of Common Stock, except in the event the underwriters managing the offering otherwise agree by written consent. Each Holder that holds greater than five percent (5%) of the outstanding Common Stock or is an executive officer or director of the Company agrees to execute a customary lock-up agreement in favor of the underwriters to such effect (in each case on substantially the same terms and conditions as all such Holders).

### 3. PROCEDURES

(a) In connection with the filing of any Registration Statement or sale of Registrable Securities as provided in this Agreement, the Company shall use commercially reasonable efforts to, as expeditiously as reasonably practicable:

(i) notify promptly the Holders and, if requested by a Holder, confirm such advice in writing promptly at the address determined in accordance with Section 10(e), (A) of the issuance by the Commission or any state securities authority of any stop order suspending the effectiveness of a Registration Statement or the initiation of any proceedings for that purpose, (B) if, between the effective date of a Registration Statement and the closing of any sale of Registrable Securities covered thereby, the representations and warranties of the Company contained in any underwriting agreement, securities sales agreement or other similar agreement, if any, relating to the offering cease to be true and correct in all material respects, (C) of the happening of any event or the discovery of any facts during the period a Registration Statement is effective as a result of which such Registration Statement or any document incorporated by reference therein contains any Misstatement or alleged Misstatement (which information shall be accompanied by an instruction to suspend the use of the Registration Statement and the prospectus until the requisite changes have been made), (D) of the receipt by the Company of any notification with respect to the suspension of the qualification of Registrable Securities for sale in any jurisdiction or the initiation or threatening of any proceeding for such purpose and (E) of the filing of a post-effective amendment to such Registration Statement;

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(ii) furnish each Holder's legal counsel, if any, copies of any comment letters relating to such Holder received from the Commission or any other request by the Commission or any state securities authority for amendments or supplements to a Registration Statement and prospectus or for additional information relating to such Holder;

(iii) use commercially reasonable efforts to obtain the withdrawal of any order suspending the effectiveness of a Registration Statement as promptly as practicable;

(iv) upon the occurrence of any event or the discovery of any facts, as contemplated by Section 3(a)(i)(C) and Section 3(a)(i)(D), as promptly as practicable after the occurrence of such an event, use its commercially reasonable efforts to prepare a supplement or post-effective amendment to the Registration Statement or the related prospectus or any document incorporated therein by reference or file any other required document so that, as thereafter delivered to the purchasers of Registrable Securities, such prospectus will not contain at the time of such delivery any Misstatement or alleged Misstatement. At such time as such public disclosure is otherwise made or the Company determines that such disclosure is not necessary, in each case to correct any Misstatement, the Company agrees promptly to notify the Holders of such determination and to furnish any Holder such number of copies of the prospectus as amended or supplemented, as such Holder may reasonably request;

(v) enter into agreements in customary form (including underwriting agreements) and take all other reasonable and customary appropriate actions in order to expedite or facilitate the disposition of such Registrable Securities regardless of whether an underwriting agreement is entered into and regardless of whether the registration is an underwritten registration, including:

(A) for an Underwritten Offering, making such representations and warranties to the underwriters, if any, in form, substance and scope as are customarily made by issuers to underwriters in similar Underwritten Offerings as may be reasonably requested by them;

(B) for an Underwritten Offering, obtaining opinions of counsel to the Company and updates thereof (which counsel and opinions (in form, scope and substance) shall be reasonably satisfactory to any managing underwriter(s) and their counsel) addressed to the underwriters, if any, covering the matters customarily covered in opinions requested in Underwritten Offerings and such other matters as may be reasonably requested by the underwriter(s);

(C) for an Underwritten Offering, obtaining "comfort" letters and updates thereof from the Company's independent registered public accounting firm (and, if necessary, any other independent certified public accountants of any subsidiary of the Company or of any business acquired by the Company for which financial statements are, or are required to be, included in the Registration Statement) addressed to the underwriter(s), such letters to be in customary form and covering matters of the type customarily covered in "comfort" letters to underwriters in connection with similar Underwritten Offerings;

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(D) entering into a securities sales agreement with the Holder(s) and an agent of Holder(s) providing for, among other things, the appointment of such agent for the Holder(s) for the purpose of soliciting purchases of Registrable Securities, which agreement shall be in form, substance and scope customary for similar offerings;

(E) if an underwriting agreement is entered into, using commercially reasonable efforts to cause the same to set forth indemnification provisions and procedures substantially similar to the indemnification provisions and procedures set forth in Section 4 with respect to the underwriters or, at the request of any underwriters, in the form customarily provided to underwriters in similar types of transactions; and

(F) delivering such documents and certificates as may be reasonably requested and as are customarily delivered in similar offerings to the managing underwriters, if any;

(vi) make available for inspection by any underwriter participating in any disposition pursuant to a Registration Statement, the Holders' legal counsel and any accountant retained by a Holder, all financial and other records, pertinent corporate documents and properties or assets of the Company reasonably requested by any such Persons (excluding all trade secrets and other proprietary or privileged information) to the extent required for the offering, and cause the respective officers, directors, employees, and any other agents of the Company to supply all information reasonably requested by any such representative, underwriter, counsel or accountant in connection with a Registration Statement, and make such representatives of the Company available for discussion of such documents as shall be reasonably requested by the Company; provided, however, that the Holders' legal counsel, if any, and the representatives of any underwriters will use commercially reasonable efforts, to the extent reasonably practicable, to coordinate the foregoing inspection and information gathering and to not unreasonably disrupt v Company's business operations;

(vii) a reasonable time prior to filing any Registration Statement, any prospectus forming a part thereof, any amendment to such Registration Statement, or amendment or supplement to such prospectus, provide copies of such document to the underwriter(s) of an Underwritten Offering of Registrable Securities; within five (5) Business Days after the filing of any Registration Statement, provide copies of such Registration Statement to any Holder's legal counsel upon request; consider in good faith making any changes requested and make such changes in any of the foregoing documents as are legally required prior to the filing thereof, or in the case of changes received from any Holder's legal counsel by filing an amendment or supplement thereto, as the underwriter or underwriters, or in the case of changes received from a Holder's legal counsel relating to such Holder or the plan of distribution of Registrable Securities, as such Holder's legal counsel reasonably requests prior to the effectiveness of the applicable Registration Statement; not file any such document in a form to which any underwriter shall not have previously been advised and furnished a copy of; not include in any amendment or

supplement to such documents any information about any Holders or any change to the plan of distribution of Registrable Securities that would limit the method of distribution of Registrable Securities unless such Holder's legal counsel has been advised in advance and has approved such information or change (it being understood that any Holder that determines not to approve the inclusion of such change or information that has been specifically requested by the Commission will not have its Registrable Securities included in such Registration Statement and the Company shall not be in breach of this Agreement as a result of such exclusion); and reasonably during normal business hours make the representatives of the Company available for discussion of such document as shall be reasonably requested by the Holders' legal counsel, if any, on behalf of a Holder, Holder's legal counsel or any underwriter;

(viii) otherwise use commercially reasonable efforts to comply with all applicable rules and regulations of the Commission and make available to its securityholders, as soon as reasonably practicable, an earnings statement covering at least twelve (12) months beginning with the first day of the Company's first full calendar quarter after the effective date of the Registration Statement, which shall satisfy the provisions of Section 11(a) of the Securities Act and Rule 158 thereunder;

(ix) cooperate and assist in any filings required to be made with FINRA and in the performance of any due diligence investigation by any underwriter and its counsel (including any "qualified independent underwriter" that is required to be retained in accordance with the rules and regulations of FINRA);

(x) if Registrable Securities are to be sold in an Underwritten Offering, include in the registration statement to be used all such information as may be reasonably requested by the underwriters for the marketing and sale of such Registrable Securities; and

(xi) in connection with an Underwritten Offering, use its reasonable efforts to cause the appropriate officers of the Company to (A) prepare and make presentations at any "road shows" and before analysts and (B) cooperate as reasonably requested by the underwriters in the offering, marketing or selling of Registrable Securities.

(b) Each Holder agrees that, upon receipt of any notice from the Company of the happening of any event or the discovery of any facts of the type described in Section 3(a)(i), each Holder will forthwith discontinue disposition of Registrable Securities pursuant to a Registration Statement relating to such Registrable Securities until such Holder's receipt of the copies of the supplemented or amended prospectus contemplated by Section 3(a)(i), and, if so directed by the Company, each Holder will deliver to the Company (at the Company's expense) all copies in such Holder's possession, other than permanent file copies then in such Holder's possession, of the prospectus covering such Registrable Securities at the time of receipt of such notice.

(c) The Company may (as a condition to any Holder's participation in an Underwritten Offering or Holder's inclusion in a Registration Statement) require each Holder to furnish to the Company such information regarding the Holder and the proposed distribution by the Holder as the Company may from time to time reasonably request in writing.

#### 4. INDEMNIFICATION

(a) *Indemnification by The Company.* The Company agrees to indemnify and hold harmless each Holder, and the respective officers, directors, partners, employees, representatives and agents of each Holder, and each Person, if any, who controls (within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act) a Holder, as follows:

(i) against any and all loss, liability, claim, damage, judgment, actions, other liabilities and expenses whatsoever (the "Liabilities"), as incurred, arising out of any Misstatement contained in any Registration Statement (or any amendment or supplement thereto) pursuant to which Registrable Securities were registered under the Securities Act at the time such Registration Statement became effective, including all documents incorporated therein by reference;

(ii) against any and all Liabilities, as incurred, to the extent of the aggregate amount paid in settlement of any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or of any claim whatsoever based upon any such untrue statement or omission, or any such alleged untrue statement or omission; provided that any such settlement is effected with the written consent of the Company; and

(iii) against any and all expense whatsoever, as incurred (including the fees and disbursements of counsel chosen by any indemnified party), reasonably incurred in investigating, preparing or defending against any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or any claim whatsoever based upon any such untrue statement or omission, or any such alleged untrue statement or omission, to the extent that any such expense is not paid under Section 4(a)(i) or Section 4(a)(ii); provided, however, that the indemnity obligations in this Section 4(a) shall not apply to any Liabilities (A) to the extent arising out of any untrue statement or omission or alleged untrue statement or omission made in reliance upon and in conformity with written information furnished to the Company by any Holder with the understanding that such information will be used in a Registration Statement (or any amendment thereto) or any prospectus (or any amendment or supplement thereto) or (B) to the extent they arise from the use of any Registration Statement during any Suspension Period or Blackout Period.

(b) *Indemnification by the Holders.* The Holders agree, severally and not jointly, to indemnify and hold harmless the Company, and each of its respective officers, directors, partners, employees, representatives and agents and any person controlling the Company, against any and all Liabilities described in the indemnity contained in Section 4(a), as incurred, but only with respect to Misstatements or alleged Misstatements made in the Registration Statement (or any amendment thereto) or any prospectus included therein (or any amendment or supplement thereto) in reliance upon and in conformity with written information with respect to such Holder furnished to the Company by such Holder with the understanding that such information will be used in the Registration Statement (or any amendment thereto) or such prospectus (or any amendment or supplement thereto); provided, however, that Holder shall be liable for any claims hereunder in excess of the amount of net proceeds received by such Holder from the sale of Registrable Securities pursuant to such Registration Statement.



(c) *Notices of Claims, etc.* Each indemnified party shall give notice as promptly as reasonably practicable to each indemnifying party of any action or proceeding commenced against it in respect of which indemnity may be sought hereunder, but failure so to notify an indemnifying party shall not relieve such indemnifying party from any liability hereunder to the extent it is not materially prejudiced as a result thereof and in any event shall not relieve it from any liability which it may have otherwise than on account of this indemnity agreement. An indemnifying party may participate at its own expense in the defense of such action; provided, however, that counsel to the indemnifying party shall not (except with the consent of the indemnified party) also be counsel to the indemnified party. In no event shall the indemnifying party or parties be liable for the fees and expenses of more than one counsel (in addition to any local counsel) separate from their own counsel for all indemnified parties in connection with any one action or separate but similar or related actions in the same jurisdiction arising out of the same general allegations or circumstances. No indemnifying party shall, without the prior written consent of the indemnified parties, settle or compromise or consent to the entry of any judgment with respect to any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or any claim whatsoever in respect of which indemnification or contribution could be sought under this Section 4 (whether or not the indemnified parties are actual or potential parties thereto), unless such settlement, compromise or consent (i) includes an unconditional release of each indemnified party from all liability arising out of such litigation, investigation, proceeding or claim and (ii) does not include a statement as to an admission of fault, culpability or a failure to act by or on behalf of any indemnified party.

(d) *Contribution.* If the indemnification provided for in this Section 4 is for any reason unavailable to or insufficient to hold harmless an indemnified party in respect of any Liabilities referred to therein, then each indemnifying party shall contribute to the aggregate amount of such Liabilities incurred by such indemnified party, as incurred, in such proportion as is appropriate to reflect the relative fault of the Company, on the one hand, and the Holders, on the other hand, in connection with the statements or omissions which resulted in such Liabilities, as well as any other relevant equitable considerations. The relative fault of the Company, on the one hand, and the Holders, on the other hand, shall be determined by reference to, among other things, whether any Misstatement or alleged Misstatements relates to information supplied by the Company or a Holder and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission. The Company and each Holder agree that it would not be just and equitable if contribution pursuant to this Section 4 were determined by pro rata allocation or by any other method of allocation which does not take account of the equitable considerations referred to above in this Section 4. The aggregate amount of Liabilities incurred by an indemnified party and referred to above in this Section 4 shall be deemed to include any legal or other expenses reasonably incurred by such indemnified party in investigating, preparing or defending against any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or any claim whatsoever based upon any such untrue or alleged untrue statement or omission or alleged omission. No Person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentation. For purposes of this Section 4, each Person, if any, who controls a Holder within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, shall have the same rights to contribution as the Holder, and each director of the Company, and each Person, if any, who controls the Company within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act shall have the same rights to contribution as the Company.

## 5. TERMINATION

(a) *Survival.* The rights of the Holders under this Agreement shall terminate in accordance with the terms of this Agreement and in any event, upon the date that each such party holds no Registrable Securities (the "Termination Date"). Notwithstanding the foregoing, the obligations of the parties under Section 4 of this Agreement shall remain in full force and effect following such time.

## 6. MISCELLANEOUS

(a) *Covenants Relating To Rule 144.* With a view to making available to the Holders the benefits of Rule 144 and any other rule or regulation of the SEC that may at any time permit a Holder to sell securities of the Company to the public without registration or pursuant to a registration statement, if the Shares of the Company are registered under the Exchange Act, the Company agrees to: (A) file with the SEC all reports and other documents required of the Company under Section 13(a) or 15(d) of the Exchange Act (at any time after it has become subject to such reporting requirements); and (B) furnish to any Holder, so long as the Holder owns any Registrable Securities, upon request, (i) a written statement by the Company that it has complied with the reporting requirements of the Exchange Act (at any time after it has become subject to such reporting requirements), or that it qualifies as a registrant whose securities may be resold pursuant to a registration statement (at any time after it so qualifies) and (ii) such other information as may be reasonably requested by any Holder in order to avail itself of any rule or regulation of the SEC which permits the selling of any such securities without registration or pursuant to such form.

(b) *No Inconsistent Agreements.* The Company has not entered into, and the Company will not after the date of this Agreement enter into, any agreement which is inconsistent with the rights granted to the Holders pursuant to this Agreement or otherwise conflicts with the provisions of this Agreement.

(c) *Amendments and Waivers.* The provisions of this Agreement may be amended or waived at any time only by the written agreement of (i) the Company, (ii) Software Acquisition Holdings III LLC and (iii) the Holders owning a majority in voting power of the Registrable Securities. Any amendment or waiver effected in accordance with this paragraph shall be binding upon each Holder and the Company. No failure to exercise, or delay in exercising, any right, remedy, power or privilege.

(d) *Notices.* All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given (a) when delivered in person or, by facsimile or by e-mail, (b) on the next Business Day when sent by overnight courier, or (c) on the second succeeding Business Day when sent by registered or certified mail (postage prepaid, return receipt requested) to the respective Parties at the following addresses (or at such other address for a Party as shall be specified by like notice):

If to a Holder, to the most current address given by such Holder to the Company by means of a notice given in accordance with the provisions of this Section 7(e).

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If to the Company to:

Nogin, Inc.  
1775 Flight Way STE 400  
Tustin, CA 92782  
Attention: Jan Nugent; Geoffrey Van Haeren  
Email: jnugent@nogin.com; gvanhaeren@nogin.com

with a copy (which shall not constitute notice) to:

Latham & Watkins LLP  
811 Main Street, Suite 3700  
Houston, Texas 77002  
Attention: Ryan J. Maierson  
John M. Greer  
Ryan J. Lynch  
E-mail: ryan.maierson@lw.com  
john.greer@lw.com  
ryan.lynch@lw.com

All such notices, requests, demands, waivers and communications shall be deemed received upon (i) actual receipt thereof by the addressee, or (ii) actual delivery thereof to the appropriate address.

(e) *Successor and Assigns.* This Agreement shall inure to the benefit of and be binding upon the successors of the Company and each Holder. Other than with respect to registration rights provided hereunder which may be assigned by a Holder to its Affiliates, no party can assign its rights under this Agreement without the prior written consent of the other parties.

(f) *Specific Enforcement.* Without limiting the remedies available to each of the parties hereto, each party acknowledges that any failure by any party to comply with its obligations this Agreement may result in material irreparable injury to the other parties for which there is no adequate remedy at law, that it would not be possible to measure damages for such injuries precisely and that, in the event of any such failure, each party may obtain such relief as may be required to specifically enforce the Company's or any Holder's obligations under this Agreement.

(g) *Counterparts.* This Agreement may be executed in any number of counterparts and by the parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

(h) *Headings.* The headings in this Agreement are for convenience of reference only and shall not limit or otherwise affect the meaning hereof.

(i) *GOVERNING LAW.* THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF DELAWARE.

(j) *Dispute Resolution*. The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of Delaware and to the jurisdiction of the United States District Court for the District of Delaware for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of Delaware or the United States District Court for the District of Delaware, and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject personally to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Agreement or the subject matter hereof may not be enforced in or by such court.

(k) *WAIVER OF JURY TRIAL*. EACH PARTY HEREBY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, THE SECURITIES OR THE SUBJECT MATTER HEREOF. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS (INCLUDING NEGLIGENCE), BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF THE PARTIES HERETO AND THESE PROVISIONS WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY HERETO HEREBY FURTHER WARRANTS AND REPRESENTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

(l) *Severability*. In the event that any one or more of the provisions contained herein, or the application thereof in any circumstance, is held invalid, illegal or unenforceable, the validity, legality and enforceability of any such provision in every other respect and of the remaining provisions contained herein shall not be affected or impaired thereby.

[SIGNATURE PAGE FOLLOWS]

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

NOGIN, INC.

By: /s/ Jan Nugent  
Name: Jan Nugent  
Title: Chief Executive Officer

SOFTWARE ACQUISITION HOLDINGS III, LLC

By: /s/ Jonathan Huberman  
Name: Jonathan Huberman  
Title: Chairman and CEO

[Signature Page to Registration Rights Agreement]

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

Jan Nugent

/s/ Jan Nugent \_\_\_\_\_

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

Geoffrey Van Haeren

/s/ Geoffrey Van Haeren

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

Stephen Choi

/s/ Stephen Choi \_\_\_\_\_



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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

Iron Gate Branded Online LLC

By: /s/ Iron Gate Branded Online LLC

Name: Ryan Pollock

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**Schedule A**  
**Sponsor Holders**

Software Acquisition Holdings III LLC  
Jonathan S. Huberman

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**Schedule B**  
**Legacy Ngin Holders**

Jan Nugent  
Geoff Van Haeren  
Iron Gate Branded Online LLC  
Stephen Choi

**BRANDED ONLINE, INC.**  
**2013 STOCK INCENTIVE PLAN**

This 2013 Stock Incentive Plan (the “**Plan**”) is hereby established by Branded Online, Inc., a Delaware corporation (the “**Company**”), and adopted by its Board of Directors as of January 24, 2013 (the “**Effective Date**”).

**ARTICLE 1.**

**PURPOSES OF THE PLAN**

**1.1 Purposes.** The purposes of the Plan are (a) to enhance the Company’s ability to attract and retain the services of qualified employees, officers and directors (including non-employee officers and directors), and consultants and other service providers upon whose judgment, initiative and efforts the successful conduct and development of the Company’s business largely depends (“**Key Team Members**”), and (b) to provide additional incentives to such persons or entities to devote their utmost effort and skill to the advancement and betterment of the Company, by providing them an opportunity to participate in the ownership of the Company and thereby have an interest in the success and increased value of the Company.

**ARTICLE 2.**

**DEFINITIONS**

For purposes of this Plan, the following terms shall have the meanings indicated:

**2.1 Administrator.** “Administrator” means the Board or, if the Board delegates responsibility for any matter to the Committee, the term Administrator shall mean the Committee.

**2.2 Affiliated Company.** “Affiliated Company” means any “parent corporation” or “subsidiary corporation” of the Company, whether now existing or hereafter created or acquired, as those terms are defined in Sections 424(e) and 424(f) of the Code, respectively.

**2.3 Award.** “Award” means any Option, Restricted Stock or Stock Appreciation Right granted to a Participant under the Plan.

**2.4 Award Agreement.** “Award Agreement” means any Option Agreement, Restricted Stock Purchase Agreement or Stock Appreciation Rights Agreement entered into between the Company and a Participant under the Plan.

**2.5 Base Value.** “Base Value” shall have the meaning set forth in Section 7.3 hereof.

**2.6 Board.** “Board” means the Board of Directors of the Company.

**2.7 Cause.** “Cause” shall, unless otherwise defined in a Participant’s written employment agreement or Award Agreement, mean: (a) the commission of any act of fraud, embezzlement or dishonesty by Participant which adversely affects the business of the Company, the acquiring or successor entity (or parent or any subsidiary thereof), (b) any unauthorized use or disclosure by Participant of confidential information or trade secrets of the Company, the acquiring or successor entity (or parent or any subsidiary thereof), (c) the refusal or omission by the Participant to perform any duties required of him if such duties are consistent with duties customary for the position held with the Company, the acquiring or successor

entity (or parent or any subsidiary thereof), (d) any act or omission by the Participant involving malfeasance or gross negligence in the performance of Participant's duties to, or deviation from any of the policies or directives of, the Company or the acquiring or successor entity (or parent or any subsidiary thereof), (e) conduct on the part of Participant which constitutes the breach of any statutory or common law duty of loyalty to the Company, the acquiring or successor entity (or parent or any subsidiary thereof), or (f) any illegal act by Participant which adversely affects the business of the Company, the acquiring or successor entity (or parent or any subsidiary thereof), or any felony committed by Participant, as evidenced by conviction thereof.

**2.8 Change in Control.** "Change in Control" means the occurrence of any of the following:

(a) A change in the ownership of the Company which occurs on the date that any one person, or more than one person acting as a group ("Person"), acquires ownership of the stock of the Company that, together with the stock held by such Person, constitutes more than 50% of the total voting power of the stock of the Company, except that any change in the ownership of the stock of the Company as a result of a private financing of the Company that is approved by the Board will not be considered a Change in Control; or

(b) If the Company has a class of securities registered pursuant to Section 12 of the Exchange Act, a change in the effective control of the Company which occurs on the date that a majority of members of the Board is replaced during any twelve (12) month period by Directors whose appointment or election is not endorsed by a majority of the members of the Board prior to the date of the appointment or election. For purposes of this clause (b), if any Person is considered to be in effective control of the Company, the acquisition of additional control of the Company by the same Person will not be considered a Change in Control; or

(c) A change in the ownership of a substantial portion of the Company's assets which occurs on the date that any Person acquires (or has acquired during the twelve (12) month period ending on the date of the most recent acquisition by such person or persons) assets from the Company that have a total gross fair market value equal to or more than 50% of the total gross fair market value of all of the assets of the Company immediately prior to such acquisition or acquisitions. For purposes of this subsection (iii), gross fair market value means the value of the assets of the Company, or the value of the assets being disposed of, determined without regard to any liabilities associated with such assets.

For purposes of this Section 2(f), persons will be considered to be acting as a group if they are owners of a corporation that enters into a merger, consolidation, purchase or acquisition of stock, or similar business transaction with the Company.

Notwithstanding the foregoing, a transaction will not be deemed a Change in Control unless the transaction qualifies as a change in control event within the meaning of Code Section 409A, as it has been and may be amended from time to time, and any proposed or final Treasury Regulations and Internal Revenue Service guidance that has been promulgated or may be promulgated thereunder from time to time.

Further and for the avoidance of doubt, a transaction will not constitute a Change in Control if: (i) its sole purpose is to change the jurisdiction of the Company's incorporation, or (ii) its sole purpose is to create a holding company that will be owned in substantially the same proportions by the persons who held the Company's securities immediately before such transaction.

**2.9 Code.** "Code" means the Internal Revenue Code of 1986, as amended from time to time, and applicable Treasury Regulations and administrative guidance promulgated thereunder.

**2.10 Committee.** “Committee” means a committee of two or more members of the Board appointed to administer the Plan pursuant to Section 8.1 hereof.

**2.11 Common Stock.** “Common Stock” means the Common Stock of the Company.

**2.12 Company.** “Company” shall have the meaning set forth in the preamble to this Plan.

**2.13 Consultant.** “Consultant” means any consultant or advisor if: (a) the consultant or advisor renders bona fide services to the Company or any Affiliated Company; (b) the services rendered by the consultant or advisor are not in connection with the offer or sale of securities in a capital-raising transaction and do not directly or indirectly promote or maintain a market for the Company’s securities; and (c) the consultant or advisor is a natural person who has contracted directly with the Company or any Affiliated Company to render such services.

**2.14 Continuous Service.** Unless otherwise provided in an Award Agreement, the terms of which may be different from the following, “Continuous Service” means (a) Participant’s employment by either the Company or any Affiliated Company, or by successor entity following a Change in Control, which is uninterrupted except for vacations, illness (not including permanent Disability), or leaves of absence which are approved in writing by the Company or any of such other employer corporations, as applicable, (b) service as a member of the Board until the Participant resigns, is removed from office, or Participant’s term of office expires and he or she is not reelected, or (c) so long as the Participant is engaged as a Consultant or other Service Provider.

**2.15 Disability.** “Disability” means permanent and total disability as defined in Section 22(e)(3) of the Code. The Administrator’s determination of a Disability or the absence thereof shall be conclusive and binding on all interested parties.

**2.16 Effective Date.** “Effective Date” shall have the meaning set forth in the preamble to this Plan.

**2.17 Established Securities Market.** “Established Securities Market” means either: (a) a securities exchange registered with the Securities and Exchange Commission under Section 6 of the Exchange Act; (b) a foreign national securities exchange officially recognized, sanctioned or supervised by governmental authority; or (c) an OTC Market.

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

**2.19 Exercise Price.** “Exercise Price” means the purchase price per share of Common Stock payable upon exercise of an Option.

**2.20 Fair Market Value.** “Fair Market Value” on any given date means the value of a share of Common Stock, determined as follows:

(a) If the Common Stock is then readily tradable on an Established Securities Market, the Fair Market Value shall be determined by the Administrator through the application of a valuation method permitted under Treasury Regulation Section 1.409A-1(b)(5)(iv)(A); and

(b) If the Common Stock is not then readily tradable on an Established Securities Market, the Fair Market Value shall be determined by the Administrator in good faith through the reasonable application of a reasonable valuation method in accordance with Treasury Regulation Section 1.409A-1(b)(5)(iv)(B), which determination shall be conclusive and binding on all interested parties.

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**2.21 FINRA Dealer.** “FINRA Dealer” means a broker-dealer that is a member of the Financial Industry Regulatory Authority, Inc.

**2.22 Incentive Option.** “Incentive Option” means any Option designated and qualified as an “incentive stock option” as defined in Section 422 of the Code.

**2.23 New Incentives.** “New Incentives” shall have the meaning set forth in Section 9.1(a) hereof.

**2.24 Nonqualified Option.** “Nonqualified Option” means any Option that is not an Incentive Option. To the extent any Option designated as an Incentive Option fails in whole or in part to qualify as an Incentive Option, including without limitation, for failure to meet the requirements applicable to 10% Stockholders or because the annual limit described in Section 5.7 hereof is exceeded, it shall to that extent constitute a Nonqualified Option.

**2.25 Option.** “Option” means any option to purchase Common Stock granted pursuant to Article 5 hereof.

**2.26 Option Agreement.** “Option Agreement” means the written agreement entered into between the Company and an Optionee with respect to an Option granted under the Plan.

**2.27 Optionee.** “Optionee” means a Participant who holds an Option.

**2.28 OTC Market.** “OTC Market” means an over-the-counter market reflected by the existence of an interdealer quotation system.

**2.29 Participant.** “Participant” means a Key Team Member that holds an Option, Restricted Stock or Stock Appreciation Right granted pursuant to the Plan.

**2.30 Plan.** “Plan” means this 2013 Stock Incentive Plan of the Company.

**2.31 Publicly Held.** “Publicly Held” means, with respect to the Company, any point in time in which any class of common equity securities of the Company are required to be registered under Section 12 of the Exchange Act.

**2.32 Purchase Price.** “Purchase Price” means the purchase price payable to purchase a share of Restricted Stock.

**2.33 Repurchase Rights.** “Repurchase Rights” means the right of the Company to repurchase shares of Common Stock issued pursuant to an Award granted under the Plan.

**2.34 Restricted Stock.** “Restricted Stock” means shares of Common Stock issued pursuant the Plan, subject to any restrictions and conditions as are established pursuant to the Plan.

**2.35 Restricted Stock Purchase Agreement.** “Restricted Stock Purchase Agreement” means the written agreement entered into between the Company and a Participant with respect to the purchase of Restricted Stock under the Plan.

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

**2.37 Service Provider.** “Service Provider” means a Consultant or other natural person the Administrator authorizes to become a Participant in the Plan and who provides services to: (a) the Company; (b) an Affiliated Company; or (c) any other business venture designated by the Administrator in which the Company (or any entity that is a successor to the Company) or an Affiliated Company has a significant ownership interest.

**2.38 Stock Appreciation Right.** “Stock Appreciation Right” means a contractual right granted to a Participant pursuant to Article 7 hereof, the exercise or settlement of which entitles the Participant to receive shares of Common Stock, cash, or a combination of Common Stock and cash, equal to the difference between the Base Value per share of the Stock Appreciation Right and the Fair Market Value of a share of Common Stock on the date of exercise or settlement, multiplied by the number of shares subject to the Stock Appreciation Right at such time, and subject to such conditions set forth in this Plan and the applicable Stock Appreciation Rights Agreement.

**2.39 Stock Appreciation Rights Agreement.** “Stock Appreciation Rights Agreement” means the written agreement entered into between the Company and a Participant with respect to a Stock Appreciation Right granted under the Plan.

**2.40 10% Stockholder.** “10% Stockholder” means a person who, as of a relevant date, owns or is deemed to own (by reason of the attribution rules applicable under Section 424(d) of the Code) stock possessing more than 10% of the total combined voting power of all classes of stock of the Company or of an Affiliated Company measured as of an Incentive Option’s date of grant.

**2.41 Treasury Regulations.** “Treasury Regulations” shall mean the regulations of the United States Treasury Department promulgated under the Code.

### ARTICLE 3.

#### ELIGIBILITY

**3.1 Incentive Options.** Only employees of the Company or of an Affiliated Company (including officers of the Company and members of the Board if they are employees of the Company or of an Affiliated Company) are eligible to receive Incentive Options under the Plan.

**3.2 Nonqualified Options, Restricted Stock and Stock Appreciation Rights** Employees of the Company or of an Affiliated Company, members of the Board (whether or not employed by the Company or an Affiliated Company), and Service Providers are eligible to receive Nonqualified Options, Restricted Stock or Stock Appreciation Rights under the Plan.

**3.3 Section 162(m) Limitation.** On and after such time, if any, that the Company is Publicly Held, no employee of the Company or of an Affiliated Company shall be eligible to be granted Options or Stock Appreciation Rights covering more than 120,000 shares of Common Stock during any calendar year; provided, however, the preceding limitation shall not apply until the earliest time required for compensation attributable to Options or Stock Appreciations granted under the Plan to be exempt from the deduction limitation of Section 162(m) of the Code.



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**ARTICLE 4.**  
**PLAN SHARES**

**4.1 Shares Subject to the Plan.** As of the Effective Date, there are 150,000 shares of Common Stock available for issuance under the Plan. Of this total, 150,000 shares of Common Stock are available for issuance pursuant to Incentive Options. For purposes of this Section 4.1, in the event that (a) all or any portion of any Award granted or offered under the Plan can no longer under any circumstances be exercised or (b) any shares of Common Stock are reacquired by the Company which were initially the subject of an Award Agreement, the shares of Common Stock allocable to the unexercised portion of such Award, or the shares so reacquired, shall again be available for grant or issuance under the Plan.

**4.2 Changes in Capital Structure.** In the event that the outstanding shares of Common Stock are hereafter increased or decreased or changed into or exchanged for a different number or kind of shares or other securities of the Company by reason of a recapitalization, stock split, reverse stock split, combination of shares, reclassification, stock dividend, or other change in the capital structure of the Company, then appropriate adjustments shall be automatically made to the aggregate number and kind of shares subject to this Plan, the number and kind of shares and the exercise price or purchase price per share subject to outstanding Award Agreements, and the limits on the number of shares under Sections 3.3 and 4.1 hereof, all in order to preserve, as nearly as practical, but not to increase, the benefits to Participants.

**ARTICLE 5.**  
**OPTIONS**

**5.1 Option Agreement.** Each Option granted pursuant to this Plan shall be evidenced by an Option Agreement that shall specify the number of shares subject thereto, the Exercise Price per share, and whether the Option is an Incentive Option or Nonqualified Option. As soon as is practical following the grant of an Option, an Option Agreement shall be duly executed and delivered by or on behalf of the Company to the Optionee to whom such Option is granted. Each Option Agreement shall be in such form and contain such additional terms and conditions, not inconsistent with the provisions of this Plan, as the Administrator shall, from time to time, deem desirable, including without limitation, the imposition of any rights of first refusal and resale obligations upon any shares of Common Stock acquired pursuant to an Option Agreement. Each Option Agreement may be different from each other Option Agreement.

**5.2 Exercise Price.** The Exercise Price per share of Common Stock covered by each Option shall be determined by the Administrator, provided that (a) the Exercise Price shall not be less than 100% of the Fair Market Value per share of Common Stock on the date the Option is granted, and (b) in the case of an Incentive Option granted to a 10% Stockholder, the Exercise Price shall not be less than 110% of the Fair Market Value per share of Common Stock on the date the Incentive Option is granted. However, an Option may be granted with an Exercise Price lower than that set forth in the preceding sentence if such Option is granted pursuant to an assumption or substitution for another option in a manner satisfying the provisions of Sections 424 of the Code, as applicable.

**5.3 Payment of Exercise Price.** Payment of the Exercise Price shall be made upon exercise of an Option and may be made, in the discretion of the Administrator, subject to any restrictions under applicable corporate law, by: (a) cash; (b) check; (c) surrender of shares of Common Stock acquired pursuant to the exercise of an Option, which surrendered shares shall be valued at Fair Market Value as of the date of such exercise; (d) delivery of a promissory note in a form and with such recourse, interest, security and other provisions as the Administrator determines to be appropriate (subject to applicable corporate law); (e) cancellation of indebtedness of the Company to the Optionee; (f) waiver of compensation due or accrued to the Optionee for services rendered; (g) provided that a public market for the Common Stock exists, a "same day sale" commitment from the Optionee and a FINRA Dealer whereby the Optionee irrevocably elects to exercise the Option and to sell a portion of the shares so purchased to pay for the Exercise Price and whereby the FINRA Dealer irrevocably commits upon receipt of such shares to forward the Exercise Price directly to the Company; (h) provided that a public market for the Common Stock exists, a "margin" commitment from the Optionee and a FINRA Dealer whereby the Optionee irrevocably elects to exercise the Option and to pledge the shares so purchased to the FINRA Dealer in a margin account as security for a loan from the FINRA Dealer in the amount of the Exercise Price, and whereby the FINRA Dealer irrevocably commits upon receipt of such shares to forward the Exercise Price directly to the Company; (i) a "net exercise" arrangement pursuant to which the Company will reduce the number of shares of Common Stock to be issued upon exercise by the number of shares of Common Stock having an aggregate Fair Market Value as of the date of exercise equal to the total Exercise Price; or (j) any combination of the foregoing methods of payment or any other consideration or method of payment as shall be permitted by applicable corporate law.

**5.4 Term and Termination of Options.** The term and provisions for termination of each Option shall be as fixed by the Administrator, but no Option may be exercisable more than ten (10) years after the date it is granted. An Incentive Option granted to a person who is a 10% Stockholder on the date of grant shall not be exercisable more than five (5) years after the date it is granted.

**5.5 Date of Grant.** The date of grant of an Option will be the date on which the Administrator makes the determination to grant such Option, unless a later date is otherwise specified by the Administrator. The Option Agreement and a copy of this Plan will be delivered to the Optionee within a reasonable time after the granting of the Option.

**5.6 Vesting and Exercise of Options.** Each Option shall vest and become exercisable in one or more installments at such time or times and subject to such conditions, including without limitation, the achievement of specified performance goals or objectives, as shall be determined by the Administrator. Notwithstanding the foregoing, each Option granted to an employee of the Company or Affiliated Company shall provide that the employee shall have the right to exercise the vested portion of any Option held at the termination of the employee's Continuous Service for at least thirty (30) days following termination of the employee's Continuous Service for any reason other than Cause and that the employee (or employee's designee) shall have the right to exercise the Option for at least six (6) months if such termination of employee's Continuous Service is due to the death or Disability of the employee.

**5.7 Annual Limit on Incentive Options.** To the extent required for "incentive stock option" treatment under Section 422 of the Code, if the aggregate Fair Market Value (determined as of the date of grant) of the Common Stock with respect to which Incentive Options granted under this Plan and any other plan of the Company or any Affiliated Company becomes exercisable for the first time by an Optionee during any calendar year exceeds \$100,000, such excess shall be a Nonqualified Option. In the event that the Code or the regulations promulgated thereunder are amended after the Effective Date to provide for a different limit on the Fair Market Value of Shares permitted to be subject to "incentive stock options" (as defined in Section 422 of the Code), then such different limit will be automatically incorporated herein and will apply to any Incentive Options granted after the effective date of such amendment.

**5.8 Nontransferability of Options.** Except as otherwise provided by the Administrator in an Option Agreement and as permissible under applicable law, no Option shall be assignable or transferable except by will or the laws of descent and distribution and during the life of the Optionee shall be exercisable only by such Optionee. Notwithstanding the forgoing, the Administrator may grant Nonqualified Options that may transferred to a revocable trust or as otherwise permitted under Rule 701 of the Securities Act.

**5.9 Rights as Stockholder.** An Optionee or permitted transferee of an Option shall have no rights or privileges as a stockholder with respect to any shares covered by an Option until such Option has been duly exercised and shares purchased upon such exercise have been issued to such person.

**5.10 Unvested Shares.** The Administrator shall have the discretion to grant Options that are exercisable for unvested shares of Common Stock on such terms and conditions as the Administrator shall determine from time to time.

**5.11 Company's Repurchase Right.** In the event of a termination of an Optionee's Continuous Service for any reason whatsoever (including death or Disability), the Option Agreement may provide, in the discretion of the Administrator, that the Company, or its assignee, shall have the right, exercisable at the discretion of the Administrator, to repurchase shares of Common Stock acquired pursuant to the exercise of an Option at any time on such terms as may be provided in the Option Agreement. The repurchase price for shares repurchased by the Company shall be as set forth in the document evidencing the Repurchase Right, subject to the following requirements:

(a) In the case of vested shares, the repurchase price shall be equal to the Fair Market Value per share of Common Stock as of the date of termination of Optionee's Continuous Service; and

(b) In the case of unvested shares, the repurchase price may be equal to one of the following: (i) the Fair Market Value per share of Common Stock as of the date of termination of Optionee's Continuous Service, (ii) the Exercise Price paid per share, or (iii) the lesser of (A) the Exercise Price paid per share, or (B) the Fair Market Value per share of Common Stock as of the date of termination of Optionee's Continuous Service.

The terms upon which the Company's Repurchase Right shall be exercisable (including but not limited to the period and procedure for exercise and the timing and method of payment for the purchased shares) shall be established by the Administrator and set forth in the document evidencing such Repurchase Right.

**5.12 Compliance with Code Section 409A.** Notwithstanding anything in this Article 5 to the contrary, all Options are intended to be structured to satisfy the requirements of Code Section 409A, or an applicable exemption, as determined by the Administrator.

## ARTICLE 6. RESTRICTED STOCK

**6.1 Issuance and Sale of Restricted Stock.** The Administrator shall have the authority to grant Restricted Stock under this Plan, subject to such terms, restrictions and conditions as the Administrator may determine at the time of grant. Such conditions may include, but are not limited to, continued employment or the achievement of specified performance goals or objectives. The Purchase Price of Restricted Stock, which may include zero dollars (\$0), shall be determined by the Administrator in its sole discretion.

**6.2 Restricted Stock Purchase Agreements.** A Participant shall have no rights with respect to the shares of Restricted Stock covered by a Restricted Stock Purchase Agreement until the Participant has paid the full Purchase Price to the Company in the manner set forth in Section 6.3 hereof and has executed and delivered to the Company the Restricted Stock Purchase Agreement. Each Restricted Stock Purchase Agreement shall be in such form, and shall set forth the Purchase Price and such other terms, conditions and restrictions of the Restricted Stock, not inconsistent with the provisions of this Plan, as the Administrator shall, from time to time, deem desirable. Each Restricted Stock Purchase Agreement may be different from each other Restricted Stock Purchase Agreement. The Restricted Stock will be accepted by the Participant's execution and delivery of the Restricted Stock Purchase Agreement and full payment for the Shares to the Company within thirty (30) days from the date the Restricted Stock Purchase Agreement is delivered to the person. If such person does not execute and deliver the Restricted Stock Purchase Agreement along with full payment for the Shares to the Company within such thirty (30) days, then the offer will terminate, unless otherwise determined by the Administrator.

**6.3 Payment of Purchase Price.** Subject to any restrictions under applicable corporate law, payment of the Purchase Price may be made, in the discretion of the Administrator, by: (a) cash; (b) check; (c) surrender of shares of Common Stock owned by the Participant, which surrendered shares shall be valued at Fair Market Value as of the date of such acceptance; (d) delivery of a promissory note in a form and with such recourse, interest, security and other provisions as the Administrator determines to be appropriate (subject to applicable corporate law); (e) cancellation of indebtedness of the Company to the Participant; (f) the waiver of compensation due or accrued to the Participant for services rendered; or (g) any combination of the foregoing methods of payment or any other consideration or method of payment as shall be permitted by applicable corporate law.

**6.4 Rights as a Stockholder.** Upon complying with the provisions of Section 6.2 hereof, a Participant shall have the rights of a stockholder with respect to the Restricted Stock purchased pursuant to a Restricted Stock Purchase Agreement, including voting and dividend rights, subject to the terms, restrictions and conditions as are set forth in such Restricted Stock Purchase Agreement. Unless the Administrator shall determine otherwise, certificates evidencing shares of Restricted Stock shall remain in the possession of the Company until such shares have vested in accordance with the terms of the Restricted Stock Purchase Agreement.

**6.5 Transfer Restrictions.** Shares of Restricted Stock may not be sold, assigned, transferred, pledged or otherwise encumbered or disposed of except as specifically provided in the Restricted Stock Purchase Agreement.

**6.6 Company's Repurchase Right.** In the event of a termination of a Participant's Continuous Service with the Company for any reason whatsoever (including death or Disability), or a Change in Control, the Restricted Stock Purchase Agreement may provide, in the discretion of the Administrator, that the Company shall have the right, exercisable at the discretion of the Administrator, to repurchase shares of Common Stock acquired pursuant to a Restricted Stock Purchase Agreement, on such terms as may be provided in the Restricted Stock Purchase Agreement. The repurchase price for shares repurchased by the Company shall be as set forth in the document evidencing the Repurchase Right, subject to the following requirements:

(a) In the case of vested shares, the repurchase price shall be equal to the Fair Market Value per share of Common Stock as of the date of termination of Participant's Continuous Service; and

(b) In the case of unvested shares, the repurchase price may be equal to one of the following: (i) the Fair Market Value per share of Common Stock as of the date of termination of Participant's Continuous Service, (ii) the original Purchase Price paid per share, if any, or (iii) the lesser of (A) the original Purchase Price paid per share, if any, or (B) the Fair Market Value per share of Common Stock as of the date of termination of Participant's Continuous Service.

The terms upon which such Repurchase Right shall be exercisable (including but not limited to the period and procedure for exercise and the timing and method of payment for the purchased shares) shall be established by the Administrator and set forth in the document evidencing such Repurchase Right.

**6.7 Vesting of Restricted Stock.** The Restricted Stock Purchase Agreement shall specify the date or dates, the performance goals or objectives which must be achieved, and any other conditions on which the Restricted Stock may vest.

**6.8 Dividends.** If payment for shares of Restricted Stock is made by promissory note, any cash dividends paid with respect to the Restricted Stock may be applied, in the discretion of the Administrator, to repayment of such note.

**6.9 Compliance with Code Section 409A.** Notwithstanding anything in this Article 6 to the contrary, all Restricted Stock Awards are intended to be structured to satisfy the requirements of Code Section 409A, or an applicable exemption, as determined by the Administrator.

## ARTICLE 7.

### STOCK APPRECIATION RIGHTS

**7.1 Grant of Stock Appreciation Rights.** The Administrator shall have the authority to grant Stock Appreciation Rights subject to such terms, restrictions and conditions as the Administrator may determine at the time of grant. Stock Appreciation Rights may be granted on a basis that allows for the exercise of the right by the Participant, or that provides for the automatic settlement of the right upon a specified date or event, for shares of Common Stock, cash or a combination of Common Stock and cash.

**7.2 Stock Appreciation Rights Agreements.** Each Stock Appreciation Right granted pursuant to this Plan shall be evidenced by a Stock Appreciation Rights Agreement, which shall specify the number of shares subject thereto, vesting provisions relating to such Stock Appreciation Right, the Base Value per share, and whether the Stock Appreciation Right shall be exercisable or subject to settlement for shares of Common Stock, cash or a combination of Common Stock and cash. As soon as is practicable following the grant of a Stock Appreciation Right, a Stock Appreciation Rights Agreement shall be duly executed and delivered by or on behalf of the Company to the Participant to whom such Stock Appreciation Right was granted. Each Stock Appreciation Rights Agreement shall be in such form and contain such additional terms and conditions, not inconsistent with the provisions of this Plan, as the Administrator shall, from time to time, deem desirable, including without limitation, the imposition of any rights of first refusal and resale obligations upon any shares of Common Stock acquired pursuant to a Stock Appreciation Right. Each Stock Appreciation Rights Agreement may be different from each other Stock Appreciation Rights Agreement.

**7.3 Base Value.** The Base Value per share of Common Stock covered by each Stock Appreciation Right shall be determined by the Administrator, except that the Base Value of a Stock Appreciation Right shall not be less than 100% of Fair Market Value of the Common Stock on the date the Stock Appreciation Right is granted.

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**7.4 Term and Termination of Stock Appreciation Rights.** The term and provisions for termination of each Stock Appreciation Right shall be fixed by the Administrator, but no Stock Appreciation Right may be exercisable or subject to settlement more than ten (10) years after the date it is granted.

**7.5 Vesting and Exercise of Stock Appreciation Rights.** Each Stock Appreciation Right shall vest, and become exercisable or subject to settlement, in one or more installments at such time or times and shall be subject to such conditions, including without limitation the achievement of specified performance goals or objectives established with respect to one or more performance criteria, as shall be determined by the Administrator. Notwithstanding the foregoing, each Stock Appreciation Right granted to an employee of the Company or Affiliated Company, on a basis that allows the right to be exercised by the employee, shall provide that the employee shall have the right to exercise the vested portion of such right held at the termination of the employee's Continuous Service for at least thirty (30) days following termination of the employee's Continuous Service for any reason other than Cause and that the employee (or employee's designee) shall have the right to exercise the Stock Appreciation Right for at least six (6) months if such termination of the employee's Continuous Service is due to the death or Disability of the employee.

**7.6 Payment of Appreciation.** A Stock Appreciation Right will entitle the holder, upon exercise or settlement of the Stock Appreciation Right, as applicable, to receive an amount determined by multiplying: (a) the excess of the Fair Market Value of a share of Common Stock on the date of exercise or settlement of the Stock Appreciation Right over the Base Value of such Stock Appreciation Right, by (b) the number of shares as to which such Stock Appreciation Right is exercised or settled. Upon exercise or settlement, payment of the appreciation determined under the preceding formula shall be made in shares of Common Stock, cash, or a combination of both shares and cash, as set forth in the Stock Appreciation Rights Agreement in the discretion of the Administrator. To the extent that payment is made in shares of Common Stock, such shares shall be valued at their Fair Market Value on the date of exercise or settlement.

**7.7 Nontransferability of Stock Appreciation Rights.** Except as otherwise provided by the Administrator in a Stock Appreciation Rights Agreement and as permissible under applicable law, no Stock Appreciation Right shall be assignable or transferable except by will, the laws of descent and distribution or pursuant to a domestic relations order, and during the life of the Participant shall be exercisable only by such Participant. Notwithstanding the foregoing, the Administrator may grant Stock Appreciation Rights that may be transferred to a revocable trust or as otherwise permitted under Rule 701 of the Securities Act.

**7.8 Rights as a Stockholder.** A Participant shall have no rights or privileges as a stockholder with respect to any shares covered by a Stock Appreciation Right until such Stock Appreciation Right has been duly exercised or settled and certificates representing shares issued upon such exercise or settlement have been issued to such person.

**7.9 Unvested Shares.** The Administrator shall have the discretion to grant Stock Appreciation Rights that may be exercised or settled for unvested shares of Common Stock on such terms and conditions as the Administrator shall determine from time to time.

**7.10 Company's Repurchase Right.** In the event of a termination of a Participant's Continuous Service for any reason whatsoever (including death or Disability), the Stock Appreciation Rights Agreement may provide, in the discretion of the Administrator, that the Company, or its assignee, shall have the right, exercisable at the discretion of the Administrator, to repurchase shares of Common Stock acquired pursuant to the exercise or settlement of a Stock Appreciation Right at any time on such terms as may be provided in the Stock Appreciation Right Agreement. The repurchase price for shares repurchased by the Company shall be equal to the Fair Market Value per share of Common Stock as of the date of termination of Participant's Continuous Service. The terms upon which such Repurchase Right shall be exercisable (including but not limited to the period and procedure for exercise and the timing and method of payment for the purchased shares) shall be established by the Administrator and set forth in the document evidencing such Repurchase Right.

**7.11 Compliance with Code Section 409A.** Notwithstanding anything in this Article 7 to the contrary, all Stock Appreciation Rights Awards are intended to be structured to satisfy the requirements of Code Section 409A, or an applicable exemption, as determined by the Administrator.

## ARTICLE 8.

### ADMINISTRATION OF THE PLAN

**8.1 Administrator.** Authority to control and manage the operation and administration of the Plan shall be vested in the Board, which may delegate such responsibilities in whole or in part to a committee consisting of two (2) or more members of the Board. Members of the Committee may be appointed from time to time by, and shall serve at the pleasure of, the Board. When and if the Company becomes Publicly Held, the Board may limit the composition of the Committee to those persons necessary to comply with the requirements of Section 162(m) of the Code and Section 16 of the Exchange Act.

**8.2 Delegation to an Officer.** To the extent authorized by applicable law, the Board may delegate to one or more officers of the Company the authority to do one or both of the following: (a) designate officers and employees of the Company or any of its subsidiary corporations to be recipients of Options or Stock Appreciation Rights and (b) determine the number of shares of Common Stock to be subject to such Options or Stock Appreciation Rights granted to such officers and employees of the Company; provided, however, that the resolutions of the Board regarding such delegation shall specify the total number of shares of Common Stock that may be subject to the Options or Stock Appreciation Rights granted by such officer and that such officer may not grant an Option or Stock Appreciation Right to himself or herself. Notwithstanding the foregoing, the Board may not delegate authority to an officer to determine the Fair Market Value of the Common Stock.

**8.3 Powers of the Administrator.** In addition to any other powers or authority conferred upon the Administrator elsewhere in the Plan or by law, the Administrator shall have full power and authority: (a) to determine the persons to whom, and the time or times at which Awards shall be granted, the number of shares of Common Stock to be represented by each Option or Stock Appreciation Rights Agreement and the number of shares of Common Stock to be subject to each Restricted Stock Purchase Agreement, and the consideration to be received by the Company upon the exercise of such Options or Stock Appreciation Right or sale of Restricted Stock; (b) to interpret the Plan; (c) to create, amend or rescind rules and regulations relating to the Plan; (d) to determine the terms, conditions and restrictions contained in, and the form of, Award Agreements; (e) to determine the identity or capacity of any persons who may be entitled to exercise a Participant's rights under any Award Agreement under the Plan; (f) to correct any defect or supply any omission or reconcile any inconsistency in the Plan or in any Award Agreement; (g) to accelerate the vesting of any Award or release or waive any Repurchase Rights of the Company with respect to any Award; (h) to extend the exercise date of any Option or Stock Appreciation Right (but not beyond the original expiration date); (i) to provide for rights of first refusal and/or Repurchase Rights; (j) to amend outstanding Award Agreements to provide for, among other things, any change or modification which the Administrator could have included in the original Award Agreement or in furtherance of the powers provided for herein; (k) to make all other determinations necessary or advisable for the administration of the Plan, but only to the extent not contrary to the express provisions of the Plan; and (l) grant Awards to Key Team Members who are foreign nationals on such terms and conditions different from those specified in the Plan as is necessary or desirable to promote achievement of the purposes of the Plan, and adopt such modifications, procedures, and/or subplans and the like as may be necessary or desirable to comply with the provisions of the laws or regulations of other countries or jurisdictions to ensure the viability of the benefits from Awards granted to such Key Team Members employed in such countries or jurisdictions, or to meet the requirements that permit the Plan to operate in a qualified or tax efficient manner, and/or comply with applicable foreign laws or regulations. Any action, decision, interpretation or determination made in good faith by the Administrator in the exercise of its authority conferred upon it under the Plan shall be final and binding on the Company and all Participants. The Administrator's decisions and determinations need not be uniform and may be made selectively among Participants in the Committee's sole discretion.

**8.4 Section 409A of the Code.** Notwithstanding anything in this Plan to the contrary, (a) any adjustments made pursuant to this Article 8 to Awards that are considered "deferred compensation" within the meaning of Section 409A of the Code shall be made in compliance with the requirements of Section 409A of the Code; (b) any adjustments made pursuant to Article 8 to Awards that are not considered "deferred compensation" subject to Section 409A of the Code shall be made in such a manner as to ensure that after such adjustment the Awards either (i) continue not to be subject to Section 409A of the Code or (ii) comply with the requirements of Section 409A of the Code; and (c) in any event, the Administrator shall not have the authority to make any adjustments pursuant to Article 8 to the extent the existence of such authority would cause an Award that is not intended to be subject to Section 409A of the Code at the time of grant to be subject thereto.

**8.5 Limitation on Liability.** No employee of the Company or member of the Board or Committee shall be subject to any liability with respect to duties under the Plan unless the person acts fraudulently or in bad faith. To the extent permitted by law, the Company shall indemnify each member of the Board or Committee, and any employee of the Company with duties under the Plan, who was or is a party, or is threatened to be made a party, to any threatened, pending or completed proceeding, whether civil, criminal, administrative or investigative, by reason of such person's conduct in the performance of duties under the Plan.



**ARTICLE 9.**  
**CHANGE IN CONTROL**

**9.1 Change in Control.** In order to preserve a Participant's rights with respect to any outstanding Awards in the event of a Change in Control of the Company:

(a) Any or all outstanding Awards may be assumed, converted or replaced by the successor or acquiring entity (if any)(or by any of its parents, if any), which assumption, conversion or replacement will be binding on all Participants. In the alternative, any successor or acquiring entity (or any of its parents, if any) may substitute equivalent awards for outstanding Awards or provide substantially similar consideration to Participants in respect of their outstanding Awards as was provided to stockholders of the Company in such Change in Control after taking into account the existing provisions of the outstanding Awards (except that the exercise price and the number and nature of shares issuable upon exercise of any such option or stock appreciation right, or any award that is subject to Section 409A of the Code, will be adjusted appropriately pursuant to Section 424(a) of the Code). Any successor or acquiring entity in such Change in Control (or any of its parents, if any) may also substitute by issuing, in place of any Award of outstanding Restricted Stock held by a Participant, substantially similar shares of stock or other property subject to repurchase restrictions and other provisions no less favorable to such Participant than those that applied to such outstanding Restricted Stock immediately prior to such Change in Control.

(b) If, neither the successor or acquiring entity (if any) nor any parent (if any) of such successor or acquiring entity assumes, converts, replaces or substitutes outstanding Awards as provided above in Section 9.1(a), then notwithstanding any other provision in this Plan to the contrary, and unless otherwise approved by the Administrator or otherwise required by the terms of any Award Agreement or any separate written agreement governing such Award that has been approved by the Board, each such Award that has not already terminated in accordance with the Plan or the applicable Award Agreement shall terminate, without accelerating vesting, immediately prior to the consummation of such Change in Control at such times and upon such conditions as the Committee may determine.

(c) If vesting of outstanding Options or Stock Appreciation Rights will accelerate as a result of a Change in Control, the Administrator in its discretion may provide, in connection with the Change in Control transaction, for the purchase or exchange of each such Option or Stock Appreciation Right for an amount of cash or other property having a value equal to the difference (or "spread") between: (i) the value of the cash or other property that the Participant would have received pursuant to the Change in Control transaction in exchange for the shares issuable upon exercise of the Option or Stock Appreciation Right had such Option or Stock Appreciation Right been exercised immediately prior to the Change in Control, and (ii) the Exercise Price of the Option or Stock Appreciation Right.

(d) Notwithstanding Sections 9.1(a)-(c) above, the Administrator shall have the discretion to provide in each Option Agreement or Stock Appreciation Rights Agreement other terms and conditions that relate to (i) vesting of the Option or Stock Appreciation Right in the event of a Change in Control, and (ii) assumption of such Option or Stock Appreciation Right or issuance of comparable securities or new incentives in the event of a Change in Control. The aforementioned terms and conditions may vary in each Option Agreement or Stock Appreciation Rights Agreement, and may be different from and have precedence over the provisions set forth in Sections 9.1(a)—9.1(c) above.

(e) If outstanding Options or Stock Appreciation Rights will not be assumed by the acquiring or successor entity (or parent or subsidiary thereof), the Administrator shall cause written notice of a proposed Change in Control transaction to be given to Participants not less than fifteen (15) days prior to the anticipated effective date of the proposed transaction.

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**ARTICLE 10.**

**AMENDMENT AND TERMINATION OF THE PLAN**

**10.1 Amendments.** The Board may from time to time alter, amend, suspend or terminate the Plan in such respects as the Board may deem advisable. No such alteration, amendment, suspension or termination shall be made which shall (i) substantially affect or impair the rights of any Participant under an outstanding Award Agreement without such Participant's consent, or (ii) cause this Plan, or any Award granted pursuant to it, to violate Code Section 409A. The Board may alter or amend the Plan to comply with requirements under the Code relating to Incentive Options or other types of options that give Optionees more favorable tax treatment than that applicable to Options granted under this Plan as of the date of its adoption. Upon any such alteration or amendment, any outstanding Award granted hereunder may, if the Administrator so determines and if permitted by applicable law, be subject to the more favorable tax treatment afforded to a Participant pursuant to such terms and conditions.

**10.2 Plan Termination.** Unless the Plan shall theretofore have been terminated, the Plan shall terminate on the tenth (10th) anniversary of the Effective Date and no Awards may be granted under the Plan thereafter, but Award Agreements then outstanding shall continue in effect in accordance with their respective terms.

**ARTICLE 11.**

**TAXES**

**11.1 Tax Withholding.** The Company shall have the power to withhold, or require a Participant to remit to the Company, an amount sufficient to satisfy any applicable Federal, state, and local tax withholding requirements with respect to any Options or Stock Appreciation Rights exercised or shares of Restricted Stock issued under this Plan. To the extent permissible under applicable tax, securities and other laws, the Administrator may, in its sole discretion and upon such terms and conditions as it may deem appropriate, permit a Participant to satisfy his or her obligation to pay any such tax, in whole or in part, by (a) directing the Company to apply shares of Common Stock to which the Participant is entitled as a result of the exercise of an Option or Stock Appreciation Right or as a result of the purchase of or lapse of restrictions on shares of Restricted Stock or (b) delivering to the Company shares of Common Stock owned by the Participant; provided, however, the amount withheld shall not exceed the amount necessary to satisfy the Company's tax withholding obligations at the minimum statutory withholding rates, as applicable. The shares of Common Stock so applied or delivered in satisfaction of the Participant's tax withholding obligation shall be valued at their Fair Market Value as of the date of measurement of the amount of income subject to withholding.

**ARTICLE 12.**

**MISCELLANEOUS**

**12.1 Benefits Not Alienable.** Other than as provided above, benefits under the Plan may not be assigned or alienated, whether voluntarily or involuntarily. Any unauthorized attempt at assignment, transfer, pledge or other disposition shall be without effect.

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**12.2 No Enlargement of Employee Rights.** This Plan is strictly a voluntary undertaking on the part of the Company and shall not be deemed to constitute a contract between the Company and any Participant to be consideration for, or an inducement to, or a condition of, the employment of any Participant. Nothing contained in the Plan shall be deemed to give the right to any Participant to be retained as an employee of the Company or any Affiliated Company or to limit the right of the Company or any Affiliated Company to discharge any Participant at any time.

**12.3 Application of Funds.** The proceeds received by the Company from the sale of Common Stock pursuant to Option Agreements and Restricted Stock Purchase Agreements, except as otherwise provided herein, will be used for general corporate purposes.

**12.4 Financial Reports.** To the extent required by Rule 701(e) of the Securities Act, the Company shall provide, at least annually, summary financial information relating to the Company's financial condition and results of operations to each Participant who holds one or more Awards or shares of Common Stock issued pursuant to the Plan.

**12.5 Adoption and Stockholder Approval.** This Plan will become effective on the Effective Date and will be approved by the stockholders of the Company (excluding Shares issued pursuant to this Plan), consistent with applicable laws, within twelve (12) months before or after the Effective Date. Upon the Effective Date, the Administrator may grant Awards pursuant to this Plan; provided, however, that: (a) no Option or SAR may be exercised prior to initial stockholder approval of this Plan; (b) no Option or SAR granted pursuant to an increase in the number of Shares approved by the Administrator shall be exercised prior to the time such increase has been approved by the stockholders of the Company; (c) in the event that initial stockholder approval is not obtained within the time period provided herein, all Awards shall be canceled, any Shares issued pursuant to any such Award shall be canceled and any purchase of such Shares issued hereunder shall be rescinded; and (d) Awards granted pursuant to an increase in the number of Shares approved by the Administrator which increase is not approved by stockholders within the time then required, any Shares issued pursuant to any such Awards shall be canceled, and any purchase of Shares subject to any such Award shall be rescinded.

**12.6 Electronic Delivery.** Any reference herein to a "written" agreement or document shall include any agreement or document delivered electronically or posted on the Company's intranet.

## NOGIN, INC.

## 2022 INCENTIVE AWARD PLAN

**ARTICLE I.  
PURPOSE**

The Plan's purpose is to enhance the Company's ability to attract, retain and motivate persons who make (or are expected to make) important contributions to the Company by providing these individuals with equity ownership opportunities and/or equity-linked compensatory opportunities. Capitalized terms used in the Plan are defined in Article XI.

**ARTICLE II.  
ELIGIBILITY**

Service Providers are eligible to be granted Awards under the Plan, subject to the limitations described herein.

**ARTICLE III.  
ADMINISTRATION AND DELEGATION**

3.1 Administration. The Plan is administered by the Administrator. The Administrator has authority to determine which Service Providers receive Awards, grant Awards and set Award terms and conditions, subject to the conditions and limitations in the Plan. The Administrator also has the authority to take all actions and make all determinations under the Plan, to interpret the Plan and Award Agreements and to adopt, amend and repeal Plan administrative rules, guidelines and practices as it deems advisable. The Administrator may correct defects and ambiguities, supply omissions and reconcile inconsistencies in the Plan or any Award Agreement as it deems necessary or appropriate to administer the Plan and any Awards. The Administrator's determinations under the Plan are in its sole discretion and will be final and binding on all persons having or claiming any interest in the Plan or any Award.

3.2 Appointment of Committees. To the extent Applicable Laws permit, the Board or the Administrator may delegate any or all of its powers under the Plan to one or more Committees or committees of officers of the Company or any of its Subsidiaries; provided, that, any such officer delegation shall exclude the power to grant Awards to non-employee Directors or Section 16 Persons. The Board or the Administrator, as applicable, may rescind any such delegation, abolish any such committee or Committee and/or re-vest in itself any previously delegated authority at any time.

**ARTICLE IV.  
STOCK AVAILABLE FOR AWARDS**

4.1 Number of Shares. Subject to adjustment under Article VIII and the terms of this Article IV, Awards may be made under the Plan covering up to the Overall Share Limit Shares issued under the Plan may consist of authorized but unissued Shares, Shares purchased on the open market or treasury Shares. From and after the effectiveness of this Plan, the Company will not grant awards under the Branded Online, Inc. 2013 Stock Incentive Plan (as may be amended from time to time, the "*Prior Plan*"); however, awards previously granted under the Prior Plan that are assumed by the Company in connection with the Initial Business Combination (the "*Prior Plan Awards*") will remain subject to the terms of the Prior Plan.

4.2 Share Recycling. If all or any part of an Award or Prior Plan Award expires, lapses or is terminated, exchanged for or settled in cash, surrendered, repurchased, canceled without having been fully exercised or forfeited, in any case, in a manner that results in the Company acquiring Shares covered by the Award or Prior Plan Award at a price not greater than the price (as adjusted to reflect any Equity Restructuring) paid by the Participant for such Shares or not issuing any Shares covered by the Award or Prior Plan Award, the unused Shares covered by the Award or Prior Plan Award will, as applicable, become or again be available for Award grants under the Plan. Further, Shares delivered (either by actual delivery or attestation) to the Company by a Participant to satisfy the applicable exercise or purchase price of an Award or Prior Plan Award and/or to satisfy any applicable tax withholding obligation with respect to an Award (including Shares retained by the Company from the Award or Prior Plan Award being exercised or purchased and/or creating the tax obligation) will again be available for Award grants under the Plan. The payment of Dividend Equivalents in cash in conjunction with any outstanding Awards or Prior Plan Awards shall not count against the Overall Share Limit.

4.3 Incentive Stock Option Limitations. Notwithstanding anything to the contrary herein, no more than 56,132,428 Shares may be issued pursuant to the exercise of Incentive Stock Options.

4.4 Substitute Awards. In connection with an entity's merger or consolidation with the Company or the Company's acquisition of an entity's property or stock, the Administrator may grant Awards in substitution for any options or other stock or stock-based awards granted before such merger or consolidation by such entity or its affiliate. Substitute Awards may be granted on such terms as the Administrator deems appropriate, notwithstanding limitations on Awards in the Plan. Substitute Awards will not count against the Overall Share Limit (nor shall Shares subject to a Substitute Award be added to the Shares available for Awards under the Plan as provided above), except that Shares acquired by exercise of substitute Incentive Stock Options will count against the maximum number of Shares that may be issued pursuant to the exercise of Incentive Stock Options under the Plan. Additionally, in the event that a company acquired by the Company or any Subsidiary or with which the Company or any Subsidiary combines has shares available under a pre-existing plan approved by stockholders and not adopted in contemplation of such acquisition or combination, the shares available for grant pursuant to the terms of such pre-existing plan (as adjusted, to the extent appropriate, using the exchange ratio or other adjustment or valuation ratio or formula used in such acquisition or combination to determine the consideration payable to the holders of common stock of the entities party to such acquisition or combination) may be used for Awards under the Plan and shall not reduce the Shares authorized for grant under the Plan (and Shares subject to such Awards shall not be added to the Shares available for Awards under the Plan as provided above); provided that Awards using such available shares shall not be made after the date awards or grants could have been made under the terms of the pre-existing plan, absent the acquisition or combination, and shall only be made to individuals who were employees, consultants or directors of such company acquired by the Company or any Subsidiary or with which the Company or any Subsidiary combines immediately prior to such acquisition or combination.

4.5 Non-Employee Director Compensation. Notwithstanding any provision to the contrary in the Plan, the Administrator may establish compensation for non-employee Directors from time to time, subject to the limitations in the Plan. The Administrator will from time to time determine the terms, conditions and amounts of all such non-employee Director compensation in its discretion and pursuant to the exercise of its business judgment, taking into account such factors, circumstances and considerations as it shall deem relevant from time to time; provided that the sum of any cash compensation, or other compensation, and the value (determined as of the grant date in accordance with Financial Accounting Standards Board Accounting Standards Codification Topic 718, or any successor thereto) of Awards granted to a non-employee Director as compensation for services as a non-employee Director during any fiscal year of the Company may not exceed \$750,000, increased to \$1,000,000 for fiscal year 2023 or in the fiscal year of a non-employee Director's initial service as a non-employee Director. The Administrator

may make exceptions to this limit for individual non-employee Directors in extraordinary circumstances, as the Administrator may determine in its discretion; provided that the non-employee Director receiving such additional compensation may not participate in the decision to award such compensation or in other contemporaneous compensation decisions involving non-employee Directors.

**ARTICLE V.  
STOCK OPTIONS AND STOCK APPRECIATION RIGHTS**

5.1 General. The Administrator may grant Options or Stock Appreciation Rights to Service Providers subject to the limitations in the Plan, including any limitations in the Plan that apply to Incentive Stock Options. The Administrator will determine the number of Shares covered by each Option and Stock Appreciation Right, the exercise price of each Option and Stock Appreciation Right and the conditions and limitations applicable to the exercise of each Option and Stock Appreciation Right. A Stock Appreciation Right will entitle the Participant (or other person entitled to exercise the Stock Appreciation Right) to receive from the Company upon exercise of the exercisable portion of the Stock Appreciation Right an amount determined by multiplying the excess, if any, of the Fair Market Value of one Share on the date of exercise over the exercise price per Share of the Stock Appreciation Right by the number of Shares with respect to which the Stock Appreciation Right is exercised, subject to any limitations of the Plan or that the Administrator may impose and shall be payable in cash, Shares valued at Fair Market Value or a combination of the two as the Administrator may determine or provide in the Award Agreement.

5.2 Exercise Price. The Administrator will establish each Option's and Stock Appreciation Right's exercise price and specify the exercise price in the Award Agreement. Unless otherwise determined by the Administrator, the exercise price will not be less than 100% of the Fair Market Value on the grant date of the Option (subject to Section 5.6) or Stock Appreciation Right. Notwithstanding the foregoing, in the case of an Option or a Stock Appreciation Right that is a Substitute Award, the exercise price per share of the Shares subject to such Option or Stock Appreciation Right, as applicable, may be less than the Fair Market Value per share on the date of grant; provided that the exercise price of any Substitute Award shall be determined in accordance with the applicable requirements of Sections 424 and 409A of the Code.

5.3 Duration. Each Option or Stock Appreciation Right will be exercisable at such times and as specified in the Award Agreement, provided that, unless otherwise determined by the Administrator, the term of an Option or Stock Appreciation Right will not exceed ten years. Notwithstanding the foregoing and unless determined otherwise by the Company, in the event that on the last business day of the term of an Option or Stock Appreciation Right (other than an Incentive Stock Option) (a) the exercise of the Option or Stock Appreciation Right is prohibited by Applicable Law, as determined by the Company, or (b) Shares may not be purchased or sold by the applicable Participant due to any Company insider trading policy (including blackout periods) or a "lock-up" agreement undertaken in connection with an issuance of securities by the Company, and, in either case the exercise price of such Award is the less than the Fair Market Value of the Shares as of such date, then the term of the Option or Stock Appreciation Right shall be extended, except to the extent that such extension would violate Section 409A, until the date that is 30 days after the end of the legal prohibition, black-out period or lock-up agreement, as determined by the Company; provided, however, that in no event shall the extension last beyond the ten year term of the applicable Option or Stock Appreciation Right. Notwithstanding the foregoing, to the extent permitted under Applicable Laws, if the Participant, prior to the end of the term of an Option or Stock Appreciation Right, violates in any material respect the non-competition, non-solicitation, confidentiality or other similar restrictive covenant provisions of any employment contract, confidentiality and nondisclosure agreement or other agreement between the Participant and the Company or any of its Subsidiaries (and such violation is not cured within 30 days following receipt by the Participant of written notice from the Company of such violation), the right of the Participant and the Participant's transferees to exercise any Option or Stock Appreciation Right issued to the Participant shall terminate immediately upon such violation, unless the

Company otherwise determines. In addition, if, prior to the end of the term of an Option or Stock Appreciation Right, the Participant is given notice by the Company or any of its Subsidiaries of the Participant's Termination of Service by the Company or any of its Subsidiaries for Cause, and the effective date of such Termination of Service is subsequent to the date of the delivery of such notice, the right of the Participant and the Participant's transferees to exercise any Option or Stock Appreciation Right issued to the Participant shall be suspended from the time of the delivery of such notice until the earlier of (i) such time as it is determined or otherwise agreed that the Participant's service as a Service Provider will not be terminated for Cause as provided in such notice or (ii) the effective date of the Participant's Termination of Service by the Company or any of its Subsidiaries for Cause (in which case the right of the Participant and the Participant's transferees to exercise any Option or Stock Appreciation Right issued to the Participant will terminate immediately upon the effective date of such Termination of Service).

5.4 Exercise. Options and Stock Appreciation Rights may be exercised by delivering to the Company a written notice of exercise, in a form the Administrator approves (which may be electronic), signed by the person authorized to exercise the Option or Stock Appreciation Right, together with, as applicable, payment in full (a) as specified in Section 5.5 for the number of Shares for which the Award is exercised and (b) as specified in Section 9.5 for any applicable taxes. Unless the Administrator otherwise determines, an Option or Stock Appreciation Right may not be exercised for a fraction of a Share.

5.5 Payment Upon Exercise. Subject to Section 10.8, any Company insider trading policy (including blackout periods) and Applicable Laws, the exercise price of an Option must be paid by:

(a) cash, wire transfer of immediately available funds or by check payable to the order of the Company, provided that the Company may limit the use of one of the foregoing payment forms if one or more of the payment forms below is permitted;

(b) if there is a public market for Shares at the time of exercise, unless the Company otherwise determines, (i) delivery (including electronically or telephonically to the extent permitted by the Company) of an irrevocable and unconditional undertaking by a broker acceptable to the Company to deliver promptly to the Company sufficient funds to pay the exercise price, or (ii) the Participant's delivery to the Company of a copy of irrevocable and unconditional instructions to a broker acceptable to the Company to deliver promptly to the Company cash or a check sufficient to pay the exercise price; provided that such amount is paid to the Company at such time as may be required by the Administrator;

(c) to the extent permitted by the Administrator, delivery (either by actual delivery or attestation) of Shares owned by the Participant valued at their fair market value;

(d) to the extent permitted by the Administrator at its discretion, surrendering Shares then issuable upon the Option's exercise valued at their fair market value on the exercise date;

(e) to the extent permitted by the Administrator, delivery of a promissory note or any other property that the Administrator determines is good and valuable consideration; or

(f) to the extent permitted by the Company, any combination of the above payment forms approved by the Administrator.

5.6 Additional Terms of Incentive Stock Options. The Administrator may grant Incentive Stock Options only to employees of the Company, any of its present or future parent or subsidiary corporations, as defined in Sections 424(e) or (f) of the Code, respectively, and any other entities the employees of which are eligible to receive Incentive Stock Options under the Code. If an Incentive Stock Option is granted to a Greater Than 10% Stockholder, the exercise price will not be less than 110% of the

Fair Market Value on the Option's grant date, and the term of the Option will not exceed five years. All Incentive Stock Options will be subject to and construed consistently with Section 422 of the Code. By accepting an Incentive Stock Option, the Participant agrees to give prompt written notice to the Company of dispositions or other transfers (other than in connection with a Change in Control) of Shares acquired under the Option made within (a) two years from the grant date of the Option or (b) one year after the transfer of such Shares to the Participant, specifying the date of the disposition or other transfer and the amount the Participant realized, in cash, other property, assumption of indebtedness or other consideration, in such disposition or other transfer. Neither the Company nor the Administrator will be liable to a Participant, or any other party, if an Incentive Stock Option fails or ceases to qualify as an "incentive stock option" under Section 422 of the Code. Any Incentive Stock Option or portion thereof that fails to qualify as an "incentive stock option" under Section 422 of the Code for any reason, including becoming exercisable with respect to Shares having a fair market value exceeding the \$100,000 limitation under Treasury Regulations Section 1.422-4, will be a Non-Qualified Stock Option.

## **ARTICLE VI. RESTRICTED STOCK; RESTRICTED STOCK UNITS**

6.1 General. The Administrator may grant Restricted Stock, or the right to purchase Restricted Stock, to any Service Provider, subject to the Company's right to repurchase all or part of such Shares at their issue price or other stated or formula price from the Participant (or to require forfeiture of such Shares) if conditions the Administrator specifies in the Award Agreement are not satisfied before the end of the applicable restriction period or periods that the Administrator establishes for such Award. In addition, the Administrator may grant to Service Providers Restricted Stock Units, which may be subject to vesting and forfeiture conditions during the applicable restriction period or periods, as set forth in an Award Agreement. The Administrator will determine and set forth in the Award Agreement the terms and conditions for each Restricted Stock and Restricted Stock Unit Award, subject to the conditions and limitations contained in the Plan.

### 6.2 Restricted Stock.

(a) Dividends. Participants holding Shares of Restricted Stock will be entitled to all ordinary cash dividends paid with respect to such Shares, unless the Administrator provides otherwise in the Award Agreement. In addition, unless the Administrator provides otherwise, if any dividends or distributions are paid in Shares, or consist of a dividend or distribution to holders of Common Stock of property other than an ordinary cash dividend, the Shares or other property will be subject to the same restrictions on transferability and forfeitability as the Shares of Restricted Stock with respect to which they were paid. Notwithstanding anything to the contrary herein, with respect to any award of Restricted Stock, dividends which are paid to holders of Common Stock prior to vesting shall only be paid out to the Participant holding such Restricted Stock to the extent that the vesting conditions are subsequently satisfied. All such dividend payments will be made no later than March 15 of the calendar year following the calendar year in which the right to the dividend payment becomes nonforfeitable.

(b) Stock Certificates. The Company may require that the Participant deposit in escrow with the Company (or its designee) any stock certificates issued in respect of Shares of Restricted Stock, together with a stock power endorsed in blank.

### 6.3 Restricted Stock Units.

(a) Settlement. The Administrator may provide that settlement of Restricted Stock Units will occur upon or as soon as reasonably practicable after the Restricted Stock Units vest or will instead be deferred, on a mandatory basis or at the Participant's election, in a manner intended to comply with Section 409A.



(b) Stockholder Rights. A Participant will have no rights of a stockholder with respect to Shares subject to any Restricted Stock Unit unless and until the Shares are delivered in settlement of the Restricted Stock Unit.

**ARTICLE VII.  
OTHER STOCK OR CASH BASED AWARDS; DIVIDEND EQUIVALENTS**

7.1 Other Stock or Cash Based Awards. Other Stock or Cash Based Awards may be granted to Participants, including Awards entitling Participants to receive Shares to be delivered in the future and including annual or other periodic or long-term cash bonus awards (whether based on specified Performance Criteria or otherwise), in each case subject to any conditions and limitations in the Plan. Such Other Stock or Cash Based Awards will also be available as a payment form in the settlement of other Awards, as standalone payments and as payment in lieu of compensation to which a Participant is otherwise entitled. Other Stock or Cash Based Awards may be paid in Shares, cash or other property, as the Administrator determines. Subject to the provisions of the Plan, the Administrator will determine the terms and conditions of each Other Stock or Cash Based Award, including any purchase price, performance goal (which may be based on the Performance Criteria), transfer restrictions, and vesting conditions, which will be set forth in the applicable Award Agreement.

7.2 Dividend Equivalents. A grant of Restricted Stock Units or Other Stock or Cash Based Award may provide a Participant with the right to receive Dividend Equivalents, and no Dividend Equivalents shall be payable with respect to Options or Stock Appreciation Rights. Dividend Equivalents may be paid currently or credited to an account for the Participant, settled in cash or Shares and subject to the same restrictions on transferability and forfeitability as the Award with to which the Dividend Equivalents are paid and subject to other terms and conditions as set forth in the Award Agreement. Notwithstanding anything to the contrary herein, Dividend Equivalents with respect to an Award shall only paid out to the Participant to the extent that the vesting conditions are subsequently satisfied. All such Dividend Equivalent payments will be made no later than March 15 of the calendar year following calendar year in which the right to the Dividend Equivalent payment becomes nonforfeitable, unless determined otherwise by the Administrator or unless deferred in a manner intended to comply with Section 409A.

**ARTICLE VIII.  
ADJUSTMENTS FOR CHANGES IN COMMON STOCK  
AND CERTAIN OTHER EVENTS**

8.1 Equity Restructuring. In connection with any Equity Restructuring, notwithstanding anything to the contrary in this Article VIII, the Administrator will equitably adjust each outstanding Award as it reasonably and in good faith deems appropriate to reflect the Equity Restructuring, which may include adjusting the number and type of securities subject to each outstanding Award and/or the Award's exercise price or grant price (if applicable), granting new Awards to Participants, and making a cash payment to Participants. The adjustments provided under this Section 8.1 will be nondiscretionary and final and binding on the affected Participant and the Company; provided that the Administrator will reasonably and in good faith determine whether an adjustment is equitable.

8.2 Corporate Transactions. In the event of any dividend (other than ordinary cash dividends) or other distribution (whether in the form of cash, Common Stock, other securities, or other property), reorganization, merger, consolidation, combination, amalgamation, repurchase, recapitalization, liquidation, dissolution, or sale, transfer, exchange or other disposition of all or substantially all of the assets

of the Company, or sale or exchange of Common Stock or other securities of the Company, Change in Control, issuance of warrants or other rights to purchase Common Stock or other securities of the Company, other similar corporate transaction or event, other unusual or nonrecurring transaction or event affecting the Company or its financial statements or any change in any Applicable Laws or accounting principles, the Administrator, on such terms and conditions as it reasonably and in good faith deems appropriate, either by the terms of the Award or by action taken prior to the occurrence of such transaction or event (except that action to give effect to a change in Applicable Law or accounting principles may be made within a reasonable period of time after such change), is hereby authorized to take any one or more of the following actions whenever the Administrator reasonably and in good faith determines that such action is appropriate to (x) prevent dilution or enlargement of the benefits or potential benefits intended by the Company to be made available under the Plan or with respect to any Award granted or issued under the Plan, (y) to facilitate such transaction or event or (z) give effect to such changes in Applicable Laws or accounting principles:

(a) To provide for the cancellation of any such Award in exchange for either an amount of cash or other property with a fair market value equal to the amount that could have been obtained upon the exercise or settlement of the vested portion of such Award or realization of the Participant's rights under the vested portion of such Award, as applicable; provided that, if the amount that could have been obtained upon the exercise or settlement of the vested portion of such Award or realization of the Participant's rights, in any case, is equal to or less than zero, then the Award may be terminated without payment;

(b) To provide that such Award shall vest and, to the extent applicable, be exercisable as to all Shares covered thereby, notwithstanding anything to the contrary in the Plan or the provisions of such Award;

(c) To provide that such Award be assumed by the successor or survivor corporation, or a parent or subsidiary thereof, or shall be substituted for by awards covering the stock of the successor or survivor corporation, or a parent or subsidiary thereof, with appropriate adjustments as to the number and kind of shares and/or applicable exercise or purchase price, in all cases, as determined by the Administrator;

(d) To make adjustments in the number and type of Shares (or other securities or property) subject to outstanding Awards and/or with respect to which Awards may be granted under the Plan (including, but not limited to, adjustments of the limitations in Article IV on the maximum number and kind of shares which may be issued) and/or in the terms and conditions of (including the grant or exercise price or applicable performance goals), and the criteria included in, outstanding Awards;

(e) To replace such Award with other rights or property of equivalent value selected by the Administrator; and/or

(f) To provide that the Award will terminate and cannot vest, be exercised or become payable after the applicable event.

8.3 Administrative Stand Still. In the event of any pending stock dividend, stock split, combination or exchange of shares, merger, consolidation or other distribution (other than normal cash dividends) of Company assets to stockholders, or any other extraordinary transaction or change affecting the Shares or the share price of Common Stock, including any Equity Restructuring or any securities offering or other similar transaction, for administrative convenience, the Administrator may refuse to permit the exercise of any Award for up to 60 days before or after such transaction.

8.4 General. Except as expressly provided in the Plan or the Administrator's action under the Plan, no Participant will have any rights due to any subdivision or consolidation of Shares of any class, dividend payment, increase or decrease in the number of Shares of any class or dissolution, liquidation, merger, or consolidation of the Company or other corporation. Except as expressly provided with respect to an Equity Restructuring under Section 8.1 or the Administrator's action under the Plan, no issuance by the Company of Shares of any class, or securities convertible into Shares of any class, will affect, and no adjustment will be made regarding, the number of Shares subject to an Award or the Award's grant or exercise price. The existence of the Plan, any Award Agreements and the Awards granted hereunder will not affect or restrict in any way the Company's right or power to make or authorize (a) any adjustment, recapitalization, reorganization or other change in the Company's capital structure or its business, (b) any merger, consolidation dissolution or liquidation of the Company or sale of Company assets or (c) any sale or issuance of securities, including securities with rights superior to those of the Shares or securities convertible into or exchangeable for Shares. The Administrator may treat Participants and Awards (or portions thereof) differently under this Article VIII.

#### **ARTICLE IX. GENERAL PROVISIONS APPLICABLE TO AWARDS**

9.1 Transferability. Except as the Administrator may determine or provide in an Award Agreement or otherwise for Awards other than Incentive Stock Options, Awards may not be sold, assigned, transferred, pledged or otherwise encumbered, either voluntarily or by operation of law, except by will or the laws of descent and distribution, or, subject to the Administrator's consent, pursuant to a domestic relations order, and, during the life of the Participant, will be exercisable only by the Participant. References to a Participant, to the extent relevant in the context, will include references to a Participant's authorized transferee that the Administrator specifically approves.

9.2 Documentation. Each Award will be evidenced in an Award Agreement, which may be written or electronic, as the Administrator determines. Each Award may contain terms and conditions in addition to those set forth in the Plan.

9.3 Discretion. Except as the Plan otherwise provides, each Award may be made alone or in addition or in relation to any other Award. The terms of each Award to a Participant need not be identical, and the Administrator need not treat Participants or Awards (or portions thereof) uniformly.

9.4 Termination of Status. The Administrator will determine how the disability, death, retirement or authorized leave of absence or any other change or purported change in a Participant's Service Provider status affects an Award and the extent to which, and the period during which the Participant, the Participant's legal representative, conservator, guardian or Designated Beneficiary may exercise rights under the Award, if applicable.

9.5 Withholding. Each Participant must pay the Company or make provision satisfactory to the Administrator for payment of any taxes required by Applicable Law to be withheld in connection with such Participant's Awards by the date of the event creating the tax liability. The Company may deduct an amount sufficient to satisfy such tax obligations based on the applicable statutory withholding rates (or such other rate as may be determined by the Company reasonably and in good faith after considering any accounting consequences or costs) from any payment of any kind otherwise due to a Participant. Subject to Section 10.8 and any Company insider trading policy (including blackout periods), Participants may satisfy such tax obligations (a) in cash, by wire transfer of immediately available funds, by check made payable to the order of the Company, provided that the Company may limit the use of the foregoing payment forms if one or more of the payment forms below is permitted, (b) to the extent permitted by the Administrator, in whole or in part by delivery of Shares, including Shares delivered by attestation and

Shares retained from the Award creating the tax obligation, valued at their Fair Market Value on the date of delivery, (c) if there is a public market for Shares at the time the tax obligations are satisfied, unless the Company otherwise determines, (i) delivery (including electronically or telephonically to the extent permitted by the Company) of an irrevocable and unconditional undertaking by a broker acceptable to the Company to deliver promptly to the Company sufficient funds to satisfy the tax obligations, or (ii) delivery by the Participant to the Company of a copy of irrevocable and unconditional instructions to a broker acceptable to the Company to deliver promptly to the Company cash or a check sufficient to satisfy the tax withholding; provided that such amount is paid to the Company at such time as may be required by the Administrator, or (d) to the extent permitted by the Company, any combination of the foregoing payment forms approved by the Administrator. If any tax withholding obligation will be satisfied under clause (b) above by the Company's retention of Shares from the Award creating the tax obligation and there is a public market for Shares at the time the tax obligation is satisfied, the Company may elect to instruct any brokerage firm determined acceptable to the Company for such purpose to sell on the applicable Participant's behalf some or all of the Shares retained and to remit the proceeds of the sale to the Company or its designee, and each Participant's acceptance of an Award under the Plan will constitute the Participant's authorization to the Company and instruction and authorization to such brokerage firm to complete the transactions described in this sentence.

9.6 Amendment of Award: Repricing. The Administrator may amend, modify or terminate any outstanding Award, including by substituting another Award of the same or a different type, changing the exercise or settlement date, and converting an Incentive Stock Option to a Non-Qualified Stock Option. The Participant's consent to such action will be required unless (a) the action, taking into account any related action, does not materially and adversely affect the Participant's rights under the Award, or (b) the change is permitted under Article VIII or pursuant to Section 10.6. Notwithstanding the foregoing or anything in the Plan to the contrary, the Administrator may not, except pursuant to Article VIII, without the approval of the stockholders of the Company, reduce the exercise price per share of outstanding Options or Stock Appreciation Rights or cancel outstanding Options or Stock Appreciation Rights that have an exercise price that is greater than the then-current Fair Market Value of the Shares in exchange for cash, other Awards or Options or Stock Appreciation Rights with an exercise price per share that is less than the exercise price per share of the original Options or Stock Appreciation Rights.

9.7 Conditions on Delivery of Stock. The Company will not be obligated to deliver any Shares under the Plan or remove restrictions from Shares previously delivered under the Plan until (a) all Award conditions have been met or removed to the Company's satisfaction, (b) as determined reasonably and in good faith by the Company, all other legal matters regarding the issuance and delivery of such Shares have been satisfied, including any applicable securities laws and stock exchange or stock market rules and regulations, and (c) the Participant has executed and delivered to the Company such representations or agreements as the Administrator deems reasonably necessary or appropriate to satisfy any Applicable Laws. The Company's inability after commercially reasonable good faith effort to obtain authority from any regulatory body having jurisdiction, which the Administrator determines is necessary to the lawful issuance and sale of any securities, will relieve the Company of any liability for failing to issue or sell such Shares as to which such requisite authority has not been obtained.

9.8 Acceleration. The Administrator may at any time provide that any Award will become immediately vested and fully or partially exercisable, free of some or all restrictions or conditions, or otherwise fully or partially realizable.

9.9 Cash Settlement. Without limiting the generality of any other provision of the Plan, the Administrator may provide, in an Award Agreement or subsequent to the grant of an Award, in its discretion, that any Award may be settled in cash, Shares or a combination thereof.

9.10 Broker-Assisted Sales. In the event of a broker-assisted sale of Shares in connection with the payment of amounts owed by a Participant under or with respect to the Plan or Awards, including amounts to be paid under the final sentence of Section 9.5: (a) any Shares to be sold through the broker-assisted sale will be sold on the day the payment first becomes due, or as soon thereafter as practicable; (b) such Shares may be sold as part of a block trade with other Participants in the Plan in which all participants receive an average price; (c) if determined by the Administrator, the applicable Participant will be responsible for all broker's fees and other costs of sale, and by accepting an Award, each Participant agrees to indemnify and hold the Company harmless from any losses, costs, damages, or expenses relating to any such sale; (d) to the extent the Company or its designee receives proceeds of such sale that exceed the amount owed, the Company will pay such excess in cash to the applicable Participant as soon as reasonably practicable; (e) the Company and its designees are under no obligation to arrange for such sale at any particular price; and (f) in the event the proceeds of such sale are insufficient to satisfy the Participant's applicable obligation, the Participant may be required to pay immediately upon demand to the Company or its designee an amount in cash sufficient to satisfy any remaining portion of the Participant's obligation.

## ARTICLE X. MISCELLANEOUS

10.1 No Right to Employment or Other Status. No person will have any claim or right to be granted an Award, and the grant of an Award will not be construed as giving a Participant the right to continued employment or any other relationship with the Company or any of its Subsidiaries. The Company and its Subsidiaries expressly reserves the right at any time to dismiss or otherwise terminate its relationship with a Participant free from any liability or claim under the Plan or any Award, except as expressly provided in an Award Agreement or in the Plan.

10.2 No Rights as Stockholder; Certificates. Subject to the Award Agreement, no Participant or Designated Beneficiary will have any rights as a stockholder with respect to any Shares to be distributed under an Award until becoming the record holder of such Shares. Notwithstanding any other provision of the Plan, unless the Administrator otherwise determines or Applicable Laws require, the Company will not be required to deliver to any Participant certificates evidencing Shares issued in connection with any Award and instead such Shares may be recorded in the books of the Company (or, as applicable, its transfer agent or stock plan administrator). The Company may place legends on stock certificates issued under the Plan that the Administrator deems necessary or appropriate to comply with Applicable Laws.

10.3 Effective Date and Term of Plan. Unless earlier terminated by the Board, the Plan will become effective upon the consummation of the transactions contemplated by that certain Agreement and Plan of Merger entered into on February 14, 2022, by and among the Company, Branded Online, Inc. dba Nogin, and Nuevo Merger Sub, Inc. (the "*Initial Business Combination*," and the date that the Plan becomes effective, the "*Effective Date*"), subject to the approval of the Company's stockholders, and will remain in effect until the tenth anniversary of the earlier of (a) the date the Board adopted the Plan and (b) the date the Company's stockholders approved the Plan, provided that Awards previously granted may extend beyond that date in accordance with the Plan. If the Plan is not approved by the Company's stockholders, the Plan will not become effective, and no Awards will be granted under the Plan.

10.4 Amendment of Plan. The Administrator may amend, suspend or terminate the Plan at any time; provided that no amendment, other than an increase to the Overall Share Limit, may materially and adversely affect the rights of a Participant with respect to any Award outstanding at the time of such amendment without the affected Participant's consent. No Awards may be granted under the Plan during any suspension period or after the Plan's termination. Awards outstanding at the time of any Plan suspension or termination will continue to be governed by the Plan and the Award Agreement, as in effect before such suspension or termination. The Board will obtain stockholder approval of any Plan amendment to the extent necessary to comply with Applicable Laws.

10.5 Provisions for Foreign Participants The Administrator may modify Awards granted to Participants who are foreign nationals or employed outside the United States or establish subplans or procedures under the Plan to address differences in laws, rules, regulations or customs of such foreign jurisdictions with respect to tax, securities, currency, employee benefit or other matters.

10.6 Section 409A.

(a) General. The Company intends that all Awards be structured to comply with, or be exempt from, Section 409A, such that no adverse tax consequences, interest, or penalties under Section 409A apply, and the Plan shall be construed and interpreted in accordance with such intent. Each payment under an Award shall be treated as a separate payment for purposes of Section 409A. Notwithstanding anything in the Plan or any Award Agreement to the contrary, the Administrator may, without a Participant's consent, amend this Plan or Awards, adopt policies and procedures, or take any other actions (including amendments, policies, procedures and retroactive actions) as are necessary or appropriate to preserve the intended tax treatment of Awards, including any such actions intended to (i) exempt this Plan or any Award from Section 409A, or (ii) comply with Section 409A, including regulations, guidance, compliance programs and other interpretative authority that may be issued after an Award's grant date; provided, that, any such amendment or policies or procedures shall endeavor to maintain the intended economic impact of any outstanding Awards. The Company makes no representations or warranties as to an Award's tax treatment under Section 409A or otherwise. The Company will have no obligation under this Section 10.6 or otherwise to avoid the taxes, penalties or interest under Section 409A with respect to any Award and will have no liability to any Participant or any other person if any Award, compensation or other benefits under the Plan are determined to constitute noncompliant "nonqualified deferred compensation" subject to taxes, penalties or interest under Section 409A.

(b) Separation from Service. If an Award constitutes "nonqualified deferred compensation" under Section 409A, any payment or settlement of such Award upon a termination of a Participant's Service Provider relationship will, to the extent necessary to avoid taxes under Section 409A, be made only upon the Participant's "separation from service" (within the meaning of Section 409A), whether such "separation from service" occurs upon or after the termination of the Participant's Service Provider relationship. For purposes of this Plan or any Award Agreement relating to any such payments or benefits, references to a "termination," "termination of employment" or like terms means a "separation from service."

(c) Payments to Specified Employees. Notwithstanding any contrary provision in the Plan or any Award Agreement, any payment(s) of "nonqualified deferred compensation" required to be made under an Award to a "specified employee" (as defined under Section 409A and as the Administrator determines) due to his or her "separation from service" will, to the extent necessary to avoid taxes under Section 409A(a)(2)(B)(i) of the Code, be delayed for the six-month period immediately following such "separation from service" (or, if earlier, until the specified employee's death) and will instead be paid (as set forth in the Award Agreement) on the day immediately following such six-month period or as soon as administratively practicable thereafter (without interest). Any payments of "nonqualified deferred compensation" under such Award payable more than six months following the Participant's "separation from service" will be paid at the time or times the payments are otherwise scheduled to be made.

10.7 Limitations on Liability. Notwithstanding any other provisions of the Plan, no individual acting as a director, officer, other employee or agent of the Company or any Subsidiary will be liable to any Participant, former Participant, spouse, beneficiary, or any other person for any claim, loss, liability, or expense incurred in connection with the Plan or any Award, and such individual will not be personally liable with respect to the Plan because of any contract or other instrument executed in his or her capacity as an Administrator, director, officer, other employee or agent of the Company or any Subsidiary. The Company will indemnify and hold harmless each director, officer, other employee and agent of the Company or any Subsidiary that has been or will be granted or delegated any duty or power relating to the Plan's administration or interpretation, against any cost or expense (including attorneys' fees) or liability (including any sum paid in settlement of a claim with the Administrator's approval) arising from any act or omission concerning this Plan unless arising from such person's own fraud or bad faith.

10.8 Lock-Up Period. The Company may, at the request of any underwriter representative or otherwise, in connection with registering the offering of any Company securities under the Securities Act, prohibit Participants from, directly or indirectly, selling or otherwise transferring any Shares or other Company securities during a period of up to 180 days following the effective date of a Company registration statement filed under the Securities Act, or such longer period as determined by the underwriter.

10.9 Data Privacy. As a condition for receiving any Award, each Participant explicitly and unambiguously consents to the collection, use and transfer, in electronic or other form, of personal data as described in this section by and among the Company and its Subsidiaries and affiliates exclusively for implementing, administering and managing the Participant's participation in the Plan. The Company and its Subsidiaries and affiliates may hold certain personal information about a Participant, including the Participant's name, address and telephone number; birthdate; social security, insurance number or other identification number; salary; nationality; job title(s); any Shares held in the Company or its Subsidiaries and affiliates; and Award details, to implement, manage and administer the Plan and Awards (the "**Data**"). The Company and its Subsidiaries and affiliates may transfer the Data amongst themselves as necessary to implement, administer and manage a Participant's participation in the Plan, and the Company and its Subsidiaries and affiliates may transfer the Data to third parties assisting the Company with Plan implementation, administration and management. These recipients may be located in the Participant's country, or elsewhere, and the Participant's country may have different data privacy laws and protections than the recipients' country. By accepting an Award, each Participant authorizes such recipients to receive, possess, use, retain and transfer the Data, in electronic or other form, to implement, administer and manage the Participant's participation in the Plan, including any required Data transfer to a broker or other third party with whom the Company or the Participant may elect to deposit any Shares. The Data related to a Participant will be held only as long as necessary to implement, administer, and manage the Participant's participation in the Plan. A Participant may, at any time, view the Data that the Company holds regarding such Participant, request additional information about the storage and processing of the Data regarding such Participant, recommend any necessary corrections to the Data regarding the Participant or refuse or withdraw the consents in this Section 10.9 in writing, without cost, by contacting the local human resources representative. If the Participant refuses or withdraws the consents in this Section 10.9, the Company may cancel Participant's ability to participate in the Plan and, in the Administrator's discretion, the Participant may forfeit any outstanding Awards. For more information on the consequences of refusing or withdrawing consent, Participants may contact their local human resources representative.

10.10 Severability. If any portion of the Plan or any action taken under it is held illegal or invalid for any reason, the illegality or invalidity will not affect the remaining parts of the Plan, and the Plan will be construed and enforced as if the illegal or invalid provisions had been excluded, and the illegal or invalid action will be null and void.

10.11 Governing Documents. If any contradiction occurs between the Plan and any Award Agreement or other written agreement between a Participant and the Company (or any Subsidiary) that the Administrator has approved, the Plan will govern, unless it is expressly specified in such Award Agreement or other written document that a specific provision of the Plan will not apply or that the Award Agreement or other written document will govern.

10.12 Governing Law. The Plan and all Awards will be governed by and interpreted in accordance with the laws of the State of Delaware, disregarding any state's choice-of-law principles requiring the application of a jurisdiction's laws other than the State of Delaware.

10.13 Claw-back Provisions. All Awards (including, without limitation, any proceeds, gains or other economic benefit actually or constructively received by Participant upon any receipt or exercise of any Award or upon the receipt or resale of any Shares underlying the Award) shall be subject to the provisions of any claw-back policy implemented by the Company, including, without limitation, any claw-back policy adopted to comply with Applicable Laws (including the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and any rules or regulations promulgated thereunder) as and to the extent set forth in such claw-back policy or the Award Agreement.

10.14 Titles and Headings. The titles and headings in the Plan are for convenience of reference only and, if any conflict, the Plan's text, rather than such titles or headings, will control.

10.15 Conformity to Securities Laws. Participant acknowledges that the Plan is intended to conform to the extent necessary with Applicable Laws. Notwithstanding anything herein to the contrary, the Plan and all Awards will be administered only in conformance with Applicable Laws. To the extent Applicable Laws permit, the Plan and all Award Agreements will be deemed amended as necessary to conform to Applicable Laws.

10.16 Relationship to Other Benefits. No payment under the Plan will be taken into account in determining any benefits under any pension, retirement, savings, profit sharing, group insurance, welfare or other benefit plan of the Company or any Subsidiary except as expressly provided in writing in such other plan or an agreement thereunder.

## ARTICLE XI. DEFINITIONS

As used in the Plan, the following words and phrases will have the following meanings:

11.1 "**Administrator**" means the Board or a Committee to the extent that the Board's powers or authority under the Plan have been delegated to such Committee.

11.2 "**Applicable Laws**" means the requirements relating to the administration of equity incentive plans under U.S. federal and state securities, tax and other applicable laws, rules and regulations, the applicable rules of any stock exchange or quotation system on which the Common Stock is listed or quoted and the applicable laws and rules of any foreign country or other jurisdiction where Awards are granted.

11.3 "**Award**" means, individually or collectively, a grant under the Plan of Options, Stock Appreciation Rights, Restricted Stock, Restricted Stock Units, Dividend Equivalents, or Other Stock or Cash Based Awards.

11.4 "**Award Agreement**" means a written agreement evidencing an Award, which may be electronic, that contains such terms and conditions as the Administrator determines, consistent with and subject to the terms and conditions of the Plan.



11.5 “**Board**” means the Board of Directors of the Company.

11.6 “**Cause**” means (a) if a Participant is a party to a written employment or consulting agreement with the Company or any of its Subsidiaries or an Award Agreement in which the term “Cause” is defined (a “**Relevant Agreement**”), “Cause” as defined in the Relevant Agreement, and (b) if no Relevant Agreement exists, (i) the Administrator’s determination that the Participant failed to substantially perform the Participant’s duties (other than a failure resulting from the Participant’s disability); (ii) the Administrator’s determination that the Participant failed to carry out, or comply with any lawful and reasonable directive of the Board or the Participant’s immediate supervisor; (iii) the occurrence of any act or omission by the Participant that could reasonably be expected to result in (or has resulted in) the Participant’s conviction, plea of no contest, plea of *nolo contendere*, or imposition of unadjudicated probation for any felony or indictable offense or crime involving moral turpitude; (iv) the Participant’s unlawful use (including being under the influence) or possession of illegal drugs on the premises of the Company or any of its Subsidiaries or while performing the Participant’s duties and responsibilities for the Company or any of its Subsidiaries; (v) the Participant’s breach of any agreement with the Company or a Subsidiary thereof (including, without limitation, any confidentiality, non-competition, non-solicitation or assignment of inventions agreement); (vi) the Participant’s breach of any material policy or code of conduct established by a member of the Company or any of its Subsidiaries and applicable to the Participant, including any policy or code of conduct provision relating to discrimination, harassment or retaliation; or (vii) the Administrator’s determination that the Participant committed an act of fraud, embezzlement, misappropriation, or misconduct, or breached a fiduciary duty against the Company or any of its Subsidiaries. The Administrator, in its absolute discretion, shall determine the effect of all matters and questions relating to whether a Participant has been discharged for Cause.

11.7 “**Change in Control**” means and includes each of the following:

(a) A transaction or series of transactions (other than an offering of Common Stock to the general public through a registration statement filed with the Securities and Exchange Commission or a transaction or series of transactions that meets the requirements of clauses (i) and (ii) of subsection (c) below) whereby any “person” or related “group” of “persons” (as such terms are used in Sections 13(d) and 14(d)(2) of the Exchange Act) (other than the Company, any of its Subsidiaries, an employee benefit plan maintained by the Company or any of its Subsidiaries or a “person” that, prior to such transaction, directly or indirectly controls, is controlled by, or is under common control with, the Company) directly or indirectly acquires beneficial ownership (within the meaning of Rule 13d-3 under the Exchange Act) of securities of the Company possessing more than 50% of the total combined voting power of the Company’s securities outstanding immediately after such acquisition;

(b) During any period of two consecutive years, individuals who, at the beginning of such period, constitute the Board together with any new Director(s) (other than a Director designated by a person who shall have entered into an agreement with the Company to effect a transaction described in subsections (a) or (c)) whose election by the Board or nomination for election by the Company’s stockholders was approved (other than in connection with the settlement of an actual or threatened hostile proxy contest) by a vote of at least two-thirds of the Directors then still in office who either were Directors at the beginning of the two-year period or whose election or nomination for election was previously so approved, cease for any reason to constitute a majority thereof; or

(c) The consummation by the Company (whether directly involving the Company or indirectly involving the Company through one or more intermediaries) of (x) a merger, consolidation, reorganization, or business combination, (y) a sale or other disposition of all or substantially all of the Company’s assets in any single transaction or series of related transactions or (z) the acquisition of assets or stock of another entity, in each case other than a transaction:

(i) that results in the Company's voting securities outstanding immediately before the transaction continuing to represent (either by remaining outstanding or by being converted into voting securities of the Company or the person that, as a result of the transaction, controls, directly or indirectly, the Company or owns, directly or indirectly, all or substantially all of the Company's assets or otherwise succeeds to the business of the Company (the Company or such person, the "**Successor Entity**") directly or indirectly, at least a majority of the combined voting power of the Successor Entity's outstanding voting securities immediately after the transaction in substantially the same proportions as immediately prior to the transaction, and

(ii) after which no person or group beneficially owns voting securities representing 50% or more of the combined voting power of the Successor Entity; provided, however, that no person or group shall be treated for purposes of this clause (ii) as beneficially owning 50% or more of the combined voting power of the Successor Entity solely as a result of the voting power held in the Company prior to the consummation of the transaction.

Notwithstanding the foregoing, in no event shall the Initial Business Combination or the transactions occurring in connection therewith constitute a Change in Control and if a Change in Control constitutes a payment event with respect to any Award (or portion of any Award) that provides for the deferral of compensation that is subject to Section 409A, to the extent required to avoid the imposition of additional taxes under Section 409A, the transaction or event described in subsection (a), (b) or (c) with respect to such Award (or portion thereof) shall only constitute a Change in Control for purposes of the payment timing of such Award if such transaction also constitutes a "change in control event," as defined in Treasury Regulations Section 1.409A-3(i)(5).

The Administrator shall have full and final authority, which shall be exercised in its discretion, to determine conclusively whether a Change in Control has occurred pursuant to the above definition, the date of the occurrence of such Change in Control and any incidental matters relating thereto; provided that any exercise of authority in conjunction with a determination of whether a Change in Control is a "change in control event" as defined in Treasury Regulations Section 1.409A-3(i)(5) shall be consistent with such regulation.

11.8 "**Code**" means the Internal Revenue Code of 1986, as amended, and the regulations issued thereunder.

11.9 "**Committee**" means one or more committees or subcommittees of the Board, which may include one or more Company directors or executive officers, to the extent Applicable Laws permit. To the extent required to comply with the provisions of Rule 16b-3, it is intended that each member of the Committee will be, at the time the Committee takes any action with respect to an Award that is subject to Rule 16b-3, a "non-employee director" within the meaning of Rule 16b-3; however, a Committee member's failure to qualify as a "non-employee director" within the meaning of Rule 16b-3 will not invalidate any Award granted by the Committee that is otherwise validly granted under the Plan.

11.10 "**Common Stock**" means the Class A common stock, par value \$0.0001, of the Company.

11.11 "**Company**" means Nogin, Inc., a Delaware corporation, or any successor.

11.12 "**Consultant**" means any person, including any adviser, engaged by the Company or any of its Subsidiaries to render services to such entity if the consultant or adviser: (a) renders bona fide services to the Company; (b) renders services not in connection with the offer or sale of securities in a capital-raising transaction and does not directly or indirectly promote or maintain a market for the Company's securities; and (c) is a natural person.

11.13 “**Designated Beneficiary**” means the beneficiary or beneficiaries the Participant designates, in a manner the Administrator determines, to receive amounts due or exercise the Participant’s rights if the Participant dies or becomes incapacitated. Without a Participant’s effective designation, “Designated Beneficiary” will mean the Participant’s estate.

11.14 “**Director**” means a Board member.

11.15 “**Disability**” means a permanent and total disability under Section 22(e)(3) of the Code, as amended.

11.16 “**Dividend Equivalents**” means a right granted to a Participant under the Plan to receive the equivalent value (in cash or Shares) of dividends paid on Shares.

11.17 “**Employee**” means any employee of the Company or its Subsidiaries.

11.18 “**Equity Restructuring**” means, as determined by the Administrator, a non-reciprocal transaction between the Company and its stockholders, such as a stock dividend, stock split, spin-off or recapitalization through a large, nonrecurring cash dividend, or other large, nonrecurring cash dividend, that affects the number or kind of Shares (or other securities of the Company) or the share price of Common Stock (or other securities of the Company) and causes a change in the per share value of the Common Stock underlying outstanding Awards.

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

11.20 “**Fair Market Value**” means, as of any date, the value of a share of Common Stock determined as follows: (a) if the Common Stock is listed on any established stock exchange, its Fair Market Value will be the closing sales price for such Common Stock as quoted on such exchange for such date, or if no sale occurred on such date, the last day preceding such date during which a sale occurred, as reported in *The Wall Street Journal* or another source the Administrator deems reliable; (b) if the Common Stock is not traded on a stock exchange but is quoted on a national market or other quotation system, the closing sales price on such date, or if no sales occurred on such date, then on the last date preceding such date during which a sale occurred, as reported in *The Wall Street Journal* or another source the Administrator deems reliable; or (c) without an established market for the Common Stock, the Administrator will determine the Fair Market Value in its discretion.

11.21 “**Greater Than 10% Stockholder**” means an individual then owning (within the meaning of Section 424(d) of the Code) more than 10% of the total combined voting power of all classes of stock of the Company or its parent or subsidiary corporation, as defined in Section 424(e) and (f) of the Code, respectively.

11.22 “**Incentive Stock Option**” means an Option intended to qualify as an “incentive stock option” as defined in Section 422 of the Code.

11.23 “**Non-Qualified Stock Option**” means an Option, or portion thereof, not intended or not qualifying as an Incentive Stock Option.

11.24 “**Option**” means an option to purchase Shares, which will either be an Incentive Stock Option or a Non-Qualified Stock Option.

11.25 “**Other Stock or Cash Based Awards**” means cash awards, awards of Shares, and other awards valued wholly or partially by referring to, or are otherwise based on, Shares or other property awarded to a Participant under Article VII.

11.26 “**Overall Share Limit**” means the sum of (i) 5,102,948 Shares and (ii) an annual increase on the first day of each calendar year beginning January 1, 2023 and ending on and including January 1, 2032, equal to the lesser of (A) 15% of the aggregate number of Shares outstanding on the final day of the immediately preceding calendar year and (B) such smaller number of Shares as is determined by the Board.

11.27 “**Participant**” means a Service Provider who has been granted an Award.

11.28 “**Performance Criteria**” mean the criteria (and adjustments) that the Administrator may select for an Award to establish performance goals for a performance period, which may include the following: net earnings or losses (either before or after one or more of interest, taxes, depreciation, amortization, and non-cash equity-based compensation expense); gross or net sales or revenue or sales or revenue growth; net income (either before or after taxes) or adjusted net income; profits (including but not limited to gross profits, net profits, profit growth, net operation profit or economic profit), profit return ratios or operating margin; budget or operating earnings (either before or after taxes or before or after allocation of corporate overhead and bonus); cash flow (including operating cash flow and free cash flow or cash flow return on capital); return on assets; return on capital or invested capital; cost of capital; return on stockholders’ equity; total stockholder return; return on sales; costs, reductions in costs and cost control measures; expenses; working capital; earnings or loss per share; adjusted earnings or loss per share; price per share or dividends per share (or appreciation in or maintenance of such price or dividends); regulatory achievements or compliance; implementation, completion or attainment of objectives relating to research, development, regulatory, commercial, or strategic milestones or developments; market share; economic value or economic value added models; division, group or corporate financial goals; customer satisfaction/growth; customer service; employee satisfaction; recruitment and maintenance of personnel; human resources management; supervision of litigation and other legal matters; strategic partnerships and transactions; financial ratios (including those measuring liquidity, activity, profitability or leverage); debt levels or reductions; sales-related goals; financing and other capital raising transactions; cash on hand; acquisition activity; investment sourcing activity; and marketing initiatives, any of which may be measured in absolute terms or as compared to any incremental increase or decrease. Such performance goals also may be based solely by reference to the Company’s performance or the performance of a Subsidiary, division, business segment or business unit of the Company or a Subsidiary or based upon performance relative to performance of other companies or upon comparisons of any of the indicators of performance relative to performance of other companies. The Committee may provide for exclusion of the impact of an event or occurrence which the Committee determines should appropriately be excluded, including (a) restructurings, discontinued operations, extraordinary items, and other unusual, infrequently occurring or non-recurring charges or events, (b) asset write-downs, (c) litigation or claim judgments or settlements, (d) acquisitions or divestitures, (e) reorganization or change in the corporate structure or capital structure of the Company, (f) an event either not directly related to the operations of the Company, Subsidiary, division, business segment or business unit or not within the reasonable control of management, (g) foreign exchange gains and losses, (h) a change in the fiscal year of the Company, (i) the refinancing or repurchase of bank loans or debt securities, (j) unbudgeted capital expenditures, (k) the issuance or repurchase of equity securities and other changes in the number of outstanding shares, (l) conversion of some or all of convertible securities to Common Stock, (m) any business interruption event (n) the cumulative effects of tax or accounting changes in accordance with U.S. generally accepted accounting principles, or (o) the effect of changes in other laws or regulatory rules affecting reported results.

11.29 “**Plan**” means this 2022 Incentive Award Plan, as amended from time to time.

11.30 “**Restricted Stock**” means Shares awarded to a Participant under Article VI subject to certain vesting conditions and other restrictions.

11.31 “**Restricted Stock Unit**” means an unfunded, unsecured right to receive, on the applicable settlement date, one Share or an amount in cash or other consideration determined by the Administrator to be of equal value as of such settlement date awarded to a Participant under Article VI subject to certain vesting conditions and other restrictions.

11.32 “**Rule 16b-3**” means Rule 16b-3 promulgated under the Exchange Act.

11.33 “**Section 409A**” means Section 409A of the Code and all regulations, guidance, compliance programs and other interpretative authority thereunder.

11.34 “**Section 16 Persons**” means those officers, directors or other persons who are subject to Section 16 of the Exchange Act.

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

11.36 “**Service Provider**” means an Employee, Consultant or Director.

11.37 “**Shares**” means shares of Common Stock.

11.38 “**Stock Appreciation Right**” means a stock appreciation right granted under Article V.

11.39 “**Subsidiary**” means any entity (other than the Company), whether domestic or foreign, in an unbroken chain of entities beginning with the Company if each of the entities other than the last entity in the unbroken chain beneficially owns, at the time of the determination, securities or interests representing at least 50% of the total combined voting power of all classes of securities or interests in one of the other entities in such chain.

11.40 “**Substitute Awards**” means Awards granted or Shares issued by the Company in assumption of, or in substitution or exchange for, awards previously granted, or the right or obligation to make future awards, in each case by a company acquired by the Company or any Subsidiary or with which the Company or any Subsidiary combines.

11.41 “**Termination of Service**” means the date the Participant ceases to be a Service Provider.

\* \* \* \* \*

**NOGIN, INC.  
2022 INCENTIVE AWARD PLAN**

**STOCK OPTION GRANT NOTICE**

Capitalized terms not specifically defined in this Stock Option Grant Notice (the “Grant Notice”) have the meanings given to them in the 2022 Incentive Award Plan (as may be amended from time to time, the “Plan”) of Nogin, Inc. (the “Company”).

The Company has granted to the participant listed below (“Participant”) the stock option described in this Grant Notice (the “Option”), subject to the terms and conditions of the Plan and the Stock Option Agreement attached as Exhibit A (the “Agreement”), both of which are incorporated into this Grant Notice by reference.

- Participant:** [ ]
- Grant Date:** [ ]
- Exercise Price per Share:** [Can be no less than 100% of the FMV on the Grant Date (or 5<sup>th</sup> anniversary for ISOs granted to 10% stockholders)]
- Shares Subject to the Option:** [ ]
- Final Expiration Date:** [Can be no later than 10<sup>th</sup> anniversary of Grant Date]
- Vesting Commencement Date:** [ ]
- Vesting Schedule:** [To be specified in individual award agreements]
- Type of Option** [Incentive Stock Option/Non-Qualified Stock Option]

By accepting (whether in writing, electronically or otherwise) the Option, Participant agrees to be bound by the terms of this Grant Notice, the Plan and the Agreement. Participant has reviewed the Plan, this Grant Notice and the Agreement in their entirety, has had an opportunity to obtain the advice of counsel prior to executing this Grant Notice and fully understands all provisions of the Plan, this Grant Notice and the Agreement. Participant hereby agrees to accept as binding, conclusive and final all decisions or interpretations of the Administrator upon any questions arising under the Plan, this Grant Notice or the Agreement.

**NOGIN, INC.**

**PARTICIPANT**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
[Participant Name]

**STOCK OPTION AGREEMENT**

Capitalized terms not specifically defined in this Agreement have the meanings specified in the Grant Notice or, if not defined in the Grant Notice, in the Plan.

**ARTICLE I.  
GENERAL**

1.1 Grant of Option. The Company has granted to Participant the Option effective as of the grant date set forth in the Grant Notice (the "**Grant Date**").

1.2 Incorporation of Terms of Plan. The Option is subject to the terms and conditions set forth in this Agreement and the Plan, which is incorporated herein by reference. In the event of any inconsistency between the Plan and this Agreement, the terms of the Plan will control.

**ARTICLE II.  
PERIOD OF EXERCISABILITY**

2.1 Commencement of Exercisability. The Option will vest and become exercisable according to the vesting schedule in the Grant Notice (the "**Vesting Schedule**") except that any fraction of a Share as to which the Option would be vested or exercisable will be accumulated and will vest and become exercisable only when a whole vested Share has accumulated; *provided, however*, that, notwithstanding the foregoing or anything to the contrary in the Grant Notice or this Agreement, in no event may the Option be exercised (in whole or in part) prior to the date on which the Company files a Form S-8 Registration Statement covering the Shares subject to the Option. Except as otherwise set forth in the Grant Notice, the Plan or this Agreement, unless the Administrator otherwise determines, the Option will immediately expire and be forfeited as to any portion that is not vested and exercisable as of Participant's Termination of Service for any reason.

2.2 Duration of Exercisability. The Vesting Schedule is cumulative. Any portion of the Option which vests and becomes exercisable will remain vested and exercisable until the Option expires. The Option will be forfeited immediately upon its expiration.

2.3 Expiration of Option. The Option may not be exercised to any extent by anyone after, and will expire on, the first of the following to occur:

- (a) The final expiration date in the Grant Notice;
- (b) Except as the Administrator may otherwise approve, the expiration of three (3) months from the date of Participant's Termination of Service, unless Participant's Termination of Service is for Cause or by reason of Participant's death or Disability;
- (c) Except as the Administrator may otherwise approve, the expiration of one (1) year from the date of Participant's Termination of Service by reason of Participant's death or Disability; and
- (d) Except as the Administrator may otherwise approve, Participant's Termination of Service for Cause.

2.4 Leaves of Absence. If the Participant goes on a leave of absence, then the Company may adjust the Vesting Schedule in accordance with the Company's leave of absence policy or the terms of such leave. Except as provided in the preceding sentence, the Participant shall be deemed to continue to be a Service Provider for any purpose under this Agreement while Participant is on a *bona fide* leave of absence, if (i) such leave was approved by the Company in writing and (ii) continued crediting of service for such purpose is expressly required by the terms of such leave or by applicable law (as determined by the Company). A Termination of Service shall be deemed to occur when such leave ends, unless the Participant immediately returns to active work. If the reemployment of a Participant upon expiration of a leave of absence approved by the Company that exceeds three months is not expressly required by the terms of such leave or by applicable law (as determined by the Company), any Incentive Stock Option exercised by such Participant more than six months after the first day of such leave shall cease to be treated as an Incentive Stock Option and shall be treated for tax purposes as a Non-Qualified Stock Option.

### **ARTICLE III. EXERCISE OF OPTION**

3.1 Person Eligible to Exercise. During Participant's lifetime, only Participant may exercise the Option. After Participant's death, any exercisable portion of the Option may, prior to the time the Option expires, be exercised by Participant's Designated Beneficiary as provided in the Plan.

3.2 Partial Exercise. Any exercisable portion of the Option or the entire Option, if then wholly exercisable, may be exercised, in whole or in part, according to the procedures in the Plan at any time prior to the time the Option or portion thereof expires, except that the Option may only be exercised for whole Shares.

#### 3.3 Tax Withholding.

(a) The Company has the right and option, but not the obligation, to treat Participant's failure to provide timely payment in accordance with the Plan of any withholding tax arising in connection with the Option as Participant's election to satisfy all or any portion of the withholding tax by requesting the Company retain Shares otherwise issuable under the Option.

(b) Participant acknowledges that Participant is ultimately liable and responsible for all taxes owed in connection with the Option, regardless of any action the Company or any Subsidiary takes with respect to any tax withholding obligations that arise in connection with the Option. Neither the Company nor any Subsidiary makes any representation or undertaking regarding the treatment of any tax withholding in connection with the awarding, vesting or exercise of the Option or the subsequent sale of Shares. The Company and the Subsidiaries do not commit and are under no obligation to structure the Option to reduce or eliminate Participant's tax liability.

### **ARTICLE IV. OTHER PROVISIONS**

4.1 Adjustments. Participant acknowledges that the Option is subject to adjustment, modification and termination in certain events as provided in this Agreement and the Plan.

4.2 Forfeiture and Claw-Back. Participant acknowledges and agrees that the Option (including any proceeds, gains or other economic benefit actually or constructively received by Participant upon any receipt or exercise of the Option or upon the receipt or resale of any Shares underlying the Option) shall be subject to the provisions of any claw-back policy implemented by the Company or any Subsidiary, including, without limitation, any claw-back policy adopted to comply with the requirements of applicable law, including without limitation the Dodd-Frank Wall Street Reform and Consumer Protection Act and any rules or regulations promulgated thereunder.



4.3 Notices. Any notice to be given under the terms of this Agreement to the Company must be in writing and addressed to the Company in care of the Company's Secretary at the Company's principal office or the Secretary's then-current email address or facsimile number. Any notice to be given under the terms of this Agreement to Participant must be in writing and addressed to Participant (or, if Participant is then deceased, to the Designated Beneficiary) at Participant's last known mailing address, email address or facsimile number in the Company's personnel files. By a notice given pursuant to this Section, either party may designate a different address for notices to be given to that party. Any notice will be deemed duly given when actually received, when sent by email, when sent by certified mail (return receipt requested) and deposited with postage prepaid in a post office or branch post office regularly maintained by the United States Postal Service, when delivered by a nationally recognized express shipping company or upon receipt of a facsimile transmission confirmation.

4.4 Titles. Titles are provided herein for convenience only and are not to serve as a basis for interpretation or construction of this Agreement.

4.5 Conformity to Securities Laws. Participant acknowledges that the Plan, the Grant Notice and this Agreement are intended to conform to the extent necessary with all Applicable Laws and, to the extent Applicable Laws permit, will be deemed amended as necessary to conform to Applicable Laws.

4.6 Successors and Assigns. The Company may assign any of its rights under this Agreement to single or multiple assignees, and this Agreement will inure to the benefit of the successors and assigns of the Company. Subject to the restrictions on transfer set forth in this Agreement or the Plan, this Agreement will be binding upon and inure to the benefit of the heirs, legatees, legal representatives, successors and assigns of the parties hereto.

4.7 Limitations Applicable to Section 16 Persons. Notwithstanding any other provision of the Plan or this Agreement, if Participant is a Section 16 Person, the Plan, the Grant Notice, this Agreement and the Option will be subject to any additional limitations set forth in any applicable exemptive rule under Section 16 of the Exchange Act (including any amendment to Rule 16b-3) that are requirements for the application of such exemptive rule. To the extent Applicable Laws permit, this Agreement will be deemed amended as necessary to conform to such applicable exemptive rule.

4.8 Entire Agreement. The Plan, the Grant Notice and this Agreement (including any exhibit hereto) constitute the entire agreement of the parties and supersede in their entirety all prior undertakings and agreements of the Company and Participant with respect to the subject matter hereof.

4.9 Agreement Severable. In the event that any provision of the Grant Notice or this Agreement is held illegal or invalid, the provision will be severable from, and the illegality or invalidity of the provision will not be construed to have any effect on, the remaining provisions of the Grant Notice or this Agreement.

4.10 Limitation on Participant's Rights. Participation in the Plan confers no rights or interests other than as herein provided. This Agreement creates only a contractual obligation on the part of the Company as to amounts payable and may not be construed as creating a trust. Neither the Plan nor any underlying program, in and of itself, has any assets. Participant will have only the rights of a general unsecured creditor of the Company with respect to amounts credited and benefits payable, if any, with respect to the Option, and rights no greater than the right to receive the Shares as a general unsecured creditor with respect to the Option, as and when exercised pursuant to the terms hereof.

4.11 Not a Contract of Employment. Nothing in the Plan, the Grant Notice or this Agreement confers upon Participant any right to continue in the employ or service of the Company or any Subsidiary or interferes with or restricts in any way the rights of the Company and its Subsidiaries, which rights are hereby expressly reserved, to discharge or terminate the services of Participant at any time for any reason whatsoever, with or without Cause, except to the extent expressly provided otherwise in a written agreement between the Company or a Subsidiary and Participant.

4.12 Counterparts. The Grant Notice may be executed in one or more counterparts, including by way of any electronic signature, subject to Applicable Law, each of which will be deemed an original and all of which together will constitute one instrument.

4.13 Incentive Stock Options. If the Option is designated as an Incentive Stock Option:

(a) Participant acknowledges that to the extent the aggregate fair market value of shares (determined as of the time the option with respect to the shares is granted) with respect to which stock options intended to qualify as "incentive stock options" under Section 422 of the Code, including the Option, are exercisable for the first time by Participant during any calendar year exceeds \$100,000 or if for any other reason such stock options do not qualify or cease to qualify for treatment as "incentive stock options" under Section 422 of the Code, such stock options (including the Option) will be treated as non-qualified stock options. Participant further acknowledges that the rule set forth in the preceding sentence will be applied by taking the Option and other stock options into account in the order in which they were granted, as determined under Section 422(d) of the Code. Participant acknowledges that amendments or modifications made to the Option pursuant to the Plan that would cause the Option to become a Non-Qualified Stock Option will not materially or adversely affect Participant's rights under the Option, and that any such amendment or modification shall not require Participant's consent. Participant also acknowledges that if the Option is exercised more than three (3) months after Participant's Termination of Service as an Employee, other than by reason of death or Disability, the Option will be taxed as a Non-Qualified Stock Option.

(b) Participant will give prompt written notice to the Company of any disposition or other transfer of any Shares acquired under this Agreement if such disposition or other transfer is made (a) within two (2) years from the Grant Date or (b) within one (1) year after the transfer of such Shares to Participant. Such notice will specify the date of such disposition or other transfer and the amount realized, in cash, other property, assumption of indebtedness or other consideration, by Participant in such disposition or other transfer.

4.14 Restrictions. In the event the Shares are no longer registered with the United States Securities and Exchange Commission (as determined by the Administrator), any Shares acquired in respect of the Option shall be subject to such terms and conditions as the Administrator shall determine, including, without limitation, restrictions on the transferability, repurchase rights, the right of the Company to require that Shares be transferred in the event of certain transactions, rights of first refusal, tag-along rights, bring-along rights, redemption and co-sale rights and voting requirements. Such terms and conditions may be additional to those contained in the Plan and may, as determined by the Administrator, be contained in an exercise notice, securityholders' agreement or in such other agreement as the Administrator shall determine, in each case in a form determined by the Administrator. The Administrator may condition the issuance of such Shares on the Participant's consent to such terms and conditions and the Participant's entering into such agreement or agreements.

\* \* \* \* \*

**NOGIN, INC.  
2022 INCENTIVE AWARD PLAN**

**RESTRICTED STOCK UNIT GRANT NOTICE**

Capitalized terms not specifically defined in this Restricted Stock Unit Grant Notice (the "*Grant Notice*") have the meanings given to them in the 2022 Incentive Award Plan (as may be amended from time to time, the "*Plan*") of Nogin, Inc. (the "*Company*").

The Company has granted to the participant listed below ("*Participant*") the Restricted Stock Units described in this Grant Notice (the "*RSUs*"), subject to the terms and conditions of the Plan and the Restricted Stock Unit Agreement attached as **Exhibit A** (the "*Agreement*"), both of which are incorporated into this Grant Notice by reference.

**Participant:** [ ]  
**Grant Date:** [ ]  
**Number of RSUs:** [ ]  
**Vesting Commencement Date:** [ ]  
**Vesting Schedule:** [To be specified in individual award agreements]

By accepting (whether in writing, electronically or otherwise) the RSUs, Participant agrees to be bound by the terms of this Grant Notice, the Plan and the Agreement. Participant has reviewed the Plan, this Grant Notice and the Agreement in their entirety, has had an opportunity to obtain the advice of counsel prior to executing this Grant Notice and fully understands all provisions of the Plan, this Grant Notice and the Agreement. Participant hereby agrees to accept as binding, conclusive and final all decisions or interpretations of the Administrator upon any questions arising under the Plan, this Grant Notice or the Agreement.

**NOGIN, INC.**

**PARTICIPANT**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
[Participant Name]

## RESTRICTED STOCK UNIT AGREEMENT

Capitalized terms not specifically defined in this Agreement have the meanings specified in the Grant Notice or, if not defined in the Grant Notice, in the Plan.

### ARTICLE I. GENERAL

1.1 Award of RSUs. The Company has granted the RSUs to Participant effective as of the grant date set forth in the Grant Notice (the "**Grant Date**"). Each RSU represents the right to receive one Share or, at the option of the Company, an amount of cash, in either case, as set forth in this Agreement. Participant will have no right to the distribution of any Shares or payment of any cash until the time (if ever) the RSUs have vested.

1.2 Incorporation of Terms of Plan. The RSUs are subject to the terms and conditions set forth in this Agreement and the Plan, which is incorporated herein by reference. In the event of any inconsistency between the Plan and this Agreement, the terms of the Plan will control.

1.3 Unsecured Promise. The RSUs will at all times prior to settlement represent an unsecured Company obligation payable only from the Company's general assets.

### ARTICLE II. VESTING; FORFEITURE AND SETTLEMENT

2.1 Vesting; Forfeiture. The RSUs will vest according to the vesting schedule in the Grant Notice except that any fraction of an RSU that would otherwise be vested will be accumulated and will vest only when a whole RSU has accumulated. In the event of Participant's Termination of Service for any reason, all unvested RSUs will immediately and automatically be cancelled and forfeited, except as otherwise determined by the Administrator or provided in a binding written agreement between Participant and the Company.

2.2 Leaves of Absence. If the Participant goes on a leave of absence, then the Company may adjust the vesting schedule set forth in the Grant Notice in accordance with the Company's leave of absence policy or the terms of such leave. Except as provided in the preceding sentence, the Participant shall be deemed to continue to be a Service Provider for any purpose under this Agreement while Participant is on a *bona fide* leave of absence, if (i) such leave was approved by the Company in writing and (ii) continued crediting of service for such purpose is expressly required by the terms of such leave or by applicable law (as determined by the Company). A Termination of Service shall be deemed to occur when such leave ends, unless the Participant immediately returns to active work.

#### 2.3 Settlement.

(a) RSUs will be paid in Shares or cash at the Company's option as soon as administratively practicable after the vesting of the applicable RSU, but in no event more than sixty (60) days after the RSU's vesting date. Notwithstanding the foregoing, the Company may delay any payment under this Agreement that the Company reasonably determines would violate Applicable Law until the earliest date the Company reasonably determines the making of the payment will not cause such a violation (in accordance with Treasury Regulation Section 1.409A-2(b)(7)(ii)), provided the Company reasonably believes the delay will not result in the imposition of excise taxes under Section 409A.

(b) If an RSU is paid in cash, the amount of cash paid with respect to the RSU will equal the Fair Market Value of a Share on the day immediately preceding the payment date.

### **ARTICLE III. TAXATION AND TAX WITHHOLDING**

3.1 Representation. Participant represents to the Company that Participant has reviewed with Participant's own tax advisors the tax consequences of this Award and the transactions contemplated by the Grant Notice and this Agreement. Participant is relying solely on such advisors and not on any statements or representations of the Company or any of its agents.

#### 3.2 Tax Withholding.

(a) The Company has the right and option, but not the obligation, to treat Participant's failure to provide timely payment in accordance with the Plan of any withholding tax arising in connection with the RSUs as Participant's election to satisfy all or any portion of the withholding tax by requesting the Company retain Shares otherwise issuable under the Award.

(b) Participant acknowledges that Participant is ultimately liable and responsible for all taxes owed in connection with the RSUs, regardless of any action the Company or any Subsidiary takes with respect to any tax withholding obligations that arise in connection with the RSUs. Neither the Company nor any Subsidiary makes any representation or undertaking regarding the treatment of any tax withholding in connection with the awarding, vesting or payment of the RSUs or the subsequent sale of Shares. The Company and the Subsidiaries do not commit and are under no obligation to structure the RSUs to reduce or eliminate Participant's tax liability.

### **ARTICLE IV. OTHER PROVISIONS**

4.1 Adjustments. Participant acknowledges that the RSUs, the Shares subject to the RSUs are subject to adjustment, modification and termination in certain events as provided in this Agreement and the Plan.

4.2 Forfeiture and Claw-Back. Participant acknowledges and agrees that the RSUs (including any proceeds, gains or other economic benefit actually or constructively received by Participant upon any receipt RSUs) shall be subject to the provisions of any claw-back policy implemented by the Company or any Subsidiary, including, without limitation, any claw-back policy adopted to comply with the requirements of applicable law, including without limitation the Dodd-Frank Wall Street Reform and Consumer Protection Act and any rules or regulations promulgated thereunder.

4.3 Notices. Any notice to be given under the terms of this Agreement to the Company must be in writing and addressed to the Company in care of the Company's Secretary at the Company's principal office or the Secretary's then-current email address or facsimile number. Any notice to be given under the terms of this Agreement to Participant must be in writing and addressed to Participant (or, if Participant is then deceased, to the Designated Beneficiary) at Participant's last known mailing address, email address or facsimile number in the Company's personnel files. By a notice given pursuant to this Section, either party may designate a different address for notices to be given to that party. Any notice will be deemed duly given when actually received, when sent by email, when sent by certified mail (return receipt requested) and deposited with postage prepaid in a post office or branch post office regularly maintained by the United States Postal Service, when delivered by a nationally recognized express shipping company or upon receipt of a facsimile transmission confirmation.

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4.4 Titles. Titles are provided herein for convenience only and are not to serve as a basis for interpretation or construction of this Agreement.

4.5 Conformity to Securities Laws. Participant acknowledges that the Plan, the Grant Notice and this Agreement are intended to conform to the extent necessary with all Applicable Laws and, to the extent Applicable Laws permit, will be deemed amended as necessary to conform to Applicable Laws.

4.6 Successors and Assigns. The Company may assign any of its rights under this Agreement to single or multiple assignees, and this Agreement will inure to the benefit of the successors and assigns of the Company. Subject to the restrictions on transfer set forth in this Agreement or the Plan, this Agreement will be binding upon and inure to the benefit of the heirs, legatees, legal representatives, successors and assigns of the parties hereto.

4.7 Limitations Applicable to Section 16 Persons. Notwithstanding any other provision of the Plan or this Agreement, if Participant is a Section 16 Person, the Plan, the Grant Notice, this Agreement and the RSUs will be subject to any additional limitations set forth in any applicable exemptive rule under Section 16 of the Exchange Act (including any amendment to Rule 16b-3) that are requirements for the application of such exemptive rule. To the extent Applicable Laws permit, this Agreement will be deemed amended as necessary to conform to such applicable exemptive rule.

4.8 Entire Agreement. The Plan, the Grant Notice and this Agreement (including any exhibit hereto) constitute the entire agreement of the parties and supersede in their entirety all prior undertakings and agreements of the Company and Participant with respect to the subject matter hereof.

4.9 Agreement Severable. In the event that any provision of the Grant Notice or this Agreement is held illegal or invalid, the provision will be severable from, and the illegality or invalidity of the provision will not be construed to have any effect on, the remaining provisions of the Grant Notice or this Agreement.

4.10 Limitation on Participant's Rights. Participation in the Plan confers no rights or interests other than as herein provided. This Agreement creates only a contractual obligation on the part of the Company as to amounts payable and may not be construed as creating a trust. Neither the Plan nor any underlying program, in and of itself, has any assets. Participant will have only the rights of a general unsecured creditor of the Company with respect to amounts credited and benefits payable, if any, with respect to the RSUs, and rights no greater than the right to receive cash or the Shares as a general unsecured creditor with respect to the RSUs, as and when settled pursuant to the terms of this Agreement.

4.11 Not a Contract of Employment. Nothing in the Plan, the Grant Notice or this Agreement confers upon Participant any right to continue in the employ or service of the Company or any Subsidiary or interferes with or restricts in any way the rights of the Company and its Subsidiaries, which rights are hereby expressly reserved, to discharge or terminate the services of Participant at any time for any reason whatsoever, with or without Cause, except to the extent expressly provided otherwise in a written agreement between the Company or a Subsidiary and Participant.

4.12 Counterparts. The Grant Notice may be executed in one or more counterparts, including by way of any electronic signature, subject to Applicable Law, each of which will be deemed an original and all of which together will constitute one instrument.

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4.13 Restrictions. In the event the Shares are no longer registered with the United States Securities and Exchange Commission (as determined by the Administrator), any Shares acquired in respect of the RSUs shall be subject to such terms and conditions as the Administrator shall determine, including, without limitation, restrictions on the transferability, repurchase rights, the right of the Company to require that Shares be transferred in the event of certain transactions, rights of first refusal, tag-along rights, bring-along rights, redemption and co-sale rights and voting requirements. Such terms and conditions may be additional to those contained in the Plan and may, as determined by the Administrator, be contained in an exercise notice, securityholders' agreement or in such other agreement as the Administrator shall determine, in each case in a form determined by the Administrator. The Administrator may condition the issuance of such Shares on the Participant's consent to such terms and conditions and the Participant's entering into such agreement or agreements.

\* \* \* \* \*

**SOFTWARE ACQUISITION GROUP INC. III**  
**CLASS A COMMON STOCK**  
**FORM OF SUBSCRIPTION AGREEMENT**

Date: August 26, 2022

**1. Subscription:**

(a) The undersigned (the “**Purchaser**”) hereby agrees to purchase \_\_\_\_\_ shares (the “**Purchased Shares**”) of Class A Common Stock, par value \$0.0001 per share (the “**Class A Common Stock**”), of Software Acquisition Group Inc. III., a Delaware corporation (the “**Company**”), in accordance with the terms and conditions of this Subscription Agreement (this “**Subscription**”), at a nominal purchase price of \$ \_\_\_\_\_ per share of Class A Common Stock, subject to the adjustments set forth in Section 1(iv) hereof. The Purchaser acknowledges and understands that this offering of the Class A Common Stock is being made without registration under the Securities Act of 1933, as amended (the “**Securities Act**”), or any securities “blue sky” or other similar laws of any state.

(b) Prior to the consummation of the Subscription, the Purchaser must complete, execute and deliver to the Company the following:

(i) An executed copy of this Subscription; and

(ii) The Purchaser’s payment in the amount of \$ \_\_\_\_\_ representing partial payment (the “**Initial Payment Amount**”) in exchange for \_\_\_\_\_ shares of Class A Common Stock purchased, in the form of a wire transfer sent to the Company in accordance with wire transfer instructions which the Company will provide at the request of the Purchaser. The Purchaser shall have no further obligation with respect to the payment or any consideration for the Purchase Shares except pursuant to clause (iv) below.

(c) Disposal of Purchased Shares.

(i) Upon the effectiveness of the Registration Statement (as defined below), the Purchaser may, in its sole discretion, from time to time, offer the Purchased Shares for sale, subject only to the limitation that such daily dispositions shall not exceed twenty-five percent (25%) of the daily trading volume of the Class A Common Stock (as reported by The Nasdaq Stock Market LLC (“**Nasdaq**”)) (the proceeds from each such sale, a “**Disposition**”). From and after the time the Purchaser receives aggregate Dispositions equal to Initial Payment Amount, sales of the Purchased Shares shall only be permitted at prices equal to or in excess of \$7.50 per Purchased Share. Any proposed sales of the Purchased Shares at prices less than \$7.50 per Purchased Share shall require the mutual consent of the Company and the Purchaser.



(ii) The Purchaser shall retain one hundred percent (100%) of the Dispositions until the sum of such Dispositions equals the Initial Payment Amount. Thereafter, as payment for the Purchased Shares, by no later than the third Business Day of each calendar month, the Purchaser shall remit to the Company an amount equal to the Dispositions that settled on or before the last Business Day of the previous calendar month, net of (a) any applicable income and other taxes and (b) the Liquidity Fee. The “**Liquidity Fee**” shall mean a fee equal to the three and one-half percent (3.5%) of Dispositions for such previous calendar month.

(iii) On the earlier of (i) September 2, 2026 and (ii) the date that (x) none of the Company’s 7.00% Convertible Senior Notes due 2026 are outstanding and (y) all of the Purchased Shares have been disposed of by the Purchaser in accordance with this Section 1, the Company shall pay to the Purchaser the Commitment Fee. The “**Commitment Fee**” shall mean a fee equal to the Initial Payment Amount minus the amount by which the Initial Payment Amount is recovered by the Purchaser through Dispositions in accordance with clause (iv) above (provided, for the avoidance of doubt, that in no circumstances shall the Commitment Fee be negative).

(d) Registration. The Purchaser shall be entitled to all registration and procedural rights set forth in Sections 2 and 3 of that certain Amended and Restated Registration Rights Agreement to be entered into on the date hereof, by and among the Company, the sponsor holders signatory thereto and the legacy Ngin holders signatory thereto (the “**Registration Rights Agreement**”). The Purchased Shares shall be “Registrable Securities” (as such term is defined in the Registration Rights Agreement) and shall cease to be Registrable Securities in accordance with the Registration Rights Agreement.

**2. Representations by Purchaser.** In consideration of the Company’s acceptance of the Subscription, Purchaser makes the following representations and warranties to the Company and to its principals, jointly and severally, which warranties and representations shall survive any acceptance of the Subscription by the Company:

(a) Purchaser acknowledges that the Class A Common Stock not been registered under the Securities Act, or qualified under any state securities laws, or any other applicable blue sky laws, in reliance, in part, on Purchaser’s representations, warranties and agreements made herein.

(b) Purchaser represents that Purchaser is an “accredited investor” within the meaning of Rule 501 of Regulation D under the Securities Act.

(c) Each security representing Class A Common Stock issuable pursuant to this Subscription will be endorsed with the following legend (or a substantially similar legend):

THE SECURITIES EVIDENCED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND MAY NOT BE SOLD, TRANSFERRED, ASSIGNED OR HYPOTHECATED UNLESS THERE IS AN EFFECTIVE REGISTRATION STATEMENT UNDER SUCH ACT COVERING SUCH SECURITIES, THE TRANSFER IS MADE IN COMPLIANCE WITH RULE 144 PROMULGATED UNDER SUCH ACT OR THE COMPANY RECEIVES AN OPINION OF COUNSEL FOR THE HOLDER OF THESE

**3. Representations and Warranties by the Company.** The Company represents and warrants that:

(a) The Class A Common Stock is currently quoted on Nasdaq. The Company has not, in the 12 months preceding the date hereof, received notice from Nasdaq to the effect that the Company is not in compliance with the listing or maintenance requirements of Nasdaq. To the Company's knowledge, it is in compliance with all such listing and maintenance requirements.

(b) The Company has been duly incorporated and is validly existing as a corporation, in good standing under the laws of the State of Delaware, with full power and authority (corporate and other) to own, lease and operate its properties and conduct its business as described in the Commission Documents (defined below), and to enter into and perform its obligations under this Agreement, and has been duly qualified as a foreign corporation for the transaction of business and is in good standing under the laws of each other jurisdiction in which it owns or leases properties or conducts any business so as to require such qualification, except where the failure so to qualify or be in good standing would not have a material adverse effect on the general affairs, business, prospects, management, financial position, shareholders' equity or results of operations of the Company and the Subsidiaries (as defined below), considered as one enterprise (a "**Material Adverse Effect**").

(c) Each subsidiary of the Company (collectively, the "**Subsidiaries**" and each a "**Subsidiary**") has been duly incorporated, formed or organized, as applicable, and is validly existing as a corporation, limited liability company, general or limited partnership or other organization, as applicable, in good standing under the laws of the jurisdiction of its incorporation, formation or organization, as applicable, with full power and authority to own, lease and operate its properties and conduct its business as described in the Commission Documents, and has been duly qualified as a foreign corporation, limited liability company, general or limited partnership or other organization, for the transaction of business and is in good standing under the laws of each other jurisdiction in which it owns or leases properties or conducts any business so as to require such qualification, except where the failure so to qualify or be in good standing would not have a Material Adverse Effect; all of the issued and outstanding capital stock, member interests, general or limited partner interest or other ownership interests of each Subsidiary have been duly and validly authorized and issued, are fully paid and non-assessable (except, in the case of a limited liability company or limited partnership, as such non-assessability may be affected by applicable law) and are owned by the Company, directly or through Subsidiaries, free and clear of any lien.

(d) The Company has all necessary power and authority to execute, deliver, and perform its obligations under this Subscription. This Subscription has been duly authorized, executed and delivered by Company and constitutes legally valid and binding obligations of Company, enforceable against the Company in accordance with its respective terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by general equitable principles.

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(e) Neither the execution and delivery by the Company of this Subscription, nor the performance by the Company of its obligations under this Subscription requires the consent, approval, order or authorization of, or registration with, or the giving notice to, any Governmental Authority or Person, except such as have been obtained, made or given or are otherwise set forth in this Subscription.

(f) The statements in the Commission Documents under the heading “Description of Capital Stock” are true and correct in all material respects.

(g) Neither the Company, nor to the Company’s knowledge, any of its affiliates, has taken or may take, directly or indirectly, any action designed to cause or result in, or which has constituted or which might reasonably be expected to constitute, the stabilization or manipulation of the price of the shares of any securities of the Company to facilitate the sale or resale of the Purchased Shares.

(h) The execution of this Subscription by the Company and the performance by the Company of the provisions of this Subscription and the consummation of the transactions herein contemplated will not conflict with or result in a breach or violation of any of the terms or provisions of, or constitute a default under, any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which the Company or any of the Subsidiaries is a party or by which the Company or any of the Subsidiaries is bound or to which any of the property or assets of the Company or any of the Subsidiaries is subject, nor will such action result in any violation of the provisions of the certificate or articles of incorporation or by-laws (or other organization documents) of the Company or any of the Subsidiaries or any statute or any order, rule or regulation of any court or governmental agency or body having jurisdiction over the Company or any of the Subsidiaries or any of their properties; and no consent, approval, authorization, order, registration or qualification of or with any such court or governmental agency or body is required for the performance by the Company of its obligations hereunder or the consummation by the Company of the transactions contemplated by this Subscription.

(i) Marcum, LLP, who has certified certain financial statements of the Company and the Subsidiaries, is an independent public accounting firm as required by the Securities Act. The financial statements, together with related schedules and notes thereto, included in the Commission Documents, comply in all material respects with the requirements of the Securities Act and present fairly the consolidated financial position, results of operations and changes in financial position of the Company and the Subsidiaries on the basis stated therein at and as of the respective dates or for the respective periods to which they apply; and such statements and related schedules and notes have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods involved, except as disclosed therein. All other financial information included in the Commission Documents has been derived from the accounting records of the Company and presents fairly in all material respects the information shown thereby. The Company does not have any material liabilities or obligations, direct or contingent (including any off-balance sheet obligations), that are not described in the Commission Documents. All disclosures contained in the Commission Documents regarding “non-GAAP financial measures” (as such term is defined by the Rules and Regulations) comply with Regulation G promulgated under the Exchange Act and Item 10 of Regulation S-K promulgated under the Securities Act, to the extent applicable.

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(j) Neither the Company nor any Subsidiary has sustained since the date of the latest audited financial statements included in the Commission Documents any material loss or interference with its business from fire, explosion, flood or other calamity, whether or not covered by insurance, or from any labor dispute or court or governmental action, order or decree; and (1) there has not been any change in the capital stock or long-term indebtedness of the Company or any of the Subsidiaries, (2) there has not been any material adverse change in or affecting the general affairs, business, prospects, management, financial position, shareholders' equity or results of operations of the Company and the Subsidiaries, considered as one enterprise, (3) there have been no transactions entered into by, and no obligations or liabilities, contingent or otherwise, incurred by the Company or any of the Subsidiaries, whether or not in the ordinary course of business, that are material to the Company and the Subsidiaries, considered as one enterprise or (4) there has been no dividend or distribution of any kind declared, paid or made by the Company on any class of its capital stock, in each case, otherwise than as set forth in the Commission Documents.

(k) Neither the Company nor any of the Subsidiaries is (i) in violation of its certificate or articles of incorporation or bylaws (or other organization documents) or (ii) in violation of any law, ordinance, administrative or governmental rule or regulation applicable to the Company or any of the Subsidiaries, or (iii) in violation of any decree of any court or governmental agency or body having jurisdiction over the Company or any of the Subsidiaries, or (iv) in default in the performance of any obligation, agreement or condition contained in any bond, debenture, note or any other evidence of indebtedness or in any agreement, indenture, lease or other instrument to which the Company or any of the Subsidiaries is a party or by which any of them or any of their respective properties may be bound, except, in the case of clauses (ii), (iii) and (iv), where any such violation or default, individually or in the aggregate, would not have a Material Adverse Effect.

(l) Each of the Company and each Subsidiary has good and marketable title to all real and personal property owned by it, in each case free and clear of all liens, encumbrances and defects except such as are described in the Commission Documents or such as do not materially affect the value of such property and do not interfere with the use made and proposed to be made of such property by the Company or any Subsidiary; and any real property and buildings held under lease by the Company or any Subsidiary are held under valid, subsisting and enforceable leases with such exceptions as are not material and do not interfere with the use made and proposed to be made of such property and buildings by the Company or any Subsidiary.

(m) Other than as set forth in the Commission Documents, there is no action, suit, proceeding, inquiry or investigation before or brought by any arbitrator, court, governmental body, regulatory body, administrative agency or other authority, body or agency having jurisdiction over the Company or any of the Subsidiaries or any of their respective properties, assets or operations or self-regulatory organization or other non-governmental regulatory authority (including, without limitation, Nasdaq) now pending or, to the knowledge of the Company, threatened, against the Company or any of the Subsidiaries, which could reasonably be expected to result in a Material Adverse Effect, or which could reasonably be expected to materially and adversely affect the consummation of the transactions contemplated by this Subscription or which are required to be described in the Commission Documents.

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(n) Each of the Company and each of the Subsidiaries possesses all permits, licenses, approvals, consents and other authorizations (collectively, “**Permits**”) issued by the appropriate federal, state, local or foreign regulatory agencies or bodies necessary to conduct the businesses now operated by each of them; each of the Company and each of the Subsidiaries is in compliance with the terms and conditions of all such Permits; all of the Permits are valid and in full force and effect, except, in each case, where the failure so to comply or where the invalidity of such Permits or the failure of such Permits to be in full force and effect, individually or in the aggregate, would not have a Material Adverse Effect; and none of the Company nor any Subsidiary has received any notice of proceedings relating to the revocation or material modification of any such Permits.

(o) Each of the Company and each of the Subsidiaries own or possess, or can acquire on reasonable terms, adequate patents, patent rights, licenses, inventions, copyrights, know-how (including trade secrets and other unpatented and/or unpatentable proprietary or confidential information, systems or procedures), trademarks, service marks, trade names or other intellectual property (collectively, “**Intellectual Property**”) necessary to carry on the business now operated by them, except to the extent that the failure to own, possess or have other rights in such Intellectual Property would not, singly or in the aggregate, reasonably be expected to have a Material Adverse Effect, and none of the Company or any of the Subsidiaries has received any notice or is otherwise aware of any infringement of or conflict with asserted rights of others with respect to any Intellectual Property or of any facts or circumstances which would render any Intellectual Property invalid or inadequate to protect the interest of the Company or any of the Subsidiaries therein, and which infringement or conflict (if the subject of any unfavorable decision, ruling or finding) or invalidity or inadequacy, singly or in the aggregate, would result in a Material Adverse Effect.

(p) No labor dispute with the employees of any of the Company or any of the Subsidiaries exists or, to the knowledge of the Company, is imminent, and none of the Company or any of the Subsidiaries is aware of any existing or imminent labor disturbance by the employees of any of their respective principal suppliers, manufacturers, customers or contractors, which, in any case, would result in a Material Adverse Effect.

(q) The Company and the Subsidiaries are insured by insurers of recognized financial responsibility against such losses and risks and in such amounts as are prudent and customary in the respective businesses in which they are engaged; none of the Company nor any Subsidiary has been refused any insurance coverage sought or applied for; and the Company has no reason to believe that either it or any Subsidiary will not be able to renew its or their respective existing insurance coverage as and when such coverage expires or to obtain similar coverage from similar insurers as may be necessary to continue its business at a cost that would not have a Material Adverse Effect.

(r) The Company and each of the Subsidiaries have made and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Company and the Subsidiaries. The Company maintains a system of internal accounting controls sufficient to provide reasonable assurance that (1) transactions are executed

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in accordance with management's general or specific authorizations; (2) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain accountability for assets; (3) access to assets is permitted only in accordance with management's general or specific authorization; and (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(s) Except as set forth or contemplated in the Commission Documents, since the date of the latest audited financial statements included in the Commission Documents, (a) the Company has not been advised of (1) any material weaknesses or significant deficiencies in the design or operation of internal controls that could reasonably be expected to adversely affect the ability of the Company and each of the Subsidiaries to record, process, summarize and report financial data, or any material weaknesses in internal controls and (2) any fraud, whether or not material, that involves management or other employees who have a significant role in the internal controls of the Company and each of the Subsidiaries, and (b) since that date, there has been no change in the Company's internal control over financial reporting that has materially affected, or is reasonably likely to materially affect, the Company's internal control over financial reporting.

(t) The Company maintains disclosure controls and procedures (as such term is defined in Rule 13a-15(e) of the Exchange Act) that comply with the requirements of the Exchange Act; such disclosure controls and procedures are effective in all material respects to perform the functions for which they were established.

(v) All United States federal income tax returns of the Company and the Subsidiaries required by law to be filed have been filed (or extensions have been obtained with respect thereto) and all taxes shown by such returns or otherwise assessed, which are due and payable, have been paid, except assessments against which appeals have been or will be promptly taken and as to which adequate reserves have been provided. The Company and the Subsidiaries have filed all other tax returns that are required to have been filed by them pursuant to applicable foreign, state, local or other law, except insofar as the failure to file such returns, individually or in the aggregate, would not result in a Material Adverse Effect, and have paid all taxes due pursuant to such returns or pursuant to any assessment received by the Company or any Subsidiary except for such taxes, if any, as are being contested in good faith and as to which adequate reserves have been provided. The charges, accruals and reserves on the books of the Company and the Subsidiaries in respect of any income and corporation tax liability for any years not finally determined are adequate to meet any assessments or re-assessments for additional income tax for any years not finally determined.

(w) Except as described in the Commission Documents, neither the Company nor any of the Subsidiaries is in violation of any statute or any rule, regulation, decision or order of any governmental agency or body or any court, domestic or foreign, relating to the use, production, disposal or release of hazardous or toxic substances or relating to the protection or restoration of the environment or human exposure to hazardous or toxic substances (collectively, "*environmental laws*"), owns or operates any real property contaminated with any substance that is subject to any environmental laws, is liable for any off-site disposal or contamination pursuant to any environmental laws, or is subject to any claim relating to any environmental laws, which violation, contamination, liability or claim, individually or in the aggregate, would have a Material Adverse Effect; and, to the best of the Company's knowledge, no pending investigation which might lead to such a claim exists or has been threatened.

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(x) Each employee benefit plan, within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), for which the Company would have any liability, that is maintained, administered or contributed to by the Company or any Subsidiary for employees or former employees of the Company and its affiliates has been maintained in compliance with its terms and the requirements of any applicable statutes, orders, rules and regulations, including but not limited to ERISA and the Internal Revenue Code of 1986, as amended (the “Code”), except to the extent that failure to so comply, individually or in the aggregate, would not have a Material Adverse Effect. No prohibited transaction, within the meaning of Section 406 of ERISA or Section 4975 of the Code has occurred with respect to any such plan excluding transactions effected pursuant to a statutory or administrative exemption, that would have or may reasonably be expected to have a Material Adverse Effect.

(y) None of the Company nor any of the Subsidiaries, nor any director, officer, agent, employee or other person associated with or acting on behalf of the Company or any of its Subsidiaries, has (i) used any corporate funds for any unlawful contribution, gift, entertainment or other unlawful expense relating to political activity; (ii) made any direct or indirect unlawful payment to any foreign or domestic government official or employee from corporate funds, (iii) violated or is in violation of any provision of the Foreign Corrupt Practices Act of 1977, or (iv) made any bribe, unlawful rebate, payoff, influence payment, kickback or other unlawful payment.

(z) There is and has been no failure on the part of the Company or any of the Company’s directors or officers, in their capacities as such, to comply with any provision of the Sarbanes-Oxley Act of 2002 and the rules and regulations promulgated in connection therewith.

(aa) The Company is not an “investment company” as such term is defined in the Investment Company Act of 1940, as amended;

(bb) The statistical and market and industry-related data included in the Commission Documents are based on or derived from sources which the Company believes to be reliable and accurate or represent the Company’s good faith estimates that are made on the basis of data derived from such sources, and the Company has obtained the written consent to the use of such data from sources to the extent required.

(cc) The Class A Common Stock is listed on Nasdaq.

(dd) The Company has no debt security or preferred stock that is rated by any “nationally recognized statistical rating agency” (as that term is defined by the Commission (defined below) for purposes of Rule 436(g)(2) under the Securities Act).

(ee) The operations of the Company and each of the Subsidiaries are and have been conducted at all times in compliance with applicable financial recordkeeping and reporting requirements of the Currency and Foreign Transactions Reporting Act of 1970, as amended, the money laundering statutes of all jurisdictions, the rules and regulations thereunder and any related or similar rules, regulations or guidelines, issued, administered or enforced by any Governmental Entity (collectively, the “**Money Laundering Laws**”); and no action, suit or proceeding by or before any Governmental Entity involving the Company or any of the Subsidiaries with respect to the Money Laundering Laws is pending or, to the best knowledge of the Company, threatened.

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(ff) None of the Company nor any of the Subsidiaries nor, to the knowledge of any of the Company, any director, officer, agent, employee, affiliate or representative or other person acting on behalf of or providing services to the Company or any Subsidiary is an individual or entity (“**Person**”) currently the subject or target of any sanctions administered or enforced by the United States Government, including, without limitation, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“**OFAC**”), the United Nations Security Council (“**UNSC**”), the European Union, Her Majesty’s Treasury (“**HMT**”), or other relevant sanctions authority (collectively, “**Sanctions**”), nor is the Company or any Subsidiary located, organized or resident in a country or territory that is the subject of Sanctions.

(gg) The Company is not entering into the transactions contemplated hereby to create actual or apparent trading activity in the Class A Common Stock (or any security convertible into or exchangeable for the Class A Common Stock) or to raise or depress or otherwise manipulate the price of the Class A Common Stock (or any security convertible into or exchangeable for the Class A Common Stock) for the purpose of inducing the purchase or sale of such securities or otherwise in violation of the Exchange Act.

(hh) The Company agrees that it will not seek to control or influence Purchaser’s decision to make any “purchases or sales” (within the meaning of Rule 10b5-1(c)(1)(i)(B)(3)), including, without limitation, Purchaser’s decision to enter into any hedging transactions.

(ii) The Company is not entering into this Subscription to facilitate a distribution of the Purchased Shares (or any security that may be converted into or exercised or exchanged for Purchased Shares, or whose value under its terms may in whole or in significant part be determined by the value of the Purchased Shares) or in connection with any future issuance of securities.

(jj) The Company is acting for its own account, and it has made its own independent decisions to enter into this Subscription and as to whether the transactions contemplated hereby are appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of Purchaser or any of its affiliates, representatives, advisors or counsel, as investment advice or as a recommendation to enter into this Subscription, it being understood that information and explanations related to the terms and conditions of this Subscription will not be considered investment advice or a recommendation to enter into this Subscription or the transactions contemplated hereby.

“**Commission**” shall mean U.S. Securities and Exchange Commission.

“**Commission Documents**” shall mean (1) the Company’s registration statement on Form S-4 (File No. 333- 262723) initially filed with the Commission on February 14, 2022, including any related prospectus or prospectuses, for the registration of the Common Stock to be issued in connection with the Merger, (2) the proxy statement/prospectus, dated July 27, 2022, including all documents incorporated or deemed incorporated therein by reference, included in the Registration Statement, as it may be supplemented, in the form in which such proxy statement/prospectus has most recently been filed with the Commission pursuant to Rule 424(b)



under the Securities Act, (3) all reports, schedules, registrations, forms, statements, information and other documents filed with or furnished to the Commission by the Company pursuant to the reporting requirements of the Exchange Act, including all material filed with or furnished to the Commission pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act, since July 1, 2021, including, without limitation, the Company's Annual Report on Form 10-K for its fiscal year ended December 31, 2021 filed by the Company with the Commission on March 30, 2022 (the **2021 Form 10-K**"), and which hereafter shall be filed with or furnished to the Commission by the Company, and (4) all information contained in such filings and all documents and disclosures that have been and heretofore shall be incorporated by reference therein.

"**Exchange Act**" means the Securities Exchange Act of 1934, as amended, and the rules and regulations of the Commission thereunder.

#### **4. Indemnification.**

(a) The Company shall indemnify and hold harmless Purchaser, and each of its affiliates, directors, officers, stockholders, members, managers, partners, employees, representatives, agents and advisors (and any other Persons with a functionally equivalent role of a Person holding such titles notwithstanding the lack of such title or any other title), each Person, if any, who controls the Purchaser (within the meaning of Section 15 of the Securities Act or Section 20(a) of the Exchange Act, as defined below), and each of their respective directors, officers, stockholders, members, managers, partners, employees, representatives, agents and advisors (and any other Persons with a functionally equivalent role of a Person holding such titles notwithstanding the lack of such title or any other title) of such controlling Persons (each, an "**Indemnified Party**"), from and against all losses, liabilities, obligations, claims, contingencies, damages, costs and expenses (including all judgments, amounts paid in settlement, court costs, reasonable attorneys' fees and costs of defense and investigation) (collectively, "**Damages**") that any Indemnified Party may suffer or incur as a result of or relating to (a) any breach of any of the representations, warranties, covenants or agreements made by the Company in this Subscription, or (b) any action, suit, claim or proceeding (including for these purposes a derivative action brought on behalf of the Company) instituted against such Indemnified Party arising out of or resulting from the execution, delivery, performance or enforcement of this Subscription; provided, however, that (x) the foregoing indemnity shall not apply to any Damages to the extent, but only to the extent, that such Damages resulted directly and primarily from a breach of any of such Indemnified Party's, and (y) the Company shall not be liable under subsection (a) of this Section 4 to the extent, but only to the extent, that a court of competent jurisdiction shall have determined by a final judgment (from which no further appeals are available) that such Damages resulted directly and primarily from any acts or failures to act, undertaken or omitted to be taken by such Indemnified Party through its fraud, bad faith, gross negligence, or willful or reckless misconduct.

(b) The Company shall reimburse any Indemnified Party promptly upon demand (with accompanying presentation of sufficiently detailed documentary evidence) for all legal and other costs and expenses reasonably incurred by such Indemnified Party in connection with (i) any action, suit, claim or proceeding, whether at law or in equity, to enforce compliance by the Company with any provision of this Subscription or (ii) any other any action, suit, claim or proceeding, whether at law or in equity, with respect to which it is entitled to indemnification under this Section 4; provided that the Purchaser shall promptly reimburse the Company for all such legal and other costs and expenses to the extent a court of competent jurisdiction determines that any Indemnified Party was not entitled to such reimbursement.

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(c) An Indemnified Party's right to indemnification or other remedies based upon the representations, warranties, covenants and agreements of the Company set forth in this Subscription shall not in any way be affected by any investigation or knowledge of such Indemnified Party. Such representations, warranties, covenants and agreements shall not be affected or deemed waived by reason of the fact that an Indemnified Party knew or should have known that any representation or warranty might be inaccurate or that the Company failed to comply with any agreement or covenant. Any investigation by such Indemnified Party shall be for its own protection only and shall not affect or impair any right or remedy hereunder.

(d) To the extent that the foregoing undertakings by the Company set forth in this Section 4 may be unenforceable for any reason, the Company shall make the maximum contribution to the payment and satisfaction of each of the Damages which is permissible under applicable law.

(e) Promptly after an Indemnified Party receives notice of a claim or the commencement of an action for which the Indemnified Party intends to seek indemnification under Section 4, the Indemnified Party will notify the Company in writing of the claim or commencement of the action, suit or proceeding; provided, however, that failure to notify the Company will not relieve the Company from liability under this Section 4, except to the extent it has been materially prejudiced by the failure to give notice. The Company will be entitled to participate in the defense of any claim, action, suit or proceeding as to which indemnification is being sought, and if the Company acknowledges in writing the obligation to indemnify the Indemnified Party against whom the claim or action is brought, the Company may (but will not be required to) assume the defense against the claim, action, suit or proceeding with counsel satisfactory to it. After the Company notifies the Indemnified Party that the Company wishes to assume the defense of a claim, action, suit or proceeding, the Company will not be liable for any further legal or other expenses incurred by the Indemnified Party in connection with the defense against the claim, action, suit or proceeding except that if, in the opinion of counsel to the Indemnified Party, it would be inappropriate under the applicable rules of professional responsibility for the same counsel to represent both the Company and such Indemnified Party. In such event, the Company will pay the reasonable fees and expenses of no more than one separate counsel for all such Indemnified Parties promptly as such fees and expenses are incurred. Each Indemnified Party, as a condition to receiving indemnification as provided in this Section 4, will cooperate in all reasonable respects with the Company in the defense of any action or claim as to which indemnification is sought. The Company will be not liable for any settlement of any action effected without its prior written consent, which consent shall not be unreasonably withheld, delayed or conditioned. The Company will not, without the prior written consent of the Indemnified Party, effect any settlement of a pending or threatened action with respect to which an Indemnified Party is, or is informed that it may be, made a party and for which it would be entitled to indemnification, unless the settlement includes an unconditional release of the Indemnified Party from all liability and claims which are the subject matter of the pending or threatened action.

(f) The remedies provided for in this Section 4 are not exclusive and shall not limit any rights or remedies which may otherwise be available to any Indemnified Party at law or in equity.

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**5. Adjustment in Share Numbers and Prices.** In the event of any stock split, subdivision, dividend or distribution payable in shares of Class A Common Stock (or other securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly shares of Class A Common Stock), combination or other similar recapitalization or event occurring after the date hereof and prior to the issuance of the Class A Common Stock, each reference in the Subscription to a number of shares or price per share shall be deemed to be amended to appropriately account for such event.

**6. Governing Law.** This Subscription shall be construed in accordance with the laws of the State of New York.

**7. Counterparts.** This Subscription and any signed agreement or instrument entered into in connection with this Subscription, and any amendments hereto or thereto, may be executed in one or more counterparts, all of which shall constitute one and the same instrument. Any such counterpart, to the extent delivered by means of a facsimile machine or by .pdf, .tif, .gif, .peg or similar attachment to electronic mail (any such delivery, an “**Electronic Delivery**”) shall be treated in all manner and respects as an original executed counterpart and shall be considered to have the same binding legal effect as if it were the original signed version thereof delivered in person. At the request of any party, each other party shall re execute the original form of this Subscription and deliver such form to all other parties. No party shall raise the use of Electronic Delivery to deliver a signature or the fact that any signature or agreement or instrument was transmitted or communicated through the use of Electronic Delivery as a defense to the formation of a contract, and each such party forever waives any such defense, except to the extent such defense relates to lack of authenticity.

**8. Investor Information:**

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Subject to acceptance by the Company, the undersigned has completed this Subscription to evidence his/her/its subscription for the purchase of Securities of the Company, this 26<sup>th</sup> day of August, 2022.

[     ]

By: \_\_\_\_\_  
Name:  
Title:

The Company has accepted this subscription this 26th day August of 2022

**SOFTWARE ACQUISITION GROUP INC. III**

By: \_\_\_\_\_  
Name:  
Title:

**NOGIN, INC.**  
**CODE OF ETHICS AND CONDUCT**

In accordance with the requirements of the Securities and Exchange Commission (the “SEC”) and of the listing standards of the Nasdaq Stock Market LLC (“NASDAQ”), the Board of Directors (the “Board”) of Nogin, Inc., a Delaware corporation (the “Company”), has adopted this Code of Ethics and Conduct (the “Code”) to encourage:

- Honest and ethical conduct, including fair dealing and the ethical handling of actual or apparent conflicts of interest;
- Full, fair, accurate, timely and understandable disclosure;
- Compliance with applicable governmental laws, rules and regulations;
- Prompt internal reporting of any violations of law or the Code;
- Accountability for adherence to the Code, including fair process by which to determine violations;
- Consistent enforcement of the Code, including clear and objective standards for compliance;
- Protection for persons reporting any such questionable behavior;
- The protection of the Company’s legitimate business interests, including its assets and corporate opportunities; and
- Confidentiality of information entrusted to directors, officers and employees by the Company and its customers.

All directors, officers and employees (each a “Covered Party” and, collectively, the “Covered Parties”) of the Company and all of its subsidiaries and controlled affiliates are expected to be familiar with the Code and to adhere to the principles and procedures set forth below. Covered Parties must conduct themselves accordingly, exhibiting the highest standard of business and professional integrity, and seek to avoid even the appearance of improper behavior.

**I. Conflicts of Interest**

A conflict of interest occurs when the private interests of a Covered Party interfere, or appear to interfere, with the interests of the Company as a whole.

For example, a conflict of interest can arise when a Covered Party takes actions or has personal interests that may make it difficult to perform his or her Company duties objectively and effectively. A conflict of interest may also arise when a Covered Party, or a member of his or her immediate family,<sup>1</sup> receives improper personal benefits as a result of his or her position at the Company.

<sup>1</sup> Item 404(a) of SEC Regulation S-K defines “immediate family member” as a person’s child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law, or any person (other than a tenant or employee) sharing the person’s household.

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Conflicts of interest can also occur indirectly. For example, a conflict of interest may arise when a Covered Party is also an executive officer, a major shareholder or has a material interest in a company or organization doing business with the Company.

Each Covered Party has an obligation to conduct the Company's business in an honest and ethical manner, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships. Any situation that involves, or may reasonably be expected to involve, a conflict of interest with the Company, should be disclosed promptly to the Company's Audit Committee of the Board.

This Code does not attempt to describe all possible conflicts of interest that could develop. Other common conflicts from which Covered Parties must refrain are set out below:

- Covered Parties may not engage in any conduct or activities that are inconsistent with the Company's best interests or that disrupt or impair the Company's relationship with any person or entity with which the Company has or proposes to enter into a business or contractual relationship.
- Covered Parties may not accept compensation, in any form, for services performed for the Company from any source other than the Company.
- No Covered Party may take up any management or other employment position with, or have any material interest in, any firm or company that is in direct or indirect competition with the Company.

## **II. Disclosures**

The information in the Company's public communications, including all reports and documents filed with or submitted to the SEC, must be full, fair, accurate, timely and understandable.

To ensure the Company meets this standard, all Covered Parties (to the extent they are involved in the Company's disclosure process) are required to maintain familiarity with the disclosure requirements, processes and procedures applicable to the Company commensurate with their duties. Covered Parties are prohibited from knowingly misrepresenting, omitting or causing others to misrepresent or omit, material facts about the Company to others, including the Company's independent auditors, governmental regulators and self-regulatory organizations.

## **III. Compliance with Laws, Rules and Regulations**

The Company is obligated to comply with all applicable laws, rules and regulations. It is the personal responsibility of each Covered Party to adhere to the standards and restrictions imposed by these laws, rules and regulations in the performance of his or her duties for the Company.

The Chief Executive Officer, Chief Financial Officer and Chief Accounting Officer or Controller (or persons performing similar functions) of the Company (together, the "Senior Financial Officers") are also required to promote compliance by all employees with the Code and to abide by Company standards, policies and procedures.

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*Covered Parties located outside of the United States must comply with laws, regulations, rules and regulatory orders of the United States, including the Foreign Corrupt Practices Act ("FCPA") and U.S. export control laws, in addition to applicable local laws.*

#### **IV. Reporting, Accountability and Enforcement**

The Company promotes ethical behavior at all times and encourages Covered Parties to talk to supervisors, managers and other appropriate personnel, including officers, the General Counsel, outside counsel for the Company and the Board or the relevant committee thereof, when in doubt about the best course of action in a particular situation.

Covered Parties should promptly report suspected violations of laws, rules, regulations or the Code or any other unethical behavior by any director, officer, employee or anyone purporting to be acting on the Company's behalf to appropriate personnel, including officers, the General Counsel, outside counsel for the Company and the Board or the relevant committee thereof. Reports may be made anonymously. If requested, confidentiality will be maintained, subject to applicable law, regulations and legal proceedings.

The Audit Committee of the Board or other appropriate officer or body shall investigate and determine, or shall designate appropriate persons to investigate and determine, the legitimacy of such reports. The Audit Committee of the Board or other appropriate officer or body will then determine the appropriate disciplinary action. Such disciplinary action includes, but is not limited to, reprimand, termination with cause, and possible civil and criminal prosecution.

To encourage employees to report any and all violations, the Company will not tolerate retaliation for reports made in good faith. Retaliation or retribution against any Covered Party for a report made in good faith of any suspected violation of laws, rules, regulations or this Code is cause for appropriate disciplinary action.

#### **V. Corporate Opportunities**

All Covered Parties owe a duty to the Company to advance the legitimate interests of the Company when the opportunity to do so arises. Covered Parties are prohibited from directly or indirectly (a) taking personally for themselves opportunities that are discovered through the use of Company property, information or positions; (b) using Company property, information or positions for personal gain; or (c) competing with the Company for business opportunities; provided, however, if the Company's disinterested directors of the Board determine that the Company will not pursue an opportunity that relates to the Company's business, a Covered Party may do so, after notifying the disinterested directors of the Board of intended actions in order to avoid any appearance of conflict of interest.

#### **VI. Confidentiality**

In carrying out the Company's business, Covered Parties may learn confidential or proprietary information about the Company, its customers, distributors, suppliers or joint venture partners. Confidential or proprietary information includes all non-public information relating to the Company, or other companies, that would be harmful to the relevant company or useful or

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helpful to competitors if disclosed, including financial results or prospects, information provided by a third party, trade secrets, new product or marketing plans, research and development ideas, manufacturing processes, potential acquisitions or investments, or information of use to our competitors or harmful to us or our customers if disclosed.

Covered Parties must maintain the confidentiality of all information so entrusted to them, except when disclosure is authorized or legally mandated. Covered Parties must safeguard confidential information by keeping it secure, limiting access to those who have a need to know in order to do their job, and avoiding discussion of confidential information in public areas such as planes, elevators, and restaurants and on mobile phones. This prohibition includes, but is not limited to, inquiries made by the press, analysts, investors or others. Covered parties also may not use such information for personal gain. These confidentiality obligations continue even after employment with the Company ends.

#### **VII. Fair Dealing**

Each Covered Party should endeavor to deal fairly with the Company's customers, service providers, suppliers, competitors and employees. No Covered Party should take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any unfair dealing practice. Inappropriate use of proprietary information, misusing trade secret information that was obtained without the owner's consent, or inducing such disclosures by past or present employees of other companies is also prohibited.

#### **VIII. Protection and Proper Use of Company Assets**

All Covered Parties should protect the Company's assets and ensure their efficient use. Theft, carelessness and waste have a direct impact on the Company's profitability. All Company assets should be used only for legitimate business purposes. The obligation of employees to protect the Company's assets includes its proprietary information. Proprietary information includes intellectual property such as trade secrets, patents, trademarks and copyrights, as well as business, marketing and service plans, engineering and manufacturing ideas, designs, databases, records, salary information and any unpublished financial data and reports.

#### **IX. Waivers**

Before an employee, or an immediate family member of any such employee, engages in any activity that would be otherwise prohibited by the Code, he or she is strongly encouraged to obtain a written waiver from the Board or other appropriate officer or body.

Before a director or executive officer, or an immediate family member of a director or executive officer, engages in any activity that would be otherwise prohibited by Sections I through VIII of the Code, he or she must obtain a written waiver from the disinterested directors of the Board. Such waiver must then be disclosed to the Company's shareholders, along with the reasons for granting the waiver.



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**X. Accuracy of Business Records**

All financial books, records and accounts must accurately reflect transactions and events, and conform both to generally accepted accounting principles (GAAP) and to the Company's system of internal controls. No entry may be made that intentionally hides or disguises the true nature of any transaction. Covered Parties should therefore attempt to be as clear, concise, truthful and accurate as possible when recording any information.

**XI. Corporate Loans or Guarantees**

Federal law prohibits the Company to make loans and guarantees of obligations to directors, executive officers, and members of their immediate families.

**XII. Gifts and Favors**

The purpose of business gifts and entertainment in a commercial setting is to create goodwill and sound working relationships, not to gain unfair advantage with customers. Covered Parties must act in a fair and impartial manner in all business dealings. Gifts and entertainment should further the business interests of the Company and not be construed as potentially influencing business judgment or creating an obligation.

Gifts must not be lavish or in excess of the generally accepted business practices of one's country and industry. In general, no gift, entertainment or business courtesy should be offered, given, provided or accepted unless it: (1) is not a gift of cash, stock or negotiable instruments, (2) is consistent with customary business practices, (3) is not excessive in value (less than \$150), (4) cannot be construed as a bribe or payoff and (5) does not violate any laws or regulations. Covered employees and members of their immediate families may not offer, give or receive gifts from persons or entities who deal with the Company: (a) in those cases where the gift would be illegal or result in a violation of law; (b) as part of an agreement to do anything in return for the gift, (c) if the gift has a value beyond what is normal and customary in the Company's business; (d) if for directors, the gift is being made to influence the director's actions as a member of the Board; or (e) if the gift could create the appearance of a conflict of interest. Gifts of cash or cash equivalents are never permitted. Requesting or soliciting personal gifts, favors, entertainment or services is unacceptable. Covered Parties should contact the officers, the General Counsel, outside counsel for the Company and the Board or the relevant committee thereof to discuss if they are not certain that a gift is appropriate.

The FCPA prohibits giving anything of value, directly or indirectly, to officials of foreign governments or foreign political candidates in order to obtain or retain business. It is strictly prohibited to make illegal payments to government officials of any country. In addition, the promise, offer or delivery to an official or employee of the U.S. government of a gift, favor or other gratuity in violation of these rules would not only violate Company policy but could also be a criminal offense. State and local governments, as well as foreign governments, may have similar rules.

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### **XIII. Personal Investments**

Covered Parties may not own, either directly or indirectly, a substantial interest in any business entity that does or seeks to do business with or is in competition with the Company without providing advance notice to the Audit Committee of the Board. Investments in publicly traded securities of companies not amounting to more than one percent (1%) of that company's total outstanding shares are permitted without such advanced approval.

### **XIV. Antitrust Laws and Competition**

The purpose of antitrust laws is to preserve fair and open competition and a free market economy, which are goals that the Company fully supports. Covered Parties must not directly or indirectly enter into any formal or informal agreement with competitors that fixes or controls prices, divides or allocates markets, limits the production or sale of products, boycotts certain suppliers or customers, eliminates competition or otherwise unreasonably restrains trade.

### **XV. Political Contributions**

Covered Parties may participate in the political process as individuals on their own time. However, Covered Parties must make every effort to ensure that they do not create the impression that they speak or act on behalf of the Company with respect to political matters. Company contributions to any political candidate or party or to any other organization that might use the contributions for a political candidate or party are prohibited. A Covered Party may not receive any reimbursement from corporate funds for a personal political contribution.

### **XVI. Discrimination and Harassment**

The Company is an equal opportunity employer and will not tolerate illegal discrimination or harassment of any kind. The Company is committed to providing a workplace free of discrimination and harassment based on race, color, religion, age, gender, national origin, ancestry, sexual orientation, disability, veteran status, or any other basis prohibited by applicable law. Examples include derogatory comments based on a person's protected class and sexual harassment and unwelcome sexual advances. Similarly, offensive or hostile working conditions created by such harassment or discrimination will not be tolerated.

### **XVII. Environmental Protection**

The Company is committed to managing and operating its assets in a manner that is protective of human health and safety and the environment. It is our policy to comply with both the letter and the spirit of the applicable health, safety and environmental laws and regulations and to attempt to develop a cooperative attitude with government inspection and enforcement officials. Covered Parties are encouraged to report conditions that they perceive to be unsafe, unhealthy or hazardous to the environment.

### **XVIII. Personal Conduct and Social Media Policy**

Covered Parties should take care when presenting themselves in public settings, as well as online and inweb-based forums or networking sites. Each Covered Party is encouraged to conduct himself or herself in a responsible, respectful, and honest manner at all times. The Company understands that Covered Parties may wish to create and maintain a personal presence

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online using various forms of social media. However, in so doing Covered Parties should include a disclaimer that the views expressed therein do not necessarily reflect the views of the Company. Covered Parties should be aware that even after a posting is deleted, certain technology may still make that content available to readers.

Covered Parties are prohibited from using or disclosing confidential, proprietary, sensitive or trade secret information of the Company, its partners, vendors, consultants or other third parties with which the Company does business. Harassment of other directors, officers or employees will also not be tolerated. A Covered Party may not provide any content to Company social media sites that may be construed as political lobbying or solicitation of contributions, or use the sites to link to any sites sponsored by or endorsing political candidates or parties, or to discuss political campaigns, political issues or positions on any legislation or law.

**XIX. No Rights Created**

This Code is a statement of certain fundamental principles, policies and procedures that govern the Company's Covered Parties in the conduct of the Company's business. It is not intended to and does not create any rights in any employee, customer, client, visitor, supplier, competitor, shareholder or any other person or entity. It is the Company's belief that the policy is robust and covers most conceivable situations.

September 1, 2022

Office of the Chief Accountant

Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

Commissioners:

We have read the statements made by Nogin, Inc. (formerly known as Software Acquisition Group Inc. III) included under Item 4.01 of its Form 8-K dated September 1, 2022. We agree with the statements concerning our Firm under Item 4.01. We are not in a position to agree or disagree with other statements of Nogin, Inc. (formerly known as Software Acquisition Group Inc. III) contained therein.

Very truly yours,

/s/ Marcum LLP

Marcum LLP  
Boston, MA

**Subsidiaries of Nogin, Inc.**

Subsidiary  
Branded Online, Inc.  
Native Brands Group LLC

Jurisdiction of Incorporation  
Delaware  
California

**Branded Online, Inc. dba Nogin**  
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**Branded Online, Inc. dba Nogin**  
**Unaudited Condensed Consolidated Balance Sheets**  
(In thousands, except share and per share data)

	<u>June 30, 2022</u>	<u>December 31, 2021</u>
<b>ASSETS</b>		
Current assets:		
Cash	\$ 1,207	\$ 1,071
Accounts receivable, net	2,523	1,977
Related party receivables	6,236	5,356
Inventory	16,385	22,777
Prepaid expenses and other current assets	5,225	2,915
Total current assets	<u>31,576</u>	<u>34,096</u>
Restricted cash	1,500	3,500
Property and equipment, net	1,699	1,789
Intangible assets, net	996	1,112
Investment in unconsolidated affiliates	11,588	13,570
Other non-current asset	664	664
Total assets	<u>\$ 48,023</u>	<u>\$ 54,731</u>
<b>LIABILITIES, CONVERTIBLE REDEEMABLE PREFERRED STOCK AND STOCKHOLDERS' DEFICIT</b>		
Current liabilities:		
Accounts payable	\$ 16,086	\$ 16,098
Due to clients	4,596	5,151
Related party payables	1,870	—
Promissory notes	6,740	—
Promissory notes from related parties	2,666	—
Accrued expenses and other liabilities	10,823	14,018
Total current liabilities	<u>42,781</u>	<u>35,267</u>
Line of credit	4,998	348
Long-term note payable, net	19,921	19,249
Deferred tax liabilities	1,239	1,174
Other long-term liabilities	1,244	734
Total liabilities	<u>70,183</u>	<u>56,772</u>
Commitments and contingencies (Note 14)		
<b>CONVERTIBLE REDEEMABLE PREFERRED STOCK</b>		
Series A convertible, redeemable preferred stock, \$0.0001 par value, 2,042,483 shares authorized, issued and outstanding, as of June 30, 2022 and December 31, 2021	4,687	4,687
Series B convertible, redeemable preferred stock, \$0.0001 par value, 1,600,000 shares authorized as of June 30, 2022 and December 31, 2021 respectively; 1,459,462 shares issued and outstanding	6,502	6,502
<b>STOCKHOLDERS' DEFICIT</b>		
Common stock, \$0.0001 par value, 14,000,000 shares authorized; 9,129,358 shares issued and outstanding as of June 30, 2022 and December 31, 2021	1	1
Additional paid-in capital	5,157	4,361
Treasury stock	(1,330)	(1,330)
Accumulated deficit	<u>(37,177)</u>	<u>(16,262)</u>
Total stockholders' deficit	<u>(33,349)</u>	<u>(13,230)</u>
Total liabilities, convertible redeemable preferred stock and stockholders' deficit	<u>\$ 48,023</u>	<u>\$ 54,731</u>

See notes to unaudited condensed consolidated financial statements

**Branded Online, Inc. dba Nogin**  
**Unaudited Condensed Consolidated Statements of Operations**  
(In thousands, except share and per share data)

	<b>Six Months Ended June 30,</b>	
	<b>2022</b>	<b>2021</b>
Net service revenue	\$ 17,787	\$ 22,171
Net product revenue	20,756	4,515
Net revenue from related parties	7,005	1,588
Total net revenue	45,548	28,274
Operating costs and expenses:		
Cost of services <sup>(1)</sup>	11,192	11,471
Cost of product revenue <sup>(1)</sup>	15,407	1,908
Sales and marketing	1,186	677
Research and development	2,827	2,424
General and administrative	30,362	14,642
Depreciation and amortization	420	240
Total operating costs and expenses	61,394	31,362
Operating loss	(15,846)	(3,088)
Interest expense	(2,117)	(120)
Change in fair value of promissory notes	(2,566)	—
Change in fair value of unconsolidated affiliates	(1,982)	4,937
Other income, net	1,661	312
Income (loss) before income taxes	(20,850)	2,041
Provision (benefit) for income taxes	65	(284)
Net income (loss)	\$ (20,915)	\$ 2,325
Net income (loss) per common share – basic	\$ (2.29)	\$ 0.18
Net income (loss) per common share – diluted	\$ (2.29)	\$ 0.18
Weighted average shares outstanding – basic	9,129,358	9,129,358
Weighted average shares outstanding – diluted	9,129,358	9,389,210

(1) Exclusive of depreciation and amortization shown separately.

See notes to unaudited condensed consolidated financial statements



**Branded Online, Inc. dba Nogin**  
**Unaudited Condensed Consolidated Statements of Convertible Redeemable Preferred Stock and Stockholders' Deficit**  
(In thousands, except share data)

	Convertible Redeemable Preferred Stock				Common Stock		Additional Paid-in Capital	Treasury Stock	Accumulated Deficit	Total Stockholders' Deficit
	Series A		Series B		Shares	Amount				
	Shares	Amount	Shares	Amount	Shares	Amount				
Balance, December 31, 2020	2,042,483	\$ 4,687	1,459,462	\$ 6,502	9,129,358	\$ 1	\$ 4,308	\$ (1,330)	\$ (16,197)	\$ (13,218)
Stock-based compensation	—	—	—	—	—	—	32	—	—	32
Net income	—	—	—	—	—	—	—	—	2,325	2,325
Balance, June 30, 2021	<u>2,042,483</u>	<u>\$ 4,687</u>	<u>1,459,462</u>	<u>\$ 6,502</u>	<u>9,129,358</u>	<u>\$ 1</u>	<u>\$ 4,340</u>	<u>\$ (1,330)</u>	<u>\$ (13,872)</u>	<u>\$ (10,861)</u>
Balance, December 31, 2021	2,042,483	\$ 4,687	1,459,462	\$ 6,502	9,129,358	\$ 1	\$ 4,361	\$ (1,330)	\$ (16,262)	\$ (13,230)
Stock-based compensation	—	—	—	—	—	—	83	—	—	83
Warrant issuance	—	—	—	—	—	—	713	—	—	713
Net loss	—	—	—	—	—	—	—	—	(20,915)	(20,915)
Balance, June 30, 2022	<u>2,042,483</u>	<u>\$ 4,687</u>	<u>1,459,462</u>	<u>\$ 6,502</u>	<u>9,129,358</u>	<u>\$ 1</u>	<u>\$ 5,157</u>	<u>\$ (1,330)</u>	<u>\$ (37,177)</u>	<u>\$ (33,349)</u>

See notes to unaudited condensed consolidated financial statements

**Branded Online, Inc. dba Nogin**  
**Unaudited Condensed Consolidated Statements of Cash Flows**  
(In thousands)

	<b>Six Months Ended June 30,</b>	
	<b>2022</b>	<b>2021</b>
<b>CASH FLOWS FROM OPERATING ACTIVITIES:</b>		
Net (loss) income	\$ (20,915)	\$ 2,325
Adjustments to reconcile net income (loss) to net cash used by operating activities:		
Depreciation and amortization	420	240
Amortization of debt issuance costs and discounts	802	—
Amortization of contract acquisition costs	—	333
Stock-based compensation	83	32
Deferred income taxes	65	—
Fair value adjustment on joint ventures	1,982	(4,791)
Fair value adjustment on warrant liability	509	—
Fair value adjustment on promissory notes	2,566	—
Settlement of deferred revenue	(1,611)	—
Other	82	—
Changes in operating assets and liabilities:		
Accounts receivable	(546)	1,111
Related party receivables	(880)	—
Inventory	6,392	(3,625)
Prepaid expenses and other current assets	(2,306)	32
Accounts payable	(12)	1,419
Due to clients	(555)	(9,315)
Related party payables	1,870	—
Accrued expenses and other liabilities	(1,139)	838
Net cash used in operating activities	<u>(13,193)</u>	<u>(11,401)</u>
<b>CASH FLOWS FROM INVESTING ACTIVITIES:</b>		
Purchases of property and equipment	(226)	(449)
Investment in unconsolidated affiliate	—	(1,500)
Net cash used in investing activities	<u>(226)</u>	<u>(1,949)</u>
<b>CASH FLOWS FROM FINANCING ACTIVITIES:</b>		
Proceeds from promissory notes	5,000	—
Proceeds from promissory notes – related parties	1,975	—
Payment of debt issuance costs	(70)	—
Proceeds from line of credit	86,905	77,629
Repayments of line of credit	(82,255)	(77,629)
Net cash provided by financing activities	<u>11,555</u>	<u>5,000</u>
<b>NET (DECREASE) INCREASE IN CASH AND RESTRICTED CASH</b>	<u>(1,864)</u>	<u>(8,350)</u>
Beginning of period	4,571	16,168
End of period	<u>\$ 2,707</u>	<u>\$ 7,818</u>
<b>SUPPLEMENTAL CASH FLOW INFORMATION</b>		
Cash paid for interest	\$ 1,288	\$ 49
Cash paid for taxes	169	—
<b>SCHEDULE OF CASH AND RESTRICTED CASH</b>		
Cash	\$ 1,207	\$ 5,818
Restricted cash	1,500	2,000
Total cash and restricted cash	<u>\$ 2,707</u>	<u>\$ 7,818</u>

See notes to unaudited condensed consolidated financial statements

**Branded Online, Inc. dba Nogin**  
**Notes to the Unaudited Condensed Consolidated Financial Statements**

**1. OVERVIEW**

Nogin (the “Company”) is an e-commerce, technology platform provider that delivers Commerce-as-a-Service (“CaaS”) solutions as a headless, flexible full stack enterprise commerce platform with cloud services and optimizations along with experts for brands and retailers that provide a unique combination of customizability and sales efficiency. The Company manages clients’ front-to-back-end operations so clients can focus on their business. The Company’s business model is based on providing a comprehensive e-commerce solution to its customers on a revenue sharing basis.

The Company’s headquarters and principal place of business are in Tustin, California.

**2. SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES**

**Basis of Presentation**

The accompanying condensed consolidated financial statements are presented in accordance with accounting principles generally accepted in the United States of America (“U.S. GAAP”) and pursuant to the rules and regulations of the Securities and Exchange Commission (“SEC”). The interim financial information provided is unaudited and omits certain information and note disclosures normally included in annual consolidated financial statements. The condensed consolidated financial statements reflect adjustments that are of a normal recurring nature and are necessary for the fair presentation of the financial condition, operating results, and cash flows for the interim period presented. Operating results for the six months ended June 30, 2022 are not necessarily indicative of the results that may be expected for the year ending December 31, 2022. These condensed consolidated financial statements should be read in conjunction with the Company’s audited financial statements for the year ended December 31, 2021 and notes thereto included elsewhere in the Proxy/Prospectus for Software Acquisition Group Inc. III (“SWAG”) for the fiscal year ended December 31, 2021 filed with the SEC (note 15).

**Liquidity**

The Company’s financial statements have been prepared by management on the basis that the Company will continue as a going concern, which contemplates the realization of assets and satisfaction of liabilities in the normal course of business. As a result, these financial statements do not include any adjustments that might result from the outcome of going concern uncertainty.

Historically, the Company has financed its operations through issuances of equity securities, revenues from services, and borrowings under its credit agreements. The Company’s principal liquidity requirements are to meet working capital needs, make debt service payments, and fund capital expenditures. The Company’s management believes even with the impacts of the global coronavirus (“COVID-19”) pandemic, and with the close of the Business Combination (Note 16), its existing cash and restricted cash will be sufficient to support working capital and capital expenditure requirements for at least the next twelve months. The Company believes it has the ability to continue as a going concern.

**COVID-19 Pandemic**

In March 2020, the World Health Organization declared the COVID-19 outbreak a pandemic. At the onset of COVID-19, the Company anticipated an impact to the business, its financial conditions and results of operations. The Company applied for and was granted a Paycheck Protection Plan (“PPP”) loan. In addition, the Company has taken a number of actions to mitigate the impacts of the COVID-19 pandemic on its business. The Company witnessed a large shift in consumer spending from retail stores to online stores, and as a result, there were no significant declines in the periods presented. However, the impacts of the COVID-19 pandemic will depend on future developments, including the duration and spread of the pandemic. These developments and the impacts of the COVID-19 pandemic on the financial markets and overall economy are highly uncertain and cannot be predicted.

**Branded Online, Inc. dba Nogin**  
**Notes to the Unaudited Condensed Consolidated Financial Statements**

**Use of Estimates**

The preparation of financial statements in conformity with U.S. GAAP requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities, and the reported amounts of revenue and expenses during the reporting period. The Company prepared these estimates based on the most current and best available information, but actual results could differ materially from these estimates and assumptions. Significant estimates and assumptions reflected in the financial statements include, but are not limited to, the allowance for credit losses and revenue recognition, including variable consideration for estimated reserves for returns and other allowances. Management bases its estimates on historical experience and on assumptions that it believes to be reasonable under the circumstances, the results of which form the basis for marking judgements about the carrying value of assets and liabilities that are not readily apparent from other sources.

**Accounts Receivable**

The allowance for doubtful accounts was \$425 thousand as of June 30, 2022 and \$406 thousand as of December 31, 2021.

**Inventory**

Inventory is comprised entirely of finished goods for resale. The reserve for returns was \$156 thousand as of June 30, 2022 and \$532 thousand as of December 31, 2021.

**Promissory Notes**

The Company elected to account for certain promissory notes under the fair value option of accounting in accordance with ASC 825 Financial Instruments wherein the financial instrument is initially measured at its fair value upon issuance and then subsequently re-measured at its estimated fair value on a recurring basis at each reporting period with the change in fair value recognized in earnings. The portion of the fair value adjustment attributed to a change in the instrument-specific credit risk, if any, is recognized as a component of other comprehensive income or loss.

**Concentration of Risks**

*Credit Risk*

Financial instruments that potentially subject the Company to significant concentrations of credit risk consist primarily of cash and cash equivalents, restricted cash and equity method investments. The Company maintains cash balances at financial institutions. Amounts on deposit at these institutions are secured by the Federal Deposit Insurance Corporation ("FDIC") insurance limit. At various times, the Company has had bank deposits in excess of the FDIC's insurance limit. The Company has not experienced any losses in its cash accounts to date. Management believes that the Company is not exposed to any significant credit risk with respect to its cash.

The Company performs ongoing credit evaluations of its customers and generally does not require collateral. As of June 30, 2022, receivables from two customers amounted to \$0.9 million or 11% and \$6.2 million or 73% of accounts receivable. As of December 31, 2021, receivables from two customers amounted to \$1.1 million or 15% and \$5.4 million or 73% of accounts receivable.

*Major Customers*

For the six months ended June 30, 2022, revenue from three customers amounted to \$15.1 million or 33%, \$6.3 million or 14%, and \$4.2 million or 9% of total revenue. For the six months ended June 30, 2021, revenue from three customer amounted to \$4.6 million or 16%, \$4.6 million or 16%, and \$4.0 million or 14% of total revenue.

*Major Suppliers*

For the six months ended June 30, 2022, two vendors accounted for \$5.6 million or 15% and \$4.5 million or 12% of total purchases. For the six months ended June 30, 2021, two vendors accounted for \$3.4 million or 20% and \$2.3 million or 13% of total purchases.

**Revenue Recognition**

Revenue is accounted for using Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC") Topic 606, Revenue from Contracts with Customers.

**Branded Online, Inc. dba Nogin**  
**Notes to the Unaudited Condensed Consolidated Financial Statements**

In accordance with ASC Topic 606, the Company recognizes revenue when control of the promised goods or services is transferred to the Company's customers, in an amount that reflects the consideration it expects to be entitled to in exchange for those goods or services. The Company determines revenue recognition through the following steps:

- Identification of a contract with a customer,
- Identification of the performance obligations in the contract,
- Determination of the transaction price,
- Allocation of the transaction price to the performance obligations in the contract, and
- Recognition of revenue when or as the performance obligations are satisfied.

A performance obligation is a promise in a contract to transfer a distinct product. Performance obligations promised in a contract are identified based on the goods that will be transferred that are both capable of being distinct and are distinct in the context of the contract, whereby the transfer of the goods is separately identifiable from other promises in the contract. Performance obligations include establishing and maintaining customer online stores, providing access to the Company's e-commerce platform, customer service support, photography services, warehousing, and fulfillment. Most of the contracts of the Company with customers contain multiple promises, which may result in multiple performance obligations, while others are combined into one performance obligation. For contracts with customers, the Company accounts for individual promises separately if they are distinct. The transaction price is allocated to the separate performance obligations on a relative standalone selling price basis. The Company determines the standalone selling prices based on its overall pricing objectives, taking into consideration market conditions and other factors.

The Company has concluded the sale of goods and related shipping and handling on behalf of our customers are accounted for as a single performance obligation, while the expenses incurred for actual shipping charges are included in cost of sales.

The Company's revenue is mainly commission fees derived from contractually committed gross revenue processed by customers on the Company's e-commerce platform. The Company is acting as an agent in these arrangements and customers do not have the contractual right to take possession of the Company's software. Revenue is recognized in an amount that reflects the consideration that the Company expects to ultimately receive in exchange for those promised goods, net of expected discounts for sales promotions and customary allowances.

CaaS Revenue is recognized on a net basis from maintaining e-commerce platforms and online orders, as the Company is engaged primarily in an agency relationship with its customers and earns defined amounts based on the individual contractual terms for the customer and the Company does not take possession of the customers' inventory or any credit risks relating to the products sold.

Variable consideration is included in revenue for potential product returns. The Company uses an estimate to constrain revenue for the expected variable consideration at each period end. The Company reviews and updates its estimates and related accruals of variable consideration each period based on the terms of the agreements, historical experience, and expected levels of returns. Any uncertainties in the ultimate resolution of variable consideration due to factors outside of the Company's influence are typically resolved within a short timeframe therefore not requiring any additional constraint on the variable consideration. The estimated reserve for returns is included on the balance sheet in accrued expenses with changes to the reserve in revenue on the accompanying statement of operations. The reserve for returns as of June 30, 2022 was \$0.6 million and as of December 31, 2021 was \$1.8 million.

In most cases the Company acts as the merchant of record, resulting in a due to client liability (discussed below). However, in some instances, the Company may perform services without being the merchant of record in which case there is a receivable from the customer.

**Branded Online, Inc. dba Nogin**  
**Notes to the Unaudited Condensed Consolidated Financial Statements**

Payment terms and conditions are generally consistent for customers, including credit terms to customers ranging from seven days to 60 days, and the Company's contracts do not include any significant financing component. The Company performs credit evaluations of customers and evaluates the need for allowances for potential credit losses based on historical experience, as well as current and expected general economic conditions.

Sales taxes collected from customers and remitted to governmental authorities are accounted for on a net basis and, therefore, are excluded from net revenue in the condensed consolidated statements of operations.

***Commerce as a Service***

As noted above, the Company's main revenue stream is "Commerce as a Service" revenue in which it receives commission fees derived from contractually committed gross revenue processed by customers on the Company's e-commerce platform. Consideration for online sales is collected directly from the end customer by the Company and amounts not owed to the Company are remitted to the customer. Revenue is recognized on a net basis from maintaining e-commerce platforms and online orders, as the Company is engaged in an agency relationship with its customers and earns defined amounts based on the individual contractual terms for the customer and the Company does not take possession of the customers' inventory or any credit risks relating to the products sold.

***Product sales***

Under two licensee agreements, the Company is the owner of inventory and reseller of record. As a result, the Company is the principal in sales to end customers and records these revenues on a gross basis at a point in time.

***Fulfillment services***

Revenue for business-to-business ("B2B") fulfillment services is recognized on a gross basis either at a point in time or over a point in time. For example, inbound and outbound services are recognized when the service is complete, while monthly storage services are recognized over the service period.

***Marketing services***

Revenue for marketing services is recognized on a gross basis as marketing services are complete. Performance obligations include providing marketing and program management such as procurement and implementation.

***Shipping services***

Revenue for shipping services is recognized on a gross basis as shipments are completed and products are shipped to end customers.

***Set up and implementation services***

The Company provides set up and implementation services for new clients. The revenue is recognized on a gross basis at the completion of the service, with the unearned amounts received for incomplete services recorded as deferred revenue, if any.

***Other services***

Revenue for other services such as photography, business to customer ("B2C") fulfillment, customer service, development and web design are reimbursable costs and recognized on the gross basis, and are services rendered as part of the performance obligations to clients for which an online platform and online orders are managed. All reimbursable costs are the responsibility of the Company as the Company uses such services to fulfill its performance obligations.

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***Cost of services***

Cost of services reflects costs directly related to providing services under the master service agreements with customers, which primarily includes service provider costs directly related to processing revenue transactions, marketing expenses and shipping and handling expenses which correspond to marketing and shipping revenues, as well as credit card merchant fees. Cost of services is exclusive of depreciation and amortization and general salaries and related expenses.

***Cost of product revenue***

Cost of product revenue reflects costs directly related to selling inventory acquired from select clients, which primarily includes product cost, warehousing costs, fulfillment costs, credit card merchant fees and third-party royalty costs. Cost of product revenue is exclusive of depreciation and amortization and general salaries and related expenses.

**Fair Value Measurement**

The Company applies the provisions of Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) 820, *Fair Value Measurements and Disclosures* ("ASC 820"), which provides a single authoritative definition of fair value, sets out a framework for measuring fair value, and expands on required disclosures about fair value measurement.

The Company applies the provisions of ASC 820 to all financial assets and liabilities and non-financial assets and liabilities that are recognized or disclosed at fair value in the financial statements on a recurring basis.

The Company defines fair value as an exit price, representing the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. As such, fair value is a market-based measurement that should be determined based on assumptions that market participants would use in pricing an asset or liability.

Fair value is estimated by applying the following hierarchy, which prioritizes the inputs used to measure fair value into three levels and bases the categorization within the hierarchy upon the lowest level of input that is available and significant to the fair value measurement:

*Level 1* - Quoted prices in active markets for identical assets or liabilities.

*Level 2* - Observable inputs other than quoted prices in active markets for identical assets and liabilities, quoted prices for identical or similar assets or liabilities in inactive markets, or other inputs that are observable or can be corroborated by observable market data for substantially the full term of the assets or liabilities.

*Level 3* - Inputs that are generally unobservable and typically reflect management's estimate of assumptions that market participants would use in pricing the asset or liability.

In determining fair value, the Company utilized valuation techniques that maximize the use of observable inputs and minimize the use of unobservable inputs to the extent possible as well as considers counter party credit risk and nonperformance risk in its assessment of fair value.

The carrying value of the Company's short-term financial instruments, such as cash and cash equivalents, restricted cash, accounts receivable, notes payable, and accounts payable, approximate the fair value due to the immediate or short-term maturity of these instruments. The carrying value of the Company's long-term debt approximates fair value as the interest rate on the Company's secured credit facility and certain other debt has a variable component, which is reflective of the market.

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**Recent Accounting Pronouncements**

In February 2016, the FASB issued ASU2016-02, Leases (ASC Topic 842), a comprehensive new lease recognition standard which will supersede previous existing lease recognition guidance. Under the standard, lessees will need to recognize a right-of use asset and a lease liability for leases with terms greater than twelve months. The liability will be equal to the present value of lease payments. The asset will be based on the liability, subject to adjustment, such as for initial direct costs. For income statement purposes, leases will be required to be classified as either operating or finance. Operating leases will result in straight-line expense (similar to current operating leases) while finance leases will result in a front-loaded expense pattern (similar to current capital leases). The standard is effective for fiscal periods beginning after December 15, 2021 and interim periods within fiscal years beginning after December 15, 2022 and requires a modified retrospective adoption. The Company is currently evaluating the impact the adoption of this standard will have on the financial statements.

In June 2016, the FASB issued ASU2016-13, “Financial Instruments—Credit Losses” (Topic 326). The FASB issued this update to provide financial statement users with more decision-useful information about the expected credit losses on financial instruments and other commitments to extend credit held by a reporting entity at each reporting date. The amendments in this update replace the existing guidance of incurred loss impairment methodology with an approach that reflects expected credit losses and requires consideration of a broader range of reasonable and supportable information to inform credit loss estimates. In November 2018, the FASB issued ASU 2018-19, “Codification Improvements to Topic 326, Financial Instruments—Credit Losses,” which clarifies the scope of guidance in the ASU 2016-13. The updated guidance is effective for annual periods beginning after December 15, 2022 and interim periods within fiscal years beginning after December 15, 2023. The Company is currently evaluating the impact the adoption of this standard will have on the financial statements.

In December 2019, the Financial Accounting Standards Board (“FASB”) issued Accounting Standards Update (“ASU”)2019-12, Simplifying the Accounting for Income Taxes, which eliminates certain exceptions related to the approach for intra-period tax allocation, the methodology for calculating taxes during the quarters and the recognition of deferred tax liabilities for outside basis differences. This guidance also simplifies aspects of the accounting for franchise taxes and changes in tax laws or rates, as well as clarifies the accounting for transactions that result in a step-up in the tax basis of goodwill. ASU 2019-12 is effective for the Company beginning January 1, 2022. The Company has adopted this guidance and there was not a material impact on the financial statements.

In August 2020, the Financial Accounting Standards Board (“FASB”) issued Accounting Standards Update (“ASU”)2020-06 Debt—Debt with Conversion and Other Options (Subtopic 470-20) and Derivatives and Hedging—Contracts in Entity’s Own Equity (Subtopic 815-40): Accounting for Convertible Instruments and Contracts in an Entity’s Own Equity, which improves Convertible Instruments and Contracts in an Entity’s Own Equity and is expected to improve financial reporting associated with accounting for convertible instruments and contracts in an entity’s own equity. The ASU simplifies accounting for convertible instruments by removing major separation models required under current U.S. GAAP. Consequently, more convertible debt instruments will be reported as a single liability instrument and more convertible preferred stock as a single equity instrument with no separate accounting for embedded conversion features. The ASU removes certain settlement conditions that are required for equity contracts to qualify for the derivative scope exception, which will permit more equity contracts to qualify for it.

The ASU also simplifies the diluted earnings per share (EPS) calculation in certain areas. ASU2020-06 is effective for the Company beginning January 1, 2024, with early adoption permitted as of January 1, 2021. The Company is currently evaluating the impact that ASU 2020-06 may have on our financial statements.

Other recently issued accounting standards are not expected to have a material effect on the Company’s financial statements.



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**3. PROPERTY AND EQUIPMENT**

Property and equipment, net as of June 30, 2022 and December 31, 2021, consisted of the following (in thousands):

	<u>June 30, 2022</u>	<u>December 31, 2021</u>
Furniture and equipment	\$ 2,365	\$ 2,160
Leasehold Improvements	536	536
Property, plant, and equipment, gross	2,901	2,696
Less accumulated depreciation	(1,202)	(907)
Property and equipment, net	<u>\$ 1,699</u>	<u>\$ 1,789</u>

Depreciation expense for property and equipment for the six months ended June 30, 2022 and 2021 was \$304 thousand and \$210 thousand, respectively.

**4. INTANGIBLE ASSETS**

The Company entered into a three-year master service agreement with a new customer for a \$2.0 million contract acquisition fee on July 16, 2018. The agreement resulted in the acquisition of nine new contracts with different companies and brands. The cost is amortized over a three-year period, which ended in 2021.

In connection with the Betabrand acquisition (note 9), the Company's amortization expense for capitalized software for the six months ended June 30, 2022 and 2021 was \$116 thousand and \$30 thousand, respectively.

As of June 30, 2022 and December 31, 2021, intangible assets consist of the following (in thousands):

	<u>June 30, 2022</u>	<u>December 31, 2021</u>
Contract acquisition cost	\$ 2,000	\$ 2,000
Software	1,174	1,174
	3,174	3,174
Less: Accumulated amortization	(2,178)	(2,062)
Intangible assets-net	<u>\$ 996</u>	<u>\$ 1,112</u>

**5. INVESTMENT IN UNCONSOLIDATED AFFILIATES**

On April 6, 2021, the Company and Tiger Capital Group, LLC ("Tiger Capital") formed a joint venture, Modcloth Partners, LLC. ("Modcloth"). The Company and Tiger Capital each contributed \$1.5 million into Modcloth and the Company will own 50% of the outstanding membership units. Tiger Capital will provide the financing for the inventory, while the Company entered into a Master Services Agreement ("MSA") with Modcloth to provide the eCommerce services (see Note 10). The Company accounts for its investment in ModCloth under the fair value option of accounting. As of June 30, 2022 and December 31, 2021, the investment balance related to ModCloth was \$4.5 million and \$6.4 million, respectively, and was included in investment in unconsolidated affiliates on the condensed consolidated balance sheets. For the six months ended June 30, 2022, the Company recorded a fair value adjustment related to its ModCloth investment of \$1.9 million included in changes in fair value of unconsolidated affiliates on the condensed consolidated statements of operations.

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On December 31, 2021, the Company and CFL Delaware, Inc. (“CFL”) formed a joint venture, IPCO, whereby Nogin contributed certain assets acquired from the BTB (ABC), LLC (“Betabrand”) acquisition (see Note 9) and entered into a MSA with IPCO to provide certain eCommerce services, marketing, photography, customer service and merchant credit card monitor fraud services; and CFL entered into a Master Supply Agreement with IPCO and agreed to procure the supply of inventory to IPCO, provide manufacturing, fulfillment, logistics and warehousing services for the inventory. The Company accounts for its investment in IPCO under the fair value option of accounting. As of June 30, 2022 and December 31, 2021, the investment balance related to IPCO was \$7.1 million, and was included in investment in unconsolidated affiliates on the condensed consolidated balance sheets. For the six months ended June 30, 2022, the Company recorded \$1.6 million to other income, net related to the settlement of deferred revenue related to sale of finished inventory to IPCO. In addition, the Company recorded a fair value adjustment related to its IPCO investment of \$41 thousand included in changes in fair value of unconsolidated affiliates on the condensed consolidated statement of operations for the six months ended June 30, 2022.

The following table presents summarized financial information for the joint ventures for the six months ended and as of June 30, 2022 (in thousands):

	<u>Modcloth</u>	<u>IPCO</u>
Net revenue	\$ 9,350	\$ 13,578
Gross margin	\$ 3,997	\$ 10,776
Net loss	\$ (2,531)	\$ (826)
Current assets	\$ 1,567	\$ 4,385
Long term assets	\$ 6,285	\$ 5,824
Current liabilities	\$ 8,387	\$ 7,031
Long term liabilities	\$ 4,945	\$ —

The Company’s ModCloth and IPCO investments are Level 3 fair value measurement. The Company utilized the following valuation methods to conclude on the fair value as of June 30, 2022:

- *Discounted Cash Flow* – The key unobservable input utilized was a discount rate of 16.3% for Modcloth and 19.3% for IPCO.
- *Guideline Public Company Method* – The Company utilized a revenue multiple of 0.80x for Modcloth and 0.25x for IPCO on current period forecasted revenues. The revenue multiple was derived from public peers of the Company.
- *Guideline Transaction Method* – The Company utilized a revenue multiple of 0.85x for Modcloth and 0.29x for IPCO on current period forecasted revenues. The revenue multiple was derived from public transactions in which the target companies were similar to the Company.

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The following table summarizes the changes in the ModCloth and IPCO investment Level 3 fair value measurement (in thousands):

	<u>Modcloth</u>	<u>IPCO</u>
Balance as of December 31, 2021	\$ 6,437	\$7,133
Change in fair value	(1,940)	(41)
Balance as of June 30, 2022	<u>\$ 4,497</u>	<u>\$7,092</u>

**6. LONG-TERM DEBT**

*Line of credit*

Effective January 14, 2015, the Company entered into a Revolving Credit Agreement with a financial institution that provided maximum borrowing under a revolving loan commitment of up to \$2 million, bearing an interest rate of 2% plus prime rate as published by the Wall Street Journal. Effective July 3, 2020, the Company renewed the line of credit with the financial institution through May 31, 2021 that provided maximum borrowing under a revolving loan commitment of up to \$5 million. In May 2021 the maturity date was extended to June 30, 2021 and then further extended to July 31, 2021. The line was then renewed on July 21, 2021 with an expanded credit limit of \$8 million, a new maturity date of June 30, 2023 and an amended per annum interest rate of the greater of 2.25% plus prime rate as published by the Wall Street Journal or 5.50%. As of June 30, 2022 and December 31, 2021, the Company has \$5.0 million and \$348 thousand, respectively, due on its line of credit with a \$3 million letter of credit issued against the line of credit, which results in remaining availability of \$0 and \$4.7 million, respectively. The line of credit contains covenants regarding certain financial statement amounts and ratios of the Company. The Company received waivers for its financial statement covenants for the period ended June 30, 2022 and December 31, 2021.

*Notes Payable*

On August 11, 2021, the Company entered into a loan and security agreement (“Note Agreement”) with a financial institution that provided for a borrowing commitment of \$15 million in the form of promissory notes. In August 2021, the Company borrowed \$10 million under the first tranche (“First Tranche Notes”). The Note Agreement has a commitment for additional second tranche borrowings of \$5 million through June 30, 2022. In October 2021 the Company borrowed the remaining \$5 million committed under the Note Agreement. The borrowings under the Note Agreement are secured by substantially all assets of the Company.

The First and Second Tranche Notes mature on September 1, 2026 and November 1, 2026, respectively, and bear an interest at a rate per annum of 6.25% plus the greater of 3.25% or the prime rate as published by the Wall Street Journal. The Company is required to make interest only payments on the first of each month beginning October 1, 2021 and December 1, 2021, respectively. Beginning October 1, 2023 and December 1, 2023, respectively, the Company is required to make principal payments of \$278 thousand and \$139 thousand, respectively, plus accrued interest on the first of each month through maturity. Upon payment in full of the First and Second Tranche Notes, the Company is required to pay exit fees (“Exit Fee”) of \$600 thousand and \$300 thousand, respectively.

In December 2021 the Company borrowed an additional \$6 million from the same financial institution, of which \$1 million was repaid in full on December 31, 2021, and \$5 million (“Third Tranche Notes”) bear an interest at a rate per annum of 6.25% plus the greater of 3.25% or the prime rate as published by the Wall Street Journal. The Company is required to make interest only payments on the first of each month beginning February 1, 2022, with the full principal amount due on July 1, 2023. Upon payment in full, the Company is required to pay exit fees of \$50 thousand.

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In connection with the Note Agreement, the Company issued warrants to purchase up to 33,357 shares of common stock of the Company (the “Warrants”) at an exercise price of \$0.01 per share (Note 7). On the date of issuance, the Company recorded the fair value of the Warrants as a discount to the First Tranche Notes which is being amortized into interest expense over the term of the First Tranche Notes using the effective interest method. The issuance costs are deferred over the repayment term of the debt. Deferred issuance costs relate to the Company’s debt instruments, the short-term and long-term portions are reflected as a deduction from the carrying amount of the related debt.

The components of the long-term notes payable, net are as follows (in thousands):

	<u>June 30, 2022</u>	<u>December 31, 2021</u>
First Tranche Notes	\$ 10,000	\$ 10,000
First Tranche Notes Exit Fee	600	600
Second Tranche Notes	5,000	5,000
Second Tranche Notes Exit Fee	300	300
Third Tranche Notes	5,000	5,000
Third Tranche Notes Exit Fee	50	50
	<u>20,950</u>	<u>20,950</u>
Less: Unamortized Exit Fee payment	(773)	(884)
Less: Unamortized warrant discount	(597)	(678)
Less: Unamortized debt issuance costs	(122)	(139)
Add: Unamortized costs – short-term in accrued expense and other liabilities	463	—
	<u>\$ 19,921</u>	<u>\$ 19,249</u>

Scheduled maturities for the First, Second and Third Tranche Notes, inclusive of Exit Fee payments of the Company’s long-term notes payable as of June 30, 2022 were as follows (in thousands):

2022 (remaining)	\$ —
2023	6,022
2024	5,000
2025	5,000
2026	<u>4,928</u>
Total	<u>\$20,950</u>

*Promissory Notes*

During Q2 2022, the Company entered into promissory notes with various individuals (the “Promissory Notes”), including current investors, members of management and other unrelated parties in exchange for cash of \$7.0 million (the “Promissory Notes”). The Promissory Notes mature on the earlier of one year from issuance or close of the merger with SWAG (Note 15) and bear per annum interest at the rate of 7.75%

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plus the greater of 3.50% or the prime rate as published by the Wall Street Journal. The Company is required to make nine interest-only payments, followed by three principal and interest payments. In connection with the Promissory Notes, the Company issued warrants (“Promissory Note Warrants”) to purchase up to 31,024 shares of common stock of the Company at an exercise price of \$0.01 per share (Note 7). Upon payment in full of the Promissory Notes, the Company is required to make an additional final payment (“Final Payment”) of \$3.5 million.

The Company elected to account for the Promissory Notes under the fair value option of accounting upon issuance of each of the Promissory Notes. At issuance the Company recognized the fair value of the Promissory Notes of \$6.3 million with the remaining \$0.7 million of proceeds received allocated to the Promissory Note Warrants. As of June 30, 2022, the fair value of the Promissory Notes was \$9.4 million of which \$6.7 million was recorded in promissory notes and \$2.7 million was recorded in promissory notes from related parties on the condensed consolidated balance sheets. The loss on the increase in fair value of the Promissory Notes during the six months ended June 30, 2022 was \$3.1 million of which \$0.5 million is included in interest expense, which is recognized based on the effective interest method, and \$2.6 million is included in change in fair value of promissory notes on the condensed consolidated statements of operations. The difference between the amount due at maturity and the fair value of the Promissory Notes as of June 30, 2022 is \$1.1 million.

**7. WARRANTS**

In connection with the Note Agreement, on August 11, 2021 the Company granted Warrants to purchase up to 33,357 shares of common stock at a price of \$0.01 per share. The Warrants are exercisable at any time through the tenth anniversary from the date of grant. The Warrants have customary anti-dilution provisions for stock splits, stock dividends and recapitalizations of the Company’s common stock. The Warrants have been determined to be liability classified as the exercise price may be reduced and result in the issuance of additional shares in connection with the sale of the Company if such warrants are not assumed. The warrants were initially recorded at fair value with a corresponding debt discount (see Note 6) at grant date and are subsequently remeasured to fair value each reporting period. The Company recorded a fair value loss of \$509 thousand, which is included in other income, net in the condensed consolidated statements of operations for the six months ended June 30, 2022. The fair value of the warrant liability as of June 30, 2022 and December 31, 2021 was \$1.1 million and \$561 thousand, respectively, and is included in other long-term liabilities in the condensed consolidated balance sheets. As of June 30, 2022, none of the warrants have been exercised.

The Company has determined the warrant liability to be a Level 3 fair value measurement. The Company utilizes the Black-Scholes-Merton (“Black-Scholes”) model to determine the fair value of the Warrants at each reporting date. The significant inputs utilized in the Black-Scholes model as of June 30, 2022 and December 31, 2021 were as follows:

	<u>June 30, 2022</u>	<u>December 31, 2021</u>
Common Stock Fair Value Per Share	\$ 32.07	\$ 16.81
Exercise Price Per Share	\$ 0.01	\$ 0.01
Volatility	75.7%	75.7%
Risk-free rate	3.25%	0.53%
Expected Dividend Rate	0.0%	0.0%

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The expected dividend rate is 0.0% as the Company has not and does not intend to pay dividends. The Company utilized the probability weighted expected return method ("PWERM") to value the Company's common stock. The Company's common stock fair value per share under the PWERM was determined by applying a probability weighting to a stay-private scenario and a sale scenario. The probability weighted common stock fair value was adjusted for lack of marketability by applying a blended discount of 23% to arrive at the concluded common stock fair value included in the Black-Scholes model.

The following table summarizes the changes in the warrant liability included in other long-term liabilities (in thousands):

Balance as of December 31, 2021	\$ 561
Change in fair value of warrant liability	<u>509</u>
Balance as of June 30, 2022	\$1,070

*Other Warrants*

The Company had also granted warrants in 2017 and 2018 to purchase 100,000 shares of common stock at a price of \$0.96 per share. 75,000 of such warrants expire on January 12, 2027 and the remaining 25,000 expire on July 20, 2028. The warrants are fully vested and exercisable at the Holder's option at any time. Any shares not exercised at time of an acquisition will automatically be deemed to be cashless exercises. Under the applicable accounting literature, these warrants meet the criteria to be classified as permanent equity within the equity section of the condensed consolidated balance sheet.

In addition, in connection with the Promissory Notes, the Company issued the Promissory Note Warrants to purchase up to 31,024 shares of common stock of the Company at an exercise price of \$0.01 per share. The Promissory Note Warrants are fully vested and exercisable at the Holder's option at any time. Under the applicable accounting literature, these warrants meet the criteria to be classified as permanent equity within the equity section of the condensed consolidated balance sheet.

**8. INCOME TAXES**

The income tax expense for the six months ended June 30, 2022 was \$65 thousand and income tax benefit of \$284 thousand for the six months ended June 30, 2021. Income tax expense differs from the income taxes expected at the U.S. federal statutory tax rate of 21%, primarily due to state taxes and additional valuation allowance for the six months ended June 30, 2022.

**9. ACQUISITION**

On December 2, 2021, the Company acquired the assets of Betabrand through a credit bid of \$7 million on Betabrand's outstanding indebtedness. The Company engaged a third-party valuation specialist to assist with the purchase price valuation, which resulted in goodwill of \$3.1 million. The following table summarizes the finalized fair value of the assets and assumed liabilities (in thousands):

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	As of December 2, 2021
<b>Acquired assets</b>	
Inventory	\$ 2,408
Other current assets	741
Property and equipment	26
Internal-use software and website	348
Intangible assets	
Customer relationships	2,538
Developed technology	748
Trade name	438
Security Deposits	19
<b>Total identifiable assets</b>	<b>\$ 7,266</b>
<b>Liabilities assumed</b>	
Accounts payable	\$ 151
Deferred revenue	3,224
<b>Total liabilities</b>	<b>\$ 3,375</b>

On December 31, 2021, the Company and CFL entered into a Limited Liability Operating Agreement (the “LLC Agreement”), whereby Nogin contributed certain assets acquired from the Betabrand acquisition and entered into a MSA with IPCO to provide certain eCommerce services, marketing, photography, customer service and merchant credit card monitor fraud services; and CFL entered into a Master Supply Agreement with IPCO and agreed to procure the supply of inventory to IPCO, provide manufacturing, fulfillment, logistics and warehousing services for the inventory. The Company and CFL each received fifty percent ownership.

**10. RELATED PARTY TRANSACTIONS**

The Company provides services to its joint ventures, ModCloth and IPCO under Master Services agreements (“MSA”), which were entered into on April 25, 2021 and December 31, 2021, respectively. Sales under the MSA to ModCloth and IPCO both represented \$3.5 million of revenue during the six months ended June 30, 2022. In addition, the Company sold inventory to IPCO for \$0.6 million, included in net revenue to related parties in the condensed consolidated statement of operations. As of June 30, 2022 and December 31, 2021, receivables from ModCloth of \$6.2 million and \$5.3 million, respectively, were included in related party receivables on the condensed consolidated balance sheets. As of June 30, 2022, payables to IPCO of \$1.9 million was included in related party payables on the condensed consolidated balance sheets.

During Q2 2022, the Company issued a portion of the Promissory Notes described in Note 7 to certain principal owners and members of management of the Company which have been identified as related parties. The Company received proceeds in connection with the Promissory Notes to related parties of \$2.0 million at issuance of which \$0.2 million was allocated to the Promissory Note Warrants. The fair value of Promissory Notes with related parties as of June 30, 2022 was \$2.7 million. During the six months ended June 30, 2022, the Company recognized a loss on the increase in fair value of such Promissory Notes with related parties of \$0.9 million of which \$0.7 million is included in change in fair value of promissory notes and \$0.2 million is included in interest expense on the condensed consolidated statements of operations.

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**11. REVENUE**

*Disaggregation of Revenue*

The Company has five major streams of revenue. CaaS service revenue, product revenue and shipping revenue are considered transferred to customers at the point of sale. Marketing and other revenue (other than B2C fulfillment services for rental space) are considered transferred to customers when services are performed. Thus, these revenues streams are recognized at a point in time. B2C fulfillment services for rental space is recognized over time.

The following table presents a disaggregation of the Company's revenues by revenue source for the six months ended June 30, 2022 and 2021 (in thousands):

	<u>Six Months ended June 30,</u>	
	<u>2022</u>	<u>2021</u>
Commerce-as-a-Service Revenue	\$ 10,307	\$ 9,382
Product sales revenue	20,756	4,515
Marketing revenue	7,686	8,808
Shipping revenue	4,115	2,823
Other revenue	2,684	2,746
Total revenue	<u>\$ 45,548</u>	<u>\$ 28,274</u>

**12. SEGMENT REPORTING**

The Company conducts business domestically and our revenue is managed on a consolidated basis. Our Chief Executive Officer, who is our Chief Operating Decision Maker, reviews financial information presented on a consolidated basis for purposes of allocating resources and evaluating financial performance. There are no segment managers who are held accountable for operations, operating results, and plans for levels, components, or types of products or services below the consolidated unit level. Accordingly, the Company is considered to be a single reportable segment.

All of the Company's long-lived assets and external customers are located within the United States.

**13. EARNINGS PER SHARE**

Basic and diluted net income (loss) per share are computed using the two-class method as required when there are participating securities. The Company's redeemable convertible preferred stock are participating securities as the holders of the redeemable convertible preferred stock are entitled to participate with in dividends with common stock. In periods of net income, net income is attributed to common stockholders and participating securities based on their participating rights. Net losses are not allocated to the participating securities as the participating securities do not have a contractual obligation to share in any losses. The following table presents the Company's basic and diluted net income (loss) per share:



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<i>(In thousands, except share and per share amounts)</i>	<u>Six Months ended June 30,</u>	
	<u>2022</u>	<u>2021</u>
<b>Numerator: Basic EPS</b>		
Net income (loss)	\$ (20,915)	\$ 2,325
Less: Undistributed earnings attributable to participating securities	—	(645)
Net income (loss) attributable to common stockholders-basic	<u>\$ (20,915)</u>	<u>\$ 1,680</u>
<b>Denominator: Basic EPS</b>		
Weighted average shares of common stock outstanding-basic	<u>9,129,358</u>	<u>9,129,358</u>
<b>Net income (loss) per share attributable to common stock-basic</b>	<u>\$ (2.29)</u>	<u>\$ 0.18</u>

<i>(In thousands, except share and per share amounts)</i>	<u>Six Months ended June 30,</u>	
	<u>2022</u>	<u>2021</u>
<b>Numerator: Diluted EPS</b>		
Net income (loss) attributable to common stockholders-diluted	\$ (20,915)	\$ 1,680
<b>Denominator: Diluted EPS</b>		
Weighted average shares of common stock outstanding-diluted	9,129,358	9,129,358
Dilutive potential shares of common stock:		
Options to purchase shares of common stock	—	167,367
Warrants to purchase shares of common stock	—	92,485
Weighted average shares of common stock outstanding-diluted	<u>9,129,358</u>	<u>9,389,210</u>
<b>Net income (loss) per share attributable to common stock-diluted</b>	<u>\$ (2.29)</u>	<u>\$ 0.18</u>

The Company's potentially dilutive securities below, have been excluded from the computation of diluted net loss per share as they would be anti-dilutive.

***Weighted-average number of potentially anti-dilutive shares excluded from calculation of earnings per share***

	<u>Six Months ended June 30,</u>	
	<u>2022</u>	<u>2021</u>
Series A convertible, redeemable preferred shares	2,042,483	2,042,483
Series B convertible, redeemable preferred shares	1,459,462	1,459,562
Stock-based compensation awards	507,314	—
Outstanding warrants	143,705	—

**14. COMMITMENTS AND CONTINGENCIES**

***Operating Leases***

The Company has entered into lease agreements for offices and warehouses located in California.

As of June 30, 2022, the monthly lease payments for the leases range from approximately \$36 thousand to approximately \$124 thousand and the leases expire at various times through November 2028. Some of the leases contain renewal options.

**Branded Online, Inc. dba Nogin**  
**Notes to the Unaudited Condensed Consolidated Financial Statements**

Minimum rent payments under all operating leases are recognized on a straight-line basis over the term of the lease including any periods of free rent, and any difference between rental payments and straight-line is recognized as deferred rent in the accompanying condensed consolidated balance sheet.

Rent expense for the six months ended June 30, 2022 and 2021 was approximately \$2.7 million and \$1.6 million, respectively, and is included in general and administrative expenses in the condensed consolidated statements of operations.

In July 2018, the Company assumed the operating lease for office space of the entity with which an asset purchase agreement (APA) was executed. The monthly lease payment is \$75 thousand and expires in May 2023. The future minimum lease payments are included in the table below. The Company subleased the office space to a third-party in December 2018 for approximately \$87 thousand per month. The sublease agreement will expire in May 2023. Future rental income is as follows: approximately \$1.0 million per year during 2022 and approximately \$435 thousand in 2023.

Future minimum lease payments under non-cancelable terms are as follows (in thousands):

	<u>As of June 30, 2022</u>
2022 (remaining payments)	\$ 1,353
2023	1,272
2024	873
2025	900
2026	927
Thereafter	1,853
Total minimum lease payments	<u>\$ 7,178</u>

***Litigation***

In the ordinary course of business, the Company may face various claims brought by third parties and the Company may, from time to time, make claims or take legal actions to assert its rights, including intellectual property disputes, contractual disputes, and other commercial disputes. Any of these claims could subject the Company to litigation. As of June 30, 2022 there are no claims that would cause a material impact on the condensed consolidated financial statements.

***Indemnities***

The Company's directors and officers agreements require us, among other things, to indemnify the director or officer against specified expenses and liabilities, such as attorneys' fees, judgments, fines and settlements, paid by the individual in connection with any action, suit or proceeding arising out of the individual's status or service as our director or officer, other than liabilities arising from willful misconduct or conduct that is knowingly fraudulent or deliberately dishonest, and to advance expenses incurred by the individual in connection with any proceeding against the individual with respect to which the individual may be entitled to indemnification by the Company. The Company also indemnifies its lessor in connection with its facility lease for certain claims arising from the use of the facilities.

These indemnities do not provide for any limitation of the maximum potential future payments the Company could be obligated to make. Historically, the Company has not incurred any payments for these obligations and, therefore, no liabilities have been recorded for these indemnities in the accompanying condensed consolidated balance sheets.

**Branded Online, Inc. dba Nogin**  
**Notes to the Unaudited Condensed Consolidated Financial Statements**

**15. RECENT EVENTS**

On February 14, 2022, the Company, together with SWAG filed a FormS-4 registration statement related to plans of a merger between the parties with Nogin as the surviving entity and a wholly owned subsidiary of SWAG, which was approved by the SEC in July 2022 (Note 16). As of June 30, 2022, \$2.8 million of direct and incremental transaction costs have been deferred and are included in prepaid and other current assets, and in accrued expense and other liabilities, on the condensed consolidated balance sheet.

On April 20, 2022, SWAG and the Company entered into an amended merger agreement, which secured private placement fund financing in the form of subscription agreements pursuant to which SWAG agreed to issue and sell, at the par value of the notes, to subscribers immediately prior to the closing of the merger up to an aggregate principal amount of \$75 million of 7% convertible senior notes due 2026 and an aggregate of 1.5 million warrants. The financing is conditioned upon the closing of the merger.

**16. SUBSEQUENT EVENTS**

The Company has evaluated the impact of subsequent events through September 1, 2022, which is the date the financial statements were available to be issued.

In July 2022 the Company amended the Note Agreement to borrow an additional \$3 million from the same financial institution providing the Note Agreement, which bear interest at a rate per annum of 7.75% plus the greater of 3.50% or the prime rate as published by the Wall Street Journal. In connection with this borrowing, the Company issued warrants to purchase up to 13,343 shares of common stock of the Company at an exercise price of \$0.01 per share. Such warrants, along with the promissory note warrants (Note 6), were converted into a number of shares of the Company's common stock prior to closing of the transaction in accordance with the related warrant agreements.

In July 2022, the beneficiary to the letter of credit issued against the line of credit (Note 6) exercised the right to draw on the line, which increased the amount owed on the line of credit by \$3 million.

The SEC approved the Form S-4 registration statement in July 2022 related to plans of a merger between SWAG and the Company (Note 15). The special shareholder meeting took place on August 22, 2022 and the transaction closed on August 26, 2022. Upon close of the transaction, the Company received cash of \$65 million, which were used to repay all amounts outstanding under the Note Agreement, Promissory Notes and line of credit (Note 6).

## UNAUDITED PRO FORMA CONDENSED COMBINED FINANCIAL STATEMENTS

### Introduction:

Nogin Inc. (the “Company”, “Nogin”, f/k/a “SWAG”) is providing the following unaudited pro forma condensed combined financial information prepared in accordance with Article 11 of Regulation S-X as amended by the final rule, Release No. 33-10786 “*Amendments to Financial Disclosures about Acquired and Disposed Businesses*”. The unaudited pro forma condensed combined financial information presents the pro forma effects related to the following:

- The automatic conversion of Branded Online, Inc.’s (“Legacy Nogin”) redeemable Series A and Series B preferred stock to Legacy Nogin Common Stock;
- The net settlement of Legacy Nogin’s outstanding warrants for Legacy Nogin Common Stock via cashless exercise;
- The repayment of Legacy Nogin debt, including debt issued subsequent to June 30, 2022;
- The execution of the standby capital support facility agreement (the “Standby Agreement”) between SWAG and a financial institution (the “Financial Institution”);
- The redemption of 17,021,595 shares of SWAG Class A Common Stock for \$173.0 million.
- The PIPE Subscription Agreements entered into by SWAG with various investors to purchase Convertible Notes and PIPE Warrants for an aggregate purchase price of \$65.5 million; and
- The merger between Legacy Nogin and Merger Sub, a wholly owned subsidiary of SWAG, with Legacy Nogin surviving the merger as a wholly owned subsidiary of Nogin (together, the “Merger”) which was consummated on August 26, 2022 (the “Closing”).

SWAG was a blank check company incorporated as a Delaware corporation and formed for the purpose of effecting a merger, capital stock exchange, asset acquisition, stock purchase, reorganization or similar business combination with one or more businesses. On August 2, 2021, SWAG consummated its initial public offering of its units, with each unit consisting of one share of SWAG Class A Common Stock and one-half of one public warrant, which included the underwriters partially exercising their over-allotment option. Simultaneously with the closing of the initial public offering, SWAG completed the private sale of 9,000,000 private placement warrants at a price of \$1.00 per private placement warrant, to the Sponsor generating gross proceeds of \$9.0 million. As part of the underwriters’ partial exercise of their over-allotment option, SWAG consummated the sale of an additional 2,807,868 units at \$10.00 per unit, and the sale of an additional 982,754 private placement warrants, at \$1.00 per private placement warrant, generated gross proceeds of \$29.1 million. Following the closing of SWAG’s initial public offering, a total of \$231.5 million of the net proceeds from SWAG’s initial public offering, the sale under the underwriters’ over-allotment option and the sale of the private placement warrants were placed into the Trust Account. As of June 30, 2022, funds in the Trust Account totaled \$231.8 million.

Legacy Nogin is an e-commerce, technology and platform provider in the apparel and ancillary industry’s multichannel retailing, business-to-consumer and business-to-business domains. Nogin’s commerce-as-a-service platform delivers full-stack enterprise-level capabilities to online retailers enabling them to compete with larger retailers. Nogin provides the technology for these companies to manage complexities related to customer management, order optimization, returns, and fulfillment. In addition, Nogin is an e-commerce technology platform and distribution partner whose products also include website development, photography, content management, customer service, marketing, warehousing, and fulfillment. Nogin’s business model is based on providing a total e-commerce solution to its partners on a revenue-sharing basis.

The unaudited pro forma condensed combined financial information is based upon, and should be read in conjunction with, the historical financial statements and related notes of SWAG and Legacy Nogin for the applicable periods included in the Proxy Statement/Prospectus or filed as Exhibit 99.1 to the Current Report on Form 8-K dated September 1, 2022. The pro forma condensed combined financial information has been presented for informational purposes only and is not necessarily indicative of what the Company’s balance sheet or statement of operations actually would have been had the Merger been completed as of the dates indicated, nor do they purport to project the future financial position or operating results of the Company. The actual financial position and results of operations may differ significantly from the pro forma amounts reflected herein due to a variety of factors. The pro forma financial information is presented for illustrative purposes only and does not reflect the costs of any integration activities or cost savings or synergies that may be achieved as a result of the Merger.

The unaudited pro forma condensed combined balance sheet combines the Legacy Nogin unaudited consolidated balance sheet as of June 30, 2022 and the SWAG unaudited historical consolidated balance sheet as of June 30, 2022, giving effect to the Merger as if it had been consummated on June 30, 2022. The unaudited pro forma condensed combined statements of operations for the six months ended June 30, 2022 and the year ended December 31, 2021 presents the pro forma effect of the Merger as if it had been consummated on January 1, 2021.

The Merger will be accounted for as a reverse recapitalization, with no goodwill or other intangible assets recorded, in accordance with US GAAP. Under this method of accounting, SWAG will be treated as the acquired company for financial reporting purposes. Accordingly, for accounting purposes, the Merger will be treated as the equivalent of Legacy Nogin issuing shares for the net assets of SWAG, accompanied by a recapitalization. The net assets of SWAG will be recorded at carrying value, with no goodwill or other intangible assets recorded.

Legacy Nogin has been determined to be the accounting acquirer based on evaluation of the following facts and circumstances:

- Legacy Nogin’s shareholders will have majority of the voting power of the Company
- Legacy Nogin’s existing management will primarily comprise the management of the Company
- Legacy Nogin will comprise the ongoing operations of the Company

The following summarizes the pro forma ownership of the Company following the Merger (shares are in millions):

	Shares	Ownership %
Legacy Nogin Equity holders	54.3	81.4%
Standby Agreement Financial Institution	0.5	0.8%
Sponsor	5.7	8.5%
Transaction Service Providers	0.4	0.6%
Public Stockholders (1)	5.8	8.7%
<b>Total</b>	<b>66.7</b>	<b>100.0%</b>

(1) Included in Public Stockholders amount is 5.7 million shares purchased by the Standby Agreement Financial Institution prior to redemption deadline.

The following unaudited pro forma condensed combined balance sheet as of June 30, 2022 and the unaudited pro forma condensed combined statement of operations for the six months ended June 30, 2022 and for the year ended December 31, 2021 are based on the historical financial statements of SWAG and Legacy Nogin. The unaudited pro forma adjustments are based on information currently available and assumptions and estimates underlying the unaudited pro forma adjustments are described in the accompanying notes. Actual results may differ materially from the assumptions used to present the accompanying unaudited pro forma condensed combined financial information.

**UNAUDITED PRO FORMA CONDENSED COMBINED BALANCE SHEET**  
**As of June 30, 2022**  
**(\$ in thousands)**

	Historical		Transaction Accounting Adjustments	Notes	Pro Forma Combined
	SWAG	Legacy Nogin			
<b>Assets</b>					
<b>Current Assets:</b>					
Cash	\$ 18	\$ 1,207	\$ 24,136	[A]	\$ 25,361
Accounts Receivable, Net	—	2,523	—		2,523
Related Party Receivables	5	6,236	—		6,241
Inventory	—	16,385	—		16,385
Prepaid Expenses and Other Current Assets	347	5,225	(2,800)	[F]	2,772
<b>Total Current Assets</b>	<b>370</b>	<b>31,576</b>	<b>21,336</b>		<b>53,282</b>
Restricted Cash	—	1,500	—		1,500
Property and Equipment—Net	—	1,699	—		1,699
Intangible Assets—Net	—	996	—		996
Investment in Unconsolidated Affiliates	—	11,588	—		11,588
Marketable Securities Held in Trust Account	231,843	—	(231,843)	[B]	—
Other Non-Current Asset	23	664	42,005	[K]	42,692
<b>Total Assets</b>	<b>\$232,236</b>	<b>\$ 48,023</b>	<b>\$ (168,502)</b>		<b>\$ 111,757</b>
<b>Liabilities and Stockholders' Equity (Deficit)</b>					
<b>Current Liabilities:</b>					
Accounts Payable	—	16,086	(3,000)	[H]	13,086
Due to Clients	—	4,596	—		4,596
Related Party Payables	—	1,870	9,777	[J]	11,647
Promissory Notes	—	6,740	(6,740)	[H]	—
Promissory Notes from Related Parties	400	2,666	(2,666)	[H]	400
Accrued Expenses and Other Liabilities	2,518	10,823	(4,694)	[G]	8,647
<b>Total Current Liabilities</b>	<b>2,918</b>	<b>42,781</b>	<b>(7,323)</b>		<b>38,376</b>
Line of Credit	—	4,998	(4,998)	[H]	—
Long-Term Note Payable	—	19,921	(19,921)	[H]	—
Convertible Notes	—	—	62,154	[I]	62,154
Deferred Tax Liabilities	—	1,239	—		1,239
Other Long-Term Liabilities	—	1,244	11,040	[E]	12,284
Deferred Underwriting Fee Payable	7,983	—	(7,983)	[C]	—
<b>Total Liabilities</b>	<b>10,901</b>	<b>70,183</b>	<b>32,969</b>		<b>114,053</b>
<b>Commitments and Contingencies</b>					
Series A Convertible	—	4,687	(4,687)	[D]	—
Series B Convertible	—	6,502	(6,502)	[D]	—
Class A Common Stock Subject to Redemption	231,535	—	(231,535)	[D]	—
<b>Stockholders' Equity/(Deficit):</b>					
Common Stock	—	1	(1)	[D]	—
Class A Common Stock	—	—	7	[D]	7
Class B Common Stock	1	—	(1)	[D]	—
Additional Paid-In Capital	—	5,157	43,348	[D]	48,505
Treasury Stock	—	(1,330)	1,330	[D]	—
Accumulated Deficit	(10,201)	(37,177)	(3,430)	[D]	(50,808)
<b>Total Stockholders' Equity (Deficit)</b>	<b>(10,200)</b>	<b>(33,349)</b>	<b>41,253</b>		<b>(2,296)</b>
<b>Total Liabilities and Stockholders' Equity/ (Deficit)</b>	<b>\$232,236</b>	<b>\$ 48,023</b>	<b>\$ (168,502)</b>		<b>\$ 111,757</b>

**UNAUDITED PRO FORMA CONDENSED COMBINED STATEMENT OF OPERATIONS**  
**For the Six Months Ending June 30, 2022**  
(Sin thousands, except share and per share amounts)

	Historical		Transaction Accounting Adjustments	Notes	Pro Forma Combined
	SWAG	Legacy Nogin			
Service Revenue	\$ —	\$ 17,787	\$ —		\$ 17,787
Product Revenue	—	20,756	—		20,756
Revenue from Related Parties	—	7,005	—		7,005
Total Revenue	<u>\$ —</u>	<u>\$ 45,548</u>	<u>\$ —</u>		<u>\$ 45,548</u>
Operating Costs and Expenses:					
Cost of Services	—	11,192	—		11,192
Cost of Product Revenue	—	15,407	—		15,407
Sales & Marketing	—	1,186	—		1,186
Research & Development	—	2,827	—		2,827
General and Administrative	2,067	30,362	—		32,429
Depreciation and Amortization	—	420	—		420
Total Operating Costs and Expenses	<u>2,067</u>	<u>61,394</u>	<u>—</u>		<u>63,461</u>
Operating Loss	(2,067)	(15,846)	—		(17,913)
Interest Expense	—	(2,117)	(1,584)	[D]	(3,701)
Change in Fair Value of Promissory Notes	—	(2,566)	2,566	[E]	—
Change in Fair Value of Unconsolidated Affiliates	—	(1,982)	—		(1,982)
Other Income (Loss)	336	1,661	—		1,977
Income (Loss) Before Income Taxes	(1,731)	(20,850)	982		(21,599)
Provision for Income Tax	10	65	—		75
Net Income (Loss)	<u>\$ (1,741)</u>	<u>\$ (20,915)</u>	<u>\$ 982</u>		<u>\$ (21,674)</u>
<b>Pro Forma Loss Per Share</b>					
Weighted Average Shares of Class A Outstanding—Basic and Diluted	22,807,868	—	—		66,694,295
Loss Per Share Class A—Basic and Diluted	\$ (0.06)	—	—		\$ (0.32)
Weighted Average Shares of Class B Outstanding—Basic and Diluted	5,701,967	—	—		—
Loss Per Share Class B—Basic and Diluted	\$ (0.06)	—	—		—
Weighted Average Common Shares Outstanding—Basic and Diluted	—	9,129,358	—		—
Loss Per Common Share—Basic and Diluted	—	\$ (2.29)	—		—

**UNAUDITED PRO FORMA CONDENSED COMBINED STATEMENT OF OPERATIONS**  
**For the Year Ending December 31, 2021**  
**(Sin thousands, except share and per share amounts)**

	Historical				
	SWAG (Historical from 1/5/21 through 12/31/21)	Legacy Nogin	Transaction Accounting Adjustments	Notes	Pro Forma Combined
Service Revenue	\$ —	\$ 41,866	\$ —		\$ 41,866
Product Revenue	—	51,346	—		51,346
Revenue from Related Parties	—	8,136	—		8,136
Total Revenue	\$ —	\$ 101,348	\$ —		\$ 101,348
Operating Costs and Expenses:					
Cost of Services	—	24,174	—		24,174
Cost of Product Revenue	—	20,431	—		20,431
Sales & Marketing	—	1,772	—		1,772
Research & Development	—	5,361	—		5,361
General and Administrative	1,917	55,369	—		57,286
Depreciation and Amortization	—	520	—		520
Transaction Costs	—	—	4,050	[A]	4,050
Total Operating Costs and Expenses	1,917	107,627	4,050		113,594
Operating Loss	(1,917)	(6,279)	(4,050)		(12,246)
Interest Expense	—	(926)	(6,476)	[C]	(7,402)
Change in Fair Value of Unconsolidated Affiliates	—	4,937	—		4,937
Other Income (Loss)	(37)	3,378	(13,631)	[B]	(10,290)
Income (Loss) Before Income Taxes	(1,954)	1,110	(24,157)		(25,001)
Provision for Income Tax	—	1,175	—		1,175
Net Loss	\$ (1,954)	\$ (65)	\$ (24,157)		\$ (26,176)
<b>Pro Forma Loss Per Share</b>					
Weighted Average Shares of Class A Outstanding—Basic and Diluted	10,024,409	—	—		66,694,295
Loss Per Share Class A—Basic and Diluted	\$ (0.13)	—	—		\$ (0.39)
Weighted Average Shares of Class B Outstanding—Basic and Diluted	5,304,936	—	—		—
Loss Per Share Class B—Basic and Diluted	\$ (0.13)	—	—		—
Weighted Average Common Shares Outstanding—Basic and Diluted	—	9,129,358	—		—
Loss Per Common Share—Basic and Diluted	—	\$ (0.01)	—		—



## NOTES TO UNAUDITED PRO FORMA CONDENSED COMBINED FINANCIAL INFORMATION

### 1. Description of the Business Combination

On August 26, 2022, Legacy Nogin and SWAG consummated the Merger. Pursuant to the Merger Agreement, at Closing, Legacy Nogin Stockholders received an aggregate of \$551.0 million in 54.3 million newly issued shares of Class A Common Stock at a price of \$10.00 per share and 1.0 million vested SWAG options, and \$15.0 million in cash (the “Cash Consideration”) for total aggregate consideration of \$566.0 million. In addition, Legacy Nogin’s unvested options were assumed and converted into 0.7 million unvested SWAG options. On August 26, 2022, SWAG, Merger Sub and Legacy Nogin entered into the Amendment No.2 to the Merger Agreement (“MA Amendment No.2”). Pursuant to this amendment the Cash Consideration paid at Closing was \$5.2 million. Payment of the remaining \$9.8 million in Cash Consideration would be deferred at Closing and payable pursuant to the terms and conditions of MA Amendment No.2 filed as Exhibit 2.3 to the Current Report on Form 8-K dated September 1, 2022. After four years and ninety-one days from Closing, if the deferred Cash Consideration is not fully paid, the remaining amount shall be settled through the issuance of the Company’s Common Stock equal to the quotient of (i) the remaining deferred Cash Consideration divided by (ii) the 10-day volume weighted average trading price of the Company’s Common Stock.

At Closing, Legacy Nogin merged with and into Merger Sub, a wholly owned subsidiary of SWAG with Legacy Nogin as the surviving company and Legacy Nogin became a wholly owned subsidiary of SWAG.

#### PIPE Convertible Notes

In connection with the PIPE Subscription Agreements, immediately prior to Closing, the Company issued and sold to PIPE investors an aggregate principal of \$65.5 million of 7.00% Convertible Senior Notes and 1.4 million PIPE Warrants for aggregate proceeds of \$65.5 million.

#### Standby Agreement

On August 18, 2022, SWAG entered into the Standby Agreement with a Financial Institution whereby the Financial Institution would use commercially reasonable efforts to purchase approximately 6 million shares (as such number may be increased with the mutual consent of SWAG and the Financial Institution, subject to maximum of 9.99% of the post-Merger outstanding common stock) of SWAG’s Class A Common Stock, par value \$0.0001 per share (the “Purchased Shares”). Pursuant to the Standby Agreement, the Company would pay the Financial Institution immediately following the Closing an amount equal to approximately 80% of the aggregate price (such aggregate price of Purchased Shares, the “Standby Capital Deposit Amount”) of the Purchased Shares (80% of the Standby Capital Deposit Amount, the “Standby Capital Funding”). The amount of the Standby Capital Deposit Amount less the Standby Capital Funding is referred to as the “Standby Capital Support Amount”, which represents 20% of the Standby Capital Funding. Thereafter, the Financial Institution may sell the Purchased Shares in the four years plus one day following the Closing of the Merger. Following the recoupment of the Standby Capital Support Amount by the Financial Institution, any subsequent sales of the Purchased Shares will be limited to (i) 25% of the daily volume of the shares to the extent the share price is at any time at or above \$7.50 per share and (ii) the mutual agreement of the Company and the Financial Institution, to the extent the share price is below \$7.50. Following the recoupment of the Standby Capital Support Amount, the Financial Institution will retain from subsequent sales of Purchased Shares approximately 3.5% of the Standby Capital Funding that was paid to the Financial Institution (the “Liquidity Fee”).

While the redemption period for the SWAG Common Stock was outstanding, the Financial Institution purchased 5,676,351 shares of Class A Common Stock from Public Stockholders resulting in a payment of the Standby Capital Funding to the Financial Institution at the Closing of \$46.2 million. In addition, after the redemption period, the Financial Institution purchased an additional 517,079 shares of Class A Common Stock of the Company based on the redemption price in effect for the Public Stockholders. The Financial Institution paid to the Company a net amount for such shares representing the Standby Capital Support Amount of \$1.1 million. Details of the Purchased Shares held by the Financial Institution at the Closing based on where such Purchased Shares are included in the pro forma ownership table above are as follows (in millions of \$ except for shares):

	Public Stockholders	Standby Agreement Financial Institution	Total
Purchased Shares (in shares)	5,676,351	517,079	6,193,430
Liquidity Fee	\$ 1.6	\$ 0.2	\$ 1.8
Standby Capital Deposit Amount	\$ 57.7	\$ 5.3	\$ 63.0
Less: Standby Capital Funding	(46.2)	(4.2)	(50.4)
Standby Capital Support Amount	<u>\$ 11.5</u>	<u>\$ 1.1</u>	<u>\$ 12.6</u>

For purposes of the pro forma financial information, the Company is presenting the Standby Agreement as Other Assets of \$42.0 million on the unaudited pro forma condensed combined balance sheet, which is based on the fair value of the Purchased Shares at Closing, approximating \$9.10 per share as of August 26, 2022, less the Standby Capital Support Amount, less the Liquidity Fee.

#### Transaction Fees

SWAG’s and Legacy Nogin’s contracts with its financial advisors required that at the close of the Merger, a portion of the transaction costs would be paid in cash at Closing, a portion paid in shares of Class A Common Stock at Closing at a presumed price of \$10 per share, and a portion deferred. The deferred financial advisory fees at the close of the Merger will be due and payable at the earlier of (a) the maturity of the PIPE convertible notes, (b) the conversion, repurchase or redemption of the PIPE convertible notes or (c) the closing of the sale of \$25 million of newly issued equity interests in the Company after consummation of the Merger. As a result, the unpaid banker advisory transaction costs have been classified as non-current on the unaudited pro forma condensed combined balance sheet. Further, each financial advisor has the option to settle the outstanding fees at any point in shares of Class A Common Stock at the fair value of the common stock at the date of settlement. For additional information regarding settlement of the deferred portion see the section titled *Certain Engagements in Connection with the Business Combination and Related Transactions* in the Proxy Statement/Prospectus. The following details total SWAG transaction costs and total Legacy Nogin transaction costs broken down by the portion paid in cash at Closing, the portion paid in shares of Common Stock at Closing and the portion deferred at Closing as well as the number of shares of Common Stock issued at Closing (\$in thousands):

	Total Transaction Costs	Portion Paid in Cash at Close	Portion Paid in Stock at Close	Portion Deferred at Close	Shares Issued at Close
<b>SWAG Transaction Costs</b>					
Deferred IPO and Financial Advisory Fees	\$ 10,383	\$ 166	\$ 2,500	\$ 7,717	250,000
PIPE Fees	1,950	303	487	1,160	48,750
Legal Fees	3,340	3,340	—	—	—

Other	<u>669</u>	<u>669</u>	<u>—</u>	<u>—</u>	<u>—</u>
Total SWAG Transaction Costs	<u>\$ 16,342</u>	<u>\$4,478</u>	<u>\$2,987</u>	<u>\$ 8,877</u>	<u>298,750</u>

	Total Transaction Costs	Portion Paid in Cash at Close	Portion Paid in Stock at Close	Portion Deferred at Close	Shares Issued at Close
<b>Legacy Ngin Transaction Costs</b>					
Financial Advisory Fees	\$ 4,350	\$ —	\$1,087	\$ 3,263	108,750
Legal Fees	2,750	2,750	—	—	—
Other	393	393	—	—	—
Total Legacy Ngin Transaction Costs	<u>\$ 7,493</u>	<u>\$3,143</u>	<u>\$1,087</u>	<u>\$ 3,263</u>	<u>108,750</u>

## 2. Basis of Presentation

The unaudited pro forma condensed combined financial information has been prepared assuming the Merger is accounted for as a reverse recapitalization with Ngin as the accounting acquirer.

The pro forma adjustments represent management's estimates based on information available as of the date of the filing of the condensed combined financial information and do not reflect possible adjustments related to restructuring or integration activities that have yet to be determined or transaction or other costs following the Merger that are not expected to have a continuing impact on the statement of operations. Further, one-time transaction-related expenses incurred prior to, or concurrently with the consummation of the Merger, that are not currently presented in the historical condensed combined statements of operations for SWAG and Legacy Ngin, are presented in the unaudited pro forma condensed combined statements of operations as if the Merger was consummated on January 1, 2021.

The unaudited condensed combined pro forma adjustments, which are described in the accompanying notes, may be revised as additional information becomes available and is evaluated. Therefore, it is likely that the actual adjustments will differ from the pro forma adjustments and it is possible the difference may be material. The Company believes that its assumptions and methodologies provide a reasonable basis for presenting all of the significant effects of the Merger based on information available to management at this time and that the pro forma adjustments give appropriate effect to those assumptions and are properly applied in the unaudited pro forma condensed combined financial information.

The unaudited pro forma condensed combined balance sheet as of June 30, 2022 assumes that the Merger occurred on June 30, 2022. The unaudited pro forma condensed combined statements of operations for the six months ended June 30, 2022 and for the year ended December 31, 2021 presents pro forma effects to the Merger as if it had been consummated on January 1, 2021.

### 3. Adjustments to Unaudited Pro Forma Condensed Combined Balance Sheet as of June 30, 2022

The pro forma notes and adjustments, based on preliminary estimates that could change materially as additional information is obtained, are as follows:

[A] Represents the pro forma adjustments to cash upon the Closing:

	<u>Amount</u>
Reclass of SWAG Cash Held in Trust Account	\$ 231,843
PIPE Investment Proceeds <sup>(1)</sup>	65,500
Standby Agreement Cash Inflow <sup>(1)</sup>	1,052
Legacy Nogin Subsequent Event Debt Proceeds <sup>(2)</sup>	3,000
Legacy Nogin Equity Holders Cash Consideration <sup>(1)</sup>	(5,223)
Legacy Nogin Transaction Costs <sup>(3)</sup>	(3,143)
SWAG Transaction Costs <sup>(4)</sup>	(4,478)
Class A Common Stock Redemptions <sup>(1)</sup>	(173,033)
Standby Agreement Cash Outflow <sup>(1)</sup>	(46,252)
Payment of Legacy Nogin Debt <sup>(5)</sup>	(45,130)
<b>Pro Forma Adjustment to Cash</b>	<b><u>\$ 24,136</u></b>

- (1) See *Description of Business Combination* section above for additional information.
- (2) Subsequent to June 30, 2022, Legacy Nogin issued additional Promissory Notes for \$3.0 million in proceeds. Per the terms of the Promissory Note agreements, the Company was required to repay the Promissory Notes at Closing of the Merger. The payment of \$4.5 million associated with these Promissory Notes are included in the "Payment of Legacy Nogin Debt" line item above. As a result, the Company has given pro forma effect to the proceeds received from such Promissory Notes subsequent to the June 30, 2022.
- (3) Represents the payment of non-recurring direct and incremental transaction costs incurred by Legacy Nogin in connection with the Merger. Costs include legal, financial advisory, and other professional fees related to the Merger. Payment includes \$2.8 million of transaction costs that were accrued as of June 30, 2022. See *Description of Business Combination* section above for additional information.
- (4) Reflects the payment of non-recurring direct and incremental transaction costs incurred by SWAG in connection with the Merger. Costs include legal, financial advisory, and other professional fees related to the Merger. Payment includes \$2.4 million of transaction costs that were accrued as of June 30, 2022. See *Description of Business Combination* section above for additional information.
- (5) Reflects the payment related to Legacy Nogin's outstanding notes payable of \$21.9 million (inclusive of exit and early termination payments), line of credit of \$8.0 million, outstanding Promissory Notes of \$10.7 million and Promissory Notes issued subsequent to June 30, 2022 of \$4.5 million.

[B] Represents the reclassification of \$231.8 million of cash and securities held in Trust Account that became available at Closing, prior to giving effect to actual redemptions.

[C] Reflects the adjustment to deferred underwriters' fees incurred during the SWAG IPO. See *Description of Business Combination* section above for additional information on settlement of SWAG transaction costs including deferred underwriters' fees. At Closing, the Company paid \$0.2 million of the deferred underwriting fees and continued to defer the remaining \$7.7 million which were reclassified to other long-term liabilities.

[D] The following table summarizes the pro forma adjustments impacting mezzanine equity and shareholders' equity/(deficit):

	Adjustments to SWAG Equity <sup>(1)</sup>	Adjustments to Legacy Nogin Equity <sup>(2)</sup>	Recapitalization Adjustments <sup>(3)</sup>	Redemptions <sup>(4)</sup>	Standby Agreement <sup>(5)</sup>	Other items <sup>(6)</sup>	Pro forma adjustments
SWAG Class A Redeemable							
Common Stock	\$ (231,535)	\$ —	\$ —	\$ —	\$ —	\$ —	\$ (231,535)
Legacy Nogin Preferred Series A	—	(4,687)	—	—	—	—	(4,687)
Legacy Nogin Preferred Series B	—	(6,502)	—	—	—	—	(6,502)
<b>Shareholders' Equity/(Deficit):</b>							
Common Stock	—	—	(1)	—	—	—	(1)
Class A Common Stock	3	—	5	(1)	—	—	7
Class B Common Stock	(1)	—	—	—	—	—	(1)
Additional Paid-In Capital	217,192	10,959	(4)	(173,032)	5,256	(17,023)	43,348
Treasury Stock	—	1,330	—	—	—	—	1,330
Accumulated Deficit	10,201	—	—	—	(8,362)	(5,269)	(3,430)

- (1) Represents the adjustments to SWAG’s mezzanine equity and shareholders’ equity as follows:
- The reclassification of historical SWAG Class A Common Stock subject to possible redemption from mezzanine equity to permanent equity immediately prior to the consummation of the Merger. Impact of \$2 thousand to Class A Common Stock and \$231.5 million to additional paid in capital.
  - The conversion of SWAG Class B Common Stock to shares of SWAG Class A Common Stock for \$1 thousand immediately prior to the consummation of the Merger.
  - Reflects the reclassification of SWAG historical accumulated deficit of \$10.2 million to additional paid in capital in connection with the consummation of the Merger. The reduction to additional paid-in capital of \$14.3 million also includes \$4.1 million of additional non-recurring incremental transaction costs incurred by SWAG in connection with the Merger.
- (2) Represents the adjustments to Legacy Nogin’s mezzanine equity and shareholders’ equity as follows:
- The conversion of Legacy Nogin’s redeemable convertible Series A preferred stock and Series B preferred stock to additional paid-in capital for \$11.2 million immediately prior to the consummation of the Merger.
  - The cancellation of Legacy Nogin treasury stock of \$1.3 million with a corresponding reduction to additional paid in capital.
  - The settlement of Legacy Nogin’s liability classified warrants via cashless exercise resulting in an increase to additional paid-in capital of \$1.1 million.
- (3) Represents recapitalization of Legacy Nogin’s equity and issuance of 54.3 million shares of SWAG’s Class A Common Stock to Legacy Nogin Stockholders as consideration for the reverse recapitalization
- (4) Represents the redemption of 17.0 million shares of Class A Common Stock by SWAG Public Stockholders at \$10.17 per share for \$173.0 million.
- (5) Represents the impact of the Standby Agreement. The increase to additional paid in capital of \$5.3 million represents the Standby Capital Deposit Amount for the purchase of the 517,079 Purchased Shares by the Financial Institution directly from the Company. The increase to accumulated deficit relates to the total Liquidity Fee associated with the Standby Agreement of \$1.8 million as well as the change in the value recognized of the derivative asset at the Closing of \$6.6 million. See *Description of Business Combination* section above for additional information on the Standby Agreement.
- (6) Other adjustments to additional paid in capital and accumulated deficit are as follows:
- A reduction to additional paid in capital of \$15.0 million related to the Cash Consideration to Legacy Nogin Equityholders that was either paid in cash or deferred at Closing.
  - A net reduction to additional paid in capital of \$6.4 million related to Legacy Nogin transaction costs incurred in connection with the Merger that are incremental and non-recurring. The \$6.4 million reduction includes capitalized transaction costs of \$7.5 million (inclusive of \$2.8 million that was deferred as of June 30, 2022 and included in prepaid and other current assets) in connection with the reverse recapitalization offset by \$1.1 million of such transaction costs that were settled in shares of Class A Common Stock of the Company. See *Description of Business Combination* section above for additional information regarding transaction costs.
  - An increase to additional paid in capital of \$2.5 million related to the portion of non-PIPE SWAG transaction costs that were settled in shares of Class A Common Stock of the Company at Closing. See *Description of Business Combination* section above for additional information regarding transaction costs.
  - An increase to additional paid in capital of \$1.9 million related to the PIPE Convertible Notes of which \$1.4 million relates to PIPE Warrants issued in connection with the PIPE subscription and \$0.5 million related to PIPE transaction costs that are settled in shares of Class A Common Stock of the Company. See *Description of Business Combination* section above for additional information regarding transaction costs.
  - Reflects an increase to accumulated deficit of \$5.3 million related to debt extinguishment costs as a result of the payment of Nogin’s outstanding debt at close of the Merger.

[E] In connection with the Merger, the adjustments to other long-term liabilities are as follows (\$ in thousands):

	<u>Amount</u>
Settlement of Legacy Nogin liability classified warrants	\$ (1,100)
Deferred SWAG Transaction Costs	8,877
Deferred Legacy Nogin Transaction Costs	<u>3,263</u>
Total	<u>\$11,040</u>

- [F] Adjustment relates to the reversal of Legacy Nogin transaction costs that were deferred as of June 30, 2022 in connection with the Merger that is accounted for as a reverse recapitalization and recorded to additional paid in capital upon consummation of the Merger.
- [G] The reduction to accrued expenses of \$4.7 million relates to the payment of Legacy Nogin transaction costs of \$2.8 million and SWAG transactions costs of \$2.4 million upon consummation of the Merger that were accrued as of June 30, 2022. This is offset by the write-off of \$0.5 million of the current portion of the unamortized debt discount and debt issuance costs that are included in Legacy Nogin’s historical accrued expenses and other liabilities as of June 30, 2022 and are written-off as a result of the paydown of Legacy Nogin debt at close of the Merger.
- [H] Reflects the payment of Legacy Nogin outstanding debt upon consummation of the Merger. Includes the payment of \$21.5 million of outstanding notes payable (inclusive of exit payments) offset by \$1.6 million write-off of unamortized debt discount and issuance costs associated with the Nogin notes payable (additional write-off of \$0.5 million of unamortized debt discount and issuance costs is included in accrued expenses and other liabilities adjustment – see note [G]).

Adjustment also includes the payment of \$8.0 million related to the Legacy Nogin line of credit of which \$5.0 million was included in line of credit and \$3.0 million was included in accounts payable as a result of the settlement of a \$3.0 million letter of credit associated with the line of credit subsequent to June 30, 2022 for which the related invoices associated with the letter of credit were included in accounts payable as of June 30, 2022.

Finally, adjustment includes the payment of \$10.7 million in connection with the Legacy Nogin Promissory Notes accounted for under the fair value option of accounting and for which \$9.4 million was outstanding as of June 30, 2022 and included in Promissory Notes and Promissory Notes From Related Parties.

- [I] Represents the gross proceeds from the issuance of the PIPE Convertible Debt of \$65.5 million, net of \$1.9 million related to the fees associated with the PIPE Convertible Debt and net of \$1.4 million related to the PIPE Warrants that were issued for no additional consideration in conjunction with the PIPE Convertible Debt. For purposes of the pro forma financial information, the PIPE Convertible Debt has been accounted for as a single debt instrument that does not have a separable derivative associated with the conversion feature. The PIPE Warrants have similar terms to the Private Placement Warrants in which the fair value was determined based on the \$1 per Warrant fair value at which the Private Placement Warrants were issued and are expected to be equity classified. As a result, the 1.4 million PIPE Warrants are being treated as a discount to the PIPE Convertible Notes for \$1.4 million with a corresponding increase to additional paid in capital of \$1.4 million. None of the fees associated with the PIPE Investment were allocated to the PIPE Warrants as the impact would be de minimis.
- [J] Represents the portion of the Cash Consideration to Legacy Ngin Equityholders deferred at Closing. See *Description of Business Combination* section above for additional information on the Cash Consideration.
- [K] Represents the value of the derivative asset associated with the Standby Agreement at Closing. See *Description of Business Combination* section above for additional information of the Standby Agreement and the calculation to determine the value of \$42.0 million at Closing.

**4. Adjustments to Unaudited Pro Forma Condensed Combined Statement of Operations for the Six Months Ended June 30, 2022 and the Year Ended December 31, 2021**

SWAG and Legacy Nogin did not have any historical relationship prior to the Merger. Accordingly, no pro forma adjustments were required to eliminate activities between the companies. The pro forma notes and adjustments, based on preliminary estimates that could change materially as additional information is obtained, are as follows:

- [A] Reflects SWAG's additional non-recurring, incremental transaction related costs of \$4.1 million in connection with the Merger as if it was consummated on January 1, 2021. Costs include legal, financial advisory, and other professional fees related to the Merger. Adjustment does not include \$1.4 million and \$1.0 million of SWAG transaction costs that were already incurred and recognized in the SWAG historical statements of operations for the six months ended June 30, 2022 and the year ended December 31, 2021, respectively.
- [B] Reflects the debt extinguishment costs associated with the payment of Legacy Nogin's debt upon consummation of the Merger of \$5.3 million. Also includes the Liquidity Fee associated with the Standby Agreement of \$1.8 million and the reduction to the value of the Standby Agreement derivative asset of \$6.6 million.
- [C] Reflects the net pro forma adjustment to interest expense for the year ended December 31, 2021 of \$6.5 million as if the Merger was consummated on January 1, 2021. Includes \$7.4 million of interest expense associated with the Convertible Notes, which is based on, a \$4.6 million interest expense for the 7.00% interest on the \$65.5 million aggregate principal amount of Convertible Notes, a \$2.0 million interest expense related to the annual accretion of principal on the Convertible Notes expected in the first twelve months, and amortization of the debt discount and issuance costs of \$0.8 million based on straight line amortization. This is offset by the removal of \$0.9 million of historical Legacy Nogin interest expense as a result of the payment of Legacy Nogin's debt upon consummation of the Merger.
- [D] Reflects the net pro forma adjustment to interest expense for the six months ended June 30, 2022 of \$1.6 million as if the Merger was consummated on January 1, 2021. Includes \$3.7 million of interest expense associated with the Convertible Notes, which is based on, a \$2.3 million interest expense for the 7.00% interest on the \$65.5 million aggregate principal amount of Convertible Notes, a \$1.0 million interest expense related to the six month accretion of principal on the Convertible Notes and amortization of the debt discount and issuance costs of \$0.4 million based on straight line amortization. This is offset by the removal of \$2.1 million of historical Legacy Nogin interest expense as a result of the payment of Legacy Nogin's debt upon consummation of the Merger.
- [E] Reflects the removal for the six months ended June 30, 2022 of the Legacy Nogin change in fair value of promissory notes as if the Merger was consummated as of January 1, 2021 and the promissory notes were paid at close of the Merger.

## 5. Pro Forma Loss Per Share Information

As a result of the Merger, the pro forma basic and diluted loss per share is as follows (in thousands of \$ except share and per share amounts):

	Year Ended December 31, 2021	Six Months Ended June 30, 2022
Net loss	\$ (26,176)	\$ (21,674)
Weighted Average Shares Outstanding—Basic and Diluted	66,694,295	66,694,295
Loss Per Share—Basic and Diluted	\$ (0.39)	\$ (0.32)

The pro forma weighted average shares outstanding for the six months ended June 30, 2022 and the year ended December 31, 2021 was calculated as if the Merger was consummated on January 1, 2021 and the shares issued were outstanding for the entire period presented. The weighted average shares outstanding for the six months ended June 30, 2022 and the year ended December 31, 2021 includes 54,281,476 shares of Class A Common Stock issued to Legacy Nogin Equityholders, 5,701,967 shares of Class A Common Stock issued to Sponsor, 6,193,430 shares of Class A Common Stock issued to the Standby Agreement Financial Institution, 407,500 shares of Class A Common Stock issued to SWAG and Legacy Nogin service providers and 109,922 shares of Class A Common Stock issued to the remaining Public Stockholders.

Loss per share for the six months ended June 30, 2022 and the year ended December 31, 2021 excludes convertible notes, warrants and options that would be anti-dilutive to pro forma earnings per share, including (1) 1,782,953 options to Legacy Nogin option holders, (2) 21,386,688 SWAG warrants, (3) 1,396,419 PIPE Warrants (4) 5,695,651 shares of Class A Common Stock upon conversion of the Convertible Notes and (5) 1,333,962 shares of Class A Common Stock issuable upon exercise of the option by certain transaction service providers to settle deferred transaction costs in shares of Class A Common Stock.





### Software Acquisition Group Inc. III and Nogin Complete Business Combination

*- Nogin to Begin Trading on Nasdaq Under the Ticker Symbols "NOGN" and "NOGNW" Beginning Tuesday, August 30<sup>th</sup>*

*- Company to Ring Nasdaq Closing Bell on Friday, September 16<sup>th</sup>*

**TUSTIN, California and LAS VEGAS, Nevada—August 29, 2022** – Software Acquisition Group Inc. III (Nasdaq: SWAG) ("SWAG"), a publicly traded special purpose acquisition company, today announced the completion of its business combination (the "Business Combination") with Nogin ("Nogin" or the "Company"), a leading provider of innovative Commerce-as-a-Service ("CaaS") technology.

The combined company will operate under the name "Nogin, Inc.," and will be led by Chairman and co-Chief Executive Officer Jan Nugent and President and co-Chief Executive Officer Jon Huberman. Commencing at the open of trading on August 30, 2022, Nogin's Class A common stock and warrants are expected to trade on Nasdaq under the symbols "NOGN" and "NOGNW," respectively.

The transaction was approved by SWAG's stockholders at its special meeting in lieu of the 2022 annual meeting of stockholders held on August 22, 2022. SWAG also announced that holders of 74.6% of its shares of Class A common stock have properly exercised their right to redeem their shares in connection with the proposed merger. As a result, the gross amount of cash that the combined company will receive from SWAG's trust account and the previously announced concurrent private placement financing upon the closing of these transactions, before transaction expenses, will equal approximately \$124 million.

"The completion of our merger with SWAG is an extraordinary milestone for our company, our employees, and our stockholders," said Nogin Chairman and co-CEO Jan Nugent. "As commerce continues to become more and more complex, brands and merchants are looking for a way to get the hard stuff handled so they can focus on making great products and better connecting with their customers. Becoming a public company enables us to expand our mission to serve our customers and accelerate our growth strategy, bringing Intelligent Commerce to the mainstream. We appreciate the support of the SWAG leadership team throughout this transaction and are looking forward to continuing our partnership as we begin life in the public markets."

"On behalf of SWAG leadership and our investors, we would like to congratulate the Nogin team on a successful business combination," said Nogin President and co-CEO Jon Huberman. "In the time that we've spent with Jan and the rest of the organization these past few months, our belief in the Company's value proposition, addressable market opportunity, and growth prospects has only grown. With the transaction completed, I look forward to officially joining the Nogin leadership team and further investing in our mission to deliver world-class ecommerce solutions to a massive end market."

Additional details on the business combination can be found in the original announcement from February 14, 2022, [linked here](#).

### **Advisors**

Stifel Financial Corp. served as exclusive strategic and financial advisor to Nogin, and Latham & Watkins LLP acted as Nogin's legal counsel. Gateway Group acted as investor relations advisor to Nogin, and BOCA Communications acted as its public relations advisor. Jefferies LLC served as exclusive financial advisor and capital markets advisor to SWAG III, and Kirkland & Ellis acted as SWAG III's legal counsel.

### **About Nogin**

Nogin, the Intelligent Commerce company, provides the world's leading Commerce-as-a-Service (CaaS) technology platform for brand leaders that need to deliver superior growth with predictable costs and an exceptional online experience. The Nogin Commerce Platform is a cloud-based ecommerce environment purpose-built for brands selling direct-to-consumer (D2C) and through online channel partners. Nogin frees its customers to focus on their brands while running as much or as little of the infrastructure as they choose. Founded in 2010, Nogin optimizes the entire ecommerce lifecycle for such D2C brands as bebe, Brookstone, Hurley, and Kenneth Cole, achieving average growth of more than 40% in annual gross merchandise value (GMV) in the first year. To learn more, visit [www.nogin.com](http://www.nogin.com) or follow us on [LinkedIn](#) and on Twitter at [@Nogincommerce](#).

### **About Software Acquisition Group Inc. III**

Software Acquisition Group Inc. III is a blank-check company formed for the purpose of effecting a merger, capital stock exchange, asset acquisition, stock purchase, reorganization, or similar business combination with one or more businesses. SWAG is led by Chairman and Chief Executive Officer, Jonathan Huberman, and Vice President of Acquisitions, Mike Nikzad. In addition to Messrs. Huberman and Nikzad, the Board of Directors includes Andrew Nikou, Stephanie Davis, Peter Diamandis, Steven Guggenheimer and Matt Olton.

### **Forward-Looking Statements**

*Certain statements included in this communication are not historical facts but are forward-looking statements for purposes of the safe harbor provisions under the United States Private Securities Litigation Reform Act of 1995. Forward-looking statements generally relate to future events or the Company's future financial or operating performance. In some cases, you can identify forward-looking statements by terminology such as "may", "should", "would", "seem", "expect", "intend", "will", "estimate", "anticipate", "believe", "future", "predict", "potential" or "continue", or the negatives of these terms or variations of them or similar terminology, but the absence of these words does not mean that a statement is not forward looking. Such forward-looking statements are subject to risks, uncertainties, and other factors that could cause actual results to differ materially from those expressed or implied by such forward-looking statements.*

*These forward-looking statements are based upon estimates and assumptions that, while considered reasonable by the Company and its management, as the case may be, are inherently uncertain. These forward-looking statements are provided for illustrative purposes only and are not intended to serve as, and must not be relied on by any investor as, a guarantee, an assurance, a prediction or a definitive statement of fact or probability. Actual events and circumstances are difficult or impossible to predict and may differ from assumptions. Many actual events and circumstances are beyond the control of the Company. Factors that may cause actual results to differ materially from current expectations include, but are not limited to, the ability to continue to meet the stock exchange listing, the ability to recognize the anticipated benefits of the business combination, which may be affected by, among other things, competition, the ability of the combined company to grow and manage growth profitably, maintain relationships with customers and suppliers and retain its management and key employees, changes in applicable laws or regulation, the possibility that the Company or the combined company may be adversely affected by other economic, business, and/or competitive factors, and other risks and uncertainties set forth in the section entitled "Risk Factors" and "Cautionary Note Regarding Forward Looking Statements" in documents filed by the Company from time to time with the SEC.*



*Nothing in this communication should be regarded as a representation by any person that the forward-looking statements set forth herein will be achieved or that any of the contemplated results of such forward-looking statements will be achieved. You should not place undue reliance on forward-looking statements, which speak only as of the date they are made. Neither SWAG nor the Company undertakes any duty to update these forward-looking statements.*

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