Startup Law Day 2014

The Government Law Center has created this reference guide to complement the presentations at Startup Law Day. It can be used as an educational tool to assist startup companies and entrepreneurs with legal issues that may arise in the early stages of business development.

DISCLAIMER: The information contained in this handbook is provided with the understanding that the authors and reviewers herein are not engaged in rendering legal or other professional advice and/or services. Accordingly, the information provided in this handbook is for educational purposes only and not for the purpose of providing legal advice. You should contact an attorney to obtain legal counsel with respect to your particular legal needs.
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Helpful Resources

Founder’s Workbench
http://www.foundersworkbench.com
A free online resource that helps discuss the legal and organizational challenges startups face. Founder’s Workbench provides legal documents, tips and best practices.

U.S. Small Business Administration
www.sba.gov
Provides resources explaining a variety of topics relevant to startups and new businesses including creating business plans, financing, hiring, and growing.

Forbes
www.forbes.com
Online resource for business and investment leaders, providing analysis, reporting, and tools for succeeding in business. Includes a variety of how-to articles and resource guides.

Y Combinator
www.ycombinator.com
Y Combinator is a fixed-term accelerator program. Y Combinator invests a small amount in a startup followed by three months of business mentorship, education, and training, ultimately culminating in an opportunity for the business to pitch its company to a select audience. The website also includes articles about startup funding.

AlleyWatch
www.alleywatch.com
Provides news regarding startups in New York City, as well as opinions, overviews, investment and product information, and company profiles. The site has a “Resources” section containing articles with management, strategy and business tips.

Business Insider
www.businessinsider.com
An online resource for U.S. business and technology news.

World Intellectual Property Organization
The World Intellectual Property Organization (WIPO) is an agency of the United Nations. This site provides helpful overviews of international intellectual property laws.

Entrepreneur
www.entrepreneur.com
Provides advice, insights, and guides for entrepreneurs as well as articles.

Law360
www.law360.com
An online news source covering a variety of legal topics, including intellectual property. This site also has articles with advice about intellectual property best practices.
Business Owner’s Toolkit
A how-to guide for entrepreneurs. Topics include business planning, financing a startup, evaluating startup success, and growth strategies.

The Entrepreneurial Mind
http://www.drjeffcornwall.com
A blog curated by Dr. Jeff Cornwall, a professor of entrepreneurship at Belmont University with entrepreneur interviews and downloadable resources

Bloomberg Businessweek: Small Business
http://www.businessweek.com/small-business
An online news source with articles on companies and industries, technology, market and finance, and global economics.
Creating the Company:
Business Formation Basics

Phillips Lytle is pleased to support the inaugural Startup Law Day. We are proud to partner with Albany Law School to spotlight opportunities for entrepreneurs to drive innovation and economic development.

Phillips Lytle LLP

ALBANY
BUFFALO
CHAUTAUQUA
GARDEN CITY
NEW YORK
ROCHESTER
WASHINGTON, DC
WATERLOO REGION | CANADA

PHILLIPSLYTELE.COM
Glossary

Application for Authority:
Permission for a company formed in one state to do business in another state.

Calendar Year Filers:
A business that files taxes according to a January to December tax year.

Certificate of Assumed Name (“DBA”):
Documentation exposing a business’s true legal name, the name under which the business operates in public. Filed in every county in which the entity does business.

Federal Employer Identification Number:
A 9-digit identification number given to a US company by the Internal Revenue Service.

Fiscal Year Filers:
A business that files taxes for a 12-month period that does not run January to December.

Founders Agreement:
A contract between a company’s founders that explains the rights and expectations of one another to the business.

Home State:
The state in which the business is formally registered.

Incorporator:
Anyone over the age of 18 that incorporates a business.

Joint and Several Liability:
A legal principle that enables a plaintiff to recover 100% of his damages from any defendant, no matter each defendant’s fault in a tort action.

Par Value:
The monetary value of common stock.

Pass-Through Entity:
A business in which company profits are taxed as personal income; profits “pass through” to the individual.
## Entity Choices for New York Companies

<table>
<thead>
<tr>
<th></th>
<th>Sole Proprietorship (&quot;SP&quot;)</th>
<th>General Partnership (&quot;GP&quot;)</th>
<th>Limited Partnership (&quot;LP&quot;)</th>
<th>Limited Liability Company (&quot;LLC&quot;)</th>
<th>Corporation (&quot;Corp.&quot;)</th>
</tr>
</thead>
</table>
| **Formation**        | No formal registration.     | No formal registration.     | 1. General partner and limited partner ("LiP") create a partnership agreement and file a Certificate of Limited Partnership with the Department of State.  
2. Complete the publication requirement and submit a Certificate of Publication to the Department of State.  
3. Draft an Operating Agreement. | 1. File the Certificate of Formation with the Department of State.  
2. Complete the publication requirement and file the Certificate of Publication with the Department of State.  
3. Draft an Operating Agreement. | File the Certificate of Incorporation with the Department of State. |
| **Liability**        | The owner is 100% liable.   | Joint and several liability. | General partner: 100% liability (personal and business assets).  
LiP: liable to the extent invested in the business. LiP can become a general partner if he exerts heavy control in the business. | Limited to the investment in the LLC. | Limited to the investment in Corp. |
# Entity Choices for New York Companies

<table>
<thead>
<tr>
<th></th>
<th>Sole Proprietorship (“SP”)</th>
<th>General Partnership (“GP”)</th>
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<th>Corporation (“Corp.”)</th>
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</thead>
<tbody>
<tr>
<td><strong>Tax</strong></td>
<td>Pass-through entity.</td>
<td>Pass-through entity.</td>
<td>Pass-through entity.</td>
<td>May choose either corporate taxation or pass-through status.</td>
<td>C-Corp.: business profits face corporate taxation and dividends taxed as personal income. S-Corp.: pass-through entity</td>
</tr>
<tr>
<td><strong>Forms Associated</strong></td>
<td>Certificate of Assumed Name (“DBA”)</td>
<td>Partnership Agreement DBA</td>
<td>Certificate of Limited Partnership</td>
<td>Certificate of Publication</td>
<td>Articles of Organization Certificate of Publication Operating Agreement</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Certificate of Formation</td>
<td></td>
</tr>
<tr>
<td><strong>Additional Considerations</strong></td>
<td>Owners should register in each county in which the business is located. Registration is complete after a DBA is filed with the County Clerk.</td>
<td>NYC charges an unincorporated business income tax on GP profits.</td>
<td>[Intentionally empty]</td>
<td>Default tax status is pass-through.</td>
<td>S-Corp. formation must be specifically designated in the Certificate of Formation. Not all businesses are eligible to be an S-Corp.</td>
</tr>
</tbody>
</table>
# Schedule of Important Documents: New York Corporations

<table>
<thead>
<tr>
<th>DOCUMENT NAME</th>
<th>DESCRIPTION</th>
<th>DUE DATE</th>
<th>FEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Biennial Statement</td>
<td>Corporate information update</td>
<td>Every 2 years in the calendar month when the Certificate of Incorporation was filed. Example: a corporation formed in January of 2012 must file its Biennial Statement no later than January 31, 2014.</td>
<td>$9</td>
</tr>
<tr>
<td><strong>Annual New York Franchise Tax Report</strong></td>
<td>State tax filing</td>
<td>Calendar-year filer: franchise tax report and taxes due March 15. Fiscal-year filers: franchise tax report and taxes due 2 ½ months after end of reporting period. Example: corporations starting the fiscal year on April 1 (ending March 31) must file the franchise tax report by June 15.</td>
<td>Taxes due</td>
</tr>
<tr>
<td>Federal Corporate Income Tax Return (Form 1120)</td>
<td>Federal tax filing</td>
<td>Due by day 15 of the third month of the corporation’s tax year. Examples: calendar-year filers (January-December) must pay taxes by March 15. Non-calendar-year filers, i.e. April-March, must file during the third month following the end of the tax year, June 15.</td>
<td>Taxes due</td>
</tr>
<tr>
<td>Federal Estimated Tax Payments (Form 1120-W)</td>
<td>Federal taxes</td>
<td>Due by day 15 of the months 4, 6, 9, and 12 in corporation’s tax year. Examples: Corporations with a normal calendar year (January-December) would file by: April 15, June 15, September 15, and December 15. A corporation with an April-March tax year would file by: July 15, September 15, December 15, and March 15.</td>
<td>Payments due</td>
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## Schedule of Important Documents: New York Corporations

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<tr>
<td>Withholding Exemption Certificate (W-4)</td>
<td>Employee taxation</td>
<td>Given to the employee on or before the start date—the first day the worker performs a task for a paid wage. Example: Corporation hires an employee on January 1 with a January 2 start date; employee must receive a W-4 on or before January 2.</td>
<td>$0</td>
</tr>
<tr>
<td>Wage and Tax Statement (W-2)</td>
<td>Employee taxation</td>
<td>To employee: January 21 To Social Security Administration: last day of February</td>
<td>$0</td>
</tr>
<tr>
<td>Employment Eligibility Verification (Form I-9)</td>
<td>Determination of employee eligibility to work</td>
<td>Must be kept in business records either: 3 years after employment or 1 year after termination of employment (whichever is later).</td>
<td>$0</td>
</tr>
<tr>
<td>New Hire Report</td>
<td>Notification of new hire or rehire</td>
<td>Within 20 days after employee’s start date.</td>
<td>$0</td>
</tr>
</tbody>
</table>
| Employer’s Quarterly Federal Tax Return (Form 941) | Reporting withholding of employee wages | Due the last day of the month following the end of the quarter. Examples: Calendar year companies:  
Quarter 1 → form due April 30  
Quarter 2 → form due July 31  
Quarter 3 → form due October 31  
Quarter 4 → form due January 31  
Companies with April to March tax year:  
Quarter 1 → form due July 31  
Quarter 2 → form due October 31  
Quarter 3 → form due January 31  
Quarter 4 → form due April 30 | The amount due on line 12 on Form 941. |
| Employer's Annual Federal Unemployment (FUTA) Tax Return | Taxes due to compensate workers who have lost their jobs | Due January 31 of each year. Payments are due the last day of the month following each business quarter if the FUTA tax reaches more than $500. | Tax due |
## Entity Choices for Delaware Companies

<table>
<thead>
<tr>
<th></th>
<th>Sole Proprietorship (“SP”)</th>
<th>General Partnership (“GP”)</th>
<th>Limited Partnership (“LP”)</th>
<th>Limited Liability Company (“LLC”)</th>
<th>Corporation (“Corp.”)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Governing Law</strong></td>
<td>[Intentionally empty]</td>
<td>Delaware Code, Title 6, Chapter 15</td>
<td>Delaware Code, Title 6, Chapter 17</td>
<td>Delaware Code, Title 6, Chapter 18</td>
<td>Delaware Code, Title 8</td>
</tr>
<tr>
<td><strong>Formation</strong></td>
<td>No formal registration. Starting a for-profit venture will establish a sole proprietorship.</td>
<td>No formal registration. Working in collaboration with a partner in a for-profit venture will establish a GP.</td>
<td>General partner and limited partner (&quot;LiP&quot;) create a partnership agreement file, a Certificate of Limited Partnership with the Secretary of State and retain a registered agent.</td>
<td>File the Certificate of Formation with the Secretary of State and retain a registered agent.</td>
<td>File the Certificate of Incorporation with the Secretary of State and retain a registered agent.</td>
</tr>
<tr>
<td><strong>Liability</strong></td>
<td>The owner is 100% liable. Business <em>and</em> personal assets are at risk.</td>
<td>Joint and several liability.</td>
<td>LiP: liable to the extent invested in the business. LiP can become a general partner if he exerts heavy control in the business.</td>
<td>Limited to the investment in the LLC.</td>
<td>Limited to the investment in Corp.</td>
</tr>
<tr>
<td><strong>Tax</strong></td>
<td>Pass-through entity.</td>
<td>Pass-through entity.</td>
<td>Pass-through entity.</td>
<td>May choose either corporate taxation or pass-through entity.</td>
<td>C-Corp.: business profits face corporate tax, dividends taxed as personal income. S-Corp.: pass-through entity. Annual Franchise Tax: depends on # of shares.</td>
</tr>
</tbody>
</table>
## Entity Choices for Delaware Companies

<table>
<thead>
<tr>
<th>Forms Associated</th>
<th>Sole Proprietorship (“SP”)</th>
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<th>Corporation (“Corp.”)</th>
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</thead>
</table>
| “Doing Business As” (“DBA”) | “Doing Business As” (“DBA”) | Partnership Agreement | • Certificate of Limited Partnership  
• Application for Authority  
• Certificate of Publication | • Certificate of Formation  
• Operating Agreement  
• Application for Authority  
• Certificate of Publication | • Certificate of Formation  
• Application for Authority |
| Fees | $75 for DBA | [Intentionally empty] | • $200 for Certificate of LP  
• Fees for authority to do business in other states  
• Fees for Certificate of Publication in other states | • $90 for Certificate of Formation  
• Fees for authority to do business in other states  
• Fees for Certificate of Publication in other states | • $89+ Stock Certificate of Incorporation  
• Fees for authority to do business in other states |
| Additional Considerations | Can register a DBA in each county in which the business is located in DE. | [Intentionally empty] | LPs working in multiple states must file an Application for Authority in every state in which it is not registered.  
The NY Application for Authority fee is $200. LPs located in NY must also file a Certificate of Publication ($50). | The LLC that forms in DE and will be located in another state must apply for authority to do business in every state in which it is located.  
The NY Application for Authority fee is $250. LLCs located in NY must also file a Certificate of Publication ($50). | A Corp. that forms in DE and will be located in another state must apply for authority to do business in every state in which it is located.  
The NY Application for Authority fee is $225. |
Multi Member LLC Checklist

Once you’ve completed generating the Formation Documents using Goodwin Procter LLP’s Document Driver® and you are ready to officially form your limited liability company, you will need to take the following steps:

**File Certificate of Formation with the Delaware Secretary of State**

1. Confirm availability of the name chosen for your company (this can be done at no charge at the Delaware Secretary of State website). Similarly it is suggested that you check the name in any state in which you will be doing business.
2. Contact and retain the Registered Agent you selected when answering the Questionnaire.
3. Review carefully the Certificate of Formation generated from your completed Document Driver® Questionnaire and confirm the information.
4. Cause the Authorized Person to sign and date the Certificate of Formation.
5. File the signed and dated Certificate of Formation with the Delaware Secretary of State. Filing may be accomplished directly with the Delaware Secretary of State or through a registered agent service such as The Corporation Trust Company or Corporate Service Company.
6. You will receive evidence of filing and certification of formation once your Certificate of Formation has been accepted by the Delaware Secretary of State’s office.

**Complete, Sign and Date Remaining Formation Documents**

7. Review carefully the remaining Formation Documents generated from your completed Document Driver® Questionnaire and confirm the information (including full legal names, correct addresses, unit amounts, etc.).
8. If the founder(s) are contributing material intellectual property, any other assets of value or if the founder(s) plan to contribute more than the minimum amount of cash pre-set by Document Driver® to the company, consult with the founder(s) tax, accounting and/or legal advisors regarding reflecting the value thereof in the documents generated by Document Driver® prior to signing.
9. Fill in all required dates, collect all signatures and attach applicable exhibits for each of the Formation Documents.

**Issue Common Units to Founders**

10. Obtain from the founder(s) executed copies of their respective Subscription Letters and, to the extent applicable, Founder’s Restricted Unit Agreements.
11. Obtain from the founder(s) executed copies of their respective Contribution and Assignment Agreements, to the extent applicable.
12. Collect the applicable cash contribution, if any, from each founder (the cash contribution for each founder that is pre-set by Document Driver® is reflected next to his or her name in Schedule A of the Limited Liability Company Agreement under the heading “Capital Account”) and retain evidence of the contribution for the Company’s records.
13. Any founder who is entering into a Founder’s Restricted Unit Agreement and subjecting his or her units to vesting, must decide whether or not to file an 83(b) election with the Internal Revenue Service (IRS). Such decision should be made in consultation with a tax advisor. To be effective, an 83(b) election must be filed with the IRS within 30 days of purchasing the units. See the 83(b) election memorandum posted on the Founder’s Workbench for further information. Any founder wishing to make an 83(b) election will need to consult with his or her legal and/or tax advisor for assistance in making this election and preparing the applicable tax form.

**Post-Formation**

14. Obtain from all founder(s), employees and consultants executed copies of the Confidentiality & Intellectual Property Assignment Agreement, to the extent applicable.
15. File to obtain a Federal Employer Identification Number. See the IRS website for instructions regarding the filing of Form SS-4. Filing can be completed online.
16. File to obtain applicable state level identification numbers and other state level registrations, including workers’ compensation filings, depending upon the state in which your company’s office is located. Visit your state employment and tax agencies’ websites for further information.
17. Securities law compliance. The federal and state securities laws may require governmental filings reflecting the issuance of units to founder(s). Please consult your legal counsel regarding compliance with these laws.
18. Consider foreign state qualifications. Limited liability companies may be required to qualify in states (other than the one in which they are formed) if they transact business in that state. The registered agent services, such as Corporation Trust Company or Corporate Service Company, can facilitate this process.

19. Set up and maintain the Company's records, including a company minute book to hold important company documentation (including the Formation Documents).

20. See Goodwin Procter LLP's Founder's Workbench for further instructions and guidance on launching your start-up company.
C-Corp Checklist

Once you’ve completed generating theFormation Documents using Document Driver® and you are ready to officially form your corporation, you will want to take the following steps:

File Certificate of Incorporation with the Delaware Secretary of State

1. Confirm availability of the name chosen for your company (this can be done at no charge at the Delaware Secretary of State website. Similarly it is suggested that you check the name in any state in which you will be doing business.
2. Contact and retain the Registered Agent you selected when answering the Document Driver® Questionnaire.
3. Review carefully the Certificate of Incorporation generated from your completed Document Driver® Questionnaire and confirm the information.
4. Cause the Incorporator to sign and date the Certificate of Incorporation.
5. File the signed and dated Certificate of Incorporation with the Delaware Secretary of State. Filing may be accomplished directly with the Delaware Secretary of State (click here for more information) or through a registered agent service such as The Corporation Trust Company or Corporate Service Company.
6. You will receive evidence of filing and certification of formation once your Certificate of Incorporation has been accepted by the Delaware Secretary of State’s office.

Complete, Sign and Date Remaining Formation Documents (other than Stock Certificates)

7. Review carefully the remaining Formation Documents generated from your completed Document Driver® Questionnaire and confirm the information (including full legal names, correct addresses, share amounts, etc).
8. Fill in all required dates and collect all signatures for each of these Formation Documents (other than the Stock Certificates which are addressed below).

Issue Shares of Common Stock to Founders

9. Obtain from the founders executed copies of their respective Subscription Letters and, to the extent applicable, Founder Stock Restriction Agreements.
10. Collect the applicable purchase price for the shares from each founder (each founder’s aggregate purchase price is reflected in his or her respective Subscription Letter) and retain evidence of payment for the Company’s records.
11. Print the first and second page of each Stock Certificate on both sides of a single sheet of paper to ensure that the second page (the “reverse side”) containing the applicable restrictive legends does not get detached from the front page of the certificate. You may wish to print the Stock Certificates on water-marked paper.
12. Each Stock Certificate should be signed and dated by the President and the Secretary of the Company.
13. Deliver vs. Retain Stock Certificates:
   - If a founder is not entering into a Founder Stock Restriction Agreement and his or her shares are not subject to vesting, the Stock Certificate can be delivered to the founder. Be sure to retain a photocopy of the Stock Certificate (front and back) for the Company’s records.
   - If, however, a founder is entering into a Founder Stock Restriction Agreement and his or her shares are subject to vesting, then the Company should retain such founder’s Stock Certificate to be held by the Company in escrow pursuant to Section 8 of the Founder Stock Restriction Agreement.
14. Any founder who is entering into a Founder Stock Restriction Agreement and subjecting his or her shares to vesting, must decide whether or not to file an 83(b) election with the Internal Revenue Service (IRS). Such decision should be made in consultation with a tax advisor. To be effective, an 83(b) election must be filed with the IRS within 30 days of purchasing the shares. See the 83(b) election memorandum posted on the Founder’s Workbench for further information.

Post-Formation

15. File to obtain a Federal Employer Identification Number, which is required of all corporations. Instructions regarding the filing of Form SS-4 are available on the IRS website. Filing can be completed online.

Goodwin Procter LLP, C-Corp Checklist, FOUNDERS WORKBENCH (2014)
16. File to obtain applicable state level identification numbers and other state level registrations, including workers' compensation filings, depending upon the state in which your company's office is located. Visit your state employment and tax agency's websites for further information.

**Securities Law Compliance**

17. Federal and state securities laws may require governmental filings reflecting the issuance of stock to founders. Please consult your legal counsel regarding compliance.

18. Consider foreign state qualifications. Corporations must qualify in states (other than the one in which they are incorporated) if they transact business in that state. The registered agent services, such as Corporation Trust Company or Corporate Service Company, can facilitate this process.

19. Prepare a stock ledger (for example, using an excel spreadsheet) to record the issuance of each Stock Certificate (in order by certificate number (C-1)), including share amount, name of recipient and date of issuance. Record any subsequent transfers and cancellations.

20. Set up and maintain the Company's records, including a corporate minute book to hold important corporate documentation (including the Formation Documents).

21. See Goodwin Procter LLP's Founder's Workbench® for further instructions and guidance on launching your start-up company.
## Schedule of Important Documents: Delaware Corporations

<table>
<thead>
<tr>
<th>DOCUMENT NAME</th>
<th>DESCRIPTION</th>
<th>DUE DATE</th>
<th>FEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Delaware Franchise Tax Report</td>
<td>Tax filing</td>
<td>March 1</td>
<td>$50 + Taxes due</td>
</tr>
<tr>
<td>Federal Corporate Income Tax Return (Form 1120)</td>
<td>Federal tax filing</td>
<td>Due by day 15 of the third month of the corporation’s tax year.</td>
<td>Taxes due</td>
</tr>
<tr>
<td>Federal Estimated Tax Payments (Form 1120-W)</td>
<td>Federal taxes</td>
<td>Due by day 15 of the months 4, 6, 9, and 12 in corporation’s tax year.</td>
<td>Payments due</td>
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<tr>
<td>Withholding Exemption Certificate (W-4)</td>
<td>Employee taxation</td>
<td>Given to the employee on or before the start date—the first day the worker performs a task for a paid wage.</td>
<td>$0</td>
</tr>
</tbody>
</table>

Examples: calendar-year filers (January-December) must pay taxes by March 15. Non-calendar-year filers, i.e. April-March, must file during the third month following the end of the tax year, June 15.

Examples: Corporations with a normal calendar year (January-December) would file by: April 15, June 15, September 15, and December 15. A corporation with an April-March tax year would file by: July 15, September 15, December 15, and March 15.

Example: Corporation hires an employee on January 1 with a January 2 start date; employee must receive a W-4 on or before January 2.
# Schedule of Important Documents: Delaware Corporations

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<tr>
<td>Wage and Tax Statement (W-2)</td>
<td>Employee taxation</td>
<td>To employee: January 21. To Social Security Administration: last day of February.</td>
<td>$0</td>
</tr>
<tr>
<td>Employment Eligibility Verification (Form I-9)</td>
<td>Determination of employee eligibility to work</td>
<td>Must be kept in business records either: 3 years after employment or 1 year after termination of employment (whichever is later).</td>
<td>$0</td>
</tr>
<tr>
<td>New Hire Report</td>
<td>Notification of new hire or rehire</td>
<td>Within 20 days after date of hire.</td>
<td>$0</td>
</tr>
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</table>
| Employer’s Quarterly Federal Tax Return (Form 941) | Reporting withholding of employee wages | Due the last day of the month following the end of the quarter. **Examples:** Calendar year companies:
- Quarter 1 ➔ form due April 30
- Quarter 2 ➔ form due July 31
- Quarter 3 ➔ form due October 31
- Quarter 4 ➔ form due January 31
Companies with April to March tax year:
- Quarter 1 ➔ form due July 31
- Quarter 2 ➔ form due October 31
- Quarter 3 ➔ form due January 31
- Quarter 4 ➔ form due April 30 | The amount due on line 12 on Form 941. |
| Employer's Annual Federal Unemployment (FUTA) Tax Return | Taxes due to compensate workers who have lost their jobs | Due January 31 of each year. Payments are due the last day of the month following each business quarter if the FUTA tax reaches more than $500. | Tax due |
Tax Considerations for Startups

Corporations

1. **Double tax**: Corporations are subject to tax on income and gains; shareholders are taxed on distributions.
2. **No viable tax-free exit strategy**: Gain is recognized on liquidating distributions, so generally there is no tax-free way to get assets out of a C corporation. (There are some exceptions for parent corporations of liquidating subsidiaries.)
3. **Net operating loss (NOL) carry over**: Can carry over losses in excess of income to reduce income (and therefore tax) in the two preceding taxable years and the 20 taxable years following the taxable year of loss. But use of NOLs is limited after certain changes in ownership.
4. **Debt financing**: Can deduct interest payments, subject to certain limitations. But the IRS may attempt to re-characterize this debt as equity, thus causing deductible interest to be re-classified as a non-deductible dividend.
5. **Limited liability**: Shareholders of corporations generally enjoy limited liability.

LLCs

1. **"Flow-through" tax treatment**: Members, not the entity itself, are subject to tax, so only one level of tax imposed.
2. **Flexibility**: Allows for more flexibility in how allocations and distributions can be apportioned among owners.
3. **Complexity**: Overlapping layers of anti-tax shelter statutes and regulations make LLC operating agreements very dense reading.
4. **Limited liability**: Members enjoy limited liability.

S Corporations

1. **Shareholder limitations**: Limited to 100 shareholders (natural persons and certain trusts) and only one class of stock. Shareholders cannot be non-resident aliens.
2. **Election required** within specified time: all shareholders must consent.
3. **Flow-through tax treatment**: Treated like LLCs — no tax at the corporation level, and corporation's income, credits, gains and losses flow through to shareholders.
4. **Shareholder's "flow-through" loss deductions**: Shareholder loss deductions are limited to the aggregate tax basis of (i) the shareholder's S Corp. stock and (ii) the debt of the S Corp. to shareholder.
5. **Borrowing**: Stock basis is not increased by corporate borrowing, even if the shareholder guarantees debt; to increase basis and take losses, shareholder must borrow directly and contribute cash (or other property).
6. **Property distributions**: If the S Corp. has earnings and profits from when it was a C Corp., property distributions will generate gain recognition.
7. **No special allocations**: All income and loss is shared in proportion to stock ownership.
8. **Venture capital termination**: Venture capital investment usually terminates S Corp. status because venture capital preferred stock violates rules against multiple classes of stock and VCs are disqualified shareholders.

Taxable Year

Most taxpayers use the calendar year, but a taxable year other than the calendar year may be desirable depending on the taxpayer's business cycle. There are different restrictions in place for each type of entity.

Method of Accounting

The entity must adopt a method of accounting which accurately reflects income. There are several methods available to the taxpayer.

Contributing Property

1. **General rule**: Exchange of old property for new property (e.g., a patent is contributed in exchange for stock in the newly formed entity (Newco)) is taxable.
2. **Amount of income (loss)**: The difference between the tax basis of the property and FMV of Newco stock received.
3. **Character of income (loss)**: Treated as ordinary or capital — short or long-term — depending on the character and holding period of the
4. **Incorporation transfers**: Corporate founders (and other contributors) recognize no gain or loss when they transfer property to Newco in exchange for its stock if (i) founders receive only Newco stock; (ii) anything received in addition to stock is taxed as "boot" and gain may be recognized to the extent of boot received; and (iii) founders, immediately after transfer, are members of a group "in control" of Newco, which is defined as 80% of the combined voting power of all classes of stock entitled to vote and 80% of each nonvoting class. If these requirements are met, then the transfer of property results in non-recognition treatment.

**Cheap Stock Issues**

1. Lowest risk for founders of income recognition is receipt of stock for services before any outside investors are in the wings.
2. Common stock is generally valued at a discount from preferred stock; proper amount of discount is open to question, and third-party 409A valuations are generally advised after any preferred stock financing.
3. Lower value means receipt (or vesting) of stock results in less risk of income recognition.

**Note**

This outline is intended as a general overview of issues and considerations most relevant to typical startups. It is not intended to be a comprehensive discussion of all possible issues, considerations or concerns that would apply to any entity. Each entrepreneur should seek advice from their own tax advisor regarding their particular circumstances and the tax issues that might be most applicable to those circumstances.
Founders’ Agreements

What is a founders’ agreement?
A founders’ agreement is an agreement among individual founders that addresses issues that can arise during the course of the company’s early development. By its very nature, a founders’ agreement is complex and often contentious because it forces the founders to address difficult issues such as dividing equity and exit strategies. Founders’ agreements are unique to each startup because the business plan and business needs of every startup are different.

Why does a startup need a founders’ agreement?
Every startup should have a founders’ agreement for a number of reasons.

- Founders’ agreements are necessary to establish equitable distribution of the company’s assets between the individuals.
- Investors expect a solid plan for equitable distributions. Having an agreement that identifies the individual founder’s roles and illustrates that there is clear direction as to the leadership of the startup shows investors that the founders are planning for long-term grown. In fact, many investors will demand that the startup draft a founders’ agreement before buying into the company.
- Negotiating a founders’ agreement will also begin a conversation between founders to flesh out potential disagreements. These discussions will test the sustainability of the co-founders’ relationship. It is better to find out early whether the group is in agreement rather than to invest time, money, and resources only to discover that the members of the group cannot see eye-to-eye.

Who should be involved in the process?
This is a sensitive and confidential process. Only the founding members should be involved. Sometimes mentors and advisors of the company join the conversation to give some guidance. Outside parties should only give advice; ultimately, the end agreement must be decided upon by the founders.

What are the main components of a founders’ agreement?
The main components of founders’ agreements are: equity terms, vesting period terms, management strategies, exit strategies, and the roles of founding members.

How is a founders’ agreement formalized?
The best way to formalize a founders’ agreement is to engage in a collaborative effort to identify each founders’ contribution to the business. The final document should be written and signed by everyone.

When should an agreement be formalized?
A founders’ agreement should be formalized as soon as possible, and no later than the closing of the first round of fundraising.

How is equity divided amongst the founders?
Founders can divide equity in their company however they choose. Some choose to divide equity equally amongst everyone. Others employ a task-oriented approach—equity is assigned according to the amount of work each founder will contribute to grow the business. This is a founder-friendly approach. Ultimately, every founder must agree on how the equity will be distributed. This is an important conversation.
Founders’ Agreements

How can the timing of this conversation benefit the company?
Splitting the equity early will incentivize the company’s key players to contribute toward building the business. Founders can negotiate calmly before they are under pressure to divide equity because of a potential investment. Saving this conversation for later, however, gives founders time to learn about each other’s abilities to contribute in the company and each other’s level of commitment. These factors may weigh into the conversation about dividing equity. Waiting also gives the company time to solidify its strategy, business model, and an opportunity to further define each other’s role in the company.

How do you hire new employees that are looking for an equity option?
Startups can use equity to attract new employees. In the early stages of business, stock might not be worth anything, but the value appreciates over the life of the company. This may provide a way for founders to hire new employees without putting a strain on their cash flow.

Are there additional negotiating points?
Founders should also give some thought to founder stock purchase agreements, investors’ rights agreements, non-competition agreements, non-solicitation agreements, note purchase agreements, assignments of intellectual property, rights of first refusal, drag along provisions, and stock option plans.

What are exit strategies?
An exit strategy is the method by which the business owners will “cash out” of the business after the business has been developed and becomes profitable. Some common exit strategies are:
1. Selling the business to an individual or independent business;
2. Offering shares of the company to public markets;
3. Selling the company to its employees; or
4. Passing control of the business to the founders’ heirs.

Founders should discuss exit strategy because every business owner must have a plan in case exit becomes necessary. In order for an exit strategy to be successful, the founders must all be on the same page. Investors look to see that companies have an exit strategy.
Getting the Money:
Early–Stage Capital Funding

Thank you to our consultation volunteers:

Deily & Glastetter, LLP
Harter, Secrest & Emery, LLP
Hedgeman Law
Heslin, Rothenberg, Farley & Mesiti P.C.
Hinman Straub, P.C.
McNamee, Lochner, Titus & Williams, P.C.
Nixon Peabody, LLP
Phillips Lytle, LLP
Sarah Gold Law
Selchick Venture Law Firm, PLLC
Schmeiser, Olsen & Watts, LLP
Tech Valley Patent, LLC
Whiteman, Osterman & Hannah, LLP
## Forms of Funding

<table>
<thead>
<tr>
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</thead>
</table>
| **Personal Contribution ("Bootstrapping"):** Founders contribute all capital e.g. through supplemental income, credit cards, stock investments, revolving lines of credit. | • Founders have the greatest flexibility in running the business. | • Founders take on additional financial risk; personal savings, stock portfolio and debts may be at risk. | • Cut back business expenses and look for savings and limits.  
• If cutbacks are necessary, approach them wisely. Do not make quick decisions that sacrifice crucial elements of the business plan.  
• Consider technology options that may save money e.g. going paperless or using web tools. |
| **Business Credit Cards**           | • Business credit cards do not have biannual reviews. Traditional credit lines are reviewed by a bank every two years and can be turned into a term loan for reasons including late payments, decreasing FICO scores, cash flow changes.  
• Companies are able to ask for an increase in credit.  
• May be perks/rewards associated with the card. | • Unless business is incorporated the card holder is the guarantor of all debts, meaning that the card holder assumes all responsibility for paying the debt incurred if the company cannot pay. | • If considering a card that has fees, see that these fees are justified i.e. does the card offer benefits such as a flexible payment option, or added rewards?  
• Always read the terms and conditions that accompany the credit card.  
• The best business credit cards should be sharing payment data with a business credit reporting agency; this indicates creditworthiness of the business. |
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<tr>
<td>Family &amp; Friends</td>
<td>• These individuals already know and trust the founders.</td>
<td>• If the business venture fails, or loans cannot be repaid, relationships suffer.</td>
<td>• Choose investors wisely. Approach those who have business skills and know the accompanying risks and benefits of investing in a startup.</td>
</tr>
<tr>
<td></td>
<td>• Quicker and simpler access to funding.</td>
<td></td>
<td>• Have a business plan so to show exactly what the money will be used for.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Will this person receive a share in the business or will their contribution be a loan? Perhaps consider offering a share in exchange for financial assistance if this person can serve as a business mentor.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• This will be a business agreement. Creating a repayment plan will ensure that the person knows what he or she is getting into.</td>
</tr>
<tr>
<td>Peer-to-Peer (&quot;P2P&quot;)</td>
<td>• Lower interest rates because lenders are competing with each other to make loans.</td>
<td>• Lacks the benefit of spreading financial risk offered by crowdfunding.</td>
<td>• Create a business plan detailing market research, financial forecasts, and expected returns.</td>
</tr>
<tr>
<td>Lending:</td>
<td>• Can be used when seeking financial contribution from family or friends.</td>
<td></td>
<td>• Humanize the request by describing the founder’s background and goals.</td>
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<td></td>
<td>• Facilitates a degree of separation between business and emotion, demonstrates to potential backers that they are entering into a professional transaction.</td>
<td></td>
<td>• Share what goals have already been achieved for the business and how the founders have already invested in the business.</td>
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| **Debt Financing**  
(Loans) | • Money comes in quickly when compared to equity exchanges for capital.  
• It is a guaranteed amount.  
• Fixed payments. | • Must make timely payments even if profits are low.  
• Interest rates are higher for new businesses. | • Banks will look for qualifying criteria like:  
  o A sound business purpose.  
  o Partners with good character, experience and good credit history.  
  o Likelihood that the loan will be paid back.  
• Information to prepare:  
  o Personal and business credit history and financial statements for existing and startup businesses.  
  o Projected financial statements.  
  o Detailed business plan.  
  o Cash flow projections for a year (at least).  
  o Personal guarantees from ALL principal owners of the business.  
• Things to keep in mind:  
  o Large banks are less likely to provide small loans since they are less profitable.  
  o Be thorough in providing all requested documents.  
  o Apply at banks/financial institutions with which the company has previously worked.  
  o Talk to a lending officer to find out exactly what information is needed. |
| **Competitions:**  
Competitors submit business plans, give business pitches, and answer detailed questions before judges. | • Most competitions offer prize money and in-kind services.  
• Great publicity for the company. | • There may be tax or other legal obligations associated with accepting the prize money. | • Consult legal advisor about the tax consequences of accepting prize money.  
• E.g. New York Competitions:  
  o New York Business Plan Competition  
  o New York StartUP! Business Plan Competition |
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<tr>
<td><strong>Grants</strong></td>
<td>• Provides secure funding for an allotted time period.</td>
<td>• Restricts the intellectual property rights of a company.</td>
<td>• Grants may be offered for specific types of business or demographics.</td>
</tr>
<tr>
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<td></td>
<td>• Sometimes requires that a company meet certain goals within set deadlines. If these goals are not met, funding might be lost.</td>
<td>• Grant applications are time consuming because they will require proposals in which every aspect of the company will need to be outlined in detail.</td>
</tr>
<tr>
<td><strong>Promissory Notes:</strong></td>
<td></td>
<td>• If the maturity date arrives before the company realizes any income, the company is in default.</td>
<td>• The promissory note will include the name of the parties (lender and borrower), the date of the loan, the amount to be lent, the date by which the loan will be repaid in full, the frequency of the loan payments, and the interest rate charged on the payments.</td>
</tr>
<tr>
<td>A basic interest-bearing note obligating the founder to pay the note holder in full upon a specified date or upon demand of the lender.</td>
<td>• Easy to complete; it is a simple contract where the borrower makes a note promising to repay the money by a certain date.</td>
<td>• The promissory note will include the name of the parties (lender and borrower), the date of the loan, the amount to be lent, the date by which the loan will be repaid in full, the frequency of the loan payments, and the interest rate charged on the payments.</td>
<td>• Retain a professional to draft a formal note.</td>
</tr>
<tr>
<td><strong>Convertible Notes:</strong></td>
<td></td>
<td>• If the note is converted into equity, the founder’s share is diluted.</td>
<td>• Investors may want to put a price “cap” on a convertible note. The “cap” will stop an equity conversion percentage from going over the pre-negotiated cap percentage.</td>
</tr>
<tr>
<td>A type of interest-bearing note that includes an option to convert the amount owed into an equity stake in the company instead of simply demanding payment in full.</td>
<td>• The equity conversion can be conditioned—e.g. converted at a discount or a maximum value.</td>
<td>• If the amount owed is demanded instead of a conversion, founders must pay in full.</td>
<td>• The cap is an investor-favorable provision, so speak with a professional and examine the cap closely with the investor before committing.</td>
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<td></td>
<td></td>
<td>• Investors that come after the note holder may not want to share an interest in the company with another investor.</td>
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<tr>
<td><strong>Crowdfunding</strong>&lt;br&gt; (“Crowd-Financing” or “Crowd-Sourced Capital”): A collective cooperation of people who network and pool together financial resources to support initiatives started by companies or organizations. Usually done via the internet (i.e. Kickstarter, Wefunder, crowdfunder, RockthePost).</td>
<td>- Financial risk is spread among backers.&lt;br&gt;- Creates strong network of support for the business.&lt;br&gt;- If equity is offered as a part of the package, investors can represent, advocate for, and promote the business brand.&lt;br&gt;- Certain crowdfunding platforms are “all or nothing” meaning if the goal amount is not raised, none of the funds will be received.</td>
<td>- The business pitch needs to connect with the target audience.&lt;br&gt;- Types of crowdfunding:&lt;br&gt;  o <strong>Reward-based</strong>: contributors pledge financial support in exchange for some reward e.g. the company’s product.&lt;br&gt;  o <strong>Donation-based</strong>: financial support in exchange for goodwill or personal recognition.&lt;br&gt;  o <strong>Equity-based</strong>: financial support in exchange for actual ownership of equity shares.&lt;br&gt;- JOBS Act regulation.</td>
<td></td>
</tr>
<tr>
<td><strong>Selling Stock</strong>: Investors buy a stake in the company</td>
<td>- Usually investors will want to help the company succeed.&lt;br&gt;- Founder’s interest can be diluted.&lt;br&gt;- Can be a complicated transfer.&lt;br&gt;- May limit ability to issue common stock options at lower prices.</td>
<td>- Retain a professional.&lt;br&gt;- Founder’s stock may be placed on a vesting schedule.</td>
<td></td>
</tr>
<tr>
<td><strong>Series Funding</strong>: Investors receive preferred stock in exchange for capital</td>
<td>- Investors in a series funding round will assist the company.&lt;br&gt;- Investors will require preferred stock options.</td>
<td>- When negotiations with the investor begin, the company must agree a term sheet that outlines the provisions of the agreement.&lt;br&gt;- Term sheets may prohibit the company from entering into similar negotiations with other potential investors before the closing date of the agreement.</td>
<td></td>
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</table>
## Documents Reviewed by Venture Capital Firms

<table>
<thead>
<tr>
<th>DOCUMENT</th>
<th>DESCRIPTION</th>
<th>WHY DOES IT MATTER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certificate of Incorporation</td>
<td>Document filed with the state registering the business as a legal entity.</td>
<td>• It shows that the company legally exists.</td>
</tr>
</tbody>
</table>
| Business Plan/Model    | Document describing the corporation’s product/service, market strategy, management, sales strategy, and financial projections. | It explains:  
• How the company plans to infiltrate its target market.  
• Current and projected financial state of the company.  
• The company’s direction.                                      |
| Balance Sheet          | Report of the corporation’s assets, liabilities, and stockholder’s equity.  | It explains:  
• How much money the company has and owes.  
• The health and financial condition of the company.               |
| Income Statement       | A report of the corporation’s revenue, expenses, and profits.               | It explains:  
• How well the company is performing.  
• Whether or not the company is generating money.                    |
| Cash Flow Statement    | Explains quarterly cash flow coming in and leaving the company. Similar to the income statement, the cash flow statement shows revenues and expenses when cash is exchanged, not just when transactions occur. | It shows:  
• If the company has enough cash on hand to pay its expenses and purchase additional assets.  
• How much actual cash a company has generated.  
• How the corporation will fare in the future.  
• Changes in money received over time.                             |
| Bylaws                 | The company’s internal governance.                                          | It describes:  
• The internal structure.  
• Operation procedures.  
• Company management.                                             |
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<tr>
<td>Management’s Discussion, Analysis of Financial Condition, Results of Operations “MD&amp;A”</td>
<td>A section of a corporation’s quarterly or annual report that explains the corporation’s financial performance.</td>
<td>It explains: • What the financial statements show and do not show. • Trends and risks that have shaped the past and may shape the company’s future.</td>
</tr>
<tr>
<td>Proof Intellectual Property Registration</td>
<td>Government approval of patents, trademarks, or copyrights.</td>
<td>It explains: • If the business actually owns its IP.</td>
</tr>
<tr>
<td>Licenses and Permits</td>
<td>Government licenses and permits required for the lawful operation of a business.</td>
<td>• Businesses already in compliance are safer investments because the likelihood that they face litigation for a violation is reduced.</td>
</tr>
<tr>
<td>Tax Filings (State &amp; Federal)</td>
<td>Documentation of all taxes paid annually and quarterly.</td>
<td>• It shows that the company is in good standing with all tax agencies.</td>
</tr>
<tr>
<td>Employment Policies and Agreements</td>
<td>Typically a staff handbook or individual agreements that outline the employee’s obligation to the company.</td>
<td>• VCs will review to ensure the company is protected throughout these relationships. • VCs will expect that certain key employees will be obligated to keep company information confidential and not to compete should the relationship end.</td>
</tr>
<tr>
<td>Insurance Policies</td>
<td>Policies that protect the business against different types of risk.</td>
<td>• It shows that even if the unexpected occurs, the company will have the ability to continue working without depleting company resources.</td>
</tr>
</tbody>
</table>
Securities Regulations

What is a security?
Securities are is any interest in a company which makes a person a stakeholder in the company. This includes: stocks, stock options, promissory notes, and certificates of interest.

What is securities regulation?
Securities are regulated by the Securities Act of 1933, the Securities Exchange Act of 1934, Securities Exchange Commission rules, and state consumer protection laws. These bodies of law regulate how securities can be sold, if at all, and the parties that may sell them. The Securities Exchange Commission ("SEC") is the agency that enforces federal regulation. The New York Attorney General (Investor Protection Bureau) is the enforcing body for New York State securities laws.

How can I sell securities in my company to raise money?
Companies may only sell securities if those securities are registered with the SEC or fall outside of SEC regulation because they are exempt. Registration is extremely expensive and is only applicable if a company is going public—if the company is going to be offered on a stock exchange. Most entrepreneurs raise money for their startups by selling securities under one of the exemptions offered in securities regulation.

Can I sell interest in my company without facing registration costs?
There are several exemptions small businesses may fall under that do not require registration. These exemptions offer entrepreneurs a platform to sell securities without registering with the SEC. These exemptions DO NOT exempt entrepreneurs from any antifraud provisions in securities regulation. Any entrepreneur looking to sell interest in his or her company should consult an attorney to ensure those sales comply with the law.

Some SEC exemptions include:

- **Private Placement**—Securities Act of 1934 § 4(a)(2)
  Transactions by an issuer not involving a public offering are exempt from registering securities with the SEC. Securities sold in these transactions must be restricted against resell. Purchasers in these transactions must be sophisticated investors or be able to bear the risk of loss of the investment, and provided enough information about the securities being sold that they can use their sophisticated knowledge about securities.

- **Regulation D**
  Under this exemption, companies must file a Form D with the SEC within 15 days of the first sale of securities in an offering. Some Regulation D offerings must include disclosure material, and some do not. Generally, offers and sales exempt under Regulation D are restricted; those securities cannot be resold without registering them. Most Regulation D funding rounds are integrated, meaning the amount of any fund raising that takes place within 6 months of each other will be combined. For example, X raises $500,000 on January 10 and another $500,000 on April 1. Both amounts will be integrated, making X’s total amount raised during this Regulation D funding round $1,000,000. If X raises another $100,000 on October 31, that will also be integrated into the other amounts because it is within 6 months of April 1. This is important because some Regulation D exemptions are capped at a certain amount.
  Not all fund-raising rounds are eligible for Regulation D treatment. It is important to consult a professional if your company is interested in a Regulation D offering. Regulation D is divided into four separate exemptions.
Securities Regulations

- **Rule 506(b)**—deemed a transaction not involving a public offering THEREFORE amounts raised here do not aggregate with other Regulation D offers and sales
  Entrepreneurs can raise as much money as they want, but can only sell to a maximum 35 non-accredited investors. Any non-accredited investors purchasing stock must, to the knowledge of the offering company, be sophisticated enough so that he or she can evaluate the merits of the investment. Offers to sell must be accompanied by documentation adequately describing the business so each investor has the opportunity to investigate the investment.

- **Rule 506(c)**—deemed a transaction not involving a public offering THEREFORE amounts raised here do not aggregate with other Regulation D offers and sales
  Entrepreneurs may raise an unlimited amount of capital. All purchasers must be accredited investors. The burden is on the entrepreneur to ensure all purchasers are accredited investors.

- **Rule 505**—not subject to registration and publication regulation
  This rule exempts offers and sales of up to $5,000,000 in any 12-month period. An unlimited number of accredited investors may participate in these offers and sales, and up to 35 unaccredited investors may purchase these securities. Unaccredited investors must be given disclosure documents describing the legal and financial state of the company. All securities offered under Rule 505 are restricted.

- **Rule 504**—Seed Capital Exemption
  This rule exempts offers and sales of up to $1,000,000 in a 12-month period. Not all offers and sales are restricted securities.

- **Regulation A**
  Entrepreneurs may raise up to $50,000,000 in a 12-month period. Offering statements under to solicit purchases under the Regulation A exemption must be registered with the SEC. This is a mini-registration process detailed for early-stage companies. Purchasers must be given an “offering circular” detailing the investment prospect. Securities offered under Regulation A are not restricted. Entrepreneurs may advertise this investment opportunity, unlike fund-raising rounds under other exemptions.

- **Crowdfunding**
  Section III of the recently amended JOBS Act excludes transactions of up to $1,000,000 in the aggregate within a 12-month period. Individual investors are limited in the amount they can give under crowdfunding, and all transactions must be offered through a broker or funding portal. Issuers must be registered with these portals and comply with the reporting requirements set forth in each qualifying portal. All funding portals are regulated under the Act. These securities are restricted.

The offer and sale of securities is a complex area of law. Entrepreneurs are strongly encouraged to retain a professional should they want to sell interest in their companies. For more information about complying with securities regulation as a small business owner, refer to the “Small Business and the SEC” section of www.sec.gov.
Deal Dictionary

Our Deal Dictionary is designed to help you understand the jargon that comes up in discussions with investors and legal counsel. For a quick primer on key terms you should be familiar with before meeting with investors, check out our Key Terms.

8

83(b) Election

This is a tax filing that a holder of stock subject to vesting (i.e. restricted stock) can use to elect to be immediately taxed on the difference between the price paid by the person for stock and the fair market value of that stock (if the holder pays fair market value for the stock, this will be $0). Without this filing, the tax code requires the holder to be taxed on the difference between the purchase price of each share and its fair market value as such share vests. If the purchase price is low, but the shares appreciate significantly as it vests over time, the taxes due can be significant. Please note that the tax filing may be made only within 30 days of the purchase of the stock - no exceptions.

A

Anti-dilution Provisions

These are provisions in the company’s Certificate of Incorporation that are intended to offset, typically for investors, the dilutive effect of certain kinds of new issuances of stock by adjusting the ratio at which an investor’s preferred stock converts into common stock. One type is price-based anti-dilution, which results in a share of preferred stock having the right to convert into more than one share of common stock, when the company issues shares at a lower price than the investor paid. Another type consists of adjustments made to account for stock splits, reclassifications and reorganizations (e.g. if common stock is split so that each share of common stock becomes two shares, but preferred stock is not split, then the anti-dilution provisions would ensure that preferred stock converts into two shares of common for each share of preferred stock).

B

Broad Based Weighted Average Anti-dilution

This is the most common (and most founder-friendly) type of price-based anti-dilution protection. “Weighted average” means that the conversion ratio of a share of preferred stock is proportionally reduced by the application of a formula that is based upon the price per share of the new stock being issued (as opposed to “full ratchet” which results in the conversion ratio effectively being reduced to the price per share of the new issuance). What makes a provision “broad-based” (versus “narrow-based”) is the inclusion of common stock issuable upon the conversion of options, warrants, etc. in the calculation, which results in a smaller adjustment.

Bylaws

This is a constitutional document for the company (but subordinate to the certificate of incorporation) and generally sets out the procedural rules that govern the company. Bylaws typically regulate the rules and procedures of director elections, board and stockholder meetings, officer appointments and their roles and responsibilities, and similar matters.

C

Certificate of Incorporation

This is the primary constitutional document for the company and includes provisions dealing with matters such as authorizing the stock.
issuable by the company, establishing the rights, preferences and privileges of the classes (and series) of stock authorized, and
determining what matters stockholders can vote on.

Change of Control

This generally occurs when a company is acquired by or merged into another entity, or when a majority of the voting power of the company
changes hands.

Change of Control Premium

A provision often in Promissory Notes that dictates that if the company undergoes a Change of Control while the Promissory Note is
outstanding, the holder of the Promissory Note is repaid the principal plus accrued interest, and also receives an additional payment (the
premium), which is often some multiple of the original principal amount.

Class F Common Stock (Supervoting Common Stock)

Popularized by the Founder’s Institute, this is a type of common stock held by founders that provides for super-voting power, e.g. 1 share
of Class F Common Stock gets 10 votes per share, while 1 share of other common stock gets 1 vote per share. The goal is to enable
founders to continuously issue shares to investors and/or company service providers (e.g. employees, consultants and advisors) while
keeping voting control of the company.

Closing Conditions

These are conditions that must be satisfied (or waived) before parties close the financing (e.g. before the investors wire investment funds
in exchange for the issuance of stock). Examples of closing conditions include legal opinions, appointment of new members to the Board
of Directors and the filing of an amended Certificate of Incorporation with the state of Delaware that contains the new rights, privileges and
preferences of the investor’s stock.

Conversion Discount

This is applicable to convertible Promissory Notes when calculating the number of shares of stock issuable upon the conversion of the note
into equity. Conversion works by taking the principal plus accrued interest and dividing it by the price per share of the preferred stock
being issued in the Qualified Financing in which the Promissory Note is converting. The Conversion Discount (typically expressed as a
percentage) is a discount off of that price per share, which would enable the investor to convert the dollar value of his Promissory Note
investment into more shares than the number of shares that the investors in the Qualified Financing are buying for the same amount of
cash. A Conversion Discount can be viewed as a form of compensation to an investor for taking earlier risk.

Cumulative Dividends

A Cumulative Dividend calls for some amount of money (usually a percentage of the original price paid per share of the preferred stock) to
accruce for each share of preferred stock, whether or not the company ever declares that dividend. Because, on a liquidation event (e.g.
sale of the company), the preferred stock is typically due its Liquidation Preference AND any unpaid dividends, Cumulative Dividends
effectively increase the Liquidation Preference over time. Cumulative Dividends are similar to the effect of interest on debt. For example, if
an investor invested $1,000,000 with Cumulative Dividends of 10% per annum, then the Liquidation Preference would grow by $100,000
every year (unless the dividend was paid out by the company at an earlier time). Note that the Cumulative Dividends do not compound.

Demand Registration Rights

This is a standard right given to investors in priced-round investments (i.e. investment raised through the sale of preferred stock, not
convertible Promissory Notes). This entitles investors to demand, subject to certain requirements (e.g. investors demanding this have to
hold a minimum percentage of shares), that the company register some shares of stock for a public offering, which facilitates the ability of
the investor to liquate some/all of its holdings.

Double Trigger Vesting Acceleration

This is a type of accelerated Vesting that causes all or a portion of the shares to be deemed Vested upon the occurrence of a combination
of two events, which are typically (1) a Change of Control and (2) an involuntary termination (customarily defined as termination without cause or a resignation caused by events/circumstances that essentially forced the person to resign) within some period after that Change of Control. Full acceleration pursuant to this version of vesting acceleration is generally acceptable to investors.

Drag Along Provision

This is a contractual provision, often found in Voting Agreements, that obligates the parties to vote in favor of the sale of the company if a key group of constituents vote in favor of the sale (i.e. if the key group votes for the sale, then everyone else is “dragged along” (i.e. forced to vote in favor of, support and not oppose/disrupt the deal) into voting for the sale). For example, one formulation might be if the board, a majority of common stock and a majority of preferred stock approve the sale, everyone else must also so vote to approve. Another formulation might be if the board and a majority of all stock (preferred stock voting on an as-converted to common stock basis) approve the sale, everyone else must also so vote to approve.

F

Founder Stock Purchase Agreement

Please see the definition of “Stock Purchase Agreement” below.

Founders’ Preferred Stock (FF Preferred Stock)

This is a special form of founder stock that is not common stock but instead a form of preferred that is convertible into either common stock or the preferred stock issued in a later financing round (Series A, Series B, etc.). It can help facilitate a founder selling a portion of his/her equity interest to the investors at the same valuation as the financing round that the founder sells it in, and immediately upon that sale, the FF Preferred Stock automatically converts into the series of preferred stock being sold in that round. The purpose is to help facilitate founders taking some money off the table prior to exit, which some VCs and entrepreneurs believe helps founders focus on the long-term by providing them some short/medium term economic security. Founders could sell common stock to investors but because it cannot be the same class of stock sold in the financing round, it would not command the same price/valuation, and it could also raise the floor for stock option strike prices for future employees.

Full Ratchet

This is a form of a price-based Anti-dilution Provision that is most aggressive (in favor of the investors) in balancing against the dilution caused by the issuance of stock at a price lower than existing preferred stock. It adjusts the conversion ratio of the existing preferred stock (that was sold for more than the stock being sold now) so that such stock retains the same percentage on an as-converted basis as it did before the issuance.

Fully Participating Liquidation Preference

This is similar to a Partially Participating Liquidation Preference, except there is no cap on the preferred stock’s participation in the proceeds with common stock after payment of the original investment amounts plus dividends.

I

Investors’ Rights Agreement

An agreement (typically put in place in connection with the company’s first seed or series A round) that sets forth certain customary rights of investors, such as Pre-emptive Rights, Registration Rights, rights to obtain financial statements of the company and other information rights. This agreement will also typically include covenants by the company to do certain things, such as obtaining Key Person Insurance on the lives of its founders and insurance for the directors and officers of the company.

K

Key Person Insurance

Life insurance on one or more “key person(s)” to a company’s future success (usually a founder, current CEO or lead technical employee). This is sometimes required by investors as a condition to an investment in the Company. The proceeds of the life insurance are typically
payable to the company.

L

Liquidation Preference

The amount of money the holders of preferred stock are entitled to receive in a liquidation event (e.g. sale of the company) prior to the holders of common stock receiving any proceeds from that event.

Lock-Up Provision (Market Standoff Provision)

This is a provision that requires the holder of company securities (stock, options, etc.) to abstain from re-selling those securities for a certain period of time after a company's public offering of its securities (typically 180 days in the case of the company's initial public offering, 90 days for other public offerings). The purpose of the provision is to facilitate price stability and to prevent a glut of shares from hitting the open market right after the company's public offering.

M

Management Rights Letter

This is a customary rights letter given by the company to institutional investors in financing rounds. The letter assists such investors in being able to qualify as certain types of investment entities ("venture capital operating companies"), which in turn exempts such investors from regulations that would otherwise apply to them if some of their funds came from certain pension funds. The rights typically include the right to consult with and address management and the board of directors, and rights to inspect board meeting minutes and materials and the books and records of the company.

Mandatory Conversion

These are provisions in the company’s Certificate of Incorporation that dictate when preferred stock is automatically converted into shares of common stock. The two most common triggers are (i) a public offering with a minimum offering size (e.g. $30,000,000 in gross proceeds to the company) or (ii) the vote or written consent of a specific percentage of the preferred stock. Mandatory conversion is desirable in the first instance because common stock is what is typically sold in initial public offerings and investment banks often find it to be easier to market such offerings if there is no preferred stock outstanding following the offering, and is desirable in the second instance since large-scale revisions to the capital structure of the company (i.e. recapitalizations) may require the existing preferred stock to be converted to common to make room for the new capital structure.

Maturity Date

This is the date on or after which repayment of a Promissory Note is due.

N

No Shop Provision

A provision in term sheets that prohibits the company that is being invested in from shopping the deal around to other investors. Also referred to as an "exclusivity" provision. Depending on deal dynamics and who has leverage, the No Shop typically ranges from 30-45 days, and occasionally, a No Shop is not included in the term sheet.

Non-Competition Agreement

This is an agreement not to engage in competitive business activities. For an individual, this usually takes the form of an agreement with his/her employer that the individual will not work for a competitor after leaving his/her current position. In some states, such as California, this type of non-compete is generally unenforceable outside of the context in which a a company is being sold. For a company, this is an agreement not to compete with another company. In both cases, the non-compete may be limited by duration and geography (e.g. cannot compete in the state of New York in the relevant line of business for 2 years).
Non-Cumulative Dividends

These are dividends payable on stock that are only paid if and when they are declared by the Board of Directors of the company.

Non-Participating Liquidation Preference

This type of Liquidation Preference entitles the holders of preferred stock to receive back an amount equal to their original investment plus any dividends owed to them in the event of a liquidation event. The remaining proceeds in the liquidation event go to the holders of common stock and/or the holders of participating preferred stock (if any). Note though that this does not lock a holder of preferred into receiving just their original investment plus dividends - if it would receive more as a common stockholder after converting, then an investor can elect (by opting to convert to common stock) to receive such greater amount (often times, the Certificate of Incorporation is drafted to make that result automatic).

Non-Solicitation Agreement

This is an agreement not to solicit employees or consultants of a company to leave their current positions. This is a standard term in employment agreements, since an employer would not want any person to be able to leave and encourage the remaining employees to join the departed person’s business.

Note Purchase Agreement

The separate agreement that governs the sale of Promissory Notes in exchange for cash. This agreement contains mechanics about how the sale will occur (place and time), representations and warranties made by the seller and buyer of the note and if, how and when the note is convertible in equity of the Company.

Original Purchase Price

The price per share an investor originally paid for the stock.

Partially Participating Liquidation Preference

Like a Non-Participating Liquidation Preference, this entitles the holders of preferred stock to receive back an amount equal to their original investment plus any dividends owed to them in the event of a liquidation event. In addition, the remaining proceeds are shared between the preferred stock and common stock on a pro rata basis (treating the preferred stock as if converted to common stock), up to a certain cap that is usually expressed as a multiple of the original amount invested.

Pay to Play

A “Pay to Play” provision requires certain stockholders to participate in a future financing or risk having their shares of preferred stock converted to common stock (often at a less than 1:1 ratio) or face other punitive actions such as the loss of board seats, preemptive rights, etc. These provisions are often implemented in “down round” financings (financings in which the company is raising money at a lower valuation that in the previous round) and are used to incentivize existing stockholders to participate in such a financing. The “Pay to Play” provisions are typically contained in the Certificate of Incorporation and are often referred to as a “Special Mandatory Conversion.”

Piggy-Back Registration Rights

This is a right typically given to investors alongside Demand Registration and S-3 Registration Rights. Piggy-Back Registration Rights entitle investors to have their shares included with any shares the company itself wants to sell and register for public sale (hence, the investors can sell their shares to the public by “piggy-backing” on top of the company’s public offering).

Post-Money Valuation

The valuation of the Company after the investors have made their investment. Typically, this is just the Pre-Money Valuation plus the total
amount of investment in the round.

**Pre-emptive Rights (Rights of First Offer)**

Also referred to as "participation rights," these are rights typically given to investors in priced round investments (as opposed to investments raised purely on Promissory Notes) that conform to parenthetical or "demand reg. rights" and entitle the investors holding this right to invest in the financing. Typically, this is structured so that investors have the right to invest in the financing in an amount equal to the investor’s current ownership percentage in the company, and if any investor decides to pass, the other fully-participating investors can take up that investor’s allocation (this is referred to as a "gobble-up provision"). Essentially, it is a way for investors to maintain (or increase) their ownership percentage as the company raises more capital in successive rounds, by participating in those successive rounds.

**Pre-Money Valuation**

The dollar valuation the investors have placed on the Company prior to making their investment. This is the valuation that is used to calculate the price per share for the preferred stock to be sold by the Company in a financing.

**Promissory Note**

A written, dated and signed promise by the company to pay a defined sum of money to the holder of the note upon the demand of that holder or at some specific future date.

**Proprietary Information and Inventions Agreement**

The agreement employees of a company sign agreeing to assign the intellectual property created by that employee to the Company.

**Protective Provisions (Negative Covenants)**

The list of actions a company cannot take without the prior approval of a specified portion of the holders of preferred stock. These provisions are typically included in the company’s Certificate of Incorporation, usually when it is amended in connection with the company’s first significant third-party investment. This list is typically limited to a set of fundamental corporate actions (such as a sale of the company, an increase to the size of the Board of Directors and issuing a new series of preferred stock), but is often heavily negotiated with investors.

**Q**

**Qualified Financing (Next Equity Financing)**

This is a term that is in Promissory Notes that are convertible into equity. It is often the trigger for the automatic conversion of the outstanding amount in the Promissory Note into equity, and this term will typically specify a minimum round size. For example, if a Qualified Financing is defined as one resulting in $1,000,000 of new cash proceeds to the company, if the company raises a new equity round of $2,000,000, the Promissory Notes would automatically convert, but not if the size of the raise in the new round was less than $1,000,000.

**R**

**Redemption Rights**

This is a right of the preferred stockholders (typically contained in the Certificate of Incorporation) to demand that the company repurchase such stockholder’s shares of preferred stock by paying such stockholder the Original Purchase Price (or some other negotiated amount/multiple) after a certain amount of time has elapsed since that purchase. Investors sometimes use this provision to ensure that they can obtain liquidity on their investment at a future date, since many investors have obligations to return capital to their own investors (e.g. venture funds have limited partners, such as pension funds, that invested in the investment fund). As the redemption date draws near, these rights can also give a stockholder negotiating leverage over important strategic decisions of the company.

**Registration Rights**

Rights of investors to cause the company to register shares of the investors' stock for sale to the public. The most common 3 forms of this
are Demand Registration Rights, S-3 Registration Rights and Piggy-Back Registration Rights.

Right of First Refusal

Entitles the holder of the right to be the first to "refuse" a deal that the person subject to the right receives for the purchase of stock. From a founder perspective, this is the right of the company (and, if the company has taken institutional investment, likely the investors) to buy the founder's shares if the founder tries to sell them to a third party. See Right of First Refusal and Co-Sale Agreement.

Right of First Refusal and Co-Sale Agreement

An agreement (typically put in place in connection with the company's first significant third-party investment) that dictates that founder shares (and, frequently, other large common stock holders) are subject to a Right of First Refusal held by the company, and then secondarily, by a Right of First Refusal held by investors if the company does not fully exercise its Right of First Refusal. Further, if any shares are not purchased by the Company or investors through the Right of First Refusal, then those remaining shares are typically subject to "Co-Sale," which means an investor can tag along in any sale of the founder's stock by including a portion of the investor's shares (pro rata) and reducing the number of shares the founder is able to sell to a third party by that amount. The Right of First Refusal is meant to give the company and investors the ability to control who is a stockholder in the company; the Co-Sale is meant to allow the investors to achieve liquidity alongside a founder if the founder finds a good opportunity to sell his/her stock.

S

S-3 Registration Rights

Similar to Demand Registration Rights, this entitles an investor to require the company to register some of the investor's shares for sale to the public. After a company is already a public company, it can take advantage of more streamlined and cheaper methods of offering its shares to the public - this is called a "Form S-3 Registration." S-3 Registration Rights in turn enable an investor to require the company to register investor shares for sale using that Form S-3 Registration process.

Secured Note

This is a type of Promissory Note where the borrower's promise to pay is backed by the lender having recourse to some collateral (the "security," hence, a "secured" note) if the borrower defaults on the promise to pay. The security/collateral is generally the assets of the company (often excluding the company's intellectual property rights).

Single Trigger Vesting Acceleration

This is a type of accelerated Vesting that causes all or a portion of a person's shares to be deemed Vested upon the occurrence of a single event, which is typically (1) a Change of Control and/or (2) an involuntary termination (customarily defined as termination without cause or a resignation caused by events/circumstances that essentially forced the person to resign).

Stock Option Plan

The agreement and plan governing the issuance of stock options to the company's service providers (i.e. employees, consultants, advisors, etc.).

Stock Purchase Agreement

Generally, this is an agreement pursuant to which someone purchases shares of stock from the company.

If it is a Stock Purchase Agreement between the company and a founder or employee, then it is the agreement pursuant to which a founder or employee purchases common stock from the company. The agreement includes, among other provisions, the Vesting (Right of Repurchase) terms for the the stock, any vesting acceleration terms (Single Trigger Vesting Acceleration or Double Trigger Vesting Acceleration), the company's Right of First Refusal on the stock and a Lock-Up Provision (Market Standoff Provision).

If it is a Stock Purchase Agreement between the company and investors, then it is the agreement pursuant to which the investors pay the company the cash investment amount in exchange for equity (usually shares of preferred stock) in the company. Both the company and the investors would make representations and warranties related to the sale, and this agreement would have Closing Conditions as well.
Technology Assignment Agreement

The agreement a founder signs to transfer intellectual property related to the company's business created by the founder prior to incorporating the company and signing a Proprietary Information and Inventions Agreement.

Unsecured Note

This is a type of Promissory Note where the borrower's promise to pay is not backed by any other property and the only recourse the lender has if the borrower defaults on the promise is to take legal action and have the authorities levy a lien on the borrower.

Valuation Cap (Capped Conversion)

This is a valuation figure used in Promissory Notes dealing with the conversion of the note into equity and is a specialized form of a Conversion Discount. Conversion works by taking the principal plus accrued interest and dividing it by the price per share of the preferred stock being issued in the Qualified Financing in which the Promissory Note is converting. However, the "Valuation Cap" would be the maximum Pre-Money Valuation that could be used to calculate the price per share of the preferred stock just for the purpose of converting the note. It provides the investor with a more stable expectation of the percentage of the company that it will own following conversion. For instance, if an investor invests $1,000,000 at a Valuation Cap of $9,000,000, then the investor can expect to convert into equity later and generally hold approximately 10% ($1M invested / postmoney of $10M, but it will not be exactly 10% because the investor will also take some dilution caused by other investors converting or new investors putting cash in at the Qualified Financing). However, without that Valuation Cap, an investor investing $1,000,000 with a Promissory Note could convert into any percentage of the company, which would be completely dependent on the Pre-Money Valuation in the Qualified Financing.

Vesting (Right of Repurchase)

Vesting is the method of tying equity ownership to time served with the company. The most common vesting terms for employees is when 25% of equity vests after 1 year of service (often referred to as a "one-year cliff"), and the remainder vests monthly in equal installments over the next three years. Founders will often have different vesting schedules to reflect their early commitment to the company and higher level of involvement. A "Right of Repurchase" is the way vesting is implemented when founders or employees purchase or are granted stock (rather than options). In that case, the person "owns" and can vote all of the stock, but the stock is subject to the company's right to buy it back at the purchase price when the person's service to the company ends (subject to any acceleration provisions), and that right lapses at the rate of the vesting schedule (i.e. when the person is not vested at all, the company can buy back all of the shares, and when the person is fully vested, the company cannot buy back any shares).

Voting Agreement

An agreement (typically put in place in connection with the company's first significant third-party investment) that governs how, and by whom, the members of the company's Board of Directors are elected. This is also typically the agreement that includes Drag Along Provisions (if any).

W

Warrant Coverage Amount

In some financing deals involving convertible Promissory Notes, investors will ask for warrants exercisable for shares of a series of the company's preferred stock (or if none exist, then shares of the next series of preferred stock to be issued by the company or common stock). The number of shares the warrant is exercisable for will usually be expressed as a percentage of the amount of the investment (i.e. the principal amount of a Promissory Note) divided by the exercise price (the purchase price) of the underlying stock.
This sample document is the work product of a national coalition of attorneys who specialize in venture capital financings, working under the auspices of the NVCA. This document is intended to serve as a starting point only, and should be tailored to meet your specific requirements. This document should not be construed as legal advice for any particular facts or circumstances. Note that this sample document presents an array of (often mutually exclusive) options with respect to particular deal provisions.
Preliminary Note

This term sheet maps to the NVCA Model Documents, and for convenience the provisions are grouped according to the particular Model Document in which they may be found. Although this term sheet is perhaps somewhat longer than a "typical" VC Term Sheet, the aim is to provide a level of detail that makes the term sheet useful as both a road map for the document drafters and as a reference source for the business people to quickly find deal terms without the necessity of having to consult the legal documents (assuming of course there have been no changes to the material deal terms prior to execution of the final documents).
TERM SHEET FOR SERIES A PREFERRED STOCK FINANCING OF
[INSERT COMPANY NAME], INC.
[____, 20__]

This Term Sheet summarizes the principal terms of the Series A Preferred Stock Financing of [___________], Inc., a [Delaware] corporation (the “Company”). In consideration of the time and expense devoted and to be devoted by the Investors with respect to this investment, the No Shop/Confidentiality [and Counsel and Expenses] provisions of this Term Sheet shall be binding obligations of the Company whether or not the financing is consummated. No other legally binding obligations will be created until definitive agreements are executed and delivered by all parties. This Term Sheet is not a commitment to invest, and is conditioned on the completion of due diligence, legal review and documentation that is satisfactory to the Investors. This Term Sheet shall be governed in all respects by the laws of [_____________the ].

Offering Terms

Closing Date: As soon as practicable following the Company’s acceptance of this Term Sheet and satisfaction of the Conditions to Closing (the “Closing”). [provide for multiple closings if applicable]

Investors:

Investor No. 1: [_______] shares ([__]%), $[_________]

Investor No. 2: [_______] shares ([__]%), $[_________]

[as well other investors mutually agreed upon by Investors and the Company]

Amount Raised: $[_________], [including $[_________] from the conversion of principal [and interest] on bridge notes].

Price Per Share: $[_________] per share (based on the capitalization of the Company

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1 The choice of law governing a term sheet can be important because in some jurisdictions a term sheet that expressly states that it is nonbinding may nonetheless create an enforceable obligation to negotiate the terms set forth in the term sheet in good faith. Compare SIGA Techs., Inc. v. PharmAthene, Inc., Case No. C.A. 2627 (Del. Supreme Court May 24, 2013) (holding that where parties agreed to negotiate in good faith in accordance with a term sheet, that obligation was enforceable notwithstanding the fact that the term sheet itself was not signed and contained a footer on each page stating “Non Binding Terms”); EQT Infrastructure Ltd. v. Smith, 861 F. Supp. 2d 220 (S.D.N.Y. 2012); Stanford Hotels Corp. v. Potomac Creek Assocs., L.P., 18 A.3d 725 (D.C. App. 2011) with Rosenfield v. United States Trust Co., 5 N.E. 323, 326 (Mass. 1935) (“An agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereo.”); Martin v. Martin, 326 S.W.3d 741 (Tex. App. 2010); Va. Power Energy Mktg. v. EQT Energy, LLC, 2012 WL 2905110 (E.D. Va. July 16, 2012). As such, because a “nonbinding” term sheet governed by the law of a jurisdiction such as Delaware, New York or the District of Columbia may in fact create an enforceable obligation to negotiate in good faith to come to agreement on the terms set forth in the term sheet, parties should give consideration to the choice of law selected to govern the term sheet.

2 Modify this provision to account for staged investments or investments dependent on the achievement of milestones by the Company.
set forth below) (the “Original Purchase Price”).

*Pre-Money Valuation:* The Original Purchase Price is based upon a fully-diluted pre-money valuation of $[_____] and a fully-diluted post-money valuation of $[_____] (including an employee pool representing [__]% of the fully-diluted post-money capitalization).

*Capitalization:* The Company’s capital structure before and after the Closing is set forth on Exhibit A.

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**CHARTER**

**Dividends:**

[Alternative 1: Dividends will be paid on the Series A Preferred on an as-converted basis when, as, and if paid on the Common Stock]

[Alternative 2: The Series A Preferred will carry an annual [__]% cumulative dividend [payable upon a liquidation or redemption]. For any other dividends or distributions, participation with Common Stock on an as-converted basis.]

[Alternative 3: Non-cumulative dividends will be paid on the Series A Preferred in an amount equal to $[_____] per share of Series A Preferred when and if declared by the Board.]

**Liquidation Preference:** In the event of any liquidation, dissolution or winding up of the Company, the proceeds shall be paid as follows:

[Alternative 1 (non-participating Preferred Stock): First pay [one] times the Original Purchase Price [plus accrued dividends] [plus declared and unpaid dividends] on each share of Series A Preferred (or, if greater, the amount that the Series A Preferred would receive on an as-converted basis). The balance of any proceeds shall be distributed pro rata to holders of Common Stock.]

[Alternative 2 (full participating Preferred Stock): First pay [one]...]

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3 The Charter (Certificate of Incorporation) is a public document, filed with the Secretary of State of the state in which the company is incorporated, that establishes all of the rights, preferences, privileges and restrictions of the Preferred Stock.

4 In some cases, accrued and unpaid dividends are payable on conversion as well as upon a liquidation event. Most typically, however, dividends are not paid if the preferred is converted. Another alternative is to give the Company the option to pay accrued and unpaid dividends in cash or in common shares valued at fair market value. The latter are referred to as “PIK” (payment-in-kind) dividends.
times the Original Purchase Price [plus accrued dividends] [plus declared and unpaid dividends] on each share of Series A Preferred. Thereafter, the Series A Preferred participates with the Common Stock pro rata on an as-converted basis.

[Alternative 3 (cap on Preferred Stock participation rights): First pay [one] times the Original Purchase Price [plus accrued dividends] [plus declared and unpaid dividends] on each share of Series A Preferred. Thereafter, Series A Preferred participates with Common Stock pro rata on an as-converted basis until the holders of Series A Preferred receive an aggregate of [_____] times the Original Purchase Price (including the amount paid pursuant to the preceding sentence).]

A merger or consolidation (other than one in which stockholders of the Company own a majority by voting power of the outstanding shares of the surviving or acquiring corporation) and a sale, lease, transfer, exclusive license or other disposition of all or substantially all of the assets of the Company will be treated as a liquidation event (a “Deemed Liquidation Event”), thereby triggering payment of the liquidation preferences described above [unless the holders of [___]% of the Series A Preferred elect otherwise]. [The Investors' entitlement to their liquidation preference shall not be abrogated or diminished in the event part of the consideration is subject to escrow in connection with a Deemed Liquidation Event.]5

Voting Rights:

The Series A Preferred shall vote together with the Common Stock on an as-converted basis, and not as a separate class, except (i) [so long as [insert fixed number, or %, or “any”] shares of Series A Preferred are outstanding,] the Series A Preferred as a class shall be entitled to elect [_______] [(___)] members of the Board (the “Series A Directors”), and (ii) as required by law. The Company’s Certificate of Incorporation will provide that the number of authorized shares of Common Stock may be increased or decreased with the approval of a majority of the Preferred and Common Stock, voting together as a single class, and without a separate class vote by the Common Stock.6

Protective Provisions:

[So long as [insert fixed number, or %, or “any”] shares of Series A Preferred are outstanding,] in addition to any other vote or approval required under the Company’s Charter or Bylaws, the Company will

5 See Subsection 2.3.4 of the Model Certificate of Incorporation and the detailed explanation in related footnote 25.
6 For corporations incorporated in California, one cannot “opt out” of the statutory requirement of a separate class vote by Common Stockholders to authorize shares of Common Stock. The purpose of this provision is to “opt out” of DGL 242(b)(2).
not, without the written consent of the holders of at least \([\_\_\_\%]\) of the Company’s Series A Preferred, either directly or by amendment, merger, consolidation, or otherwise:

(i) liquidate, dissolve or wind-up the affairs of the Company, or effect any merger or consolidation or any other Deemed Liquidation Event; (ii) amend, alter, or repeal any provision of the Certificate of Incorporation or Bylaws [in a manner adverse to the Series A Preferred] \(^7\); (iii) create or authorize the creation of or issue any other security convertible into or exercisable for any equity security, having rights, preferences or privileges senior to or on parity with the Series A Preferred, or increase the authorized number of shares of Series A Preferred; (iv) purchase or redeem or pay any dividend on any capital stock prior to the Series A Preferred, [other than stock repurchased from former employees or consultants in connection with the cessation of their employment/services, at the lower of fair market value or cost;] [other than as approved by the Board, including the approval of [\(\_\_\_\_\_\) Series A Director(s)]]; or (v) create or authorize the creation of any debt security [if the Company’s aggregate indebtedness would exceed \(\_\_\_\_\_\_\_\)] [other than equipment leases or bank lines of credit][unless such debt security has received the prior approval of the Board of Directors, including the approval of [\(\_\_\_\_\_\_\_\_\) Series A Director(s)]; (vi) create or hold capital stock in any subsidiary that is not a wholly-owned subsidiary or dispose of any subsidiary stock or all or substantially all of any subsidiary assets; [or (vii) increase or decrease the size of the Board of Directors].\(^8\)

**Optional Conversion:**

The Series A Preferred initially converts 1:1 to Common Stock at any time at option of holder, subject to adjustments for stock dividends, splits, combinations and similar events and as described below under “Anti-dilution Provisions.”

**Anti-dilution Provisions:**

In the event that the Company issues additional securities at a purchase price less than the current Series A Preferred conversion price, such conversion price shall be adjusted in accordance with the following formula:

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\(^7\) Note that as a matter of background law, Section 242(b)(2) of the Delaware General Corporation Law provides that if any proposed charter amendment would adversely alter the rights, preferences and powers of one series of Preferred Stock, but not similarly adversely alter the entire class of all Preferred Stock, then the holders of that series are entitled to a separate series vote on the amendment.

\(^8\) The board size provision may also be addressed in the Voting Agreement; see Section 1.1 of the Model Voting Agreement.

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[Alternative 1: “Typical” weighted average:

$$CP_2 = CP_1 \times \frac{(A+B)}{(A+C)}$$

$CP_2$ = Series A Conversion Price in effect immediately after new issue

$CP_1$ = Series A Conversion Price in effect immediately prior to new issue

$A$ = Number of shares of Common Stock deemed to be outstanding immediately prior to new issue (includes all shares of outstanding common stock, all shares of outstanding preferred stock on an as-converted basis, and all outstanding options on an as-exercised basis; and does not include any convertible securities converting into this round of financing)$^9$

$B$ = Aggregate consideration received by the Corporation with respect to the new issue divided by $CP_1$

$C$ = Number of shares of stock issued in the subject transaction]

[Alternative 2: Full-ratchet – the conversion price will be reduced to the price at which the new shares are issued.]

[Alternative 3: No price-based anti-dilution protection.]

The following issuances shall not trigger anti-dilution adjustment:$^{10}$

(i) securities issuable upon conversion of any of the Series A Preferred, or as a dividend or distribution on the Series A Preferred; (ii) securities issued upon the conversion of any debenture, warrant, option, or other convertible security; (iii) Common Stock issuable upon a stock split, stock dividend, or any subdivision of shares of Common Stock; and (iv) shares of Common Stock (or options to purchase such shares of Common Stock) issued or issuable to employees or directors of, or consultants to, the Company pursuant to any plan approved by the Company’s Board of Directors [including at least [_______] Series A Director(s)].

Mandatory Conversion: Each share of Series A Preferred will automatically be converted into Common Stock at the then applicable conversion rate in the event of the closing of a [firm commitment] underwritten public offering with

$^9$ The “broadest” base would include shares reserved in the option pool.

$^{10}$ Note that additional exclusions are frequently negotiated, such as issuances in connection with equipment leasing and commercial borrowing. See Subsections 4.4.1(d)(v)-(viii) of the Model Certificate of Incorporation for additional exclusions.
a price of [___] times the Original Purchase Price (subject to adjustments for stock dividends, splits, combinations and similar events) and [net/gross] proceeds to the Company of not less than $[_______] (a “QPO”), or (ii) upon the written consent of the holders of [___]% of the Series A Preferred.11

[Pay-to-Play:]

[Unless the holders of [___]% of the Series A elect otherwise,] on any subsequent [down] round all [Major] Investors are required to purchase their pro rata share of the securities set aside by the Board for purchase by the [Major] Investors. All shares of Series A Preferred12 of any [Major] Investor failing to do so will automatically [lose anti-dilution rights] [lose right to participate in future rounds] [convert to Common Stock and lose the right to a Board seat if applicable].]13

Redemption Rights:14

Unless prohibited by Delaware law governing distributions to stockholders, the Series A Preferred shall be redeemable at the option of holders of at least [___]% of the Series A Preferred commencing any time after [_______] at a price equal to the Original Purchase Price [plus all accrued but unpaid dividends]. Redemption shall occur in three equal annual portions. Upon a redemption request from the holders of the required percentage of the Series A Preferred, all Series A Preferred shares shall be redeemed [(except for any Series A holders who affirmatively opt-out)].15

11 The per share test ensures that the investor achieves a significant return on investment before the Company can go public. Also consider allowing a non-QPO to become a QPO if an adjustment is made to the Conversion Price for the benefit of the investor, so that the investor does not have the power to block a public offering.

12 Alternatively, this provision could apply on a proportionate basis (e.g., if Investor plays for ½ of pro rata share, receives ½ of anti-dilution adjustment).

13 If the punishment for failure to participate is losing some but not all rights of the Preferred (e.g., anything other than a forced conversion to common), the Certificate of Incorporation will need to have so-called “blank check preferred” provisions at least to the extent necessary to enable the Board to issue a “shadow” class of preferred with diminished rights in the event an investor fails to participate. As a drafting matter, it is far easier to simply have (some or all of) the preferred convert to common.

14 Redemption rights allow Investors to force the Company to redeem their shares at cost (and sometimes investors may also request a small guaranteed rate of return, in the form of a dividend). In practice, redemption rights are not often used; however, they do provide a form of exit and some possible leverage over the Company. While it is possible that the right to receive dividends on redemption could give rise to a Code Section 305 “deemed dividend” problem, many tax practitioners take the view that if the liquidation preference provisions in the Charter are drafted to provide that, on conversion, the holder receives the greater of its liquidation preference or its as-converted amount (as provided in the Model Certificate of Incorporation), then there is no Section 305 issue.

15 Due to statutory restrictions, the Company may not be legally permitted to redeem in the very circumstances where investors most want it (the so-called “sideways situation”). Accordingly, and particularly in light of the Delaware Chancery Court’s ruling in Thoughtworks (see discussion in Model Charter), investors may seek enforcement provisions to give their redemption rights more teeth — e.g., the holders of a majority of the Series A Preferred shall be entitled to elect a majority of the Company’s Board of Directors, or shall have consent rights on Company cash expenditures, until such amounts are paid in full.
STOCK PURCHASE AGREEMENT

Representations and Warranties: Standard representations and warranties by the Company. [Representations and warranties by Founders regarding technology ownership, etc.].

Conditions to Closing: Standard conditions to Closing, which shall include, among other things, satisfactory completion of financial and legal due diligence, qualification of the shares under applicable Blue Sky laws, the filing of a Certificate of Incorporation establishing the rights and preferences of the Series A Preferred, and an opinion of counsel to the Company.

Counsel and Expenses: [Investor/Company] counsel to draft Closing documents. Company to pay all legal and administrative costs of the financing [at Closing], including reasonable fees (not to exceed $[_____] and expenses of Investor counsel[, unless the transaction is not completed because the Investors withdraw their commitment without cause].

Company Counsel: 

Investor Counsel:

INVESTORS’ RIGHTS AGREEMENT

Registration Rights:

Registrable Securities: All shares of Common Stock issuable upon conversion of the Series A Preferred [and {any other Common Stock held by the Investors}] will be deemed “Registrable Securities.”

Demand Registration: Upon earliest of (i) [three-five] years after the Closing; or (ii) [six]

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16 Founders’ representations are controversial and may elicit significant resistance as they are found in a minority of venture deals. They are more likely to appear if Founders are receiving liquidity from the transaction, or if there is heightened concern over intellectual property (e.g., the Company is a spin-out from an academic institution or the Founder was formerly with another company whose business could be deemed competitive with the Company), or in international deals. Founders’ representations are even less common in subsequent rounds, where risk is viewed as significantly diminished and fairly shared by the investors, rather than being disproportionately borne by the Founders. A sample set of Founders Representations is attached as an Addendum at the end of the Model Stock Purchase Agreement.

17 The bracketed text should be deleted if this section is not designated in the introductory paragraph as one of the sections that is binding upon the Company regardless of whether the financing is consummated.

18 Note that Founders/management sometimes also seek limited registration rights.

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months following an initial public offering (“IPO”), persons holding ___% of the Registrable Securities may request [one][two] (consummated) registrations by the Company of their shares. The aggregate offering price for such registration may not be less than $[5-15] million. A registration will count for this purpose only if (i) all Registrable Securities requested to be registered are registered, and (ii) it is closed, or withdrawn at the request of the Investors (other than as a result of a material adverse change to the Company).

**Registration on Form S-3:**
The holders of [10-30]% of the Registrable Securities will have the right to require the Company to register on Form S-3, if available for use by the Company, Registrable Securities for an aggregate offering price of at least $[1-5 million]. There will be no limit on the aggregate number of such Form S-3 registrations, provided that there are no more than [two] per year.

**Piggyback Registration:**
The holders of Registrable Securities will be entitled to “piggyback” registration rights on all registration statements of the Company, subject to the right, however, of the Company and its underwriters to reduce the number of shares proposed to be registered to a minimum of [20-30]% on a pro rata basis and to complete reduction on an IPO at the underwriter’s discretion. In all events, the shares to be registered by holders of Registrable Securities will be reduced only after all other stockholders’ shares are reduced.

**Expenses:**
The registration expenses (exclusive of stock transfer taxes, underwriting discounts and commissions will be borne by the Company. The Company will also pay the reasonable fees and expenses[,] not to exceed $______,] of one special counsel to represent all the participating stockholders.

**Lock-up:**
Investors shall agree in connection with the IPO, if requested by the managing underwriter, not to sell or transfer any shares of Common Stock of the Company [(including/excluding shares acquired in or following the IPO)] for a period of up to 180 days [plus up to an additional 18 days to the extent necessary to comply with applicable regulatory requirements] following the IPO (provided all directors and officers of the Company [and [1 – 5]% stockholders] agree to the

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19 The Company will want the percentage to be high enough so that a significant portion of the investor base is behind the demand. Companies will typically resist allowing a single investor to cause a registration. Experienced investors will want to ensure that less experienced investors do not have the right to cause a demand registration. In some cases, different series of Preferred Stock may request the right for that series to initiate a certain number of demand registrations. Companies will typically resist this due to the cost and diversion of management resources when multiple constituencies have this right.

20 See commentary in footnotes 23 and 24 of the Model Investors’ Rights Agreement regarding possible extensions of lock-up period.

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same lock-up). [Such lock-up agreement shall provide that any discretionary waiver or termination of the restrictions of such agreements by the Company or representatives of the underwriters shall apply to Investors, pro rata, based on the number of shares held.]

**Termination:**

Upon a Deemed Liquidation Event, [and/or] when all shares of an Investor are eligible to be sold without restriction under Rule 144 [and/or] the [_____] anniversary of the IPO.

No future registration rights may be granted without consent of the holders of a [majority] of the Registrable Securities unless subordinate to the Investor’s rights.

**Management and Information Rights:**

A Management Rights letter from the Company, in a form reasonably acceptable to the Investors, will be delivered prior to Closing to each Investor that requests one.\(^{21}\)

Any [Major] Investor [(who is not a competitor)] will be granted access to Company facilities and personnel during normal business hours and with reasonable advance notification. The Company will deliver to such Major Investor (i) annual, quarterly, [and monthly] financial statements, and other information as determined by the Board; (ii) thirty days prior to the end of each fiscal year, a comprehensive operating budget forecasting the Company’s revenues, expenses, and cash position on a month-to-month basis for the upcoming fiscal year; and (iii) promptly following the end of each quarter an up-to-date capitalization table. A “Major Investor” means any Investor who purchases at least $[_____] of Series A Preferred.

**Right to Participate Pro Rata in Future Rounds:**

All [Major] Investors shall have a pro rata right, based on their percentage equity ownership in the Company (assuming the conversion of all outstanding Preferred Stock into Common Stock and the exercise of all options outstanding under the Company’s stock plans), to participate in subsequent issuances of equity securities of the Company (excluding those issuances listed at the end of the “Anti-dilution Provisions” section of this Term Sheet. In addition, should any [Major] Investor choose not to purchase its full pro rata share, the remaining [Major] Investors shall have the right to purchase the remaining pro rata shares.

**Matters Requiring Investor Director Approval:**

[So long as the holders of Series A Preferred are entitled to elect a Series A Director, the Company will not, without Board approval, which approval must include the affirmative vote of [one/both] of the

\(^{21}\) See commentary in introduction to Model Managements Rights Letter, explaining purpose of such letter.
Series A Director(s):

(i) make any loan or advance to, or own any stock or other securities of, any subsidiary or other corporation, partnership, or other entity unless it is wholly owned by the Company; (ii) make any loan or advance to any person, including, any employee or director, except advances and similar expenditures in the ordinary course of business or under the terms of a employee stock or option plan approved by the Board of Directors; (iii) guarantee, any indebtedness except for trade accounts of the Company or any subsidiary arising in the ordinary course of business; (iv) make any investment inconsistent with any investment policy approved by the Board; (v) incur any aggregate indebtedness in excess of $[_____] that is not already included in a Board-approved budget, other than trade credit incurred in the ordinary course of business; (vi) enter into or be a party to any transaction with any director, officer or employee of the Company or any “associate” (as defined in Rule 12b-2 promulgated under the Exchange Act) of any such person [except transactions resulting in payments to or by the Company in an amount less than $[60,000] per year], [or transactions made in the ordinary course of business and pursuant to reasonable requirements of the Company’s business and upon fair and reasonable terms that are approved by a majority of the Board of Directors];

Non-Competition and Non-Solicitation Agreements: Each Founder and key employee will enter into a [one] year non-competition and non-solicitation agreement in a form reasonably

Note that Section 402 of the Sarbanes-Oxley Act of 2003 would require repayment of any loans in full prior to the Company filing a registration statement for an IPO.

Note that non-compete restrictions (other than in connection with the sale of a business) are prohibited in California, and may not be enforceable in other jurisdictions, as well. In addition, some investors do not require such agreements for fear that employees will request additional consideration in exchange for signing a Non-Compete/Non-Solicit (and indeed the agreement may arguably be invalid absent such additional consideration - although having an employee sign a non-compete contemporaneous with hiring constitutes adequate consideration in jurisdictions where non-competes are generally enforceable). Others take the view that it should be up to the Board on a case-by-case basis to determine whether any particular key employee is required to sign such an agreement.
acceptable to the Investors.

**Non-Disclosure and Developments Agreement:**
Each current and former Founder, employee and consultant will enter into a non-disclosure and proprietary rights assignment agreement in a form reasonably acceptable to the Investors.

**Board Matters:**
[Each Board Committee shall include at least one Series A Director.]
The Board of Directors shall meet at least [monthly][quarterly], unless otherwise agreed by a vote of the majority of Directors.

The Company will bind D&O insurance with a carrier and in an amount satisfactory to the Board of Directors. Company to enter into Indemnification Agreement with each Series A Director [and affiliated funds] in form acceptable to such director. In the event the Company merges with another entity and is not the surviving corporation, or transfers all of its assets, proper provisions shall be made so that successors of the Company assume the Company’s obligations with respect to indemnification of Directors.

**Employee Stock Options:**
All employee options to vest as follows: [25% after one year, with remaining vesting monthly over next 36 months].

[Immediately prior to the Series A Preferred Stock investment, [_____] shares will be added to the option pool creating an unallocated option pool of [_______] shares.]

**Key Person Insurance:**
Company to acquire life insurance on Founders [name each Founder] in an amount satisfactory to the Board. Proceeds payable to the Company.

**RIGHT OF FIRST REFUSAL/CO-SALE AGREEMENT**

**Right of First Refusal/Right of Co-Sale (Take-Me-Along):**
Company first and Investors second (to the extent assigned by the Board of Directors), will have a right of first refusal with respect to any shares of capital stock of the Company proposed to be transferred by Founders [and future employees holding greater than [1]% of Company Common Stock (assuming conversion of Preferred Stock and whether then held or subject to the exercise of options)], with a right of oversubscription for Investors of shares unsubscribed by the other Investors. Before any such person may sell Common Stock, he will give the Investors an opportunity to participate in such sale on a basis proportionate to the amount of securities held by the

Non-competes typically have a one year duration, although state law may permit up to two years. Note also that some states may require that a new Non-Compete be signed where there is a material change in the employee’s duties/salary/title.
seller and those held by the participating Investors.  

**VOTING AGREEMENT**

*Board of Directors:*

At the initial Closing, the Board shall consist of [______] members comprised of (i) [name] as the representative designated by [____], as the lead Investor, (ii) [name] as the representative designated by the remaining Investors, (iii) [name] as the representative designated by the Founders, (iv) the person then serving as the Chief Executive Officer of the Company, and (v) [____] person(s) who are not employed by the Company and who are mutually acceptable [to the Founders and Investors][to the other directors].

**[Drag Along:]**

Holders of Preferred Stock and the Founders [and all future holders of greater than [1]% of Common Stock (assuming conversion of Preferred Stock and whether then held or subject to the exercise of options)] shall be required to enter into an agreement with the Investors that provides that such stockholders will vote their shares in favor of a Deemed Liquidation Event or transaction in which 50% or more of the voting power of the Company is transferred and which is approved by [the Board of Directors] [and the holders of ____% of the outstanding shares of Preferred Stock, on an as-converted basis (the “Electing Holders”)], so long as the liability of each stockholder in such transaction is several (and not joint) and does not exceed the stockholder’s pro rata portion of any claim and the consideration to be paid to the stockholders in such transaction will be allocated as if the consideration were the proceeds to be distributed to the Company's stockholders in a liquidation under the Company's then-current Certificate of Incorporation.]

**[Sale Rights:]**

Upon written notice to the Company from the Electing Holders, the Company shall initiate a process intended to result in a sale of the Company.

**OTHER MATTERS**

*Founders’ Stock:*

All Founders to own stock outright subject to Company right to buyback at cost. Buyback right for [____]% for first [12 months] after Closing; thereafter, right lapses in equal [monthly] increments over

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24 Certain exceptions are typically negotiated, e.g., estate planning or *de minimis* transfers. Investors may also seek ROFR rights with respect to transfers by investors, in order to be able to have some control over the composition of the investor group.

25 See Subsection 3.3 of the Model Voting Agreement for a more detailed list of conditions that must be satisfied in order for the drag-along to be invoked.

26 See Addendum to Model Voting Agreement
following [___] months.

**Existing Preferred Stock:**

The terms set forth above for the Series [___] Preferred Stock are subject to a review of the rights, preferences and restrictions for the existing Preferred Stock. Any changes necessary to conform the existing Preferred Stock to this term sheet will be made at the Closing.

**No Shop/Confidentiality:**

The Company agrees to work in good faith expeditiously towards a closing. The Company and the Founders agree that they will not, for a period of [______] weeks from the date these terms are accepted, take any action to solicit, initiate, encourage or assist the submission of any proposal, negotiation or offer from any person or entity other than the Investors relating to the sale or issuance, of any of the capital stock of the Company [or the acquisition, sale, lease, license or other disposition of the Company or any material part of the stock or assets of the Company] and shall notify the Investors promptly of any inquiries by any third parties in regards to the foregoing. [In the event that the Company breaches this no-shop obligation and, prior to [______], closes any of the above-referenced transactions [without providing the Investors the opportunity to invest on the same terms as the other parties to such transaction], then the Company shall pay to the Investors [$[_____] upon the closing of any such transaction as liquidated damages.]

The Company will not disclose the terms of this Term Sheet to any person other than officers, members of the Board of Directors and the Company’s accountants and attorneys and other potential Investors acceptable to [_________], as lead Investor, without the written consent of the Investors.

**Expiration:**

This Term Sheet expires on [______ __, 20__] if not accepted by the Company by that date.

**EXECUTED THIS [__] DAY OF [__________], 20[__].**

**[SIGNATURE BLOCKS]**

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27 Necessary only if this is a later round of financing, and not the initial Series A round.

28 It is unusual to provide for such “break-up” fees in connection with a venture capital financing, but might be something to consider where there is a substantial possibility the Company may be sold prior to consummation of the financing (e.g., a later stage deal).
EXHIBIT A

Pre and Post-Financing Capitalization

<table>
<thead>
<tr>
<th>Security</th>
<th>Pre-Financing</th>
<th>Post-Financing</th>
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<tbody>
<tr>
<td></td>
<td># of Shares</td>
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<td>Common – Founders</td>
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<td>Common – Employee Stock Pool</td>
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<td>[Common – Warrants]</td>
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<td>Series A Preferred</td>
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<td>Total</td>
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Founders’ Stock & Vesting Provisions

What is founders’ stock?
Founders’ stock is company stock issued to the early participants in the company, at the time of the company’s incorporation. Each individual founder will likely get a large percentage and the founders’ stock may be the only initial compensation for founders. Founders’ stock is typically common stock and is usually issued at a low price because the company has not started to do any business.

What is vesting?
When something vests it means the item has become available to the owner. In a startup context, vested stock is stock that is available to the stockholder to control or sell. To keep founders invested in their company, stock is put on a vesting schedule in which portions become available on specific dates or events. Vesting is conditioned on the stockholder’s connection to the company. Agreements outlining a vesting schedule will usually offer a certain percent of stock up front, not subject to the schedule. For example, an agreement could give a founder 10% of his or her total stock apportionment upfront with the schedule that the rest of the stock shall vest monthly over four years so long as the founder continues to work for the company. Should the founder leave, all unvested shares will stay with the company and not with the founder.

Why should founders’ stock have a vesting schedule?
Investors will look for an agreement that puts founders on a vesting schedule because they want to be sure there is incentive for the founders to remain loyal to the company through the formation and development phases. If a co-founder leaves before all his or her shares have vested, he or she will forfeit all unvested shares. Founders can put their employees on a vesting schedule as well.

What is acceleration?
Acceleration speeds up a vesting schedule so that all unvested shares are “accelerated” or made available to the stockholder before the end of the vesting schedule. Usually, the vesting schedule is accelerated if the company is sold or a stockholder is terminated from the company without cause. If only one of these events triggers acceleration, it is called “single-trigger” acceleration.

What is the investor’s viewpoint on acceleration?
Single-trigger acceleration is worrisome to most investors because there is nothing tying founders to a company if the single event happens. For example, if a company is negotiating to be acquired and acquisition is a triggering event in a “single-trigger” accelerating vesting agreement, the purchaser may be concerned that the founders may leave the company as soon as it is acquired. Investors do not want to invest in a company that can befall that circumstance.

Therefore, investors prefer “double-trigger” acceleration, in which the acceleration of founders’ stock only occurs upon the completion of two events—i.e. after the sale of the company and a founder is terminated without cause. Double-trigger acceleration makes the company more approachable because founders have strong incentives to stay with the company.

What should founders keep in mind about founders’ stock?
Founders’ stock is typically issued at a low price because a new company usually does not have income. If the startup does well, the value of this founders’ stock will increase over time, and as a result, taxes will be owed on the increase in value as founders’ stock vests. In other words, the difference between the nominal value the founders paid for the stock initially and the fair market value of the stock will be characterized as taxable income should the founders ever sell their stock. The 83(b) election resolves this issue. Founders should retain an attorney to discuss the 83(b) election within 30 days after assigning founders’ stock.
Protecting Your Efforts: Foundational Intellectual Property Concepts
# Forms of Intellectual Property

<table>
<thead>
<tr>
<th></th>
<th>Patent</th>
<th>Trademark</th>
<th>Copyright</th>
<th>Trade Secret</th>
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<tbody>
<tr>
<td><strong>Definition</strong></td>
<td>Property right relating to an invention excluding others from making, using, offering to sell or selling the invention.</td>
<td>Any word, phrase, symbol, and/or design identifying and distinguishing the goods or services offered by one party from those of others.</td>
<td>An author’s exclusive right to reproduce, distribute, perform or display the work, or authorize others to do so.</td>
<td>Valuable information included in a formula, pattern, compilation, program, device, method, technique, or process, used in business that gives the owner an economic advantage.</td>
</tr>
<tr>
<td><strong>What types are there?</strong></td>
<td>Provisional: establishes filing date; limited duration of 12 months.</td>
<td>“Service mark,” which identifies a service rather than goods.</td>
<td>“Copyright” is used for all forms of protection of written work, art, and phonorecords. Different symbols are used to denote the copyright. (see below)</td>
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<tr>
<td></td>
<td>Non-provisional: results in a patent.</td>
<td>“Trademarks” identify goods and services.</td>
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<tr>
<td><strong>What does it protect?</strong></td>
<td>Inventions that are novel, useful, and non-obvious.</td>
<td>The marked item or service.</td>
<td><em>Tangible</em> expression of a work of authorship, such as:</td>
<td>Protects against misappropriation of the secret. Secrets are misappropriated if they are acquired improperly; either by using improper means or improper disclosure.</td>
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<td>• Music</td>
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<td>• Other works of art</td>
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<td><strong>How long is it protected?</strong></td>
<td>20 years so long as maintenance fees are paid and forms are filed timely.</td>
<td>Indefinitely, so long as regular maintenance documents are kept up to date and the mark is used in commerce. Trademark rights can be lost if they are not used.</td>
<td>The entire life of the author PLUS 70 years</td>
<td>Indefinitely, so long as the secret remains a secret. Any public disclosure terminates this protection.</td>
</tr>
</tbody>
</table>
## Forms of Intellectual Property

<table>
<thead>
<tr>
<th>How is the right secured?</th>
<th>Patent</th>
<th>Trademark</th>
<th>Copyright</th>
<th>Trade Secret</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Through patent prosecution:</strong> filing and tailoring a patent application until the USPTO grants the right.</td>
<td></td>
<td>Companies may formally register a trademark with the USPTO; registration is not mandatory.</td>
<td>Original work is copyrighted as soon as it is created. Authors (creators) can register the work with the US Copyright Office registration is not mandatory.</td>
<td>Attaches automatically upon creation, but reasonable efforts by the owner to maintain secrecy must be employed.</td>
</tr>
<tr>
<td><strong>Part of the patent application process. All inventions are filed with the USPTO. Can take anywhere from 3-10 years to complete.</strong></td>
<td>Trademark applications are filed and approved by the USPTO. Registering a trademark with the USPTO is not mandatory.</td>
<td>Registration is <em>not</em> required. Original works may be registered with the Library of Congress’ U.S. Copyright Office.</td>
<td>Cannot be registered because the registration process would reveal the secret.</td>
<td></td>
</tr>
<tr>
<td><strong>The patent is published by the USPTO. The patent holder is responsible for monitoring the patent.</strong></td>
<td>Trademark is denoted by “TM”; Service mark is denoted by “SM”; a registered mark is indicated by “®”—all usually placed in the upper right hand corner of the mark.</td>
<td>Copyright is denoted with “©”, followed by the date and owner’s name. Copyright of a sound recording (phonorecord) is denoted by “℗” followed by the date and owner’s name.</td>
<td>No notice is required, however, anyone who has access to the secret should be notified of the secret nature of the information including consequences to breaching the secret.</td>
<td></td>
</tr>
<tr>
<td><strong>Patent protection is granted on a “first to file” basis.</strong></td>
<td>The trademark holder must maintain the registration. Only an owner of a registered mark may sue for violations.</td>
<td>Only the holders of registered copyrights may sue for copyright infringement. Using copyright marks is permitted whether or not work is formally registered</td>
<td>Does not protect against independent discovery of the trade secret, only misappropriation.</td>
<td></td>
</tr>
</tbody>
</table>

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Intellectual Property ("IP"): Best Practices and Tips

1. Develop an IP strategy.
   • The IP strategy should involve a budget for obtaining IP protection, filing schedules, and a list of items for which the company is seeking protection e.g. brand name trademarks and technology patents.

   • Develop a practical budget; protecting IP can be expensive, but when done in a timely and thorough manner, it can serve to preserve the innovation and effort that went into the startup.

2. Obtain good IP counsel.
   • A company’s IP counsel should become familiar with the business, the industry in which the business lies, the technology, and all competition that exists in the industry. IP counsel should be a person (or people) who are invested in the development and success of the company’s IP strategy.

3. Remember that protecting IP is a time-sensitive endeavor.
   • Under the America Invents Act, in 2013, the United States became a “first to file” country. This means that if two people (or companies) invent the same item, the person that files a patent application first has right of priority over the other. Therefore, it is vital to begin the patent application process as soon as possible.

   • Protecting a brand as a trademark should be done quickly. Trademark registrations document a company’s exclusive ownership of and the right to use its trademarks. If a trademark is not registered, it will be more difficult to prove any trademark rights in litigation.

      o Before filing a registration application, retain a professional to conduct a trademark search. If another company is using the same or a similar mark, this may restrict a company’s ability to seek trademark protection.

   • Even though copyrights are automatically imposed on original work, registering a copyright makes the work part of the public record and gives the holder a right to sue for copyright infringement.

4. Be careful not to accidentally preclude the company from obtaining protection.
   • Avoid accidental public disclosure. For example: releasing patent-related information into the public through publication, presentation, website postings, blogs, or discussions with potential customers before a patent application has been filed can prohibit you from obtaining a patent.

   • Non-disclosure agreements can maintain confidentiality and protect rights if disclosure to third parties is necessary for your business strategy.
Patent Tips for Entrepreneurs

1. **Start thinking about patents early.**
   Patent systems worldwide are designed to reward inventors for early action. Because of this, certain activities may "start the clock" on a one-year grace period in the U.S. for patent filing; these activities may even prevent a company from obtaining patents in other countries. Therefore, consult a professional as early as possible if patent protection is necessary.

2. **Keep good records.**
   Keeping good records of the invention process can be important for several reasons. Organized records help identify "true inventors," who must be named on a patent application. Maintaining a timeline for technology development can help establish a priority date for when a patent application is filed. These records can also help a company defend against any infringement lawsuits.

3. **Be conscious of what is kept secret and what is disclosed.**
   Entrepreneurs face competing priorities; some priorities favor early disclosure of information, some favor non-disclosure. Entrepreneurs should carefully consider and make informed, affirmative decisions about what to disclose, to whom, and when. Certain disclosures can trigger the one-year grace period in the U.S. and bar the company’s ability to seek patents in other countries. Non-disclosure agreements are useful, but must be drafted properly in order to protect proprietary information.

4. **Do some research.**
   Patents and printed publications anywhere in the world can serve as "prior art." Prior art blocks a patent. Before spending the money on a patent application, perform a patent search to see if any prior art would block the application from acceptance. If there is prior art in the field, it must be noted on the patent application.

5. **Plan for the cost.**
   Patents are expensive to obtain, maintain, and enforce. To an entrepreneur or small startup company, the cost can be prohibitive. However, if technology is the main asset of the company this cost may be necessary for the success of the business.

6. **Expect to wait.**
   Patent prosecution can take a long time. Average pendency to a first office action is currently about twenty-four (24) months, and average pendency to a final allowance or rejection is currently more than thirty-two (32) months.

8. **Think about intellectual property strategically.**
   If proprietary information is the company’s biggest asset, founders must form a business plan around the use of that product. Investors are interested in a startup’s intellectual property portfolio. Consult a professional to create the best intellectual property strategy for the company.

9. **Leverage the experience of experts.**
   Work with a patent attorney or agent. Patent prosecution is complicated. Work with attorneys and patent agents to develop a client relationship that meets the intellectual property needs of the company while staying within the company’s financial means.
Non-Disclosure Agreements

Any time a business collaborates with another party like a vendor, supplier, or subcontractor, confidential and proprietary information may be shared between the parties. For many startups, this confidential and proprietary information is the company’s most valuable asset. So how can startups collaborate with necessary outside parties to grow the company? A non-disclosure agreement (“NDA”) is a vehicle to protect confidential and proprietary information during negotiations, discussions, and formal collaborations with third parties.

It is prudent for a company to insist for an NDA before discussing any propriety information. There is no one-size-fits-all NDA; companies should retain an attorney to draft an NDA. When tailoring an NDA, think about the following:

Nature of the Agreement.
At the very core of an NDA, there should be specific language protecting any materials, data, or information exchanged that arises from, or relates to, the discussions between the parties. This information is protected if the agreement prohibits one party from using or disclosing certain information obtained during the course of the negotiations or discussions.

Is the Agreement Unilateral or Mutual?
A unilateral provision is used if there is a one-sided stream of sensitive information from the discloser to the receiver. Unilateral agreements only require the non-disclosure of information from the receiving party alone. A mutual NDA obligates both parties to non-disclosure. This is used if confidential and proprietary information is coming from both parties. Mutual NDAs are more popular because these agreements usually mitigate the overall risk to the parties involved.

How to Protect the Material?
The scope and definition of an NDA will specify which communications between the parties are covered by the agreement. Confidential and proprietary information that comes from any communication outlined in the agreement is protected. Therefore both parties must clearly outline the scope and definition of the NDA. Information disclosed that falls outside the scope and definition is not protected. This section of the agreement should be flexible enough to include multiple forms of communication. It is helpful to include examples of communications covered by the agreement, such as “technical, financial, and transactional details” in “oral, written, electronic, or tangible” forms.

Some information, even if disclosed in a communication protected expressly in the NDA, is not protected from disclosure. Mainly, information that is already public knowledge before an NDA was drafted, information already possessed by the receiving party, and information independently developed by a third party cannot be protected in an NDA.

Duration, Enforcement, Remedy.
An NDA should express the duration or term that the confidential information must be withheld from disclosure. Non-disclosure agreements can mandate lifetime confidentiality and can continue even if both parties agree to stop working together.

Parties can choose how a breach of the NDA will be handled. Agreements can express that the breach trigger a right to litigation or arbitration. In addition, the NDA can also outline the remedy for a breach of the agreement. Remedies can include monetary compensation or an injunction.

Indemnification.
Most NDAs have an indemnification clause. This clause would obligate the breaching party to reimburse the non-breaching party for the legal fees associated with suing for the breach.
It is understood and agreed to that the Discloser and the Recipient would like to exchange certain information that may be considered confidential. To ensure the protection of such information and in consideration of the agreement to exchange said information, the parties agree as follows:

1. The confidential information to be disclosed by Discloser under this Agreement (“Confidential Information”) can be described as and includes:

   Technical and business information relating to Discloser’s proprietary ideas, patentable ideas copyrights and/or trade secrets, existing and/or contemplated products and services, software, schematics, research and development, production, costs, profit and margin information, finances and financial projections, customers, clients, marketing, and current or future business plans and models, regardless of whether such information is designated as “Confidential Information” at the time of its disclosure.

   In addition to the above, Confidential Information shall also include, and the Recipient shall have a duty to protect, other confidential and/or sensitive information which is (a) disclosed by Discloser in writing and marked as confidential (or with other similar designation) at the time of disclosure; and/or (b) disclosed by Discloser in any other manner and identified as confidential at the time of disclosure and is also summarized and designated as confidential in a written memorandum delivered to Recipient within thirty (30) days of the disclosure.

2. Recipient shall use the Confidential Information only for the purpose of evaluating potential business and investment relationships with Discloser.

3. Recipient shall limit disclosure of Confidential Information within its own organization to its directors, officers, partners, members and/or employees having a need to know and shall not disclose Confidential Information to any third party (whether an individual, corporation, or other entity) without the prior written consent of Discloser. Recipient shall have satisfied its obligations under this paragraph if it takes affirmative measures to ensure compliance with these confidentiality obligations by its employees, agents, consultants and others who are permitted access to or use of the Confidential Information.

4. This Agreement imposes no obligation upon Recipient with respect to any Confidential Information (a) that was in Recipient’s possession before receipt from Discloser; (b) is or becomes a matter of public knowledge
through no fault of Recipient; (c) is rightfully received by Recipient from a third party not owing a duty of 
confidentiality to the Discloser; (d) is disclosed without a duty of confidentiality to a third party by, or with the 
authorization of, Discloser; or (e) is independently developed by Recipient.

5. Discloser warrants that he/she has the right to make the disclosures under this Agreement.

6. This Agreement shall not be construed as creating, conveying, transferring, granting or conferring upon the 
Recipient any rights, license or authority in or to the information exchanged, except the limited right to use 
Confidential Information specified in paragraph 2. Furthermore and specifically, no license or conveyance of 
any intellectual property rights is granted or implied by this Agreement.

7. Neither party has an obligation under this Agreement to purchase any service, goods, or intangibles from the 
other party. Discloser may, at its sole discretion, using its own information, offer such products and/or services 
for sale and modify them or discontinue sale at any time. Furthermore, both parties acknowledge and agree that 
the exchange of information under this Agreement shall not commit or bind either party to any present or 
future contractual relationship (except as specifically stated herein), nor shall the exchange of information be 
construed as an inducement to act or not to act in any given manner.

8. Neither party shall be liable to the other in any manner whatsoever for any decisions, obligations, costs or 
expenses incurred, changes in business practices, plans, organization, products, services, or otherwise, based 
on either party’s decision to use or rely on any information exchanged under this Agreement.

9. If there is a breach or threatened breach of any provision of this Agreement, it is agreed and understood that 
Discloser shall have no adequate remedy in money or other damages and accordingly shall be entitled to 
injunctive relief; provided however, no specification in this Agreement of any particular remedy shall be 
construed as a waiver or prohibition of any other remedies in the event of a breach or threatened breach of this 
Agreement.

10. This Agreement states the entire agreement between the parties concerning the disclosure of Confidential 
Information and supersedes any prior agreements, understandings, or representations with respect thereto. Any 
addition or modification to this Agreement must be made in writing and signed by authorized representatives 
of both parties. This Agreement is made under and shall be construed according to the laws of the State of
__________, U.S.A. In the event that this agreement is breached, any and all disputes must be settled in a court of competent jurisdiction in the State of __________, U.S.A.

11. If any of the provisions of this Agreement are found to be unenforceable, the remainder shall be enforced as fully as possible and the unenforceable provision(s) shall be deemed modified to the limited extent required to permit enforcement of the Agreement as a whole.

WHEREFORE, the parties acknowledge that they have read and understand this Agreement and voluntarily accept the duties and obligations set forth herein.

Recipient of Confidential Information:

Name (Print or Type):
Company:
Title:
Address:
City, State & Zip:
Signature:
Date:

Discloser of Confidential Information:
Name (Print or Type):
Company:
Title:
Address:
City, State & Zip:
Signature:
Date:
Leveraging Intellectual Assets: Transactions in Intellectual Property

Friends of Startup Law Day

The Ayco Company, LP
Marvin and Company, P.C.
Nixon Peabody, LLP
Schmeiser, Olsen & Watts, LLP
## Types of Transactions Involving Intellectual Property ("IP")

<table>
<thead>
<tr>
<th>Transaction</th>
<th>Problems Addressed by Transaction</th>
<th>Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>License</td>
<td>Patents can stifle innovation by preventing third parties from developing the technology. Patent holders can license out the technology so third parties can develop protected inventions.</td>
<td>• Licenses can be either exclusive or nonexclusive. Exclusive licenses grant only one party the right to develop the technology.&lt;br&gt;• A license agreement can secure the right to use future improvements developed under the agreement for the patent holder.&lt;br&gt;• Licenses cost money; most agreements require the license holders to pay an initial fee and royalties.</td>
</tr>
<tr>
<td>Cross-Licensing Agreement</td>
<td>The owner of a “pioneering” patent (the patent introducing a new technology rather than a new improvement on existing technology) and the owners of the “improvement” patents may not be able to continue development due to the ownership limitations imposed by the respective patents. This is sometimes referred to as “two-way blocking.”</td>
<td>• Cross-licensing involves the mutual sharing of patents between the holders of those patents, giving each party the right to develop the product under the umbrella of each other’s patents.&lt;br&gt;• Cross-licensing can be a way to create strategic business relationships, and to promote research and development while avoiding costly intellectual property litigation.</td>
</tr>
<tr>
<td>Third Party Agreements</td>
<td>Typically, technology developers will use third party or outsourced providers and contractors. Without outlining the precise IP rights among these third party contractors, ownership of IP can be murky.</td>
<td>• Create a written agreement with independent contractors about IP ownership at the outset, as well as about use of IP created throughout the course of business.</td>
</tr>
<tr>
<td>Independent Contractor Agreements</td>
<td>A company may hire an independent contractor to create a computer program, written documents, or other works. Who owns these works? Without careful provisioning, the company may not actually have IP rights over the work created by the independent contractor. The company hiring the independent contractor will not be the owner of copyrights to the work created unless copyright is assigned, in writing, to the company.</td>
<td>• If the independent contractor’s commissioned work is considered “work for hire,” the hiring company will own the copyright, but this is not automatic. The independent contractor agreement will need to say that the work is “for hire.”&lt;br&gt;• The assignment can be included in the independent contractor agreement.</td>
</tr>
</tbody>
</table>
### Types of Transactions Involving Intellectual Property (“IP”)

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</table>
| **Employee Agreements**                  | When an employee is hired by a company, that employee will gain insight and information regarding the company’s IP. How can this information be protected should the company terminate the employee? Who owns the IP created by an employee? | • Employee agreements can protect a company’s intellectual property by prohibiting the employee from competing with the company for a period of time after employment ends.  
• An employee agreement can require an employee to keep certain information confidential indefinitely, even after employment ends.  
• Employee agreements can also express that any IP created by the employee in his or her capacity as an employee of the company belongs to the company, not the employee. |
| **Security Agreements**                  | Lenders seek collateral before extending credit. Intangible assets like IP may be the only substantial assets held by the company. A creditor will have a security interest in the collateral only when the interest attaches. Attachment requires that value be given for the security interest, that the business seeking the credit actually has rights in the collateral, and that the business authenticates (signs) the agreement. Priorities are established when there are multiple securities interests. The earliest perfected security gets the highest priority, meaning this interest will be paid first. | • Intellectual property can be offered as collateral for a lender extending credit.  
• The security interests in the IP must be “perfected” which means they must be recorded with the appropriate governmental authority.  
• Perfecting gives notice to the public that there is a prior interest granted in the IP belonging to the borrower.  
• Perfecting ensures the lender has the right to foreclose on the assets in the event of default.  
• The steps involved in perfection will depend on the jurisdiction where the collateral is located. |
| **Joint Venture Marketing Agreement**    | What if it would be advantageous to collaborate with another company in marketing?                                                                                                                                                     | • Joint Venture Marketing allows companies to combine marketing abilities and strategies.  
• This agreement must be clear to each party is on notice of their responsibilities. |

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- **Non-Compete Agreements**
- **Non-Disclosure Agreements**
- **IP Agreements**
Assigning IP

What is Intellectual Property assignment?

Intellectual Property ("IP") is assigned when the owner transfers his or her interest in the IP to another owner. This is a formal process. Patents, trademarks, and copyrights are assignable IP. Patent and trademark assignments must be registered with the United States Patent and Trademark Office ("USPTO"). Copyright holders do not need to register their assignments, but a certificate of acknowledgement of the assignment is strong evidence that ownership was transferred. Assigning IP is common. Most companies have a policy that requires employees to assign all IP developed in the course of their employment to the company.

Why would I assign interest in my IP?

For most lean startups, IP is the company’s greatest asset. To ensure the company’s success this IP must remain with the business even if founders or employees leave. Therefore, it might be in the company’s best interest to require all employees and founders to assign IP developed in the course of business to the company. These interests can be assigned in part or in their entirety. Most interests are assigned in their entirety. Partial assignment would be appropriate if the creator wanted to maintain ownership rights in the IP.

When must IP be assigned to a new entity?

Patents and trademarks can be assigned at any point after it is filed with the USPTO. All assignments are recorded with the USPTO; this should be done within three months of the assignment execution. If any assignment is not recorded and an innocent purchaser buys the rights to IP from a previous owner, that innocent purchaser will have ownership rights because he or she was not on notice of the assignment. The assignee receiving the IP interest, therefore, has the responsibility of recording the assignment. Typically, IP is assigned when the application is filed; this can be done, however, even after IP rights are formally granted. Further, IP can be assigned multiple times.

Copyright assignments may be recorded in the U.S. Copyright Office.

What happens to my rights in IP if I assign interest?

Owners can assign total or partial interest in their IP. If the entire interest is assigned the original owner no longer has any rights in the IP. Partial transfer, however, continues to give the original owner a claim in IP. All aspects of these transfers should be outlined in an assignment agreement. By putting the terms in writing, all parties are clear on each other’s interest in the IP.

What rights do new owners or partial owners have in assigned IP?

Once IP is assigned, the entity receiving the assignment becomes an owner. All owners may use, sell, license, and develop their IP. If there are multiple owners, all of them maintain these rights independently. This means any owner of IP can use, sell, license, or develop the IP without getting permission from other owners.

If an original owner assigns all of his or her interest to another entity, that person no longer has any claim to the IP. This means a previous owner would have no standing to sue on, use, sell, license, or develop IP that has been completely assigned to another entity.
ASSIGNMENT OF IP AND OTHER ASSETS

This Assignment of IP and Other Assets (this “Agreement”) is made and entered into effective as of ____________________ (this “Effective Date”) by and between [Company Name], a Delaware corporation (the “Company”), and [Purchaser Name] (the “Assignor”).

WHEREAS, prior to the Effective Date, the Assignor has developed certain technology and intellectual property on behalf of the Company and has developed or acquired other tangible personal property, as further described below, which relate to the Company’s actual and proposed business associated with ____________________ (the “Business”);

WHEREAS, the Assignor desires such technology and intellectual property and other tangible personal property to be assigned to and owned by the Company, in exchange for the shares of the Company’s capital stock issued by the Company to the Assignor on or about the date hereof;

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties to this Agreement hereby agree as follows:

1. Certain Definitions. As used herein, the following capitalized terms will have the meanings set forth below:

   (a) “Technology” means all inventions, technology, ideas, concepts, processes, business plans, documentation, financial projections, models and any other items, authored, conceived, invented, developed or designed by the Assignor relating to the technology or Business of the Company that is not otherwise owned by the Company.

   (b) “Derivative” means: (i) any derivative work of the Technology (as defined in Section 101 of the U.S. Copyright Act); (ii) all improvements, modifications, alterations, adaptations, enhancements and new versions of the Technology (the “Technology Derivatives”); and (iii) all technology, inventions, products or other items that, directly or indirectly, incorporate, or are derived from, any part of the Technology or any Technology Derivative.

   (c) “Intellectual Property Rights” means, collectively, all worldwide patents, patent applications, patent rights, copyrights, copyright registrations, moral rights, trade names, trademarks, service marks, domain names and registrations and/or applications for all of the foregoing, trade secrets, know-how, mask work rights, rights in trade dress and packaging, goodwill and all other intellectual property rights and proprietary rights relating in any way to the Technology, any Derivative or any Embodiment, whether arising under the laws of the United States of America or the laws of any other state, country or jurisdiction.

   (d) “Embodiment” means all documentation, drafts, papers, designs, schematics, diagrams, models, prototypes, source and object code (in any form or format and for all hardware platforms), computer-stored data, diskettes, manuscripts and other items describing
all or any part of the Technology, any Derivative, any Intellectual Property Rights or any
information related thereto or in which all of any part of the Technology, any Derivative, any
Intellectual Property Right or such information is set forth, embodied, recorded or stored.

(e) “Business Assets” means all business and marketing plans, worldwide
marketing rights, software, customer and supplier lists, price lists, mailing lists, customer and
supplier records and other confidential or proprietary information relating to the Technology, as
well as all computers, office equipment and other tangible personal property owned (i.e., not
leased) by Assignor immediately prior to the execution and delivery of this Agreement and
primarily used in or otherwise primarily related to the Business.

(f) “Assigned Assets” refers to the Technology, all Derivatives, all
Intellectual Property Rights, all Embodiments and Business Assets, collectively.

2. Assignment.

(a) The Assignor hereby sells, transfers, assigns and conveys, to the
Company, and its successors and assigns, the Assignor’s entire right, title and interest in and to
the Assigned Assets and all rights of action, power and benefit belonging to or accruing from the
Assigned Assets including the right to undertake proceedings to recover past and future damages
and claim all other relief in respect of any acts of infringement thereof whether such acts shall
have been committed before or after the date of this assignment, the same to be held and enjoyed
by said Company, for its own use and benefit and the use and benefit of its successors, legal
representatives and assigns, as fully and entirely as the same would have been held and enjoyed
by the Assignor, had this assignment not been made.

(b) The Assignor hereby appoints the Company the attorney-in-fact of the
Assignor, with full power of substitution on behalf of the Assignor to demand and receive any of
the Assigned Assets and to give receipts and releases for the same, to institute and prosecute in
the name of the Assignor, but for the benefit of the Company, any legal or equitable proceedings
the Company deems proper in order to enforce any rights in the Assigned Assets and to defend
or compromise any legal or equitable proceedings relating to the Assigned Assets as the
Company shall deem advisable. The Assignor hereby declares that the appointment made and
powers granted hereby are coupled with an interest and shall be irrevocable by the Assignor.

(c) The Assignor hereby agrees that the Assignor and the Assignor’s
successors and assigns will do, execute, acknowledge and deliver, or will cause to be done,
executed, acknowledged and delivered such further acts, documents, or instruments confirming
the conveyance of any of the Assigned Assets to the Company as the Company shall reasonably
deem necessary, provided that the Company shall provide all necessary documentation to the
Assignor.

3. Assignor Representations and Warranties. The Assignor represents and
warrants to the Company that to the best of Assignor’s knowledge the Assignor is the owner,
inventor and/or author of, and can grant exclusive right, title and interest in and to, each of the
Assigned Assets transferred by the Assignor hereunder and that none of the Assigned Assets are
subject to any dispute, claim, prior license or other agreement, assignment, lien or rights of any

third party, or any other rights that might interfere with the Company’s use, or exercise of ownership of, any of the Assigned Assets. The Assignor further represents and warrants to the Company that to the best of Assignor’s knowledge the Assigned Assets are free of any claim of any prior employer or third party client of the Assignor or any school, university or other institution the Assignor attended, and that the Assignor is not aware of any claims by any third party to any rights of any kind in or to any of the Assigned Assets. The Assignor agrees to immediately notify the Company upon becoming aware of any such claims.

4. **Reimbursement of Expenses.** The Company shall as promptly as practicable, reimburse the Assignor for the Assignor’s actual out-of-pocket costs reasonably incurred with respect to Assignor’s acquisition and maintenance of the Assigned Assets.

5. **Miscellaneous.**

   (a) **Governing Law.** The validity, interpretation, construction and performance of this Agreement, and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the state of [California], without giving effect to principles of conflicts of law.

   (b) **Entire Agreement.** This Agreement sets forth the entire agreement and understanding of the parties relating to the subject matter herein and supersedes all prior or contemporaneous discussions, understandings and agreements, whether oral or written, between them relating to the subject matter hereof.

   (c) **Amendments and Waivers.** No modification of or amendment to this Agreement, nor any waiver of any rights under this Agreement, shall be effective unless in writing signed by the parties to this Agreement. No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of that provision as to that or any other instance.

   (d) **Successors and Assigns.** Except as otherwise provided in this Agreement, this Agreement, and the rights and obligations of the parties hereunder, will be binding upon and inure to the benefit of their respective successors, assigns, heirs, executors, administrators and legal representatives. The Company may assign any of its rights and obligations under this Agreement. No other party to this Agreement may assign, whether voluntarily or by operation of law, any of its rights and obligations under this Agreement, except with the prior written consent of the Company.

   (e) **Notices.** Any notice, demand or request required or permitted to be given under this Agreement shall be in writing and shall be deemed sufficient when delivered personally or by overnight courier or sent by email, or 48 hours after being deposited in the U.S. mail as certified or registered mail with postage prepaid, addressed to the party to be notified at such party’s address as set forth on the signature page, as subsequently modified by written notice, or if no address is specified on the signature page, at the most recent address set forth in the Company’s books and records.

   (f) **Severability.** If one or more provisions of this Agreement are held to be unenforceable under applicable law, the parties agree to renegotiate such provision in good faith.
In the event that the parties cannot reach a mutually agreeable and enforceable replacement for such provision, then (i) such provision shall be excluded from this Agreement, (ii) the balance of the Agreement shall be interpreted as if such provision were so excluded and (iii) the balance of the Agreement shall be enforceable in accordance with its terms.

(g) **Construction.** This Agreement is the result of negotiations between and has been reviewed by each of the parties hereto and their respective counsel, if any; accordingly, this Agreement shall be deemed to be the product of all of the parties hereto, and no ambiguity shall be construed in favor of or against any one of the parties hereto.

(h) **Counterparts.** This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, and all of which together shall constitute one and the same agreement.

[Signature Page Follows]
IN WITNESS WHEREOF, the undersigned have executed this Agreement effective as of the date and year first above written.

Dated:__________________________

ASSIGNOR:

[PURCHASER NAME]

______________________________
(Signature)

Address:

______________________________

__________ ______ United States

Email: ________________

______________________________

Spouse of Assignor (if applicable)
EXHIBIT E

FORM OF PATENT ASSIGNMENT

(See Attached)
RECEIPT

[Company Name], a Delaware corporation (the “Company”), hereby acknowledges receipt of:

_____ A check in the amount of $__________

_____ The assignment of certain intellectual property and/or other assets having an aggregate value equal to $__________
given by ____________________ as consideration for __________ shares of Common Stock of the Company recorded on the books of the Company as Certificate No. ________.

Dated: ______________________

THE COMPANY:

[COMPANY NAME]

By: ______________________
   (Signature)

   Name: ______________________
   Title: ______________________
RECEIPT AND CONSENT

The undersigned hereby acknowledges receipt of a [notice of issuance recorded as] OR [photocopy of] Certificate No. _________ for _________ shares of Common Stock of [Company Name], a Delaware corporation (the “Company”).

The undersigned further acknowledges that the Secretary of the Company, or his or her designee, is acting as escrow holder pursuant to the Common Stock Purchase Agreement that Purchaser has previously entered into with the Company. As escrow holder, the Secretary of the Company, or his or her designee, holds the original of the aforementioned [shares] OR [certificate] issued in the undersigned’s name.

Dated: _________________________

PURCHASER:

______________________________
(PRINT NAME)

By:______________________________
(Signature)

Name:______________________________
Title:______________________________

Address:

____________

____________

Email: __________

Spouse of Purchaser (if applicable)

Sample Form. Consult an Attorney to Assign IP. Reprint Permission granted by Orrick, Herrington & Sutcliffe LLP (2014).
LICENSE AGREEMENT

by and between

RENSSELAER POLYTECHNIC INSTITUTE,
a New York not-for-profit corporation

and

_____________________
a ____________ corporation
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Rensselaer and ______________________ Exclusive License Agreement  
Contract #: __________________________

RPI DRAFT: [INSERT DATE]

This License Agreement is entered into and made effective as of this ______ day of __________________________, 20_ (the “Effective Date”), by and between RENSSELAER POLYTECHNIC INSTITUTE, a New York not-for-profit corporation (“Rensselaer”) located at 110 8th Street, Troy, New York 12180-3590, and __________________________, a __________________________ corporation (“Licensee”) located at __________________________, with respect to the facts set forth below.

RECATALS

A. Rensselaer owns certain technology described in the “Rensselaer Patent Rights” defined in Appendix A attached hereto; and

B. Rensselaer desires to grant to Licensee and Licensee wishes to acquire from Rensselaer, a right and license to such technology, subject to the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth herein, Rensselaer and Licensee hereby agree as follows:

1. Definitions.

For the purpose of this Agreement, the Appendix A definitions shall apply.

2. License Terms and Conditions.

2.1 Grant of License. Contingent upon compliance with all the terms and conditions of this Agreement, Rensselaer hereby grants to Licensee an exclusive license, including the right to sublicense, with Rensselaer’s consent, as set forth in Section 2.7 below, to the Rensselaer Patent Rights, to make, to use, to offer for sale, and to sell Licensed Products in the Field of Use in the Licensed Territory, without the right to have made or import Licensed Products.

2.2 Initial License Fee. In partial consideration for the exclusive license granted pursuant to Section 2.1 hereof, Licensee shall pay to Rensselaer a nonrefundable license fee upon execution of this Agreement in the amount of ________________ Dollars ($__________). The license fee described in this Section is consideration for the grant and continuation of the license hereunder, and Rensselaer shall have no obligation to return any portion of such license fee, notwithstanding any failure by Licensee to develop any Licensed Product or market any Licensed Product commercially, and notwithstanding the volume of sales of any such Licensed Product.

2.3 Annual Fees. In partial consideration for the exclusive license granted pursuant to Section 2.1 hereof, and for each country in which Licensee has elected a right to make, to have made, to import, to use, for sale and to sell Licensed Products, Licensee shall pay to Rensselaer annual fees for each year that this license is in force, as set forth below.
The license fee described in this Section is consideration for the grant and continuation of the license hereunder in such designated countries, and Rensselaer shall have no obligation to return any portion of such license fee, notwithstanding any failure by Licensee to develop any Licensed Product or market any Licensed Product commercially in such designated countries, and notwithstanding the volume of sales of any such Licensed Product in such designated countries.

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2.4 Royalties.

2.4.1 Percentage Royalty. As additional consideration for the exclusive license granted pursuant to Section 2.1 hereof, Licensee shall pay to Rensselaer a continuing royalty in the amount of ______ percent (___%) of Net Sales of Licensed Products which cannot be made, used or sold without utilizing one or more valid claims under Rensselaer Patent Rights.

2.4.2 Minimum Royalty. In order to maintain the license granted hereunder in force, and in addition to any initial or annual fees that are otherwise payable, Licensee shall pay to Rensselaer a minimum annual royalty. The minimum annual royalty for the calendar year next following the Effective Date of this Agreement shall be ___________ Dollars ($_________), and the amount of the minimum annual royalty payable for each subsequent calendar year during the term hereof shall be the greater of ___________ Dollars ($_________) or _________ percent (___%) of the total royalties payable under this Agreement during the immediately preceding calendar year. All minimum annual royalty payments shall be prepaid, and will be paid in full by Licensee to Rensselaer at the time of the first quarterly payment for the twelve (12) month period to which they apply. Any percentage royalties owed by Licensee pursuant to Section 2.4.1 hereof during that twelve (12) month period shall be applied against the prepaid minimum annual royalty payment made during the first quarter of that period until that minimum annual royalty prepayment amount is exhausted, and percentage royalties will then be paid as set forth in Section 2.5 below.

2.4.3 Inflation Adjustment. Beginning with the fourth (4th) calendar year following the Effective Date, the annual fees specified in Section 2.3 and the minimum annual royalty specified in Section 2.4.2 shall be adjusted for each calendar year to reflect the percentage change in the first-published Producer Price Index (“PPI”) for Finished
Rensselaer and ________________ Exclusive License Agreement
Contract #________________________

RPI DRAFT: [INSERT DATE]

Goods (the “Index”) (as published by the Bureau of Labor Statistics of the U.S. Department of Labor at http://www.bls.gov/ppi/ or any successor Web site) applicable to the preceding calendar year, in accordance with the following formula:

\[ \text{NRR} = \left[ 1 + \frac{(\text{NI} - \text{BI})}{100} \right] \times \text{IRR} \]

where:

“NRR” is the new royalty rate to be effective on January 1 of the calendar year;

“BI” is the Index published for the year ending December 31 immediately preceding the Effective Date;

“NI” is the Index published for the year ending December 31 immediately preceding the calendar year; and

“IRR” is the initial royalty rate applied as of the Effective Date with respect to the [royalty in Section 2.4.1, or the] minimum annual royalty applied in the third (3rd) calendar year with respect to the royalty in Section 2.4.2.

The NRR shall apply to all Sales of Licensed Products occurring between the effective date of such adjustment until the next adjustment thereof. The IRR shall be re-adjusted annually on January 19 of each year, effective as of the preceding January 1, without regard to whether either party notifies the other thereof.

2.4.4 Earned Royalty if Licensee Challenges Patent.

Notwithstanding the above, if Licensee or any Affiliate of Licensee, or any third party acting on behalf of Licensee or one of its Affiliates brings an action or petitions for Inter Partes Review seeking to invalidate any Rensselaer Patent Rights, Licensee shall pay royalties to Rensselaer at the rate of ___ percent (___%) of Net Sales of Licensed Products sold during the pendency of such action. Moreover, if the outcome of such action determines that any claim of a patent challenged by Licensee or its Affiliate is both valid and infringed by a Licensed Product, Licensee shall pay royalties to Rensselaer at the rate of ___ percent (___%) of Net Sales of Licensed Products sold.

2.4.5 No Escrow; No Refund. If Licensee brings a patent validity challenge during the term of this Agreement, Licensee shall pay directly to Rensselaer all royalties due under this Agreement during the period of the challenge. Licensee shall not pay such amounts into any escrow or other account. If a validity or non-infringement challenge of a Licensed Product brought by Licensee is successful, Licensee shall have no right to recoup any royalties paid before or during the challenge period.

2.5 Quarterly Payments.

2.5.1 Sales by Licensee. With regard to Net Sales made by Licensee, royalties shall be payable by Licensee by January 31, April 30, July 31 and October 31
of each year based upon the Net Sales of Licensed Products during such preceding calendar quarter, commencing with the calendar quarter in which the first commercial sale of any Licensed Product is made.

2.5.2 Sales by Sublicensees. With regard to Net Sales made by sublicensees of Licensee, royalties shall be payable by Licensee by January 31, April 30, July 31 and October 31 of each year based upon the Net Sales of Licensed Products by such sublicensee during such preceding calendar quarter, commencing with the calendar quarter in which the first commercial sale of any Licensed Product is made by such sublicensee.

2.6 Sublicense.

2.6.1 Right to Grant Sublicenses. Licensee shall have the sole and exclusive right to grant sublicenses to any party with respect to the rights conferred upon Licensee under this Agreement, provided, however, that: (i) any such sublicense shall be subject in all respects to the restrictions, exceptions, royalty obligations, reports, termination provisions, and other provisions contained in this Agreement (but not including the payment of a license fee pursuant to Section 2.2 hereof); (ii) any such sublicense agreement must incorporate by reference the terms and conditions of this Agreement, include indemnification obligations and representations, warranties and covenants by sublicensee equivalent to the indemnification and insurance obligations and representations, warranties and covenants made by Licensee herein, and in addition, further provide that such indemnification and insurance obligations and representations, warranties and covenants shall run to and be for the benefit of Indemnitees, as defined herein; (iii) any such sublicensing agreement must also prohibit sublicensee’s further sublicense of the rights delivered hereunder, and must also name Rensselaer as an intended third party beneficiary of the obligations of sublicensee without imposition of obligation or liability on the part of Rensselaer or its Inventors to the sublicensee; and (iv) each such sublicensee, and the form and substance of each such sublicense, shall be subject to the prior written approval of Rensselaer, which approval shall not be unreasonably withheld. No approval shall be required as to any sublicense which utilizes the form of sublicense attached hereto as Appendix C.

2.6.2 Royalties on Sublicenses. Licensee shall pay Rensselaer, or cause its sublicensee to pay Rensselaer, the same royalties on all Net Sales of such sublicensee as if said Net Sales had been made by Licensee. Each sublicensee shall report its Net Sales to Rensselaer through Licensee, which Net Sales shall be aggregated with any Net Sales of Licensee for purposes of determining the Net Sales upon which royalties are to be paid to Rensselaer.

2.6.3 Other Sublicense Revenue. Any and all sublicense revenues, other than royalties, lines of credit, and research and development funding, due Licensee pursuant to the grant of a sublicense to a party shall be reported to Rensselaer by Licensee within thirty (30) days of the effective date of such sublicense agreement. Licensee shall pay to Rensselaer fifty percent (50%) of such sublicense revenue within thirty (30) days of the effective date of such sublicense agreement.
2.6.4 Non-cash Consideration from Sublicenses. Any non-cash consideration received by Licensee from sublicensees shall be valued at its fair market value as of the date of receipt. All payments shall be made to Rensselaer in cash based on such valuation within thirty (30) days of the effective date of such sublicense agreement.

2.7 Duration of Royalty Obligations. The royalty obligations of Licensee as to each Licensed Product shall terminate on a country-by-country basis concurrently with the latter of (i) the expiration of the last to expire of Rensselaer Patent Rights utilized by or in such Licensed Product in each such country or (ii) the last sale of Licensed Product in each such country which was produced during the term of this License Agreement.

2.8 Reports. Licensee shall furnish to Rensselaer every calendar quarterly period following the commencement of this Agreement, and regardless of whether a payment is also due at the same time, a detailed written report of Net Sales of the Licensed Products and the royalty due and payable thereon, including a description of credits deducted therefrom, on a product-by-product and country-by-country basis, for the calendar quarter upon which the royalty payment is based. Such detailed written report shall encompass at least the same information set forth in Appendix D.

2.9 Records. Licensee shall keep, and shall cause its sublicensees to keep, full, complete and proper records and accounts of all sales of Licensed Products, including, but without limitation, inventory, purchase and invoice records specifically relating to Licensed Products or their manufacture, in sufficient detail to enable the royalties payable on Net Sales of each Licensed Product to be determined. Rensselaer shall have the right to appoint an independent certified public accounting firm approved by Licensee, which approval shall not be unreasonably withheld, to audit the records of Licensee and sublicensees as necessary to verify the royalties payable pursuant to this Agreement. Licensee and its sublicensees shall pay to Rensselaer an amount equal to any additional royalties to which Rensselaer is entitled as disclosed by the audit, plus interest thereon at the rate of one and one-half percent (1.5%) per month, accruing as of the first date of delinquency. Such audit shall be at Rensselaer’s expense; provided, however, that if the audit discloses that Rensselaer was underpaid royalties with respect to any Licensed Product by at least five percent (5%) for any calendar quarter, then Licensee and its sublicensee, as the case may be shall reimburse Rensselaer for any such audit costs. Rensselaer may exercise its right of audit as to each of Licensee and its sublicensees no more frequently than once in any calendar year. The accounting firm shall disclose to Rensselaer only information relating to the accuracy of the royalty payments. Licensee and its sublicensees shall preserve and maintain all such records required for audit for a period of seven (7) years after the calendar quarter to which the record applies.

2.10 Foreign Taxes and Foreign Fees. In consideration of the license granted herein, any taxes, registration fees and attorney fees due for (i) each territory for which sales are made, (ii) each territory for which revenue is received, and (iii) for each territory in which business is conducted and taxes are due for conducting business, and/or (iv) required to be paid by Rensselaer and/or withheld by Licensee under the laws of any foreign country for the accounts of Rensselaer as a result of the sales of Licensed Products shall be the sole
responsibility of Licensee and shall be promptly paid by Licensee for and on behalf of Rensselaer to the appropriate governmental authority. Licensee shall use its diligent efforts to furnish Rensselaer with proof of payment of such tax together with official or other appropriate evidence issued by the applicable government authority.

2.11 Milestones. Licensee shall adhere to the milestones listed below [and pay to Rensselaer the milestone payments corresponding thereto on the due dates therefor]. Licensee’s failure to fulfill on a timely basis any listed milestone shall be considered a material breach of this Agreement and be grounds for termination of this Agreement under Section 8.2.

a) On or before ____________, 20__, ____________________________ $______.
b) On or before ____________, 20__, ____________________________ $______.
c) On or before ____________, 20__, ____________________________ $______.

2.12 Accounting – Payments.

2.12.1 Currency Conversion. All royalties owing with respect to Net Sales stated in currencies other than U.S. dollars shall be converted at the rate shown in the U.S. Federal Reserve Noon Valuation – Value of Foreign Currencies on the day preceding the payment.

2.12.2 Account. Amounts owing to Rensselaer under Section 2 shall be paid to Rensselaer’s Direct Deposit Account No. ___________ as follows: [INSERT].

2.12.3 Late Fees; Collection. Late payments on any royalties, fees, costs, or any obligation whatsoever owed to Rensselaer as a result of this Agreement shall be subject to a fee calculated at one and one-half percent (1 1/2%) per month of the delinquent balance and shall begin accruing on the first day of delinquency. A payment shall be considered delinquent if not paid in full by the due date. Licensee shall be deemed to have consented to the balance stated in any invoice unless it objects to the invoice in writing within thirty (30) days. Licensee shall reimburse Rensselaer for all its reasonable attorney fees, and its costs and expenses, if Rensselaer engages legal counsel to assist in the collection of any amounts past due to Rensselaer pursuant to this Agreement, without regard to whether settlement is reached or formal proceedings are commenced to effect collection. Rensselaer shall be entitled to recover from Licensee all such attorney fees, costs and expenses in any arbitration or legal proceedings related thereto, including any and all appeals of any arbitration award or court determination.


3.1 Patent Prosecution and Maintenance. From and after the date of this Agreement, the provisions of this Section 3 shall control the prosecution and maintenance of any patent included within Rensselaer Patent Rights. Subject to the requirements, limitations and conditions set forth in this Agreement, Rensselaer shall direct and control (i) the preparation, filing and prosecution of the United States and foreign patent applications within Rensselaer
Rensselaer and __________________ Exclusive License Agreement
Contract # __________________________

RPI DRAFT: [INSERT DATE]

Patent Rights (including any interferences, reexaminations, reissues and U.S. or foreign post
grant oppositions) and (ii) maintain the patents issuing therefrom. Rensselaer shall select the
patent attorney, subject to Licensee’s written approval, which approval shall not be unreasonably
withheld, conditioned or delayed. Licensee shall have full rights of consultation with the patent
attorney so selected on all matters relating to Rensselaer Patent Rights. Rensselaer shall use its
best efforts to implement all reasonable requests made by Licensee with regard to the
preparation, filing, prosecution and/or maintenance of the patent applications and/or patents
within Rensselaer Patent Rights.

3.2 Information to Licensee. Rensselaer shall keep Licensee
reasonably informed with regard to the patent application and maintenance processes.

3.3 Patent Costs. Licensee acknowledges and agrees that Rensselaer
does not have independent funding to cover patent costs, and that the license granted hereunder
is in part in consideration for Licensee’s assumption of patent costs and expenses as described
herein. Licensee shall pay for all expenses incurred by Rensselaer pursuant to Section 3.1
hereof. In addition, Licensee agrees to reimburse Rensselaer for all patent costs and expenses
paid or incurred by Rensselaer to date in connection with Rensselaer Patent Rights licensed
hereunder. Licensee agrees to pay all such past and future patent expenses and to reimburse
Rensselaer for the payment of such expenses within thirty (30) days after Licensee receives an
itemized invoice therefor. In the event Licensee elects to discontinue payment for the filing,
prosecution and/or maintenance of any patent application and/or patent within Rensselaer Patent
Rights, any such patent application or patent shall be excluded from the definition of Rensselaer
Patent Rights and from the scope of the license granted under this Agreement, and all rights
relating thereto shall revert to Rensselaer and may be freely licensed by Rensselaer. Licensee
shall give Rensselaer at least thirty (30) days’ prior written notice of such election. No such
notice shall have any effect on Licensee’s obligations to pay expenses incurred up to the
effective date of such election.

3.4 Anticipatory Patent Cost Payment. In acknowledgment of
Licensee’s assumption of patent costs and expenses, as more fully set forth in Section 3.3 above,
and in anticipation of any such patent costs and expenses that Rensselaer may be compelled to
accrue on behalf of Licensee as a result of this Agreement, Licensee agrees to deposit with
Rensselaer an up-front payment in the sum of __________ USD, which Rensselaer agrees to use
only to pay those patent costs paid or incurred by Rensselaer in connection with Rensselaer
Patent Rights. Any funds remaining after such patent costs and expense are completely satisfied
will be returned to Licensee.

3.5 Preservation of Title. Rensselaer shall retain full ownership and
title to Rensselaer Patent Rights licensed hereunder and shall use its reasonable best efforts to
preserve and maintain such full ownership and title, subject to Licensee fully performing all of
its obligations under this Agreement.

3.6 Rensselaer Right to Pursue Patent. If at any time during the term
of this Agreement, Licensee’s rights with respect to Rensselaer Patent Rights are terminated,
Rensselaer shall have the right to take whatever action Rensselaer deems appropriate to obtain or maintain the corresponding patent protection at its own expense. If Rensselaer pursues patents under this Section, Licensee agrees to cooperate fully, including by providing, at no charge to Rensselaer, all appropriate technical data and executing all necessary legal documents.

3.7 Infringement Actions.

3.7.1 Notices of Infringement. Each party shall notify the other in writing of any discovered infringement or suspected infringement of Rensselaer Patent Rights and the parties shall discuss the course of action to pursue.

3.7.2 Prosecution and Defense of Infringements. Licensee shall have the first right but not the obligation to prosecute any and all infringements of any Rensselaer Patent Rights licensed hereunder, unless otherwise agreed to between Rensselaer and Licensee. Licensee may enter into settlements, stipulated judgments or other arrangements respecting such infringement, at its own expense, but only with the prior written consent of Rensselaer, which consent shall not be unreasonably withheld. Rensselaer shall permit any action to be brought in its name if required by law, and Licensee shall hold Rensselaer harmless from any costs, expenses or liability respecting all such infringements. Rensselaer agrees to provide reasonable assistance of a technical nature that Licensee may require in any litigation arising in accordance with the provisions of this Section, for which Licensee shall pay to Rensselaer a reasonable hourly rate of compensation, plus out-of-pocket expenses. In the event Licensee fails to prosecute any such infringement, Licensee shall notify Rensselaer in writing promptly and Rensselaer shall have the right to prosecute such infringement on its own behalf.

3.7.3 Allocation of Recovery. Any damages or other recovery from an infringement action undertaken by Licensee pursuant to Section 3.7.2 shall first be used to reimburse the parties for the costs and expenses incurred in such action, and shall thereafter be deemed to reflect lost sales of Licensed Products and Rensselaer shall receive a percentage of such recovery which is equal to the percentage royalty due Rensselaer under Article 2. If Licensee fails to prosecute any such action to completion, then any damages or other recovery net of the parties’ costs and expenses incurred in such infringement action shall be the sole property of Rensselaer.

4. Obligations Related to Commercialization.

4.1 Commercial Development Obligation.

4.1.1 Licensee agrees to and warrants that it has, or will obtain, the expertise necessary to independently evaluate the inventions of the Rensselaer Patent Rights and to develop Licensed Products for sale in the commercial market and that it so intends to develop Licensed Products for the commercial market. Licensee shall keep Rensselaer fully informed as to Licensee’s progress in such development and sale, including its efforts, if any, to sublicense Rensselaer Patent Rights.
4.1.2 Notwithstanding the foregoing, on or before the date of
effect of this Agreement, Licensee shall provide Rensselaer with a Development Plan
encompassing at least the information set forth in Appendix E describing the steps necessary to
allow the inventions of the Rensselaer Patent Rights to be utilized to provide Licensed Products
for sale in the commercial market.

4.1.3 In addition, by January 31, April 30, July 31 and October
31 of each year in which this Agreement is in force, Licensee shall provide Rensselaer with a
written Development Report encompassing at least the information set forth in Appendix F and
summarizing Licensee’s product development activities since the last Development Report and
any necessary adjustments to the Development Plan.

4.1.4 All developmental activities and strategies and all aspects
of product design and decisions to market and the like are entirely at the discretion of Licensee
and Licensee shall rely entirely on its own expertise with regard thereto. Rensselaer’s review of
Licensee’s development plan is solely to verify the existence of Licensee’s commitment to
development activity and to assure compliance with Licensee’s obligations to utilize the
inventions of the Rensselaer Patent Rights to commercialize the Licensed Products for the
marketplace, as set forth above.

4.1.5 Rensselaer reserves the right to audit Licensee’s records
relating to development of Licensed Products as required hereunder. Such record keeping and
audit procedures shall be subject to the procedures and restrictions set forth for audit of the
financial records of Licensee in Section 2.10.

4.2 Governmental Approvals and Marketing of Licensed Products.
Licensee shall be responsible for obtaining all necessary governmental approvals for the
development, production, distribution, sale and use of any Licensed Product, at Licensee’s
expense, including, without limitation, any safety studies. Licensee shall have sole responsibility
for any warning labels, packaging and instructions as to the use of Licensed Products and for the
quality control for any Licensed Product.

4.3 Indemnity. Licensee hereby agrees to indemnify, defend and hold
harmless Rensselaer and any parent, subsidiary or other affiliated entity and their current or
former trustees, directors, officers, employees, faculty, students, scientists and agents, and their
respective successors, heirs and assigns (collectively “Indemnities”) from and against any claim,
liability, costs, expense, damage, deficiency, loss or obligation of any kind or nature (including
without limitation, reasonable attorney’s fees and other costs and expense of litigation)
(collectively “Claims”) based upon, arising out of, or otherwise relating to this Agreement,
including without limitation any cause of action related to product liability concerning any
product, process or service made, used or sold pursuant to any right or license granted under this
Agreement.

4.4 Insurance. Licensee shall, at its sole cost and expense, establish
and maintain during the Term commercial general liability insurance from a company reasonably
acceptable to Rensselaer, which shall include product liability coverage encompassing such product, process or service, in the minimum amount of five million dollars ($5,000,000) per occurrence. In addition, Indemnitees shall be named as Additional Insureds on such coverage. Licensee shall furnish Rensselaer with appropriate certificates and such other evidence demonstrating that such coverage is in force as Rensselaer shall reasonably require on or before January 15 of each year that this License Agreement is in force.

4.5 Patent Marking. To the extent required by applicable law, Licensee shall mark all Licensed Products or their containers in accordance with the applicable patent marking laws.

4.6 No Use of Name. Neither party, nor any of their Affiliates, employees or agents shall have the right to use any name, trade name, seal, logo, trademark, or service mark, or any adaptation of any of them, or the name, mark, or logo of any representative or organization, of the other party, absent written approval of the other party.

4.7 U.S. Manufacture. To the extent required by 35 U.S.C. 204, Chapter 37 of the Code of Federal Regulations and other applicable United States laws and regulations, if at all, Licensee agrees that Licensed Products will be manufactured substantially in the United States, or its territories, subject to such waivers as may be required, or obtained, if at all, as set forth in applicable federal law.

4.8 Foreign Registration. Licensee agrees to register this Agreement with any foreign governmental agency which requires such registration, and Licensee shall pay all costs and legal fees in connection therewith. In addition, Licensee shall assure that all foreign laws affecting this Agreement or the sale of Licensed Products are fully satisfied.

5. Limited Warranty.

5.1 Limited Warranty. Rensselaer hereby represents and warrants that it has full right and power to enter into this Agreement. RENSSELAER MAKES NO OTHER WARRANTIES CONCERNING RENSSELAER PATENT RIGHTS COVERED BY THIS AGREEMENT, INCLUDING WITHOUT LIMITATION, ANY EXPRESS OR IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AS TO RENSSELAER PATENT RIGHTS OR ANY LICENSED PRODUCT. RENSSELAER MAKES NO WARRANTY OR REPRESENTATION AS TO THE VALIDITY OR SCOPE OF RENSSELAER PATENT RIGHTS, OR THAT ANY LICENSED PRODUCT WILL BE FREE FROM AN INFRINGEMENT ON PATENTS OR OTHER INTELLECTUAL PROPERTY RIGHTS OF THIRD PARTIES, OR THAT NO THIRD PARTIES ARE IN ANY WAY INFRINGING RENSSELAER PATENT RIGHTS COVERED BY THIS AGREEMENT. RENSSELAER'S ENTIRE LIABILITY AND LICENSEE'S EXCLUSIVE REMEDY FOR ANY CLAIMS, COSTS, LOSSES, DAMAGES OF ANY KIND OR ANY OTHER CAUSE, REGARDLESS OF THE FORM OF ACTION, SHALL NOT EXCEED THE AMOUNT OF LICENSEE FEES PAID HEREUNDER BY LICENSEE.
6. **Interests in Intellectual Property Rights.**

6.1 **Governmental Interest.** Licensee and Rensselaer acknowledge that Rensselaer may have received, and expects to continue to receive, funding from the United States Government in support of Rensselaer research activities. Licensee and Rensselaer acknowledge and agree that in such a case that their respective rights and obligations pursuant to this Agreement shall be subject to Rensselaer obligations and the rights of the United States Government, if any, that arise or result from Rensselaer’s receipt of research support from the United States Government, including, without limitation, the grant by Rensselaer to the United States of a non-exclusive, irrevocable, royalty-free license to Rensselaer Patent Rights licensed hereunder for governmental purposes.

6.2 **Reservation of Rights.** Rensselaer reserves the right to use for any research and educational purposes and the right to allow other nonprofit institutions to use for any research and educational purposes any Rensselaer Patent Rights licensed hereunder, without Rensselaer or such other institutions being obligated to pay Licensee any royalties or other compensation.

6.3 **Rensselaer’s Royalty-free License to Improvements.** Licensee hereby grants to Rensselaer a non-exclusive, royalty-free license to any improvement to Rensselaer Patent Rights or any invention disclosed and claimed therein, developed by Licensee, to use for its own educational or research purposes or grant to other nonprofit institutions for their educational or research purposes.

6.4 **No Joint Research Agreement.** This Agreement shall not be construed to be a “joint research agreement” as that term is used in Section 102 of the Patent Act (35 U.S.C. §102). Inventorship of intellectual property generated by access to Rensselaer’s inventions will be determined according to U.S. patent laws. If Licensee invokes Section 102(b) or (c) of the U.S. Patent Act to overcome any prior art rejections, however, all patents obtained by Licensee by asserting that this Agreement is a joint research agreement shall be owned by Rensselaer and become part of the Rensselaer Patent Rights, and Licensee hereby assigns all its right, title and interest in such patents to Rensselaer.

7. **Confidentiality and Publication.**

7.1 **Treatment of Confidential Information.** The parties agree that during the term of this Agreement, and for a period of three (3) years after this Agreement terminates, a party receiving Confidential Information of the other party will (i) maintain in confidence such Confidential Information to the same extent such party maintains its own proprietary industrial information, (ii) not disclose such Confidential Information to any third party without prior written consent of the other party and (iii) not use such Confidential Information for any purpose except those permitted by this Agreement.

7.2 **Publications.** Licensee agrees that Rensselaer shall have a right to publish in accordance with its general policies.
7.3 **Publicity.** Except as otherwise provided herein or required by law, no party shall originate any publication, news release or other public announcement, written or oral, whether in the public press, stockholders' reports, or otherwise, relating to this Agreement or to any sublicense hereunder, or to the performance hereunder or any such agreements, without the prior written approval of the other party, which approval shall not be unreasonably withheld. Scientific publications published in accordance with Section 7.2 of this Agreement shall not be construed as publicity governed by this Section 7.3. The party seeking such consent shall provide a complete copy of such publication, news release or other public announcement at the earliest possible time in advance of such publication. Notwithstanding any anticipated presentation or publication date, the other party shall have thirty (30) days after receipt of said copy to object to such proposed publication.

8. **Term and Termination.**

8.1 **Term.** Unless terminated sooner in accordance with the provisions of this Agreement, the term of this Agreement and the license rights granted hereunder shall expire concurrently with the later of (i) the expiration of the last to expire of the Rensselaer Patent Rights or (ii) the last sale of a Licensed Product produced prior to the date specified in (a). Notwithstanding the foregoing, if applicable government regulations require a shorter term and/or a shorter term of exclusivity than provided for herein, then the term of this Agreement shall be so shortened or this Agreement shall be amended to provide for a non-exclusive license, and, in such event, the parties shall negotiate in good faith to reduce appropriately the royalties payable hereunder.

8.2 **Termination Upon Default.** Any one or more of the following events shall constitute an event of default hereunder: (i) the failure of a party to pay any amounts when due hereunder and the expiration of fifteen (15) days after receipt of a written notice requesting the payment of such amount; (ii) the failure of a party to perform any obligation required of it to be performed hereunder, and the failure to cure within thirty (30) days after receipt of notice from the other party specifying in reasonable detail the nature of such default. Upon the occurrence of any event of default, the non-defaulting party may deliver to the defaulting party written notice of intent to terminate, such termination to be effective upon the date set forth in such notice.

Such termination rights shall be in addition to and not in substitution for any other remedies that may be available to the non-defaulting party. Termination pursuant to this Section 8.2 shall not relieve the defaulting party from liability and damages to the other party for breach of this Agreement. Waiver by either party of a single default or a succession of defaults shall not deprive such party of any right to terminate this Agreement arising by reason of any subsequent default.
8.3 **Licensee's Termination Right.** Provided Licensee is not then in material breach of any of its obligations under this Agreement, Licensee may terminate this Agreement by giving Rensselaer thirty (30) days prior written notice.

8.4 **Other Termination Events.** In the event that Licensee brings an action or proceeding seeking to invalidate any term or condition of this Agreement, or seeking to invalidate any patent licensed under this Agreement, Rensselaer may immediately terminate this Agreement upon written notice to Licensee.

8.5 **Termination Upon Bankruptcy or Insolvency.** This Agreement may be terminated by Rensselaer giving written notice of termination to Licensee upon the filing of bankruptcy or bankruptcy of Licensee or the appointment of a receiver of any of Licensee's assets, or the making by Licensee of any assignment for the benefit of creditors, or the institution of any proceedings against Licensee under any bankruptcy law. Termination shall be effective upon the date specified in such notice.

8.6 **Rights Upon Expiration.** Neither party shall have any further rights or obligations upon the expiration of this Agreement upon its regularly scheduled expiration date with respect to this Agreement, other than the obligation of Licensee to make any and all reports and payments for the final quarter period, and to submit to audit if necessary, in accordance with Section 2.10 hereof. Provided, however, that upon such expiration, each party shall be required to continue to abide by its non-disclosure obligations as described in Section 7.1, and Licensee shall continue to abide by its obligation to indemnify Rensselaer as described in Section 4.3 and by its obligations under Section 6.2 (Reservation of Rights) hereof.

8.7 **Rights Upon Termination.** Notwithstanding any other provision of this Agreement, upon any termination of this Agreement prior to the regularly scheduled expiration date of this Agreement, the license granted hereunder shall terminate. Except as otherwise provided in Section 8.8 of this Agreement with respect to work-in-progress, upon such termination, Licensee shall have no further right to develop, manufacture or market any Licensed Product, or to otherwise use any Rensselaer Patent Rights not otherwise includable therein. Upon any such termination, Licensee shall promptly return all materials, samples, documents, information, and other materials which embody or disclose Rensselaer Patent Rights not otherwise includable therein; provided, however, that Licensee shall not be obligated to provide Rensselaer with proprietary information which Licensee can show that it independently developed. Any such termination shall not relieve either party from any obligations accrued to the date of such termination. Upon such termination, each party shall be required to abide by its nondisclosure obligations as described in Section 7.1, and Licensee shall continue to abide by its obligations to indemnify Rensselaer as described in Section 4.3 and by its obligations under 6.2 (Reservation of Rights) hereof. In addition, upon termination, any sublicensees shall become a direct licensee of Rensselaer, provided that Rensselaer's obligations to sublicensees are no greater than Rensselaer's obligations to Licensee under this Agreement. Licensee shall provide written notice of such termination to each sublicensee with a copy of such notice provided to Rensselaer.
8.8 **Work-in-Progress.** Upon any such early termination of the license granted hereunder in accordance with this Agreement, Licensee shall be entitled to finish any work-in-progress and to sell any completed inventory of a Licensed Product covered by such license which remain on hand as of the date of the termination, so long as Licensee pays to Rensselaer the royalties applicable to said subsequent sales in accordance with the terms and conditions as set forth in this Agreement, provided that no such sales shall be permitted after the expiration of six (6) months after the date of termination.

9. **Assignment; Successors.**

9.1 **Assignment.** Licensee may not assign this Agreement except with the prior written consent of Rensselaer. Any assignment that does not comply with the previous sentence shall be void.

9.2 **Binding Upon Successors and Assigns.** Subject to the limitations on assignment herein, this Agreement shall be binding upon and inure to the benefit of any successors in interest and assigns of Rensselaer and Licensee. Any such successor or assignee of Licensee’s interest shall expressly assume in writing the performance of all the terms and conditions of this Agreement to be performed by Licensee.

10. **General Provisions.**

10.1 **Independent Contractors.** The relationship between Rensselaer and Licensee is that of independent contractors. Rensselaer and Licensee are not joint venturers, partners, principal and agent, master and servant, employer or employee, and have no other relationship other than independent contracting parties. Rensselaer and Licensee shall have no power to bind or obligate each other in any manner, other than as is expressly set forth in this Agreement.

10.2 **Mediation.** In the event of any dispute, claim, question or disagreement arising from or relating to this Agreement or the breach thereof, and such dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association (AAA) under its Commercial Mediation Procedures before resorting to arbitration as provide in this Agreement. The location of all mediation proceedings shall be in the County of Rensselaer, State of New York, U.S.A.

10.3 **Arbitration.** Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, which has not been resolved by mediation as provided in this Agreement shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), and the procedures set forth below. In the event of any inconsistency between the Rules of AAA and the procedures set forth below, the procedures set forth below shall control. Judgment upon the award rendered by the arbitrators may be enforced in any court having jurisdiction thereof.
10.3.1 **Location.** The location of the arbitration shall be in the County of Rensselaer, State of New York, U.S.A.

10.3.2 **Selection of Arbitrators.** The selection of an arbitrator(s) shall be in accordance with AAA rules unless the parties shall otherwise agree.

10.3.3 **Case Management.** Prompt resolution of any dispute is important to both parties; and the parties agree that the arbitration of any dispute shall be conducted expeditiously. The arbitrator(s) is instructed and directed to assume case management initiative and control over the arbitration process (including scheduling of events, pre-hearing discovery and activities, and the conduct of the hearing), in order to complete the arbitration as expeditiously as is reasonably practical for obtaining a just resolution of the dispute.

10.4 **Entire Agreement; Modification.** This Agreement sets forth the entire agreement and understanding between the parties as to the subject matter hereof. There shall be no amendments or modifications to this Agreement, except by a written document which is signed by both parties.

10.5 **New York Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of New York without regard to the conflicts of laws principles thereof.

10.6 **Headings.** The headings for each article and section in this Agreement have been inserted for convenience of reference only and are not intended to limit or expand on the meaning of the language contained in the particular article or section.

10.7 **Severability.** Should any one or more of the provisions of this Agreement be held invalid or unenforceable by a court of competent jurisdiction, it shall be considered severed from this Agreement and shall not serve to invalidate the remaining provisions thereof. The parties shall make a good faith effort to replace any invalid or unenforceable provision with a valid and enforceable one such that the objectives contemplated by them when entering this Agreement may be realized.

10.8 **No Waiver.** Any delay in enforcing a party’s rights under this Agreement or any waiver as to a particular default or other matter shall not constitute a waiver of such party’s rights to the future enforcement of its rights under this Agreement, excepting only as to an express written and signed waiver as to a particular matter for a particular period of time.

10.9 **No Set-off.** Neither party shall have, as against the other, any right of setoff, offset, or any right to withhold payment of amounts due on any sums otherwise payable herein based on any claim asserting a breach of this Agreement.

10.10 **Name.** Whenever there has been an assignment or a sublicense by Licensee as permitted by this Agreement, the term “Licensee” as used in this Agreement shall also include and refer to, if appropriate, such assignee or sublicensee.
10.11 Notices. Any notices required by this Agreement shall be in writing, shall specifically refer to this Agreement and shall be sent postage prepaid by registered or certified airmail, return receipt requested, by fax, or by overnight courier with charges prepaid, and shall be forwarded to the respective addresses set forth below unless subsequently changed by written notice to the other party:

For Rensselaer:
Rensselaer Polytechnic Institute
Office of Intellectual Property
Technology Transfer and New Ventures
110 8th Street, 3210 J Building
Troy, New York 12180-3590
Attention: Executive Director
Fax No.: (518) 276-6380

For Licensee:

Attention: __________________________
Fax No.: __________________________

Notice shall be deemed delivered upon the earlier of (i) when received, (ii) three (3) days after deposit into the mail, or (iii) the date notice is sent via telefax, telex or cable, (iv) the day immediately following delivery to overnight courier (except Sunday and holidays).

10.12 Compliance with Laws. Nothing contained in this Agreement shall require or permit Rensselaer or Licensee to do any act inconsistent with the requirements of any United States or other applicable law, regulation or executive order as the same may be in effect from time to time. In particular, but without limitation, the parties hereto agree to comply with any and all applicable laws or regulations of the United States or any country governing the export or re-export of any Licensed Product herein.

10.13 Compliance with Export Control Laws. It is understood and acknowledged that the transfer of certain commodities and technical data is subject to United States laws and regulations controlling the export of such commodities and technical data, including all Export Administration Regulations of the United States Department of Commerce, the International Traffic in Arms Regulations of the US Department of State and the executive orders, sanctions programs and other rules administered by the Office of Foreign Assets Control of the US Treasury Department. These laws and regulations, among other things, prohibit or require a license for the export of certain types of technical data to certain specified countries. Licensee hereby agrees and gives written assurance that it will comply with all United States laws and regulations controlling the export of commodities and technical data, that it will be solely responsible for any violation of such by Licensee, and that it will defend and hold Licensor harmless in the event of any legal action of any nature occasioned by such violation.

IN WITNESS WHEREOF, the parties have executed this Agreement by their duly authorized representatives as of the Effective Date.
Rensselaer and __________________ Exclusive License Agreement
Contract # ____________________________

RENSSLEAER:

RENSSLEAER POLYTECHNIC INSTITUTE

By: ________________________________
   Name:
   Title:

By: ________________________________
   Name:
   Title:

RPI DRAFT: [INSERT DATE]
APPENDIX A - DEFINITIONS

Capitalized terms shall have the meaning set forth below.

A. Affiliate. The term “Affiliate” means any entity that directly or indirectly controls, is controlled by or is under common control with Licensee as of the Effective Date. The term “control” as used herein means the possession of the power to direct or cause the direction of the management and the policies of an entity, whether through the ownership of a majority of the outstanding voting securities or by contract or otherwise.

B. Confidential Information. The term “Confidential Information” means any and all proprietary or confidential information of Rensselaer or Licensee which may be exchanged between the parties at any time and from time to time during the term of this Agreement, which, if in written or tangible form, is conspicuously marked or labeled confidential, or if orally or visually imparted, is identified as confidential in a writing sent to the receiving party within twenty (20) days of disclosure. Information shall not be considered confidential to the extent that it:

a. Is publicly disclosed through no fault of any party hereto, either before or after it becomes known to the receiving party; or

b. Was known to the receiving party prior to the date of this Agreement, which knowledge was acquired independently and not from another party hereto (or such party’s employees); or

c. Is subsequently disclosed to the receiving party in good faith by a third party who has a right to make such disclosure; or

d. Is demonstrated by written records to have been developed by or for the receiving party without reference to confidential information disclosed by the disclosing party; or

e. Has been published by a third party as a matter of right; or

f. Is required to be disclosed by law, government regulation or court order.

C. Dollars and $. The term “Dollars” and the symbols “$” or “USD” mean United States Dollars.

D. Field of Use. The term “Field of Use” means

E. Licensed Product. The term “Licensed Product” means any product which cannot be developed, manufactured, offered to sale, used or sold without infringing one or more claims under Rensselaer Patent Rights.
F. Licensed Territory. The term “Licensed Territory” means the United States of America and the following designated countries: ____________________________.

G. Net Sales. The term “Net Sales” means the gross amount invoiced by Licensee and its sublicensees, or any of them, on all sales of Licensed Products in any country, less (i) discounts actually allowed, (ii) credits for claims or allowances, (iii) prepaid freight and (iv) sales taxes or other governmental charges actually paid in connection with sales of Licensed Products (but excluding what are commonly known as income taxes and value-added taxes). For purposes of determining Net Sales, a sale shall be deemed to have occurred when an invoice therefor is generated or the Licensed Product is shipped for delivery. In addition, in the event that any particular sales of Licensed Products are of a non-monetary nature or are made for less than the price of other similar Licensed Products, sold in similar quantities, and at the same time, the gross amount of such sales shall be deemed, for the purpose of computing royalties herein, to be at the average selling price at which similar Licensed Products, sold in similar quantities, were being contemporaneously offered for sale. Sales of Licensed Products by Licensee, or a permitted sublicensee of Licensee to any Affiliate or sublicensee that is a reseller thereof shall be excluded, and only the subsequent sale of such Licensed Products by Affiliates or sublicensees of Licensee to unrelated parties shall be deemed Net Sales hereunder.

H. Rensselaer Patent Rights. The term “Rensselaer Patent Rights” means rights arising out of or resulting from (i) any and all U.S. and foreign patent applications identified and set forth with specificity in Appendix B attached hereto, and the invention(s) disclosed and claimed therein, (ii) the patents proceeding from such applications, (iii) all claims of continuations-in-part, but excluding those claims in such applications claiming any new subject matter, (iv) divisionals, continuations, reissues, reexaminations, and extensions of any patent or application set forth in (i)-(iii) above, so long as said patents have not been held invalid and/or unenforceable by a court of competent jurisdiction from which there is no appeal or, if appealable, from which no appeal has been taken.
APPENDIX B - DISCLOSURE OF PATENT RIGHTS
APPENDIX C - FORM OF SUBLICENSE

This Sublicense Term Sheet is entered into and made effective as of ______________________, 20___ by and between ________________________________, a ______________________ located at ____________________________________________________________________________ ("Licensee") and ________________________________, a ______________________ located at ____________________________________________________________________________ ("Sublicensee").

Grant of Sublicense. Licensee hereby grants to Sublicensee a sublicense under and on all the same terms and conditions of that certain License Agreement between Licensee and Rensselaer Polytechnic Institute, a New York not-for-profit corporation ("Rensselaer") attached hereto as Exhibit I (the "Master License Agreement"), and incorporated herein by reference as if fully set forth at length, except as set forth below:

   a  Technology subject to Sublicense: ________________________________

   b  Term: __________________________________________________________________

   c  Royalty Payments: __________________________________________________________________

   d  Commercial Development Obligations: __________________________________________________________________

By its signature below, Sublicensee agrees to be bound by all of the terms and conditions of the Master License Agreement, as modified hereby, for the benefit of Licensee and Rensselaer.

LICENSEE: ________________________________

By: ________________________________
Name: ________________________________
Title: ________________________________

SUBLICENSEE: ________________________________

By: ________________________________
Name: ________________________________
Title: ________________________________
APPENDIX D - ROYALTY REPORTS

Licensee: ____________________________  Agreement No: ________________
Inventor: ____________________________  P#: ____________________________
Period Covered: From: ___/___/_______  Through: ___/___/_______
Prepared By: ____________________________  Date: ____________________________
Approved By: ____________________________  Date: ____________________________

If license covers several major product lines, please prepare a separate report for each line. Then combine all product lines into a summary report.

Report Type:  ___ Single Product Line Report: ____________________________
              ___ Multiproduct Summary Report. Page 1 of ______ Pages
              ___ Product Line Detail. Line:_______ Trademark:_______ Page: ___
Report Currency:  ___ U. S. Dollars  ___ Other ____________________________

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<th>Country</th>
<th>Gross Sales</th>
<th>*Less: Allowances</th>
<th>Net Sales</th>
<th>Royalty Rate</th>
<th>Royalty This Year</th>
<th>Royalty Last Year</th>
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</tbody>
</table>

TOTAL:

Total Royalty: _______ Conversion Rate: _______ Royalty in U.S. Dollars: $ _______

The following royalty forecast is non-binding and for Rensselaer’s internal planning purposes only:
Royalty Forecast Under This Agreement: Next 6 months: ___P2: ____P3: ___P4: ___

* On a separate page, please indicate the reasons for returns or other adjustments if significant. Also note any unusual occurrences that affected royalty amounts during this period.
To assist Rensselaer's forecasting, please comment on any significant expected trends in sales volume.

I hereby certify, represent and warrant to Rensselaer that the statements contained in this report are true, accurate and complete, does not omit to state any material facts, and is not misleading in any respect whatsoever with respect to the period covered by the report.

________________________________________
Signature

________________________________________
Print or Type Name

________________________________________
Date
APPENDIX E - DEVELOPMENT PLAN

Licensee shall submit to Rensselaer a detailed development plan, setting forth the items identified below, upon execution of this Agreement. This written development plan should provide Rensselaer with sufficient information to provide a clear and comprehensive overview of the activities that Licensee believes are necessary to make Products available for sale in the commercial marketplace.

<table>
<thead>
<tr>
<th>Estimated Start Date</th>
<th>Finish Date</th>
</tr>
</thead>
</table>

I. Development Program

A. Development Activities to be Undertaken
   (Please break activities into sub-units with the date of completion of major milestones)
   1. 
   2. 
   3.

B. Estimated Total Development Time

II. Governmental Approval

A. Types of submissions required

B. Government agency (e.g. FDA, EPA, etc.)

III. Proposed Market Approach

IV. Competitive Information

A. Potential Competitors

B. Potential Competitive Devices/Compositions

C. Known Competitor’s plans, developments, technical achievements

D. Anticipated Date of Product Launch

V. Other Required Milestones
APPENDIX F - DEVELOPMENT REPORTS

All development reports issued pursuant to the requirements of this agreement shall contain the following items:

A. Date development plan initiated and time period covered by this report.

B. Development Report (4-8 paragraphs).
   1. Set forth in detail all activities completed since last report. Detail shall include the object and parameters of the development, when initiated, when completed and the results.
   2. Set forth in detail all activities currently under investigation. Details shall include all ongoing activities including object and parameters of such activities, when initiated, and projected date of completion. Also include activity regarding status of all sublicenses being pursued, and date of execution.

C. Future Development Activities (4-8 paragraphs).
   1. Set forth in detail all activities that are anticipated to be undertaken before next report. Details shall include the type and object of any studies conducted and their projected starting and completion dates.
   2. Set forth in detail the estimated total development time remaining before a product will be commercialized.

D. Changes to initial development plan (2-4 paragraphs).
   1. Set forth in detail all reasons for change.
   2. Set forth in detail all variables that may cause additional changes.

E. Items to be provided if applicable:
   1. Set forth in detail all information relating to Product that has become publicly available, e.g., published articles, competing products, patents, etc.
   2. Set forth in detail all development work being performed by third parties other than Licensee to include name and address of third party, reasons for use of third party, planned future uses of third parties including reasons why and type of work.
3. Set forth in detail up to date competitive information trends in industry, government compliance (if applicable) and market plan.

PLEASE SEND DEVELOPMENT REPORTS TO:
Rensselaer Polytechnic Institute
Attn.: Executive Director, Intellectual Property, Technology Transfer and New Ventures
Office of Technology Commercialization
110 Eighth Street
Troy, New York 12180
APPENDIX G - SUMMARY OF KEY LICENSE OBLIGATIONS

The following table summarizes certain obligations of Licensee. This summary is for convenience of the parties only. Reference should always be made to the precise terms of the relevant sections of the Agreement, which shall be controlling for all purposes.

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<th>Section</th>
<th>Task</th>
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<th>Date Rec’d</th>
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<td>pay initial license fee</td>
<td></td>
<td>upon License execution</td>
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<td>pay continuing royalty</td>
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<td>each 4/30, 7/31, 10/31, 1/31</td>
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<td>submit royalty report</td>
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<td>every 4/30, 7/31, 10/31, 1/31 during term</td>
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<td>2.12(a)</td>
<td>submit RPI HR-approved conflict of interest forms</td>
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<td>2.12(b)</td>
<td>provide copy of filed certificate of incorporation</td>
<td></td>
<td>upon License execution</td>
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<tr>
<td>2.12(c)</td>
<td>provide Board-approved business plan</td>
<td></td>
<td>upon License execution</td>
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<tr>
<td>2.12(d)</td>
<td>provide Commercialization plan</td>
<td></td>
<td>by 120 days following License execution</td>
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<tr>
<td>2.12(e)</td>
<td>complete first round financing</td>
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<tr>
<td>2.12(f)</td>
<td>develop Beta product</td>
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<tr>
<td>2.12(g)</td>
<td>first commercial product</td>
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<tr>
<td>2.12(h)</td>
<td>complete second round financing</td>
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<tr>
<td>2.13.3</td>
<td>late fees payable 1.5%/month if not paid by due date</td>
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<td>3.1; 3.3</td>
<td>reimburse RPI for all past and future patent expenses within 30 days of receipt of invoice</td>
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<td>4.1.2</td>
<td>Development plan</td>
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<tr>
<td>4.1.3</td>
<td>Development report each 4/30, 7/31, 10/31, 1/31</td>
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<td>4.4</td>
<td>Proof of insurance $5,000,000 CGL/Products Liability Upon contract signing; and by each 1/15 thereafter</td>
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