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

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**FORM 8-K**

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**CURRENT REPORT  
Pursuant to Section 13 or 15(d)  
of the Securities Exchange Act of 1934**

**Date of Report (Date of earliest event reported): June 2, 2019  
Commission File Number: 000-21088**

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**VICAL INCORPORATED**  
(Exact name of registrant as specified in its charter)

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

**93-0948554**  
(IRS Employer  
Identification No.)

**10390 Pacific Center Court  
San Diego, California 92121**  
(Address of principal executive offices)

**(858) 646-1100**  
(Registrant's telephone number)

**N/A**  
(Former name or former address, if changed since last report)

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

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

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

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock, \$0.01 par value per share	VICL	The Nasdaq Capital Market

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§ 230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§ 240.12b-2 of this chapter).

Emerging growth company

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

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

### **Merger Agreement and Transaction**

On June 2, 2019, Vical Incorporated (the “Company”) entered into an Agreement and Plan of Merger and Reorganization (the “Merger Agreement”) with Brickell Biotech, Inc., a Delaware corporation and clinical-stage medical dermatology company (“Brickell Biotech”), and Victory Subsidiary, Inc., a Delaware corporation and wholly owned subsidiary of the Company (“Merger Sub”). Upon the terms and subject to the satisfaction of the conditions described in the Merger Agreement, including approval of the transaction by the Company’s stockholders, Merger Sub will be merged with and into Brickell Biotech (the “Merger”), with Brickell Biotech surviving the Merger as a wholly owned subsidiary of the Company.

At the effective time of the Merger (the “Effective Time”): (a) each share of Brickell Biotech’s capital stock outstanding immediately prior to the Effective Time (excluding treasury stock, shares held by the Company, Merger Sub or Brickell Biotech and dissenting shares) will be converted solely into the right to receive a number of shares of the Company’s common stock (the “Shares”) equal to the exchange ratio described below, (b) each outstanding Brickell Biotech stock option will be assumed by the Company and (c) each outstanding Brickell Biotech warrant will be assumed by the Company. Under the exchange ratio formula in the Merger Agreement, the former Brickell Biotech equityholders prior to the completion of the Merger are expected to own approximately 60% of the aggregate outstanding shares of common stock of the combined company, and the equityholders of the Company prior to the completion of the Merger are expected to own approximately 40% of the aggregate shares of common stock of the combined company, subject to certain assumptions (in each case on a fully diluted basis using the treasury stock method in instances other than with respect to the NovaQuest Warrants (defined below) and certain equity issuances by Brickell Biotech following the signing of the Merger Agreement and prior to the completion of the Merger). The actual allocation between the two groups of equityholders is subject to adjustment based on the Company’s and Brickell Biotech’s respective net cash and net working capital balances, prior to the completion of the Merger.

Following the closing of the Merger (the “Closing”), Robert Brown will serve as the Company’s Chief Executive Officer, Andy Sklawer will serve as the Company’s Chief Operating Officer and R. Michael Carruthers will serve as the Company’s Chief Financial Officer. Additionally, following the Closing, the board of directors of the Company will consist of seven directors and will be comprised of (i) five members designated by Brickell Biotech, anticipated to be Reginald Hardy as Chairman, Robert Brown, Dennison Veru, Dr. William Ju and George Abercrombie, and (ii) two members designated by the Company.

The Merger Agreement contains customary representations, warranties and covenants made by the Company and Brickell Biotech, including covenants relating to obtaining the requisite approvals of the stockholders of the Company, limitations on the solicitation of alternative proposals and change of board recommendations, indemnification of directors and officers, and the Company’s and Brickell Biotech’s conduct of their respective businesses between the date of signing of the Merger Agreement and the Closing.

In connection with the Merger, the Company intends to prepare and file a proxy statement and seek the approval of the Company’s stockholders with respect to certain matters, including the following:

- the amendment of the Company’s certificate of incorporation to (a) increase the authorized shares of the Company’s common stock to facilitate the issuance of the Shares in the Merger and upon exercise of Brickell Biotech’s outstanding options and warrants and (b) implement a reverse stock split with a ratio to be mutually agreed by the parties; and
- the change of control of the Company resulting from the Merger pursuant to Nasdaq rules.

The Closing is subject to satisfaction or waiver of certain conditions including, among other things, (i) the required approval by Company’s stockholders and continued effectiveness of the approval of the Brickell stockholders obtained in connection with the execution of the Merger Agreement, (ii) the accuracy of the parties’ representations and warranties, subject to certain materiality qualifications, (iii) material compliance by the parties with their respective covenants, (iv) no law or order preventing the Merger and related transactions, (v) the Funding Agreement (defined below) between NovaQuest (defined below) and Brickell Biotech remaining in full force and effect and Brickell Biotech certifying that the consummation of the transactions contemplated by the Funding Agreement will occur immediately following the Closing, (vi) each party satisfying certain minimum net cash and net working capital, as applicable, conditions and (vii) the approval of the listing of the Shares on the Nasdaq Capital Market.

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The Merger Agreement also includes termination provisions for both the Company and Brickell Biotech. In connection with a termination of the Merger Agreement under specified circumstances, either party may be required to pay the other party a termination fee of \$1,000,000.

The Shares to be issued in the Merger will be offered and sold in reliance on an exemption from registration under Regulation D promulgated under Section 4(a)(2) of the Securities Act of 1933, as amended (the "Securities Act"). Appropriate restrictive legends will be affixed to the Shares.

#### **Funding Agreement**

Concurrently with the execution of the Merger Agreement, Brickell Biotech entered into a funding agreement (the "Funding Agreement") with NovaQuest Co-Investment Fund X, L.P. ("NovaQuest") pursuant to which NovaQuest committed to provide up to \$25.0 million in near-term research and development funding to Brickell Biotech following the Closing (the "Concurrent Financing"), with \$5.6 million of the commitment expected to be paid promptly following the Closing and the remaining portion of the commitment expected to be paid in quarterly reimbursements of 67% of invoiced research and development expenses incurred during the following four fiscal quarters. Upon receipt of marketing approvals in the United States for a softpronium bromide product, Brickell Biotech will be obligated to make certain milestone payments to NovaQuest totaling \$37.5 million. Beginning in the fiscal quarter that is two years following the first commercial sale of a softpronium bromide product, Brickell Biotech will be required to make low single digit royalty payments based on annual net sales worldwide (except for Japan, China and certain other countries). If the Funding Agreement is terminated in certain circumstances, Brickell Biotech will be required to pay NovaQuest \$25.0 million plus interest. However, in the event that the Company terminates its development program for softpronium bromide for certain reasons, including serious safety issues, a failure of the product's phase III studies, or the FDA's failure to approve the product, the Company will not be obligated to make any payments to NovaQuest.

In connection with the Concurrent Financing, immediately following the Closing, the Company is obligated to issue warrants to NovaQuest to purchase Shares (the "NovaQuest Warrants"). The number of Shares underlying the NovaQuest Warrants will be based on 10% warrant coverage on the \$25.0 million commitment and the exchange ratio for the Merger, and the exercise price of the NovaQuest Warrants will be determined based on a 10% premium to the Brickell Biotech per share of common stock price implied value in the Merger, as adjusted for the exchange ratio. The NovaQuest Warrants will be offered and sold in reliance on an exemption from registration under Regulation D promulgated under Section 4(a)(2) of the Securities Act.

#### **Support Agreements**

Concurrently with the execution of the Merger Agreement, certain officers, directors and stockholders of Brickell Biotech entered into support agreements with the Company covering approximately 71% of the outstanding shares of Brickell Biotech (the "Support Agreements"). The Support Agreements provide, among other things, that the officers, directors and stockholders party to the Support Agreements will vote all of the shares of Brickell Biotech held by them in favor of the adoption and approval of the Merger Agreement, and the approval of the Merger and the other transactions contemplated by the Merger Agreement.

#### **Lock-Up Agreements**

Concurrently with the execution of the Merger Agreement, certain officers, directors and stockholders of Brickell Biotech also entered into lock-up agreements (the "Lock-Up Agreements"), pursuant to which they agreed to certain restrictions on transfers of the Shares for the 180-day period following the Effective Time. The officers, directors and stockholders of the Company did not enter into lock-up agreements as part of the transaction.

The foregoing descriptions of the Merger Agreement, the Support Agreements and the Lock-Up Agreements, are not complete and are qualified in their entirety by reference to those agreements (or forms thereof), which are attached hereto as Exhibits 2.1, 10.1 and 10.2, respectively, to this report.

#### **Item 8.01 Other Events.**

##### **Press Release**

On June 3, 2019, the Company and Brickell Biotech issued a joint press release announcing the execution of the Merger Agreement. The press release contains statements intended as "forward-looking statements" which are subject to the cautionary statements about forward-looking statements set forth therein. The press release is attached hereto as Exhibit 99.1.

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## **Conference Call Transcript**

On June 3, 2019, the Company and Brickell Biotech held a conference call regarding the Merger Agreement and the transactions contemplated thereby. The conference call transcript contains statements intended as “forward-looking statements” which are subject to the cautionary statements about forward-looking statements set forth therein. The conference call transcript is attached hereto as Exhibit 99.2 and is posted on the Company’s website.

## **Investor Presentation**

On June 3, 2019, the Company made available an investor presentation relating to Brickell Biotech and the transactions contemplated by the Merger Agreement on its website. The investor presentation contains statements intended as “forward-looking statements” which are subject to the cautionary statements about forward-looking statements set forth therein. The investor presentation is attached hereto as Exhibit 99.3.

## ***Forward Looking Statements***

This report contains “forward-looking” statements, including, without limitation, statements related to the potential closing date of the Merger, the amount of the combined company’s cash balance at closing, the potential receipt of additional R&D funding and the timing thereof, the potential benefits of the Merger or of Brickell Biotech’s product candidates, the anticipated ownership of the combined company, the anticipated timing, scope and design of future clinical trials and the prospects for commercializing any product candidates, that are forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. In addition, when or if used herein, the words “may”, “could”, “should”, “anticipate”, “believe”, “estimate”, “expect”, “intend”, “plan”, “predict” and similar expressions and their variants, as they related to the Company, Brickell Biotech or the management of either company, before or after the Merger, may identify forward-looking statements.. These forward-looking statements are subject to numerous assumptions, risks, and uncertainties, which change over time, often in unanticipated ways. Important factors that may cause actual results to differ materially from the results discussed in the forward-looking statements or historical experience include risks and uncertainties, including the timing and completion of the Merger, the parties’ ability to satisfy the closing conditions of the Merger and Funding Agreement, whether or when the combined company will achieve any of the milestones in the Funding Agreement, potential delays in product development, unanticipated demands on cash resources, risks associated with developing, obtaining regulatory approval for and commercializing novel therapeutics and whether any anticipated benefits of the Merger will be realized. There can be no assurance that the Company will be able to complete the transactions contemplated by the Merger Agreement, or the Funding Agreement, on the anticipated terms, or at all. Additional risks and uncertainties relating to the Company and its business can be found under the caption “Risk Factors” and elsewhere in the Company’s filings and reports with the Securities and Exchange Commission (the “SEC”), including in the Company’s Quarterly Report on Form 10-Q, filed with the SEC on May 2, 2019. The forward-looking statements contained herein represent the estimates of the Company as of the date hereof only, and the Company specifically disclaims any duty or obligation to update forward-looking statements.

## ***Additional Information and Where You Can Find It***

The Merger Agreement, the Support Agreements and the Lock-Up Agreements (the “Transaction Agreements”), and the foregoing description of the Transaction Agreements, have been included to provide investors and stockholders with information regarding the terms of the Transaction Agreements.

The assertions embodied in the representations and warranties contained in the Merger Agreement are qualified by information in confidential disclosure schedules delivered by each of the Company and Brickell Biotech to the other party, respectively, in connection with the signing of the Merger Agreement. Moreover, certain representations and warranties in the Merger Agreement were made as of a specified date, may be subject to a contractual standard of materiality different from what might be viewed as material to stockholders, or may have been used for the purpose of allocating risk between the parties to the Merger Agreement. Accordingly, the representations and warranties in the Merger Agreement should not be relied on by any persons as characterizations of the actual state of facts and circumstances of the Company at the time they were made and should consider the information in the Merger Agreement in conjunction with the entirety of the factual disclosure about the Company in the Company’s public reports filed with the SEC. Information concerning the subject matter of the representations and warranties may change after the date of the Merger Agreement, which subsequent information may or may not be fully reflected in the Company’s public disclosures.

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In connection with the proposed transactions between the Company and Brickell Biotech, the Company will file a definitive proxy statement and proxy card with the SEC (the "Proxy Statement"). This communication may be deemed to be solicitation material in respect of the proposed transaction and is not a substitute for the Proxy Statement or any other documents that the Company may file with the SEC or send to its stockholders in connection with the proposed transactions. **BEFORE MAKING ANY VOTING OR INVESTMENT DECISION, INVESTORS AND STOCKHOLDERS ARE URGED TO READ THE PROXY STATEMENT (INCLUDING ANY AMENDMENTS OR SUPPLEMENTS THERETO) AND ANY OTHER RELEVANT DOCUMENTS THAT THE COMPANY MAY FILE WITH THE SEC WHEN THEY BECOME AVAILABLE BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED TRANSACTIONS.**

Stockholders may obtain free copies of the Proxy Statement and all other documents filed or that will be filed with the SEC regarding the proposed transaction at the website maintained by the SEC at [www.sec.gov](http://www.sec.gov). Once filed, the Proxy Statement will be available free of charge on the Company's website at <http://vical.com/>, by contacting the Company's Investor Relations at 858.646.1100, [ir@vical.com](mailto:ir@vical.com) or by phone at 858-646-1100 or by mail at Investor Relations, Vical Incorporated, 10390 Pacific Center Court, San Diego, CA 92121.

***Participants in Solicitation***

The Company, Brickell Biotech and their respective directors and executive officers may be deemed to be participants in the solicitation of proxies from the holders of the Company's common stock in connection with the proposed transaction. Information regarding the special interests of these directors and executive officers will be included in the Proxy Statement. Additional information about the Company's directors and executive officers is set forth in the Company's Definitive Proxy Statement for its 2018 Annual Meeting of Stockholders, which was filed with the SEC on April 9, 2018. Other information regarding the interests of such individuals, as well as information regarding Brickell Biotech's directors and executive officers and other persons who may be deemed participants in the proposed transaction, will be set forth in the Proxy Statement, which will be filed with the SEC. You may obtain free copies of these documents as described in the preceding paragraph.

***Non-Solicitation***

This report does not constitute an offer to sell or solicitation of an offer to buy any securities or the solicitation of an offer to buy any securities, nor will there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction.

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**Item 9.01 Financial Statements and Exhibits.**

(d) Exhibits

<u>Exhibit No.</u>	<u>Description</u>
2.1*	<a href="#"><u>Agreement and Plan of Merger and Reorganization, dated June 2, 2019, by and among the Company, Brickell Biotech and Merger Sub.</u></a>
10.1	<a href="#"><u>Form of Support Agreement, dated June 2, 2019, by and between the Company and each of the parties named in each agreement therein.</u></a>
10.2	<a href="#"><u>Form of Lock-Up Agreement, dated June 2, 2019, by each of the parties named in each agreement therein.</u></a>
99.1	<a href="#"><u>Joint Press Release of the Company and Brickell Biotech, dated June 3, 2019.</u></a>
99.2	<a href="#"><u>Conference Call Transcript, dated June 3, 2019.</u></a>
99.3	<a href="#"><u>Investor Presentation, dated June 3, 2019.</u></a>

\* Schedules and exhibits to the Merger Agreement have been omitted pursuant to Item 601(b)(2) of Regulation S-K. A copy of any omitted schedule and/or exhibit will be furnished to the Securities and Exchange Commission upon request.

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**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: June 3, 2019

**Vical Incorporated**

By: /s/ Anthony A. Ramos

Name: Anthony A. Ramos

Title: Chief Financial Officer

**AGREEMENT AND PLAN OF MERGER  
AND REORGANIZATION**

among:

**VICAL INCORPORATED,**  
a Delaware corporation;

**VICTORY SUBSIDIARY, INC.**  
a Delaware corporation; and

**BRICKELL BIOTECH, INC.,**  
a Delaware corporation

Dated as of June 2, 2019



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**Schedules:**

Schedule 1	Pro Forma Capitalization Calculation
Schedule 5.9	Consents

**THIS AGREEMENT AND PLAN OF MERGER AND REORGANIZATION**(this “*Agreement*”) is made and entered into as of June 2, 2019, by and among **VICAL INCORPORATED**, a Delaware corporation (“*Parent*”), **VICTORY SUBSIDIARY, INC.**, a Delaware corporation and wholly owned subsidiary of Parent (“*Merger Sub*”), and **BRICKELL BIOTECH, INC.**, a Delaware corporation (the “*Company*”). Certain capitalized terms used in this Agreement are defined in **Exhibit A**.

#### RECITALS

A. Parent and the Company intend to effect a merger of Merger Sub with and into the Company (the “*Merger*”) in accordance with this Agreement and the DGCL. Upon consummation of the Merger, Merger Sub will cease to exist and the Company will become a wholly owned subsidiary of Parent.

B. The Parties intend that the Merger qualify as a “reorganization” within the meaning of Section 368(a) of the Code, and by executing this Agreement, the Parties intend to adopt a plan of reorganization within the meaning of Treasury Regulations Sections 1.368-2(g) and 1.368-3.

C. The Parent Board has (i) determined that the Contemplated Transactions are fair to, advisable and in the best interests of Parent and its stockholders, (ii) approved and declared advisable this Agreement and the Contemplated Transactions, including the authorization and issuance of shares of Parent Common Stock to the stockholders of the Company pursuant to the terms of this Agreement and (iii) determined to recommend, upon the terms and subject to the conditions set forth in this Agreement, that the stockholders of Parent vote to approve the Parent Stockholder Matters.

D. The Merger Sub Board has (i) determined that the Contemplated Transactions are fair to, advisable, and in the best interests of Merger Sub and its sole stockholder, (ii) approved and declared advisable this Agreement and the Contemplated Transactions and (iii) determined to recommend, upon the terms and subject to the conditions set forth in this Agreement, that the stockholder of Merger Sub votes to adopt this Agreement and thereby approve the Contemplated Transactions.

E. The Company Board has (i) determined that the Contemplated Transactions are fair to, advisable and in the best interests of the Company and its stockholders, (ii) approved and declared advisable this Agreement and the Contemplated Transactions and (iii) determined to recommend, upon the terms and subject to the conditions set forth in this Agreement, that the stockholders of the Company vote to approve the Company Stockholder Matters.

F. Concurrent with the execution and delivery of this Agreement and as a condition and inducement to Parent’s willingness to enter into this Agreement, the officers, directors and at holders of at least two-thirds (2/3) of the Company Capital Stock (the “*Company Signatories*”) (solely in their capacity as stockholders of the Company) are each executing (a) a support agreement in favor of Parent in substantially the form attached hereto as **Exhibit B** (the “*Company Stockholder Support Agreement*”), pursuant to which the Company Signatories have, subject to the terms and conditions set forth therein, agreed to vote all of their shares of Company Capital Stock in favor of the Company Stockholder Matters and against any proposals that compete with

the Contemplated Transactions, (b) an action by written consent in substantially the form attached hereto as Exhibit H (each, a “*Company Stockholder Written Consent*” and collectively, the “*Company Stockholder Written Consents*”) and (c) a lock-up agreement in substantially the form attached hereto as Exhibit C (the “*Company Lock-Up Agreement*”).

G. Concurrent with the execution and delivery of this Agreement and as a condition and inducement to Parent’s willingness to enter into this Agreement, the stockholders of the Company listed on Section A of the Company Disclosure Schedule are each executing an investor questionnaire in substantially the form attached as Exhibit D (the “*Accredited Investor Questionnaire*”) provided that all such Company Signatories represent that they are “accredited investors” as defined in Regulation D under the Securities Act (“*Regulation D*”).

H. Concurrent with the execution and delivery of this Agreement, the Company has entered into that certain Funding Agreement with NovaQuest Co-Investment Fund X, L.P. (“*NovaQuest*”) pursuant to which NovaQuest will provide an aggregate of \$25,000,000 in the form of near-term research and development funding (the “*Funding Agreement*”), and which Funding Agreement will provide for the consummation of the transactions contemplated thereby immediately following the Closing (the financing contemplated by the Funding Agreement, the “*Concurrent Financing*”).

## AGREEMENT

The Parties, intending to be legally bound, agree as follows:

### Section 1. DESCRIPTION OF TRANSACTION

1.1 **The Merger.** Upon the terms and subject to the conditions set forth in this Agreement, at the Effective Time, Merger Sub shall be merged with and into the Company, and the separate existence of Merger Sub shall cease. The Company will continue as the surviving corporation in the Merger (the “*Surviving Corporation*”).

1.2 **Effects of the Merger.** The Merger shall have the effects set forth in this Agreement, the Certificate of Merger and in the applicable provisions of the DGCL. As a result of the Merger, the Company will become a wholly owned subsidiary of Parent.

1.3 **Closing; Effective Time.** Unless this Agreement is earlier terminated pursuant to the provisions of Section 9.1, and subject to the satisfaction or waiver of the conditions set forth in Sections 6, 7 and 8, the consummation of the Merger (the “*Closing*”) shall take place remotely as promptly as practicable (but in no event later than the second Business Day following the satisfaction or waiver of the last to be satisfied or waived of the conditions set forth in Sections 6, 7 and 8, other than those conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of each of such conditions), or at such other time, date and place as Parent and the Company may mutually agree in writing. The date on which the Closing actually takes place is referred to as the “*Closing Date*.” At the Closing, the Parties shall cause the Merger to be consummated by executing and filing with the Secretary of State of the State of Delaware a certificate of merger with respect to the Merger, satisfying the applicable

requirements of the DGCL and in a form reasonably acceptable to Parent and the Company (the “*Certificate of Merger*”). The Merger shall become effective at the time of the filing of such Certificate of Merger with the Secretary of State of the State of Delaware or at such later time as may be specified in such Certificate of Merger with the consent of Parent and the Company (the time as of which the Merger becomes effective being referred to as the “*Effective Time*”).

**1.4 Certificate of Incorporation and Bylaws; Directors and Officers.** At the Effective Time:

(a) the certificate of incorporation of the Surviving Corporation shall be amended and restated in its entirety to read identically to the certificate of incorporation of Merger Sub as in effect immediately prior to the Effective Time, until thereafter amended as provided by the DGCL and such certificate of incorporation; *provided, however*, that at the Effective Time, the Surviving Corporation shall file an amendment to its certificate of incorporation to change the name of the Surviving Corporation to “Brickell Subsidiary, Inc.”;

(b) the certificate of incorporation of Parent shall be identical to the certificate of incorporation of Parent immediately prior to the Effective Time, until thereafter amended as provided by the DGCL and such certificate of incorporation, *provided, however*, that at the Effective Time, Parent shall file an amendment to its certificate of incorporation to (i) change the name of Parent to “Brickell Biotech, Inc.”, (ii) as contemplated by Section 5.3(a)(i), increase the number of authorized shares of Parent Common Stock and effect the Reverse Split, and (iii) make such other changes as are mutually agreeable to Parent and the Company;

(c) the bylaws of the Surviving Corporation shall be amended and restated in their entirety to read identically to the bylaws of Merger Sub as in effect immediately prior to the Effective Time, until thereafter amended as provided by the DGCL and such bylaws;

(d) the directors and officers of Parent, each to hold office in accordance with the certificate of incorporation and bylaws of Parent, shall be as set forth in Section 5.14 after giving effect to the provisions of Section 5.14, or such other persons as shall be mutually agreed upon by Parent and the Company; and

(e) the directors and officers of the Surviving Corporation, each to hold office in accordance with the certificate of incorporation and bylaws of the Surviving Corporation, shall be the directors and officers of Parent as set forth in Section 5.14, after giving effect to the provisions of Section 5.14, or such other persons as shall be mutually agreed upon by Parent and the Company.

**1.5 Conversion of Shares.**

(a) At the Effective Time, by virtue of the Merger and without any further action on the part of Parent, Merger Sub, the Company or any stockholder of the Company or Parent:

(i) any shares of Company Capital Stock held as treasury stock or held or owned by the Company or Merger Sub immediately prior to the Effective Time



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shall be canceled and retired and shall cease to exist, and no consideration shall be delivered in exchange therefor; and

(ii) subject to Section 1.5(c), each share of Company Capital Stock outstanding immediately prior to the Effective Time (excluding shares to be canceled pursuant to Section 1.5(a)(i) and excluding Dissenting Shares) shall be automatically converted solely into the right to receive a number of shares of Parent Common Stock equal to the Exchange Ratio (the "*Merger Consideration*").

(b) If any shares of Company Capital Stock outstanding immediately prior to the Effective Time are unvested or are subject to a repurchase option or a risk of forfeiture under any applicable restricted stock purchase agreement or other similar agreement with the Company, then the shares of Parent Common Stock issued in exchange for such shares of Company Capital Stock will to the same extent be unvested and subject to the same repurchase option or risk of forfeiture, and such shares of Parent Common Stock shall accordingly be marked with appropriate legends. The Company shall take all actions that may be necessary to ensure that, from and after the Effective Time, Parent is entitled to exercise any such repurchase option or other right set forth in any such restricted stock purchase agreement or other agreement in accordance with its terms.

(c) No fractional shares of Parent Common Stock shall be issued in connection with the Merger, and no certificates or scrip for any such fractional shares shall be issued. Any holder of Company Capital Stock who would otherwise be entitled to receive a fraction of a share of Parent Common Stock (after aggregating all fractional shares of Parent Common Stock issuable to such holder) shall, in lieu of such fraction of a share and upon surrender by such holder of a letter of transmittal in accordance with Section 1.7 and any accompanying documents as required therein, be paid in cash the dollar amount (rounded to the nearest whole cent), without interest, determined by multiplying such fraction by the Parent Closing Price.

(d) All Company Options outstanding immediately prior to the Effective Time under the Company Plan shall be treated in accordance with Section 5.5(a).

(e) All Company Warrants outstanding immediately prior to the Effective Time shall be treated in accordance with Section 5.5(c).

(f) Each share of common stock, \$0.01 par value per share, of Merger Sub issued and outstanding immediately prior to the Effective Time shall be converted into and exchanged for one validly issued, fully paid and nonassessable share of common stock, \$0.0001 par value per share, of the Surviving Corporation. Each stock certificate of Merger Sub evidencing ownership of any such shares shall, as of the Effective Time, evidence ownership of such shares of common stock of the Surviving Corporation.

(g) If, between the time of calculating the Exchange Ratio and the Effective Time, the outstanding shares of Company Capital Stock or Parent Common Stock shall have been changed into, or exchanged for, a different number of shares or a different class, by reason of any stock dividend, subdivision, reclassification, recapitalization, split (including the

Reverse Split), combination or exchange of shares or other like change, the Exchange Ratio shall, to the extent necessary, be equitably adjusted to reflect such change to the extent necessary to provide the holders of Company Capital Stock, Parent Common Stock, Company Options and Company Warrants with the same economic effect as contemplated by this Agreement prior to such stock dividend, subdivision, reclassification, recapitalization, split (including the Reverse Split), combination or exchange of shares or other like change; *provided, however*, that nothing herein will be construed to permit the Company or Parent to take any action with respect to Company Capital Stock or Parent Common Stock, respectively, that is prohibited or not expressly permitted by the terms of this Agreement.

**1.6 Closing of the Company's Transfer Books.** At the Effective Time: (a) all shares of Company Capital Stock outstanding immediately prior to the Effective Time shall be treated in accordance with Section 1.5, and all holders of certificates representing shares of Company Capital Stock that were outstanding immediately prior to the Effective Time shall cease to have any rights as stockholders of the Company; and (b) the stock transfer books of the Company shall be closed with respect to all shares of Company Capital Stock outstanding immediately prior to the Effective Time. No further transfer of any such shares of Company Capital Stock shall be made on such stock transfer books after the Effective Time. If, after the Effective Time, a valid certificate previously representing any shares of Company Capital Stock outstanding immediately prior to the Effective Time (a "**Company Stock Certificate**") is presented to the Exchange Agent or to the Surviving Corporation, such Company Stock Certificate shall be canceled and shall be exchanged as provided in Sections 1.5 and 1.7.

**1.7 Surrender of Certificates.**

(a) On or prior to the Closing Date, Parent and the Company shall agree upon and select a reputable bank, transfer agent or trust company to act as exchange agent in the Merger (the "**Exchange Agent**"). At the Effective Time, Parent shall deposit with the Exchange Agent: (i) certificates or evidence of book-entry shares representing the Parent Common Stock issuable pursuant to Section 1.5 and (ii) cash sufficient to make payments in lieu of fractional shares in accordance with Section 1.5(c). The Parent Common Stock and cash amounts so deposited with the Exchange Agent, together with any dividends or distributions received by the Exchange Agent with respect to such shares, are referred to collectively as the "**Exchange Fund**."

(b) Promptly after the Effective Time, the Parties shall cause the Exchange Agent to mail to the Persons who were record holders of shares of Company Capital Stock that were converted into the right to receive the Merger Consideration: (i) a letter of transmittal in customary form and containing such provisions as Parent may reasonably specify (including a provision confirming that delivery of Company Stock Certificates shall be effected, and risk of loss and title to Company Stock Certificates shall pass, only upon proper delivery of such Company Stock Certificates to the Exchange Agent); and (ii) instructions for effecting the surrender of Company Stock Certificates in exchange for shares of Parent Common Stock. Upon surrender of a Company Stock Certificate to the Exchange Agent for exchange, together with a duly executed letter of transmittal and such other documents as may be reasonably required by the Exchange Agent or Parent: (A) the holder of such Company Stock Certificate shall be entitled to receive in exchange therefor a certificate or certificates or book-entry shares representing the

Merger Consideration (in a number of whole shares of Parent Common Stock) that such holder has the right to receive pursuant to the provisions of Section 1.5 (and cash in lieu of any fractional share of Parent Common Stock pursuant to the provisions of Section 1.5(c)); and (B) the Company Stock Certificate so surrendered shall be canceled. Until surrendered as contemplated by this Section 1.7(b), each Company Stock Certificate shall be deemed, from and after the Effective Time, to represent only the right to receive a certificate or certificates or book-entry shares of Parent Common Stock representing the Merger Consideration (and cash in lieu of any fractional share of Parent Common Stock). If any Company Stock Certificate shall have been lost, stolen or destroyed, Parent may, in its discretion and as a condition precedent to the delivery of any shares of Parent Common Stock, require the owner of such lost, stolen or destroyed Company Stock Certificate to provide an applicable affidavit with respect to such Company Stock Certificate and post a bond indemnifying Parent against any claim suffered by Parent related to the lost, stolen or destroyed Company Stock Certificate as Parent may reasonably request. In the event of a transfer of ownership of a Company Stock Certificate that is not registered in the transfer records of the Company, payment of the Merger Consideration may be made to a Person other than the Person in whose name such Company Stock Certificate so surrendered is registered if such Company Stock Certificate shall be properly endorsed or otherwise be in proper form for transfer and the Person requesting such payment shall pay any transfer or other Taxes required by reason of the transfer or establish to the reasonable satisfaction of Parent that such Taxes have been paid or are not applicable. The Merger Consideration and any dividends or other distributions as are payable pursuant to Section 1.7(c) shall be deemed to have been in full satisfaction of all rights pertaining to Company Capital Stock formerly represented by such Company Stock Certificates.

(c) No dividends or other distributions declared or made with respect to Parent Common Stock with a record date on or after the Effective Time shall be paid to the holder of any unsurrendered Company Stock Certificate with respect to the shares of Parent Common Stock that such holder has the right to receive in the Merger until such holder surrenders such Company Stock Certificate or provides an affidavit of loss or destruction in lieu thereof in accordance with this Section 1.7 (at which time (or, if later, on the applicable payment date) such holder shall be entitled, subject to the effect of applicable abandoned property, escheat or similar Laws, to receive all such dividends and distributions, without interest).

(d) Any portion of the Exchange Fund that remains undistributed to holders of Company Stock Certificates as of the date that is one year after the Closing Date shall be delivered to Parent upon demand, and any holders of Company Stock Certificates who have not theretofore surrendered their Company Stock Certificates in accordance with this Section 1.7 shall thereafter look only to Parent for satisfaction of their claims for Parent Common Stock, cash in lieu of fractional shares of Parent Common Stock and any dividends or distributions with respect to shares of Parent Common Stock.

(e) Each of the Exchange Agent, Parent and the Surviving Corporation shall be entitled to deduct and withhold from any consideration deliverable pursuant to this Agreement to any holder of any Company Stock Certificate such amounts as are required to be deducted or withheld from such consideration under the Code or under any other applicable Law. To the extent such amounts are so deducted or withheld, and remitted to the appropriate taxing

authority, such amounts shall be treated for all purposes under this Agreement as having been paid to the Person to whom such amounts would otherwise have been paid.

(f) No party to this Agreement shall be liable to any holder of any Company Stock Certificate or to any other Person with respect to any shares of Parent Common Stock (or dividends or distributions with respect thereto) or for any cash amounts delivered to any public official pursuant to any applicable abandoned property Law, escheat Law or similar Law.

(g) All shares of Parent Common Stock issued pursuant to this Agreement shall bear a legend (and Parent will make a notation on its transfer books to such effect) prominently stamped or printed thereon or the substance of which will otherwise be reflected on the books and records of the transfer agent for Parent Common Stock with respect to book-entry shares, in each case reading substantially as follows:

“THE SECURITIES REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR APPLICABLE STATE SECURITIES LAWS. THESE SECURITIES HAVE BEEN ACQUIRED FOR INVESTMENT PURPOSES AND NOT WITH A VIEW TO RESALE IN CONNECTION WITH A DISTRIBUTION AND MAY NOT BE SOLD OR OTHERWISE TRANSFERRED EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT FOR SUCH SECURITIES UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND APPLICABLE STATE SECURITIES LAWS, OR AN EXEMPTION FROM REGISTRATION UNDER SUCH ACT.”

#### 1.8 **Appraisal Rights**

(a) Notwithstanding any provision of this Agreement to the contrary, shares of Company Capital Stock that are outstanding immediately prior to the Effective Time and which are held by stockholders who have exercised and perfected appraisal rights for such shares of Company Capital Stock in accordance with the DGCL (collectively, the “*Dissenting Shares*”) shall not be converted into or represent the right to receive the Merger Consideration described in Section 1.5 attributable to such Dissenting Shares. Such stockholders shall be entitled to receive payment of the appraised value of such shares of Company Capital Stock held by them in accordance with the DGCL, unless and until such stockholders fail to perfect or effectively withdraw or otherwise lose their appraisal rights under the DGCL. All Dissenting Shares held by stockholders who shall have failed to perfect or shall have effectively withdrawn or lost their right to appraisal of such shares of Company Capital Stock under the DGCL (whether occurring before, at or after the Effective Time) shall thereupon be deemed to be converted into and to have become exchangeable for, as of the Effective Time, the right to receive the Merger Consideration, without interest, attributable to such Dissenting Shares upon their surrender in the manner provided in Sections 1.5 and 1.7.

(b) The Company shall give Parent prompt written notice of any demands by dissenting stockholders received by the Company, withdrawals of such demands and any other instruments served on the Company and any material correspondence received by the

Company in connection with such demands. The Company shall not, except with Parent's prior written consent, voluntarily make any payment with respect to, or settle or offer to settle, any such demands, or approve any withdrawal of any such demands or agree to do any of the foregoing.

**1.9 Calculation of Parent Net Cash and Company Net Working Capital** Within five Business Days prior to the date of the Parent's Stockholder Meeting, (a) Parent shall deliver to the Company a net cash schedule (the "**Net Cash Schedule**") setting forth Parent's good faith estimate of its expected Parent Net Cash (the "**Net Cash Calculation**") as prepared by Parent's chief financial officer, together with the work papers and back-up materials used in preparing the Net Cash Schedule and (b) the Company shall deliver to Parent a net working capital schedule (the "**Net Working Capital Schedule**") setting forth the Company's good faith estimate of its expected Company Net Working Capital (the "**Net Working Capital Calculation**") as prepared by the Company's chief financial officer, together with the work papers and back-up materials used in preparing the Net Working Capital Schedule. The calculations and assumptions used in the Net Cash Schedule and the Net Working Capital Schedule shall be consistent with the presentation and methodologies used in preparing the Parent Net Cash and Company Net Working Capital calculation, as applicable, attached to this Agreement as **Exhibit I-1** or **Exhibit I-2**, which calculations have been prepared for illustrative purposes. Within two Business Days after Parent delivers the Net Cash Schedule to the Company and the Company delivers the Net Working Capital Schedule to Parent (the "**Response Date**"), the receiving party shall have the right to dispute any part of such Net Cash Schedule or Net Working Capital Schedule, as applicable, by delivering a written notice (the "**Dispute Notice**") to that effect to the other party. Any Dispute Notice shall identify in reasonable detail the nature of any proposed revisions to the Net Cash Calculation or Net Working Capital Calculation, as applicable, and will be accompanied by reasonably detailed materials supporting the basis for such proposed revisions. If either party delivers a Dispute Notice on or prior to the Response Date as provided above, then the parties shall attempt to resolve the underlying dispute in good faith for a period of two Business Days (the "**Dispute Resolution Period**"). If the parties agree on the amount of any of the deviations from the Net Cash Schedule or Net Working Capital Schedule, as applicable, during the Dispute Resolution Period, the Parent Net Cash or Company Net Working Capital amount, as applicable, they agree upon shall be final. If the parties, notwithstanding such good faith effort, fail to resolve such dispute within the Dispute Resolution Period, then the parties shall jointly engage an independent accountant of national standing to make a written determination of Parent Net Cash or Company Net Working Capital, as applicable, as promptly as practicable, and such independent accountant's determination shall be final, absent manifest error or fraud.

**1.10 Further Action.** If, at any time after the Effective Time, any further action is determined by the Surviving Corporation to be necessary or desirable to carry out the purposes of this Agreement or to vest the Surviving Corporation with full right, title and possession of and to all rights and property of the Company, then the officers and directors of the Surviving Corporation shall be fully authorized, and shall use their and its commercially reasonable efforts (in the name of the Company, in the name of Merger Sub, in the name of the Surviving Corporation and otherwise) to take such action.

**1.11 Withholding.** The Parties and the Exchange Agent shall be entitled to deduct and withhold from the consideration otherwise payable pursuant to this Agreement to any

holder of Company Capital Stock or any other Person such amounts as such Party or the Exchange Agent may be required to deduct and withhold under the Code or any other Law with respect to the making of such payment. To the extent that amounts are so deducted or withheld and paid to the appropriate Governmental Body, such deducted or withheld amounts shall be treated for all purposes of this Agreement as having been paid to the Person in respect of whom such deduction and withholding was made.

## **Section 2. REPRESENTATIONS AND WARRANTIES OF THE COMPANY**

Except as set forth in the disclosure schedule delivered by the Company to Parent (the "*Company Disclosure Schedule*"), the Company represents and warrants to Parent and Merger Sub as follows:

### **2.1 Due Organization; No Subsidiaries**

(a) The Company is a corporation duly incorporated, validly existing and in good standing under the Laws of Delaware and has all necessary corporate power and authority: (i) to conduct its business in the manner in which its business is currently being conducted; (ii) to own or lease and use its property and assets in the manner in which its property and assets are currently owned or leased and used; and (iii) to perform its obligations under all Contracts by which it is bound.

(b) The Company is duly licensed and qualified to do business, and is in good standing (to the extent applicable in such jurisdiction), under the Laws of all jurisdictions where the nature of its business requires such licensing or qualification other than in jurisdictions where the failure to be so qualified individually or in the aggregate would not be reasonably expected to have a Company Material Adverse Effect.

(c) The Company has no Subsidiaries and the Company does not own any capital stock of, or any equity, ownership or profit sharing interest of any nature in, or controls directly or indirectly, any other Entity.

(d) The Company is not and has not otherwise been, directly or indirectly, a party to, member of or participant in any partnership, joint venture or similar business entity. The Company has not agreed, is not obligated to make, and is not bound by any Contract under which it may become obligated to make, any future investment in or capital contribution to any other Entity. The Company has not, at any time, been a general partner of, or has otherwise been liable for any of the debts or other obligations of, any general partnership, limited partnership or other Entity.

**2.2 Organizational Documents**. The Company has made available to Parent accurate and complete copies of the Organizational Documents of the Company in effect as of the date of this Agreement. The Company is not in breach or violation of its Organizational Documents.

**2.3 Authority; Binding Nature of Agreement**. The Company has all necessary corporate power and authority to enter into and to perform its obligations under this

Agreement and to consummate the Contemplated Transactions. The Company Board (at meetings duly called and held) has (i) determined that the Contemplated Transactions are fair to, advisable and in the best interests of the Company and its stockholders, (ii) approved and declared advisable this Agreement and the Contemplated Transactions and (iii) determined to recommend, upon the terms and subject to the conditions set forth in this Agreement, that the stockholders of the Company vote to adopt this Agreement and thereby approve the Contemplated Transactions.

This Agreement has been duly executed and delivered by the Company and assuming the due authorization, execution and delivery by Parent and Merger Sub, constitutes the legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, subject to the Enforceability Exceptions. Prior to the execution of the Company Stockholder Support Agreements, the Company Board approved the Company Stockholder Support Agreements and the transactions contemplated thereby.

**2.4 Vote Required.** The affirmative vote (or written consent) of (a) a majority of the votes represented by the outstanding shares of the Company Capital Stock (on an as-converted to Company Common Stock basis) and (b) two-thirds of the votes represented by the outstanding shares of the Company Preferred Stock voting together as a single class (on an as-converted to Company Common Stock basis) (collectively, the ***“Required Company Stockholder Vote”***), is the only vote (or written consent) of the holders of any class or series of Company Capital Stock necessary to adopt and approve this Agreement and approve the Contemplated Transactions.

**2.5 Non-Contravention; Consents.** Except as set forth in Section 2.5 of the Company Disclosure Schedule, and subject to obtaining the Required Company Stockholder Vote, the filing of the Certificate of Merger required by the DGCL, neither (x) the execution, delivery or performance of this Agreement by the Company, nor (y) the consummation of the Contemplated Transactions, will directly or indirectly (with or without notice or lapse of time):

(a) contravene, conflict with or result in a violation of any of the provisions of the Company’s Organizational Documents;

(b) contravene, conflict with or result in a violation of, or give any Governmental Body the right to challenge the Contemplated Transactions or to exercise any remedy or obtain any relief under, any Law or any order, writ, injunction, judgment or decree to which the Company, or any of the assets owned or used by the Company, is subject, except as would not reasonably be expected to be material to the Company or its business;

(c) contravene, conflict with or result in a violation of any of the terms or requirements of, or give any Governmental Body the right to revoke, withdraw, suspend, cancel, terminate or modify, any Governmental Authorization that is held by the Company, except as would not reasonably be expected to be material to the Company or its business;

(d) contravene, conflict with or result in a violation or breach of, or result in a default under, any provision of any Company Material Contract, or give any Person the right to: (i) declare a default or exercise any remedy under any Company Material Contract; (ii)

any material payment, rebate, chargeback, penalty or change in delivery schedule under any Company Material Contract; (iii) accelerate the maturity or performance of any Company Material Contract; or (iv) cancel, terminate or modify any term of any Company Material Contract, except in the case of any non-material breach, default, penalty or modification; or

(e) result in the imposition or creation of any Encumbrance upon or with respect to any asset owned or used by the Company (except for Permitted Encumbrances).

Except for (i) any Consent set forth on Section 2.5 of the Company Disclosure Schedule under any Company Contract, (ii) the Required Company Stockholder Vote, (iii) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware pursuant to the DGCL, and (iv) such consents, waivers, approvals, orders, authorizations, registrations, declarations and filings as may be required under applicable federal and state securities Laws, the Company is not and will not be required to make any filing with or give any notice to, or to obtain any Consent from, any Person in connection with (x) the execution, delivery or performance of this Agreement, or (y) the consummation of the Contemplated Transactions (in each case, other than pursuant to Company Contracts that are not Company Material Contracts). The Company Board has taken and will take all actions necessary to ensure that the restrictions applicable to business combinations contained in Section 203 of the DGCL are, and will be, inapplicable to the execution, delivery and performance of this Agreement, the Company Stockholder Support Agreements, the Company Lock-Up Agreements and to the consummation of the Contemplated Transactions. No other state takeover statute or similar Law applies or purports to apply to the Merger, this Agreement, the Company Stockholder Support Agreements, the Company Lock-Up Agreements or any of the Contemplated Transactions.

## **2.6 Capitalization.**

(a) The authorized Company Capital Stock as of the date of this Agreement consists of (i) 10,000,000 shares of Company Common Stock, par value \$0.0001 per share, of which 1,706,251 shares have been issued and are outstanding as of the date of this Agreement, and (ii) 4,446,228 shares of preferred stock, par value \$0.0001 per share (the "**Company Preferred Stock**"), of which 1,162,505 have been designated as Series A Preferred Stock, 1,162,505 of which are issued and outstanding, 882,216 shares are designated as Series B Preferred Stock, 828,998 of which are issued and outstanding, 869,565 shares are designated as Series C Preferred Stock, 743,326 of which are issued and outstanding and 1,531,942 are designated as Series C-1 Preferred Stock, 905,076 of which are issued and outstanding. All Company Capital Stock is authorized, validly issued and fully paid and is in compliance with all applicable legal requirements. Section 2.6(a) of the Company Disclosure Schedule lists, as of the date of this Agreement (A) each record holder of issued and outstanding Company Capital Stock and the number and type of shares of Company Capital Stock held by such holder; (B)(1) each holder of issued and outstanding Company Warrants, (2) the number and type of shares subject to each Company Warrant, (3) the exercise price of each Company Warrant and (4) the termination date of each Company Warrant; and (C)(1) each holder of issued and outstanding Company Convertible Notes, (2) the principal amount of each Company Convertible Note and (3) the interest applicable to each Company Convertible Note and (4) the date of issuance of each Company Convertible Note.



(b) All of the outstanding shares of Company Common Stock and Company Preferred Stock have been duly authorized and validly issued, and are fully paid and nonassessable. Except as set forth in the Investor Agreements, none of the outstanding shares of Company Capital Stock is entitled or subject to any preemptive right, right of participation, right of maintenance, right of repurchase or forfeiture, subscription right or any similar right and none of the outstanding shares of Company Capital Stock is subject to any right of first refusal in favor of the Company. Except as contemplated herein and in the Investor Agreements, there is no Company Contract relating to the voting or registration of, or restricting any Person from purchasing, selling, pledging or otherwise disposing of (or granting any option or similar right with respect to), any shares of Company Capital Stock. The Company is not under any obligation, nor is it bound by any Contract pursuant to which it may become obligated, to repurchase, redeem or otherwise acquire any outstanding shares of Company Capital Stock or other securities. Section 2.6(b) of the Company Disclosure Schedule accurately and completely lists all repurchase rights held by the Company with respect to shares of Company Capital Stock (including shares issued pursuant to the exercise of stock options) and specifies which of those repurchase rights are currently exercisable and whether the holder of such shares of Company Capital Stock timely filed an election with the relevant Governmental Bodies under Section 83(b) of the Code with respect to such shares. Each share of Company Preferred Stock is convertible into one share of Company Common Stock.

(c) Except for the 2009 Equity Incentive Plan of Brickell Biotech, Inc., as amended (the "**Company Plan**"), the Company does not have any stock option plan or any other plan, program, agreement or arrangement providing for any equity-based compensation for any Person. As of the date of this Agreement, the Company has reserved 2,872,986 shares of Company Common Stock for issuance under the Company Plan, of which 316,251 shares have been issued and are currently outstanding, 1,811,800 shares have been reserved for issuance upon exercise of Company Options previously granted and currently outstanding under the Company Plan, and 744,935 shares of Company Common Stock remain available for future issuance of awards pursuant to the Company Plan. Section 2.6(c) of the Company Disclosure Schedule sets forth the following information with respect to each Company Option outstanding as of the date of this Agreement: (i) the name of the optionee; (ii) the number of shares of Company Common Stock subject to such Company Option at the time of grant; (iii) the number of shares of Company Common Stock subject to such Company Option as of the date of this Agreement; (iv) the exercise price of such Company Option; (v) the date on which such Company Option was granted; (vi) the applicable vesting schedule, including the number of vested and unvested shares as of the date of this Agreement and any acceleration provisions; (vii) the date on which such Company Option expires; and (viii) whether such Company Option is intended to constitute an "incentive stock option" (as defined in the Code) or a non-qualified stock option. The Company has made available to Parent an accurate and complete copy of the Company Plan and all stock option agreements evidencing outstanding options granted thereunder. No vesting of Company Options will accelerate in connection with the closing of the Contemplated Transactions.

(d) Except as set forth on Section 2.6(d) of the Company Disclosure Schedule, there is no: (i) outstanding subscription, option, call, warrant or right (whether or not currently exercisable) to acquire any shares of the capital stock or other securities of the Company; (ii) outstanding security, instrument or obligation that is or may become convertible into or

exchangeable for any shares of the capital stock or other securities of the Company; or (iii) condition or circumstance that could be reasonably likely to give rise to or provide a basis for the assertion of a claim by any Person to the effect that such Person is entitled to acquire or receive any shares of capital stock or other securities of the Company. There are no outstanding or authorized stock appreciation, phantom stock, profit participation or other similar rights with respect to the Company.

(e) All outstanding shares of Company Common Stock, Company Preferred Stock, Company Options, Company Warrants and other securities of the Company have been issued and granted in material compliance with (i) all applicable securities Laws and other applicable Law, and (ii) all requirements set forth in applicable Contracts.

## **2.7 Financial Statements.**

(a) Concurrently with the execution hereof, the Company has provided to Parent true and complete copies of (i) the Company's audited consolidated balance sheets at December 31, 2018, 2017 and 2016, together with related audited consolidated statements of income, stockholders' equity and cash flows, and notes thereto, of the Company for the fiscal years then ended and (ii) the Company Unaudited Interim Balance Sheet, together with the unaudited consolidated statements of income, stockholders' equity and cash flows of the Company for the period reflected in the Company Unaudited Interim Balance Sheet (collectively, the "*Company Financials*"). The Company Financials were prepared in accordance with GAAP (except as may be indicated in the notes to such financial statements and except that the unaudited financial statements may not contain footnotes and are subject to normal and recurring year-end adjustments, none of which are material) and fairly present, in all material respects, the financial position and operating results of the Company as of the dates and for the periods indicated therein.

(b) The Company maintains accurate books and records reflecting its assets and liabilities and maintains a system of internal accounting controls designed to provide reasonable assurance that: (i) transactions are executed in accordance with management's general or specific authorizations; (ii) transactions are recorded as necessary to permit preparation of the financial statements of the Company and to maintain accountability of the Company's assets; (iii) access to the Company's assets is permitted only in accordance with management's general or specific authorization; (iv) the recorded accountability for the Company's assets is compared with the existing assets at regular intervals and appropriate action is taken with respect to any differences; and (v) accounts, notes and other receivables and inventory are recorded accurately, and proper and adequate procedures are implemented to effect the collection thereof on a current and timely basis. The Company maintains internal control over financial reporting that provides reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes.

(c) The Company has not engaged in any securitization transactions or "off-balance sheet arrangements" (as defined in Item 303(c) of Regulation S-K under the Exchange Act) since January 1, 2017.

(d) Since January 1, 2017, there have been no internal investigations regarding financial reporting or accounting policies and practices discussed with, reviewed by or initiated at the direction of the chief executive officer, chief financial officer or general counsel of the Company, the Company Board or any committee thereof. Since January 1, 2017, neither the Company nor its independent auditors have identified (i) any significant deficiency or material weakness in the design or operation of the system of internal accounting controls utilized by the Company, (ii) any fraud, whether or not material, that involves the Company, the Company's management or other employees who have a role in the preparation of financial statements or the internal accounting controls utilized by the Company or (iii) any claim or allegation regarding any of the foregoing.

**2.8 Absence of Changes.** Except as set forth on Section 2.8 of the Company Disclosure Schedule, between the date of the Company Unaudited Interim Balance Sheet and the date of this Agreement, the Company has conducted its business only in the Ordinary Course of Business (except for the execution and performance of this Agreement and the discussions, negotiations and transactions related thereto) and there has not been any (a) Company Material Adverse Effect or (b) action, event or occurrence that would have required the consent of Parent pursuant to Section 4.2(b) had such action, event or occurrence taken place after the execution and delivery of this Agreement.

**2.9 Absence of Undisclosed Liabilities.** As of the date hereof, the Company does not have any liability, indebtedness, obligation or expense of any kind, whether accrued, absolute, contingent, matured, unmatured or otherwise (whether or not required to be reflected in the financial statements in accordance with GAAP) (each a "**Liability**"), individually or in the aggregate, of a type required to be recorded or reflected on a balance sheet or disclosed in the footnotes thereto under GAAP except for: (a) Liabilities disclosed, reflected or reserved against in the Company Unaudited Interim Balance Sheet; (b) Liabilities that have been incurred by the Company since the date of the Company Unaudited Interim Balance Sheet in the Ordinary Course of Business; (c) Liabilities for performance of obligations of the Company under Company Contracts; (d) Liabilities incurred in connection with the Contemplated Transactions; (e) Liabilities which would not, individually or in the aggregate, reasonably be expected to be material to the Company; and (f) Liabilities described in Section 2.9 of the Company Disclosure Schedule.

**2.10 Title to Assets.** The Company owns, and has good and valid title to, or, in the case of leased properties and assets, valid leasehold interests in, all tangible properties or tangible assets and equipment used or held for use in its business or operations or purported to be owned by it, including: (a) all tangible assets reflected on the Company Unaudited Interim Balance Sheet; and (b) all other tangible assets reflected in the books and records of the Company as being owned by the Company. All of such assets are owned or, in the case of leased assets, leased by the Company free and clear of any Encumbrances, other than Permitted Encumbrances.

**2.11 Real Property; Leasehold.** The Company does not own and has never owned any real property. The Company has made available to Parent (a) an accurate and complete list of all real properties with respect to which the Company directly or indirectly holds a valid leasehold interest as well as any other real estate that is in the possession of or leased by the Company, and (b) copies of all leases under which any such real property is possessed (the

“**Company Real Estate Leases**”), each of which is in full force and effect, with no existing material default thereunder. The Company’s use and operation of each such leased property conforms to all applicable Laws in all material respects, and the Company has exclusive possession of each such leased property and has not granted any occupancy rights to tenants or licensees with respect to such leased property. In addition, each such leased property is free and clear of all Encumbrances other than Permitted Encumbrances.

## 2.12 **Intellectual Property.**

(a) Section 2.12 of the Company Disclosure Schedule identifies (i) the name of the applicant/registrant, (ii) the jurisdiction of application/registration, (iii) the application or registration number and (iv) any other co-owners, for each item of material Registered IP owned in whole or in part by the Company. To the Knowledge of the Company, each of the patents and patent applications included in the material Registered IP properly identifies by name each and every inventor of the inventions claimed therein as determined in accordance with applicable Laws of the United States. As of the date of this Agreement, no interference, opposition, reissue, reexamination or other proceeding of any nature (other than initial examination proceedings) is pending or, to the Knowledge of the Company, threatened in writing, in which the scope, validity, enforceability or ownership of any Registered IP listed on Section 2.12 of the Company Disclosure Schedule is being or has been contested or challenged.

(b) The Company owns all right, title and interest in and to all material Company IP (other than as disclosed on Section 2.12 of the Company Disclosure Schedule), free and clear of all Encumbrances other than Permitted Encumbrances. To the Knowledge of the Company, each Company Associate involved in the creation or development of any material Company IP, pursuant to such Company Associate’s activities on behalf of the Company, has signed a written agreement containing an assignment of such Company Associate’s rights in such Company IP to the Company and confidentiality provisions protecting the Company IP.

(c) Except as set forth in Section 2.12(c) of the Company Disclosure Schedule, to the Knowledge of the Company, no funding, facilities or personnel of any Governmental Body or any university, college, research institute or other educational institution has been used to create Company IP, except for any such funding or use of facilities or personnel that does not result in such Governmental Body or institution obtaining ownership rights to such Company IP or the right to receive royalties for the practice of such Company IP.

(d) Section 2.12(d) of the Company Disclosure Schedule sets forth each license agreement pursuant to which the Company (i) is granted a license under any material Intellectual Property Right owned by any third party that is used by the Company in its business as currently conducted (each a “**Company In-bound License**”) or (ii) grants to any third party a license under any material Company IP or material Intellectual Property Right licensed to the Company under a Company In-bound License (each a “**Company Out-bound License**”) (*provided*, that, Company In-bound Licenses shall not include material transfer agreements, clinical trial agreements, services agreements, non-disclosure agreements, commercially available Software-as-a-Service offerings, off-the-shelf software licenses or generally available patent license agreements entered into in the ordinary course of business; and Company Out-bound Licenses

shall not include material transfer agreements, clinical trial agreements, services agreements, non-disclosure agreements, or non-exclusive outbound licenses entered into in the ordinary course of business).

(e) To the Knowledge of the Company, (i) the operation of the businesses of the Company as currently conducted does not infringe any valid and enforceable Registered IP or misappropriate or otherwise violate any other Intellectual Property Right owned by any other Person; and (ii) no other Person is infringing, misappropriating or otherwise violating any Company IP or any Intellectual Property Rights exclusively licensed to the Company. As of the date of this Agreement, no Legal Proceeding is pending (or, to the Knowledge of the Company, is threatened in writing) (A) against the Company alleging that the operation of the businesses of the Company infringes or constitutes the misappropriation or other violation of any Intellectual Property Rights of another Person or (B) by the Company alleging that another Person has infringed, misappropriated or otherwise violated any of the Company IP or any Intellectual Property Rights exclusively licensed to the Company. Since January 1, 2017, the Company has not received any written notice or other written communication alleging that the operation of the business of the Company infringes or constitutes the misappropriation or other violation of any Intellectual Property Right of another Person.

(f) None of the Company IP or, to the Knowledge of the Company, any material Intellectual Property Rights exclusively licensed to the Company is subject to any pending or outstanding injunction, directive, order, judgment or other disposition of dispute that adversely and materially restricts the use, transfer, registration or licensing by the Company of any such Company IP or material Intellectual Property Rights exclusively licensed to the Company.

(g) To the Knowledge of the Company, the Company and the operation of the Company's business are in substantial compliance with all Laws pertaining to data privacy and data security of any personally identifiable information and sensitive business information (collectively, "***Sensitive Data***") except to the extent that such noncompliance has not and would not reasonably be expected to have a Company Material Adverse Effect. To the Knowledge of the Company, since January 1, 2017, there have been (i) no material losses or thefts of data or security breaches relating to Sensitive Data used in the business of the Company, (ii) no violations of any security policy of the Company regarding any such Sensitive Data, (iii) no unauthorized access or unauthorized use of any Sensitive Data used in the business of the Company and (iv) no unintended or improper disclosure of any personally identifiable information in the possession, custody or control of the Company, or a contractor or agent acting on behalf of the Company, in each case of (i) through (iv), except as would not reasonably be expected to, individually or in the aggregate, have a Company Material Adverse Effect.

### 2.13 **Agreements, Contracts and Commitments.**

(a) Section 2.13 of the Company Disclosure Schedule lists the following Company Contracts in effect as of the date of this Agreement other than any Company Benefit Plans or non-disclosure agreements entered into in the ordinary course of business or in connection with a potential strategic transaction (each, a "***Company Material Contract***" and collectively, the "***Company Material Contracts***");

(i) each Company Contract relating to any agreement of indemnification or guaranty not entered into in the Ordinary Course of Business;

(ii) each Company Contract containing (A) any covenant limiting the freedom of the Company or the Surviving Corporation to engage in any line of business or compete with any Person, (B) any most-favored pricing arrangement, (C) any exclusivity provision, or (D) any non-solicitation provision;

(iii) each Company Contract, to the Company's Knowledge based on the express terms of the Company Contract relating to capital expenditures and requiring payments after the date of this Agreement in excess of \$50,000 pursuant to its express terms and not cancelable without penalty;

(iv) each Company Contract relating to the disposition or acquisition of material assets or any ownership interest in any Entity;

(v) each Company Contract relating to any mortgages, indentures, loans, notes or credit agreements, security agreements or other agreements or instruments relating to the borrowing of money or extension of credit or creating any Encumbrances, in each case, in an amount in excess of \$100,000, with respect to any assets of the Company or any loans or debt obligations with officers or directors of the Company;

(vi) each Company Contract requiring payment by or to the Company after the date of this Agreement in excess of \$100,000 pursuant to its express terms relating to: (A) any distribution agreement (identifying any that contain exclusivity provisions); (B) any agreement involving provision of services or products with respect to any pre-clinical or clinical development activities of the Company; (C) any dealer, distributor, joint marketing, alliance, joint venture, cooperation, development or other agreement currently in force under which the Company has continuing obligations to develop or market any product, technology or service, or any agreement pursuant to which the Company has continuing obligations to develop any Intellectual Property Rights that will not be owned, in whole or in part, by the Company; or (D) any Contract to license any third party to manufacture or produce any product, service or technology of the Company or any Contract to sell, distribute or commercialize any products or service of the Company, in each case, except for Company Contracts entered into in the Ordinary Course of Business;

(vii) each Company Contract with any Person, including any financial advisor, broker, finder, investment banker or other Person, providing advisory services to the Company in connection with the Contemplated Transactions;

(viii) each Company Real Estate Lease;

(ix) each Company Contract with any Governmental Body;

(x) each Company Out-bound License and Company In-bound License;

(xi) each Company Contract containing any royalty, dividend or similar arrangement based on the revenues or profits of the Company; or

(xii) any other Company Contract that is not terminable at will (with no penalty or payment) by the Company, and (A) which involves payment or receipt by the Company after the date of this Agreement under any such agreement, contract or commitment of more than \$100,000 in the aggregate, or obligations after the date of this Agreement in excess of \$100,000 in the aggregate, or (B) that is material to the business or operations of the Company.

(b) The Company has delivered or made available to Parent accurate and complete copies of all Company Material Contracts, including all amendments thereto, as of the date of this Agreement. Except as set forth in Section 2.13(b) of the Company Disclosure Schedule, there are no Company Material Contracts that are not in written form. Except as set forth in Section 2.13(b) of the Company Disclosure Schedule, the Company does not have, nor to the Company's Knowledge, as of the date of this Agreement has any other party to a Company Material Contract, breached, violated or defaulted under, or received notice that it breached, violated or defaulted under, any of the terms or conditions of any Company Material Contract in such manner as would permit any other party to cancel or terminate any such Company Material Contract, or would permit any other party to seek damages which would reasonably be expected to be material to the Company or its business. As to the Company, as of the date of this Agreement, each Company Material Contract is valid, binding, enforceable and in full force and effect, subject to the Enforceability Exceptions. No Person is renegotiating, or has a right pursuant to the terms of any Company Material Contract to change, any material amount paid or payable to the Company under any Company Material Contract or any other material term or provision of any Company Material Contract.

#### **2.14 Compliance; Permits; Restrictions.**

(a) The Company is, and since January 1, 2017 has been, in compliance in all material respects with all applicable Laws, including the Federal Food, Drug, and Cosmetic Act ("*FDCA*"), the Food and Drug Administration ("*FDA*") regulations adopted thereunder, the Public Health Service Act and any other similar Law administered or promulgated by the FDA or other comparable Governmental Body responsible for regulation of the development, clinical testing, manufacturing, sale, marketing, distribution and importation or exportation of drug and biopharmaceutical products (each, a "*Drug Regulatory Agency*"), except for any noncompliance, either individually or in the aggregate, which would not be material to the Company. No investigation, claim, suit, proceeding, audit or other action by any Governmental Body is pending or, to the Knowledge of the Company, threatened against the Company. There is no agreement, judgment, injunction, order or decree binding upon the Company which (i) has or would reasonably be expected to have the effect of prohibiting or materially impairing any business practice of the Company, any acquisition of material property by the Company or the conduct of business by the Company as currently conducted, (ii) is reasonably likely to have an adverse effect on the Company's ability to comply with or perform any covenant or obligation under this Agreement, or (iii) is reasonably likely to have the effect of preventing, delaying, making illegal or otherwise interfering with the Contemplated Transactions. To the Knowledge of the Company,

no condition or state of facts exists that is reasonably likely to give rise to a violation of, or a material liability or default under any applicable Laws relating to the Company.

(b) The Company holds all required Governmental Authorizations which are material to the operation of the business of the Company as currently conducted (the “*Company Permits*”). Section 2.14(b) of the Company Disclosure Schedule identifies each Company Permit. The Company is in material compliance with the terms of the Company Permits. No Legal Proceeding is pending or, to the Knowledge of the Company, threatened, which seeks to revoke, limit, suspend, or materially modify any Company Permit.

(c) There are no proceedings pending or, to the Knowledge of the Company, threatened with respect to an alleged material violation by the Company of the FDCA, FDA regulations adopted thereunder, the Public Health Service Act or any other similar Law administered or promulgated by any Drug Regulatory Agency.

(d) All clinical, pre-clinical and other studies and tests conducted by or on behalf of, or sponsored by, the Company, or in which the Company or their current products or product candidates have participated, were and, if still pending, are being conducted in all material respects in accordance with standard medical and scientific research procedures and in compliance in all material respects with the applicable regulations of any applicable Drug Regulatory Agency and other applicable Law, including 21 C.F.R. Parts 50, 54, 56, 58 and 312. No preclinical or clinical trial conducted by or on behalf of the Company has been terminated or suspended prior to completion for safety or non-compliance reasons. Since January 1, 2017, the Company has not received any notices, correspondence, or other communications from any Drug Regulatory Agency requiring, or to the Knowledge of the Company threatening to initiate, the termination or suspension of any clinical studies conducted by or on behalf of, or sponsored by, the Company or in which the Company or their current products or product candidates have participated.

(e) The Company is not the subject of any pending or, to the Knowledge of the Company, threatened investigation in respect of its business or products by the FDA pursuant to its “Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities” Final Policy set forth in 56 Fed. Reg. 46191 (September 10, 1991) and any amendments thereto. To the Knowledge of the Company, the Company has not committed any acts, made any statement, or failed to make any statement, in each case in respect of its business or products that would violate the FDA’s “Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities” Final Policy, and any amendments thereto. None of the Company, or any of its officers, employees or agents has been convicted of any crime or engaged in any conduct that could result in a debarment or exclusion (i) under 21 U.S.C. Section 335a or (ii) any similar applicable Law. No debarment or exclusionary claims, actions, proceedings or investigations in respect of their business or products are pending or, to the Knowledge of the Company, threatened against the Company or any of its officers, employees or agents.

#### **2.15 Legal Proceedings: Orders.**

(a) Except as set forth in Section 2.15(a) of the Company Disclosure Schedule, as of the date of this Agreement, there is no pending Legal Proceeding and, to the



Knowledge of the Company, no Person has threatened in writing to commence any Legal Proceeding: (i) that involves (A) the Company, (B) any Company Associate (in his or her capacity as such) or (C) any of the material assets owned or used by the Company; or (ii) that may have the effect of preventing, delaying, making illegal or otherwise materially interfering with, the Contemplated Transactions.

(b) Except as set forth in Section 2.15(b) of the Company Disclosure Schedule, since January 1, 2017, no Legal Proceeding has been pending against the Company that resulted in material liability to the Company.

(c) There is no order, writ, injunction, judgment or decree to which the Company, or any of the material assets owned or used by the Company, is subject. To the Knowledge of the Company, no officer of the Company or is subject to any order, writ, injunction, judgment or decree that prohibits such officer or employee from engaging in or continuing any conduct, activity or practice relating to the business of the Company or to any material assets owned or used by the Company.

(d) Since January 1, 2017 through the date of this Agreement, the Company has not settled or compromised any proceeding or claim, whether filed or threatened.

#### **2.16 Tax Matters.**

(a) The Company has timely filed all income Tax Returns and other material Tax Returns that they were required to file under applicable Law. All such Tax Returns are correct and complete in all material respects and have been prepared in compliance with all applicable Law. No claim has ever been made by any Governmental Body in any jurisdiction where the Company does not file a particular Tax Return or pay a particular Tax that the Company is subject to taxation by that jurisdiction.

(b) All income and other material Taxes due and owing by the Company on or before the date hereof (whether or not shown on any Tax Return) have been fully paid. The unpaid Taxes of the Company did not, as of the date of the Company Unaudited Interim Balance Sheet, materially exceed the reserve for Tax liability (excluding any reserve for deferred Taxes established to reflect timing differences between book and Tax items) set forth on the face of the Company Unaudited Interim Balance Sheet. Since the date of the Company Unaudited Interim Balance Sheet, the Company has not incurred any material Liability for Taxes outside the Ordinary Course of Business.

(c) All Taxes that the Company are or were required by Law to withhold or collect have been duly and timely withheld or collected in all material respects on behalf of its employees, independent contractors, stockholders, lenders, customers or other third parties and, have been timely paid to the proper Governmental Body or other Person or properly set aside in accounts for this purpose.

(d) There are no Encumbrances for Taxes (other than Taxes not yet due and payable) upon any of the assets of the Company.

(e) No deficiencies for income or other material Taxes with respect to the Company have been claimed, proposed or assessed by any Governmental Body in writing. There are no pending or ongoing, and to the Knowledge of the Company, threatened audits, assessments or other actions for or relating to any liability in respect of a material amount of Taxes of the Company. Neither the Company nor any of its predecessors has waived any statute of limitations in respect of any income or other material Taxes or agreed to any extension of time with respect to any income or other material Tax assessment or deficiency.

(f) The Company has not been a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code during the applicable period specified in Section 897(c)(1)(A)(ii) of the Code.

(g) The Company is not a party to any Tax allocation agreement, Tax sharing agreement, Tax indemnity agreement, or similar agreement or arrangement, other than customary commercial contracts entered into in the Ordinary Course of Business the principal subject matter of which is not Taxes.

(h) The Company will not be required to include any material item of income in, or exclude any material item of deduction from, taxable income for any Tax period (or portion thereof) ending after the Closing Date as a result of any: (i) change in method of accounting by the Company for Tax purposes; (ii) use of an improper method of accounting by the Company for a Tax period ending on or prior to the Closing Date; (iii) "closing agreement" as described in Section 7121 of the Code (or any similar provision of state, local or foreign Law) executed by the Company on or prior to the Closing Date; (iv) intercompany transaction or excess loss account described in Treasury Regulations under Section 1502 of the Code (or any similar provision of state, local or foreign Law) of the Company; (v) installment sale or open transaction disposition made by the Company on or prior to the Closing Date; (vi) prepaid amount received or deferred revenue accrued by the Company on or prior to the Closing Date; (vii) application of Section 367(d) of the Code to any transfer of intangible property by the Company on or prior to the Closing Date; (viii) application of Sections 951 or 951A of the Code (or any similar provision of state, local or foreign Law) to any income received or accrued by the Company on or prior to the Closing Date; or (ix) election under Section 108(i) of the Code (or any similar provision of state, local or foreign Law) made by the Company on or prior to the Closing Date. The Company has not made any election under Section 965(h) of the Code.

(i) The Company has never been (i) a member of a consolidated, combined or unitary Tax group (other than such a group the common parent of which is the Company) or (ii) a party to any joint venture, partnership, or other arrangement that is treated as a partnership for U.S. federal income Tax purposes. The Company does not have any Liability for any material Taxes of any Person (other than the Company) under Treasury Regulations Section 1.1502-6 (or any similar provision of state, local, or foreign Law), or as a transferee or successor.

(j) The Company has not distributed stock of another Person, or had its stock distributed by another Person, in a transaction that was purported or intended to be governed in whole or in part by Section 355 of the Code or Section 361 of the Code (or any similar provisions of state, local or foreign Law).

(k) The Company (i) is not a “controlled foreign corporation” as defined in Section 957 of the Code, (ii) is not a “passive foreign investment company” within the meaning of Section 1297 of the Code, and (iii) has never had a permanent establishment (within the meaning of an applicable Tax treaty) or otherwise had an office or fixed place of business in a country other than the country in which it is organized.

(l) The Company has not participated in or been a party to a transaction that, as of the date of this Agreement, constitutes a “listed transaction” that is required to be reported to the IRS pursuant to Section 6011 of the Code and applicable Treasury Regulations thereunder.

(m) The Company has not taken any action and does not know of any fact that would reasonably be expected to prevent the Merger from qualifying for the Intended Tax Treatment.

For purposes of this Section 2.16, each reference to the Company shall be deemed to include any Person that was liquidated into, merged with, or is otherwise a predecessor to, the Company.

#### **2.17 Employee and Labor Matters; Benefit Plans**

(a) Section 2.17(a) of the Company Disclosure Schedule is a list of all material Company Benefit Plans, including, without limitation, each Company Benefit Plan that provides for retirement, change in control, stay or retention, deferred compensation, incentive compensation, severance or retiree medical or life insurance benefits. “**Company Benefit Plan**” means each (i) “employee benefit plan” as defined in Section 3(3) of ERISA and (ii) other pension, retirement, deferred compensation, excess benefit, profit sharing, bonus, incentive, equity or equity-based, phantom equity, employment (other than at-will employment offer letters on the Company’s standard form and other than individual Company Options or other compensatory equity award agreements made pursuant to the Company’s standard forms, in which case only representative standard forms of such agreements shall be scheduled), consulting, severance, change-of-control, retention, health, life, disability, group insurance, paid-time off, holiday, welfare and fringe benefit plan, program, agreement, contract, or arrangement (whether written or unwritten, qualified or nonqualified, funded or unfunded and including any that have been frozen or terminated), in any case, maintained, contributed to, or required to be contributed to, by the Company or Company ERISA Affiliates for the benefit of any current or former employee, director, officer or independent contractor of the Company or under which the Company has any actual or contingent liability (including, without limitation, as to the result of it being treated as a single employer under Code Section 414 with any other person).

(b) As applicable with respect to each material Company Benefit Plan, the Company has made available to Parent, true and complete copies of (i) each material Company Benefit Plan, including all amendments thereto, and in the case of an unwritten material Company Benefit Plan, a written description thereof, (ii) all current trust documents, investment management contracts, custodial agreements, administrative services agreements and insurance and annuity contracts relating thereto, (iii) the current summary plan description and each summary of material

modifications thereto, (iv) the most recently filed annual reports with any Governmental Body (*e.g.*, Form 5500 and all schedules thereto), (v) the most recent IRS determination, opinion or advisory letter, (vi) the most recent summary annual reports, nondiscrimination testing reports, actuarial reports, financial statements and trustee reports, (vii) all records, notices and filings concerning IRS or Department of Labor or other Governmental Body audits or investigations, "prohibited transactions" within the meaning of Section 406 of ERISA or Section 4975 of the Code, (viii) all policies and procedures established to comply with the privacy and security rules of HIPAA and (ix) any written reports constituting a valuation of the Company's capital stock for purposes of Sections 409A or 422 of the Code, whether prepared internally by the Company or by an outside, third-party valuation firm.

(c) Each Company Benefit Plan has been maintained, operated and administered in compliance in all material respects with its terms and any related documents or agreements and the applicable provisions of ERISA, the Code and all other Laws, and no event has occurred which will or could cause any such Company Benefit Plan to fail to comply with such requirements and no notice has been issued by any governmental authority questioning or challenging such compliance.

(d) The Company Benefit Plans which are "employee pension benefit plans" within the meaning of Section 3(2) of ERISA and which are intended to meet the qualification requirements of Section 401(a) of the Code have received determination or opinion letters from the IRS on which they may currently rely to the effect that such plans are qualified under Section 401(a) of the Code and the related trusts are exempt from federal income Taxes under Section 501(a) of the Code, respectively, and to the Knowledge of the Company, nothing has occurred that would reasonably be expected to materially adversely affect the qualification of such Company Benefit Plan or the tax exempt status of the related trust.

(e) Neither the Company nor any Company ERISA Affiliate maintains, contributes to, is required to contribute to, or has or has had any actual or contingent liability with respect to, (i) any "employee pension benefit plan" (within the meaning of Section 3(2) of ERISA) that is subject to Title IV or Section 302 of ERISA or Section 412 of the Code, (ii) any "multiemployer plan" (within the meaning of Section 3(37) of ERISA), (iii) any "multiple employer plan" (within the meaning of Section 413 of the Code) or (iv) any "multiple employer welfare arrangement" (within the meaning of Section 3(40) of ERISA). None of the assets of any Company Benefit Plan are invested in employer securities or employer real property.

(f) There are no pending audits or investigations by any Governmental Body involving any Company Benefit Plan, and no pending or, to the Knowledge of the Company, threatened claims (except for individual claims for benefits payable in the normal operation of the Company Benefit Plans), suits or proceedings involving any Company Benefit Plan, any fiduciary thereof or service provider thereto, in any case except as would not be reasonably expected to result in material liability to the Company. All contributions and premium payments required to have been made under any of the Company Benefit Plans or by applicable Law (without regard to any waivers granted under Section 412 of the Code), have been timely made and neither the Company nor any Company ERISA Affiliate has any liability for any unpaid contributions with respect to any Company Benefit Plan.

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(g) Neither the Company nor any Company ERISA Affiliate, nor to the Knowledge of the Company, any fiduciary, trustee or administrator of any Company Benefit Plan, has engaged in, or in connection with the Contemplated Transactions will engage in, any transaction with respect to any Company Benefit Plan which would subject any such Company Benefit Plan, the Company or Company ERISA Affiliates or Parent to a material Tax, material penalty or material liability for a “prohibited transaction” under Section 406 of ERISA or Section 4975 of the Code.

(h) No Company Benefit Plan provides death, medical, dental, vision, life insurance or other welfare benefits beyond termination of service or retirement other than coverage mandated by Law and neither the Company nor Company ERISA Affiliates has made a written or oral representation promising the same.

(i) Neither the execution of, nor the performance of the Contemplated Transactions will either alone or in connection with any other event(s) (i) result in any payment becoming due to any current or former employee, director, officer, or independent contractor of the Company, (ii) increase any amount of compensation or benefits otherwise payable under any Company Benefit Plan, (iii) result in the acceleration of the time of payment, funding or vesting of any benefits under any Company Benefit Plan, (iv) require any contribution or payment to fund any obligation under any Company Benefit Plan or (v) limit the right to merge, amend or terminate any Company Benefit Plan.

(j) Neither the execution of, nor the consummation of the Contemplated Transactions (either alone or when combined with the occurrence of any other event, including without limitation, a termination of employment) will result in the receipt or retention by any person who is a “disqualified individual” (within the meaning of Code Section 280G) with respect to the Company of any payment or benefit that is or could be characterized as a “parachute payment” (within the meaning of Code Section 280G), determined without regard to the application of Code Section 280G(b)(5).

(k) The exercise price of each Company Option is not, never has been and can never be less than the fair market value of one share of Company Common Stock as of the grant date of such Company Option.

(l) Each Company Benefit Plan providing for deferred compensation that constitutes a “nonqualified deferred compensation plan” (as defined in Section 409A(d)(1) of the Code and the regulations promulgated thereunder) is, and has been, established, administered and maintained in compliance with the requirements of Section 409A of the Code and the regulations promulgated thereunder in all material respects.

(m) No current or former employee, officer, director or independent contractor of the Company has any “gross up” agreements with the Company or other assurance of reimbursement by the Company for any Taxes imposed under Code Section 409A or Code Section 4999.

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(n) The Company does not have any Company Benefit Plan that is maintained outside of the United States.

(o) There have been no acts or omissions by the Company or any Company ERISA Affiliates which have given rise to or may give rise to interest, fines, penalties, taxes or related charges under section 502 of ERISA or Chapters 43, 47, 68 or 100 of the Code for which the Company or any Company ERISA Affiliates may be liable or under Section 409A of the Code for which the Company, any Company ERISA Affiliates or any participant in any Company Benefit Plan that is a nonqualified deferred compensation plan (within the meaning of section 409A of the Code) may be liable. The Company, and each Company Benefit Plan that is a "group health plan" as defined in Section 733(a)(1) of ERISA (a "**Health Plan**") (i) is currently in compliance in all material respects with the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 ("**PPACA**"), the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 ("**HCERA**"), and the regulations and guidance issued thereunder (collectively, with PPACA and HCERA, the "**Healthcare Reform Laws**"), and (ii) has been in compliance in all material respects with all applicable Healthcare Reform Laws since March 23, 2010. No event has occurred, and no conditions or circumstance exists, that would reasonably be expected to subject the Company, or any Health Plan, to material penalties or excise taxes under Sections 4980D, 4980H, or 4980I of the Code or any other provision of the Healthcare Reform Laws.

(p) The Company is not a party to, bound by, and does not have a duty to bargain under, any collective bargaining agreement or other Contract with a labor union, labor organization, or similar Person representing any of its employees, and there is no labor union, labor organization, or similar Person representing or, to the Knowledge of the Company, purporting to represent or seeking to represent any employees of the Company, including through the filing of a petition for representation election.

(q) The Company is, and since January 1, 2017 has been, in material compliance with all applicable Laws respecting labor, employment, employment practices, and terms and conditions of employment, including worker classification, discrimination, harassment and retaliation, equal employment opportunities, fair employment practices, meal and rest periods, immigration, employee safety and health, wages (including overtime wages), unemployment and workers' compensation, leaves of absence, and hours of work. Except as would not be reasonably likely to result in a material liability to the Company, with respect its employees, the Company, since January 1, 2017: (i) has withheld and reported all amounts required by Law or by agreement to be withheld and reported with respect to wages, salaries and other payments, benefits, or compensation to employees, (ii) is not liable for any arrears of wages (including overtime wages), severance pay or any Taxes or any penalty for failure to comply with any of the foregoing, and (iii) is not liable for any payment to any trust or other fund governed by or maintained by or on behalf of any Governmental Body, with respect to unemployment compensation benefits, disability, social security or other benefits or obligations for employees (other than routine payments to be made in the Ordinary Course of Business). There are no actions, suits, claims, charges, lawsuits, investigations, audits or administrative matters pending or, to the Knowledge of the Company, threatened or reasonably anticipated against the Company relating to any employee, applicant for employment, consultant, employment agreement or Company Benefit Plan (other than routine claims for benefits).

(r) Except as would not be reasonably likely to result in a material liability to the Company, with respect to each individual who currently renders services to the Company, the Company has accurately classified each such individual as an employee, independent contractor, or otherwise under all applicable Laws and, for each individual classified as an employee, the Company has accurately classified him or her as overtime eligible or overtime ineligible under all applicable Laws. The Company does not have any material liability with respect to any misclassification of: (a) any Person as an independent contractor rather than as an employee, (b) any employee leased from another employer, or (c) any employee currently or formerly classified as exempt from overtime wages.

(s) There is not and has not been in the past three years, nor is there or has there been in the past three years any threat of, any strike, slowdown, work stoppage, lockout, union election petition, demand for recognition, or any similar activity or dispute, or, to the Knowledge of the Company, any union organizing activity, against the Company. No event has occurred, and no condition or circumstance exists, that might directly or indirectly be likely to give rise to or provide a basis for the commencement of any such strike, slowdown, work stoppage, lockout, union election petition, demand for recognition, any similar activity or dispute, or, to the Knowledge of the Company, any union organizing activity.

(t) There is no Legal Proceeding, claim, unfair labor practice charge or complaint, labor dispute or grievance pending or, to the Knowledge of the Company, threatened against the Company relating to labor, employment, employment practices, or terms and conditions of employment.

(u) There is no contract, agreement, plan or arrangement to which the Company or any Company Affiliate is a party or by which it is bound to compensate any of its employees for excise taxes paid pursuant to Section 4999 of the Code.

2.18 **Environmental Matters.** The Company is, and since January 1, 2013 has been, in compliance with all applicable Environmental Laws, which compliance includes the possession by the Company of all permits and other Governmental Authorizations required under applicable Environmental Laws and compliance with the terms and conditions thereof, except for any failure to be in such compliance that, either individually or in the aggregate, would not reasonably be expected to be material to the Company or its business. Since January 1, 2013, the Company has not received (or prior to that time, which is pending and unresolved), any written notice or other communication (in writing or otherwise), whether from a Governmental Body or other Person, that alleges that the Company is not in compliance with or has liability pursuant to any Environmental Law and, to the Knowledge of the Company, there are no circumstances that would reasonably be expected to prevent or interfere with the Company's compliance in any material respects with any Environmental Law, except where such failure to comply would not reasonably be expected to be material to the Company or its business. The Company is not aware of any fact or circumstance which could involve the Company in any environmental litigation or impose any environmental liability upon the Company. No current or (during the time a prior property was leased or controlled by the Company) prior property leased or controlled by the Company has had a release of or exposure to Hazardous Materials in material violation of or as would reasonably be expected to result in any material liability of the Company pursuant to

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Environmental Law. No consent, approval or Governmental Authorization of or registration or filing with any Governmental Body is required by Environmental Laws in connection with the execution and delivery of this Agreement or the Contemplated Transactions. Prior to the date hereof, the Company has provided or otherwise made available to Parent true and correct copies of all material environmental reports, assessments, studies and audits in the possession or control of the Company with respect to any property leased or controlled by the Company or any business it operates.

2.19 **Insurance.** The Company maintains insurance policies, including insurance covering directors and officers for securities law and other customary liabilities, with reputable insurance carriers against all risks of a character and in such amounts as are usually insured against by similarly situated companies in the same or similar business and in such amounts and against such risks as the Company has reasonably determined is prudent, sufficient and adequate to cover the claims disclosed on Section 2.15(b) of the Company Disclosure Schedule. The Company has delivered or made available to Parent accurate and complete copies of all material insurance policies and all material self-insurance programs and arrangements relating to the business, assets, liabilities and operations of the Company. Each of such insurance policies is in full force and effect and the Company is in compliance in all material respects with the terms thereof. Other than customary end of policy notifications from insurance carriers, since January 1, 2017, the Company has not received any notice or other communication regarding any actual or possible: (i) cancellation or invalidation of any insurance policy; or (ii) refusal or denial of any coverage, reservation of rights or rejection of any material claim under any insurance policy. The Company has provided timely written notice to the appropriate insurance carrier(s) of each Legal Proceeding that is currently pending against the Company for which the Company has insurance coverage, and no such carrier has issued a denial of coverage or a reservation of rights with respect to any such Legal Proceeding, or informed the Company of its intent to do so.

2.20 **No Financial Advisors.** Except as set forth on Section 2.20 of the Company Disclosure Schedule, no broker, finder or investment banker is entitled to any brokerage fee, finder's fee, opinion fee, success fee, transaction fee or other fee or commission in connection with the Contemplated Transactions based upon arrangements made by or on behalf of the Company.

2.21 **Disclosure.** The information supplied by the Company for inclusion in the Proxy Statement (including any of the Company Financials) will not, as of the date of the Proxy Statement or as of the date such information is prepared or presented, (i) contain any statement that is inaccurate or misleading with respect to any material facts, or (ii) omit to state any material fact necessary in order to make such information, in light of the circumstances under which such information will be provided, not false or misleading.

2.22 **Transactions with Affiliates.**

(a) Section 2.22(a) of the Company Disclosure Schedule describes any material transactions or relationships, since January 1, 2017, between, on one hand, the Company and, on the other hand, any (i) executive officer or director of the Company or, to the Knowledge of the Company, or any of such executive officer's or director's immediate family members, (ii)



owner of more than 5% of the voting power of the outstanding Company Capital Stock or (iii) to the Knowledge of the Company, any “related person” (within the meaning of Item 404 of Regulation S-K under the Securities Act) of any such officer, director or owner (other than the Company) in the case of each of (i), (ii) or (iii) that is of the type that would be required to be disclosed under Item 404 of Regulation S-K under the Securities Act.

(b) Section 2.22(b) of the Company Disclosure Schedule lists each stockholders agreement, voting agreement, registration rights agreement, co-sale agreement or other similar Contract between the Company and any holders of Company Capital Stock, including any such Contract granting any Person investor rights, rights of first refusal, rights of first offer, registration rights, director designation rights or similar rights (collectively, the “*Investor Agreements*”).

2.23 Anti-Bribery. Neither the Company nor any of its directors, officers, employees, agents or any other Person acting on its behalf has directly or indirectly (i) used any funds for unlawful contributions, gifts, entertainment or other unlawful expenses relating to political activity or (ii) made any bribes, rebates, payoffs, influence payments, kickbacks, illegal payments, illegal political contributions, or other payments, in the form of cash, gifts, or otherwise, or taken any other action, in violation of the Foreign Corrupt Practices Act of 1977, the UK Bribery Act of 2010 or any other anti-bribery or anti-corruption Law (collectively, the “*Anti-Bribery Laws*”). The Company has not and has not been the subject of any investigation or inquiry by any Governmental Body with respect to potential violations of Anti-Bribery Laws.

2.24 Disclaimer of Other Representations or Warranties. Except as previously set forth in this Section 2 or in any certificate delivered by the Company to Parent and/or Merger Sub pursuant to this Agreement, the Company makes no representation or warranty, express or implied, at law or in equity, with respect to it or any of its assets, liabilities or operations, and any such other representations or warranties are hereby expressly disclaimed.

### **Section 3. REPRESENTATIONS AND WARRANTIES OF PARENT AND MERGER SUB**

Except (a) as set forth in the disclosure schedule delivered by Parent to the Company (the “*Parent Disclosure Schedule*”) or (b) as disclosed in the Parent SEC Documents filed with the SEC prior to the date hereof and publicly available on the SEC’s Electronic Data Gathering Analysis and Retrieval system (but (i) without giving effect to any amendment thereof filed with, or furnished to the SEC on or after the date hereof and (ii) excluding any disclosures contained under the heading “Risk Factors” and any disclosure of risks included in any “forward-looking statements” disclaimer or in any other section to the extent they are forward-looking statements or cautionary, predictive or forward-looking in nature), Parent and Merger Sub represent and warrant to the Company as follows:

#### **3.1 Due Organization; No Subsidiaries**

(a) Each of Parent and Merger Sub is a corporation duly incorporated, validly existing and in good standing under the Laws of the jurisdiction of its incorporation, and

has all necessary corporate power and authority to conduct its business in the manner in which its business is currently being conducted and to own or lease and use its property and assets in the manner in which its property and assets are currently owned or leased and used, except where the failure to have such power or authority would not reasonably be expected to prevent or materially delay the ability of Parent and Merger Sub to consummate the Contemplated Transactions. Since the date of its incorporation, Merger Sub has not engaged in any activities other than activities incident to its formation or in connection with or as contemplated by this Agreement.

(b) Parent is duly licensed and qualified to do business, and is in good standing (to the extent applicable in such jurisdiction), under the Laws of all jurisdictions where the nature of its business requires such licensing or qualification other than in jurisdictions where the failure to be so qualified individually or in the aggregate would not be reasonably expected to have a Parent Material Adverse Effect.

(c) Other than Merger Sub, Parent does not have any Subsidiary.

(d) Parent is not and has not otherwise been, directly or indirectly, a party to, member of or participant in any partnership, joint venture or similar business entity. Parent has not agreed and is not obligated to make, and is not bound by any Contract under which it may become obligated to make, any future investment in or capital contribution to any other Entity. Parent has not, at any time, been a general partner of, and has not otherwise been liable for any of the debts or other obligations of, any general partnership, limited partnership or other Entity.

3.2 **Organizational Documents.** Parent has made available to the Company accurate and complete copies of Parent and Merger Sub's Organizational Documents in effect as of the date of this Agreement. Neither Parent nor Merger Sub is in material breach or violation of its respective Organizational Documents.

3.3 **Authority; Binding Nature of Agreement.** Each of Parent and Merger Sub has all necessary corporate power and authority to enter into and to perform its obligations under this Agreement and, subject, with respect to Parent, to receipt of the Required Parent Stockholder Vote and, with respect to Merger Sub, the adoption of this Agreement by Parent in its capacity as sole stockholder of Merger Sub, to perform its obligations hereunder and to consummate the Contemplated Transactions. The Parent Board (at meetings duly called and held) has: (a) determined that the Contemplated Transactions are fair to, advisable and in the best interests of Parent and its stockholders; (b) authorized, approved and declared advisable this Agreement and the Contemplated Transactions, including the issuance of shares of Parent Common Stock to the stockholders of the Company pursuant to the terms of this Agreement and the treatment of the Company Options pursuant to this Agreement; and (c) determined to recommend, upon the terms and subject to the conditions set forth in this Agreement, that the stockholders of Parent vote to approve this Agreement and the Contemplated Transactions, including the issuance of shares of Parent Common Stock to the stockholders of the Company pursuant to the terms of this Agreement. The Merger Sub Board (by unanimous written consent) has: (x) determined that the Contemplated Transactions are fair to, advisable, and in the best interests of Merger Sub and its sole stockholder; (y) deemed advisable and approved this Agreement and the Contemplated Transactions; and (z) determined to recommend, upon the terms

and subject to the conditions set forth in this Agreement, that the stockholder of Merger Sub vote to adopt this Agreement and thereby approve the Contemplated Transactions. This Agreement has been duly executed and delivered by Parent and Merger Sub and, assuming the due authorization, execution and delivery by the Company, constitutes the legal, valid and binding obligation of Parent and Merger Sub, enforceable against each of Parent and Merger Sub in accordance with its terms, subject to the Enforceability Exceptions.

**3.4 Vote Required.** (a) The affirmative vote of the holders of a majority of the outstanding shares of Parent Common Stock is the only vote of the holders of any class or series of Parent's capital stock necessary to approve the proposals in Section 5.3(a)(i)(B). (b) the affirmative vote of a majority of the votes cast at the Parent Stockholders' Meeting is the only vote of the holders of any class or series of Parent's capital stock necessary to approve the proposals in Section 5.3(a)(ii) ((a) and (b), the "**Closing Parent Stockholder Vote**") and (c) the affirmative vote of the holders of a majority of the outstanding shares of Parent Common Stock is the only vote of the holders of any class or series of Parent's capital stock necessary to approve the proposals in Section 5.3(a)(i)(A) (the "**Required Parent Stockholder Vote**").

**3.5 Non-Contravention; Consents.** Subject to obtaining the Required Parent Stockholder Vote and the filing of the Certificate of Merger required by the DGCL, neither (x) the execution, delivery or performance of this Agreement by Parent or Merger Sub, nor (y) the consummation of the Contemplated Transactions, will directly or indirectly (with or without notice or lapse of time):

(a) contravene, conflict with or result in a violation of any of the provisions of the Organizational Documents of Parent or Merger Sub;

(b) contravene, conflict with or result in a violation of, or give any Governmental Body the right to challenge the Contemplated Transactions or to exercise any remedy or obtain any relief under, any Law or any order, writ, injunction, judgment or decree to which Parent or Merger Sub, or any of the assets owned or used by Parent or Merger Sub, is subject, except as would not reasonably be expected to be material to Parent or its business;

(c) contravene, conflict with or result in a violation of any of the terms or requirements of, or give any Governmental Body the right to revoke, withdraw, suspend, cancel, terminate or modify, any Governmental Authorization that is held by Parent, except as would not reasonably be expected to be material to Parent or its business;

(d) contravene, conflict with or result in a violation or breach of, or result in a default under, any provision of any Parent Material Contract, or give any Person the right to: (i) declare a default or exercise any remedy under any Parent Material Contract; (ii) any material payment, rebate, chargeback, penalty or change in delivery schedule under any Parent Material Contract; (iii) accelerate the maturity or performance of any Parent Material Contract; or (iv) cancel, terminate or modify any term of any Parent Material Contract, except in the case of any non-material breach, default, penalty or modification; or

(e) result in the imposition or creation of any Encumbrance upon or with respect to any asset owned or used by Parent (except for Permitted Encumbrances).

Except for (i) any Consent set forth on Section 3.5 of the Parent Disclosure Schedule under any Parent Contract, (ii) the Required Parent Stockholder Vote, (iii) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware pursuant to the DGCL, and (iv) such consents, waivers, approvals, orders, authorizations, registrations, declarations and filings as may be required under applicable federal and state securities Laws, Parent is not and will not be required to make any filing with or give any notice to, or to obtain any Consent from, any Person in connection with (x) the execution, delivery or performance of this Agreement, or (y) the consummation of the Contemplated Transactions (in each case other than pursuant to Parent Contracts that are not Parent Material Contracts). The Parent Board and the Merger Sub Board have taken and will take all actions necessary to ensure that the restrictions applicable to business combinations contained in Section 203 of the DGCL are, and will be, inapplicable to the execution, delivery and performance of this Agreement and to the consummation of the Contemplated Transactions. No other state takeover statute or similar Law applies or purports to apply to the Merger, this Agreement or any of the Contemplated Transactions.

### **3.6 Capitalization.**

(a) The authorized capital stock of Parent as of the date of this Agreement consists of (i) 50,000,000 shares of Parent Common Stock, par value \$0.01 per share, of which 22,822,716 shares have been issued and are outstanding as of the close of business on the Reference Date and (ii) 5,000,000 shares of preferred stock of Parent, par value \$0.01 per share, of which no shares have been issued and are outstanding as of the date of this Agreement. Parent does not hold any shares of its capital stock in its treasury. As of the close of business on the Reference Date, there are outstanding Parent Warrants to purchase 6,241,074 shares of Parent Common Stock.

(b) All of the outstanding shares of Parent Common Stock have been duly authorized and validly issued, and are fully paid and nonassessable. None of the outstanding shares of Parent Common Stock is entitled or subject to any preemptive right, right of participation, right of maintenance, right of repurchase or forfeiture, subscription right or any similar right and none of the outstanding shares of Parent Common Stock is subject to any right of first refusal in favor of Parent. Except as contemplated herein, there is no Parent Contract relating to the voting or registration of, or restricting any Person from purchasing, selling, pledging or otherwise disposing of (or granting any option or similar right with respect to), any shares of Parent Common Stock. Parent is not under any obligation, nor is it bound by any Contract pursuant to which it may become obligated, to repurchase, redeem or otherwise acquire any outstanding shares of Parent Common Stock or other securities.

(c) Except for the Parent Stock Plan, and except as set forth on Section 3.6(c) of the Parent Disclosure Schedule, Parent does not have any stock option plan or any other plan, program, agreement or arrangement providing for any equity-based compensation for any Person. As of the close of business on the Reference Date, 1,533,724 shares have been reserved for issuance upon exercise of Parent Options granted under the Parent Stock Plan that are

outstanding as of the date of this Agreement, 18,686 shares have been reserved for issuance upon the settlement of Parent RSUs granted under the Parent Stock Plan that are outstanding as of the date of this Agreement and 1,362,240 shares remain available for future issuance pursuant to the Parent Stock Plan.

(d) Except for the Parent Warrants, the Parent Stock Plan, including the Parent Options and the Parent RSUs, and as otherwise set forth on Section 3.6(d) of the Parent Disclosure Schedule, there is no: (i) outstanding subscription, option, call, warrant or right (whether or not currently exercisable) to acquire any shares of the capital stock or other securities of Parent or any of its Subsidiaries; (ii) outstanding security, instrument or obligation that is or may become convertible into or exchangeable for any shares of the capital stock or other securities of Parent or any of its Subsidiaries; or (iii) condition or circumstance that is reasonably likely to give rise to or provide a basis for the assertion of a claim by any Person to the effect that such Person is entitled to acquire or receive any shares of capital stock or other securities of Parent or any of its Subsidiaries. There are no outstanding or authorized stock appreciation, phantom stock, profit participation or other similar rights with respect to Parent or any of its Subsidiaries.

(e) All outstanding shares of Parent Common Stock, Parent Options, Parent RSUs, Parent Warrants and other securities of Parent have been issued and granted in material compliance with (i) all applicable securities Laws and other applicable Law, and (ii) all requirements set forth in applicable Contracts.

(f) Section 3.6(f) of the Parent Disclosure Schedule sets forth the following information with respect to each Parent Option and Parent RSUs outstanding as of the date of this Agreement, as applicable: (i) the name of the holder of the Parent Option or Parent RSU; (ii) the number of shares of Parent Common Stock subject to such Parent Option or Parent RSU at the time of grant; (iii) the number of shares of Parent Common Stock subject to such Parent Option or Parent RSU as of the date of this Agreement; (iv) the exercise price of each Parent Option; (v) the date on which such Parent Option or Parent RSU was granted; (vi) the applicable vesting schedule, including the number of vested and unvested shares as of the date of this Agreement and any acceleration provisions; (vii) the date on which each Parent Option expires; and (viii) whether any Parent Option is intended to constitute an “incentive stock option” (as defined in the Code) or a non-qualified stock option.

### **3.7 SEC Filings; Financial Statements**

(a) Parent has delivered or made available to the Company accurate and complete copies of all registration statements, proxy statements, Certifications (as defined below) and other statements, reports, schedules, forms and other documents filed by Parent with the SEC since January 1, 2017 (the “**Parent SEC Documents**”), other than such documents that can be obtained on the SEC’s website at [www.sec.gov](http://www.sec.gov). All material statements, reports, schedules, forms and other documents required to have been filed by Parent or its officers with the SEC have been so filed on a timely basis. As of the time it was filed with the SEC (or, if amended or superseded by a filing prior to the date of this Agreement, then on the date of such filing), each of the Parent SEC Documents complied in all material respects with the applicable requirements of the Securities Act or the Exchange Act (as the case may be) and, as of the time they were filed, none

of the Parent SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. The certifications and statements required by (i) Rule 13a-14 under the Exchange Act and (ii) 18 U.S.C. §1350 (Section 906 of the Sarbanes-Oxley Act) relating to the Parent SEC Documents (collectively, the “*Certifications*”) are accurate and complete and comply as to form and content with all applicable Laws. As used in this Section 3.7, the term “file” and variations thereof shall be broadly construed to include any manner in which a document or information is furnished, supplied or otherwise made available to the SEC.

(b) The financial statements (including any related notes) contained or incorporated by reference in the Parent SEC Documents: (i) complied as to form in all material respects with the published rules and regulations of the SEC applicable thereto; (ii) were prepared in accordance with GAAP (except as may be indicated in the notes to such financial statements or, in the case of unaudited financial statements, except as permitted by Form 10-Q of the SEC, and except that the unaudited financial statements may not contain footnotes and are subject to normal and recurring year-end adjustments) applied on a consistent basis unless otherwise noted therein throughout the periods indicated; and (iii) fairly present, in all material respects, the financial position of Parent as of the respective dates thereof and the results of operations and cash flows of Parent for the periods covered thereby. Other than as expressly disclosed in the Parent SEC Documents filed prior to the date hereof, there has been no material change in Parent’s accounting methods or principles that would be required to be disclosed in Parent’s financial statements in accordance with GAAP.

(c) Parent is in compliance in all material respects with the applicable current listing and governance rules and regulations of Nasdaq,

(d) Parent maintains a system of internal control over financial reporting (as defined in Rules 13a-15(f) and 15d-15(f) of the Exchange Act) that is designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP and to provide reasonable assurance (i) that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP, (ii) that receipts and expenditures are made only in accordance with authorizations of management and the Parent Board and (iii) regarding prevention or timely detection of the unauthorized acquisition, use or disposition of Parent’s assets that could have a material effect on Parent’s financial statements. Parent has evaluated the effectiveness of Parent’s internal control over financial reporting as of December 31, 2018, and, to the extent required by applicable Law, presented in any applicable Parent SEC Document that is a report on Form 10-K or Form 10-Q (or any amendment thereto) its conclusions about the effectiveness of the internal control over financial reporting as of the end of the period covered by such report or amendment based on such evaluation. Parent has disclosed, based on its most recent evaluation of internal control over financial reporting, to Parent’s auditors and audit committee (and made available to the Company a summary of the significant aspects of such disclosure) (A) all significant deficiencies, if any, in the design or operation of internal control over financial reporting that are reasonably likely to adversely affect Parent’s ability to record, process, summarize and report financial information and (B) any known fraud that involves management

or other employees who have a significant role in Parent's internal control over financial reporting. Parent has not identified, based on its most recent evaluation of internal control over financial reporting, any material weaknesses in the design or operation of Parent's internal control over financial reporting.

(e) Parent maintains "disclosure controls and procedures" (as defined in Rules 13a-15(e) and 15d-15(e) of the Exchange Act) that are reasonably designed to ensure that information required to be disclosed by Parent in the periodic reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported within the required time periods, and that all such information is accumulated and communicated to Parent's management as appropriate to allow timely decisions regarding required disclosure and to make the Certifications.

(f) Since January 1, 2017, there have been no internal investigations regarding financial reporting or accounting policies and practices discussed with, reviewed by or initiated at the direction of the chief executive officer, chief financial officer or general counsel of Parent, Parent Board or any committee thereof. Since January 1, 2017, neither Parent nor its independent auditors have identified (i) any significant deficiency or material weakness in the design or operation of the system of internal accounting controls utilized by Parent, (ii) any fraud, whether or not material, that involves Parent, Parent's management or other employees who have a role in the preparation of financial statements or the internal accounting controls utilized by Parent, or (iii) any claim or allegation regarding any of the foregoing.

(g) Section 3.7(g) of the Parent Disclosure Schedule lists, and Parent has delivered to the Company accurate and complete copies of the documentation creating or governing, all securitization transactions and "off-balance sheet arrangements" (as defined in Item 303(c) of Regulation S-K under the Exchange Act) effected by Parent or any of its Subsidiaries since January 1, 2017.

3.8 **Absence of Changes.** Except as set forth on Section 3.8 of the Parent Disclosure Schedule, between the date of the Parent Balance Sheet and the date of this Agreement, Parent and its Subsidiaries have conducted its business only in the Ordinary Course of Business (except for the execution and performance of this Agreement and the discussions, negotiations and transactions related thereto) and there has not been any (a) Parent Material Adverse Effect or (b) action, event or occurrence that would have required the consent of the Company pursuant to Section 4.1(b) had such action, event or occurrence taken place after the execution and delivery of this Agreement.

3.9 **Absence of Undisclosed Liabilities.** As of the date hereof, Parent does not have any Liability, individually or in the aggregate, of a type required to be recorded or reflected on a balance sheet or disclosed in the footnotes thereto under GAAP except for: (a) Liabilities disclosed, reflected or reserved against in the Parent Balance Sheet; (b) Liabilities that have been incurred by Parent since the date of the Parent Balance Sheet in the Ordinary Course of Business; (c) Liabilities for performance of obligations of Parent under Parent Contracts; (d) Liabilities incurred in connection with the Contemplated Transactions; (e) Liabilities which would not,

individually or in the aggregate, reasonably be expected to be material to Parent; and (f) Liabilities described in Section 3.9 of the Parent Disclosure Schedule.

3.10 **Title to Assets.** Parent owns, and has good and valid title to, or, in the case of leased properties and assets, valid leasehold interests in, all tangible properties or tangible assets and equipment used or held for use in its business or operations or purported to be owned by it, including: (a) all tangible assets reflected on the Parent Balance Sheet; and (b) all other tangible assets reflected in the books and records of Parent as being owned by Parent. All of such assets are owned or, in the case of leased assets, leased by Parent free and clear of any Encumbrances, other than Permitted Encumbrances.

3.11 **Real Property; Leasehold.** Parent does not own any real property. Parent has made available to the Company (a) an accurate and complete list of all real properties with respect to which Parent directly or indirectly holds a valid leasehold interest as well as any other real estate that is in the possession of or leased by Parent, and (b) copies of all leases under which any such real property is possessed (the "**Parent Real Estate Leases**"), each of which is in full force and effect, with no existing material default thereunder. Parent's use and operation of each such leased property conforms to all applicable Laws in all material respects, and Parent has exclusive possession of each such leased property and has not granted any occupancy rights to tenants or licensees with respect to such leased property. In addition, each such leased property is free and clear of all Encumbrances other than Permitted Encumbrances.

3.12 **Intellectual Property.**

(a) Section 3.12(a) of the Parent Disclosure Schedule identifies (i) the name of the applicant/registrant, (ii) the jurisdiction of application/registration, (iii) the application or registration number and (iv) any other co-owners, for each item of material Registered IP owned in whole or in part by Parent. To the Knowledge of Parent, each of the patents and patent applications included in the material Registered IP properly identifies by name each and every inventor of the inventions claimed therein as determined in accordance with applicable Laws of the United States. As of the date of this Agreement, no interference, opposition, reissue, reexamination or other proceeding of any nature (other than initial examination proceedings) is pending or, to the Knowledge of Parent, threatened in writing, in which the scope, validity, enforceability or ownership of any Registered IP listed on Section 3.12(a) of the Parent Disclosure Schedule is being or has been contested or challenged.

(b) Parent owns all right, title and interest in and to all material Parent IP (other than as disclosed on Section 3.12(a) of the Parent Disclosure Schedule), free and clear of all Encumbrances other than Permitted Encumbrances. To the Knowledge of Parent, each Parent Associate involved in the creation or development of any material Parent IP, pursuant to such Parent Associate's activities on behalf of Parent, has signed a written agreement containing an assignment of such Parent Associate's rights in such Parent IP to Parent and confidentiality provisions protecting the Parent IP.

(c) To the Knowledge of Parent, no funding, facilities or personnel of any Governmental Body or any university, college, research institute or other educational



institution has been used to create Parent IP, except for any such funding or use of facilities or personnel that does not result in such Governmental Body or institution obtaining ownership rights to such Parent IP or the right to receive royalties for the practice of such Parent IP.

(d) Section 3.12(d) of Parent Disclosure Schedule sets forth each license agreement pursuant to which Parent (i) is granted a license under any material Intellectual Property Right owned by any third party that is used by Parent in its business as currently conducted (each a “**Parent In-bound License**”) or (ii) grants to any third party a license under any material Parent IP or material Intellectual Property Right licensed to Parent under a Parent In-bound License (each a “**Parent Out-bound License**”) (provided, that, Parent In-bound Licenses shall not include material transfer agreements, services agreements, clinical trial agreements, non-disclosure agreements, commercially available Software-as-a-Service offerings, off-the-shelf software licenses or generally available patent license agreements entered into in the ordinary course of business; and Parent Out-bound Licenses shall not include material transfer agreements, clinical trial agreements, services agreements, non-disclosure agreements, or non-exclusive outbound licenses entered into in the ordinary course of business).

(e) To the Knowledge of Parent, (i) the operation of the business of Parent as currently conducted does not infringe any valid and enforceable Registered IP or misappropriate or otherwise violate any other Intellectual Property Right owned by any other Person; and (ii) no other Person is infringing, misappropriating or otherwise violating any Parent IP or any Intellectual Property Rights exclusively licensed to Parent. As of the date of this Agreement, no Legal Proceeding is pending (or, to the Knowledge of Parent, is threatened in writing) (A) against Parent alleging that the operation of the business of Parent infringes or constitutes the misappropriation or other violation of any Intellectual Property Rights of another Person or (B) by Parent alleging that another Person has infringed, misappropriated or otherwise violated any of Parent IP or any Intellectual Property Rights exclusively licensed to Parent. Since January 1, 2017, Parent has not received any written notice or other written communication alleging that the operation of the business of Parent infringes or constitutes the misappropriation or other violation of any Intellectual Property Right of another Person.

(f) None of Parent IP or, to the Knowledge of Parent, any material Intellectual Property Rights exclusively licensed to Parent is subject to any pending or outstanding injunction, directive, order, judgment or other disposition of dispute that adversely and materially restricts the use, transfer, registration or licensing by Parent of any such Parent IP or material Intellectual Property Rights exclusively licensed to Parent or its Subsidiaries.

(g) To the Knowledge of Parent, the operation of Parent’s business are in substantial compliance with all Laws pertaining to data privacy and data security of Sensitive Data, except to the extent that such noncompliance has not and would not reasonably be expected to have a Parent Material Adverse Effect. To the Knowledge of Parent, since January 1, 2017, there have been (i) no material losses or thefts of data or security breaches relating to Sensitive Data used in the business of Parent, (ii) no violations of any security policy of Parent regarding any such Sensitive Data, (iii) no unauthorized access or unauthorized use of any Sensitive Data used in the business of Parent and (iv) no unintended or improper disclosure of any personally identifiable information in the possession, custody or control of Parent or a contractor or agent

acting on behalf of Parent, in each case of (i) through (iv), except as would not reasonably be expected to, individually or in the aggregate, have a Parent Material Adverse Effect.

**3.13 Agreements, Contracts and Commitments.**

(a) Section 3.13 of the Parent Disclosure Schedule lists the following Parent Contracts in effect as of the date of this Agreement other than any Parent Benefit Plans or non-disclosure agreements entered into in the ordinary course of business or in connection with a potential strategic transaction (each, a "**Parent Material Contract**" and collectively, the "**Parent Material Contracts**"):

- (i) a material contract as defined in Item 601(b)(10) of Regulation S-K as promulgated under the Securities Act;
- (ii) each Contract relating to any agreement of indemnification or guaranty not entered into in the Ordinary Course of Business;
- (iii) each Contract containing (A) any covenant limiting the freedom of Parent to engage in any line of business or compete with any Person, (B) any most-favored pricing arrangement, (C) any exclusivity provision, or (D) any non-solicitation provision;
- (iv) each Contract, to Parent's Knowledge based on the express terms of the Contract, relating to capital expenditures and requiring payments after the date of this Agreement in excess of \$50,000 pursuant to its express terms and not cancelable without penalty;
- (v) each Contract relating to the disposition or acquisition of material assets or any ownership interest in any Entity;
- (vi) each Contract relating to any mortgages, indentures, loans, notes or credit agreements, security agreements or other agreements or instruments relating to the borrowing of money or extension of credit or creating any Encumbrances, in each case, in an amount in excess of \$100,000, with respect to any assets of Parent or any loans or debt obligations with officers or directors of Parent;
- (vii) each Contract requiring payment by or to Parent after the date of this Agreement in excess of \$100,000 pursuant to its express terms relating to: (A) any distribution agreement (identifying any that contain exclusivity provisions); (B) any agreement involving provision of services or products with respect to any pre-clinical or clinical development activities of Parent; (C) any dealer, distributor, joint marketing, alliance, joint venture, cooperation, development or other agreement currently in force under which Parent has continuing obligations to develop or market any product, technology or service, or any agreement pursuant to which Parent has continuing obligations to develop any Intellectual Property Rights that will not be owned, in whole or in part, by Parent; or (D) any Contract to license any third party to manufacture or produce any product, service or technology of Parent or any Contract to sell, distribute or

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commercialize any products or service of Parent, in each case, except for Contracts entered into in the Ordinary Course of Business;

(viii) each Contract with any Person, including any financial advisor, broker, finder, investment banker or other Person, providing advisory services to Parent in connection with the Contemplated Transactions;

(ix) each Parent Real Estate Lease;

(x) each Contract with any Governmental Body;

(xi) each Parent Out-bound License and Parent In-bound License;

(xii) each Contract containing any royalty, dividend or similar arrangement based on the revenues or profits of Parent; or

(xiii) any other Contract that is not terminable at will (with no penalty or payment) by Parent and (A) which involves payment or receipt by Parent after the date of this Agreement under any such agreement, contract or commitment of more than \$100,000 in the aggregate, or obligations after the date of this Agreement in excess of \$100,000 in the aggregate, or (B) that is material to the business or operations of Parent.

(b) Parent has delivered or made available to the Company accurate and complete copies of all Parent Material Contracts. There are no Parent Material Contracts that are not in written form. Except as set forth on Section 3.13 of the Parent Disclosure Schedule, Parent has not nor, to Parent's Knowledge, as of the date of this Agreement, has any other party to a Parent Material Contract, breached, violated or defaulted under, or received notice that it breached, violated or defaulted under, any of the terms or conditions of any Parent Material Contract in such manner as would permit any other party to cancel or terminate any such Parent Material Contract, or would permit any other party to seek damages which would reasonably be expected to be material to Parent or its business. As to Parent, as of the date of this Agreement, each Parent Material Contract is valid, binding, enforceable and in full force and effect, subject to the Enforceability Exceptions. No Person is renegotiating, or has a right pursuant to the terms of any Parent Material Contract to change, any material amount paid or payable to Parent under any Parent Material Contract or any other material term or provision of any Parent Material Contract.

#### 3.14 **Compliance; Permits.**

(a) Parent is, and since January 1, 2017 has been, in compliance in all material respects with all applicable Laws, including the FDCA, the FDA regulations adopted thereunder, the Public Health Service Act and any other similar Law administered or promulgated by the FDA or other Drug Regulatory Agency, except for any noncompliance, either individually or in the aggregate, which would not be material to Parent. No investigation, claim, suit, proceeding, audit or other action by any Governmental Body is pending or, to the Knowledge of Parent, threatened against Parent. There is no agreement, judgment, injunction, order or decree binding upon Parent which (i) has or would reasonably be expected to have the effect of prohibiting

or materially impairing any business practice of Parent, any acquisition of material property by Parent or the conduct of business by Parent as currently conducted, (ii) is reasonably likely to have an adverse effect on Parent's ability to comply with or perform any covenant or obligation under this Agreement, or (iii) is reasonably likely to have the effect of preventing, delaying, making illegal or otherwise interfering with the Contemplated Transactions. To the Knowledge of Parent, no condition or state of facts exists that is reasonably likely to give rise to a violation of, or a material liability or default under any applicable laws relating to Parent.

(b) Parent holds all required Governmental Authorizations which are material to the operation of the business of Parent as currently conducted (the "**Parent Permits**"). Section 3.14(b) of the Parent Disclosure Schedule identifies each Parent Permit. Parent is in material compliance with the terms of the Parent Permits. No Legal Proceeding is pending or, to the Knowledge of Parent, threatened, which seeks to revoke, limit, suspend, or materially modify any Parent Permit.

(c) There are no proceedings pending or, to the Knowledge of Parent, threatened with respect to an alleged material violation by Parent of the FDCA, FDA regulations adopted thereunder, the Public Health Service Act or any other similar Law administered or promulgated by any Drug Regulatory Agency.

(d) All clinical, pre-clinical and other studies and tests conducted by or on behalf of, or sponsored by, Parent, or in which Parent or its respective current products or product candidates have participated, were and, if still pending, are being conducted in all material respects in accordance with standard medical and scientific research procedures and in compliance in all material respects with the applicable regulations of any applicable Drug Regulatory Agency and other applicable Law, including 21 C.F.R. Parts 50, 54, 56, 58 and 312. No preclinical or clinical trial conducted by or on behalf of Parent has been terminated or suspended prior to completion for safety or non-compliance reasons. Since January 1, 2017, Parent has not received any notices, correspondence, or other communications from any Drug Regulatory Agency requiring, or to the Knowledge of Parent threatening to initiate, the termination or suspension of any clinical studies conducted by or on behalf of, or sponsored by, Parent or in which Parent or its current products or product candidates have participated.

(e) Parent is not the subject of any pending or, to the Knowledge of Parent, threatened investigation in respect of its business or products by the FDA pursuant to its "Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities" Final Policy set forth in 56 Fed. Reg. 46191 (September 10, 1991) and any amendments thereto. To the Knowledge of Parent, Parent has not committed any acts, made any statement, or has not failed to make any statement, in each case in respect of its business or products that would violate the FDA's "Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities" Final Policy, and any amendments thereto. Parent or any of its officers, employees or agents has not been convicted of any crime or engaged in any conduct that could result in a debarment or exclusion (i) under 21 U.S.C. Section 335a or (ii) any similar applicable Law. No debarment or exclusionary claims, actions, proceedings or investigations in respect of their business or products are pending or, to the Knowledge of Parent, threatened against Parent or any of its officers, employees or agents.

### **3.15 Legal Proceedings; Orders.**

(a) As of the date of this Agreement, there is no material pending Legal Proceeding and, to the Knowledge of Parent, no Person has threatened in writing to commence any Legal Proceeding: (i) that involves (A) Parent, (B) any Parent Associate (in his or her capacity as such) or (C) any of the material assets owned or used by Parent; or (ii) that may have the effect of preventing, delaying, making illegal or otherwise materially interfering with, the Contemplated Transactions.

(b) Except as set forth in Section 3.15(b) of the Parent Disclosure Schedule, since January 1, 2017 through the date of this Agreement, no Legal Proceeding has been pending against Parent that resulted in material liability to Parent.

(c) There is no order, writ, injunction, judgment or decree to which Parent, or any of the material assets owned or used by Parent, is subject. To the Knowledge of Parent, no officer of Parent is subject to any order, writ, injunction, judgment or decree that prohibits such officer or employee from engaging in or continuing any conduct, activity or practice relating to the business of Parent or to any material assets owned or used by Parent.

(d) Since January 1, 2017 through the date of this Agreement, Parent has not settled or compromised any proceeding or claim, whether filed or threatened.

### **3.16 Tax Matters.**

(a) Parent has timely filed all income Tax Returns and other material Tax Returns that they were required to file under applicable Law. All such Tax Returns are correct and complete in all material respects and have been prepared in compliance with all applicable Law. No claim has ever been made by any Governmental Body in any jurisdiction where Parent does not file a particular Tax Return or pay a particular Tax that Parent is subject to taxation by that jurisdiction.

(b) All income and other material Taxes due and owing by Parent on or before the date hereof (whether or not shown on any Tax Return) have been fully paid. The unpaid Taxes of Parent did not, as of the date of the Parent Balance Sheet, materially exceed the reserve for Tax liability (excluding any reserve for deferred Taxes established to reflect timing differences between book and Tax items) set forth on the face of the Parent Balance Sheet. Since the Parent Balance Sheet Date, Parent has not incurred any material Liability for Taxes outside the Ordinary Course of Business.

(c) All Taxes that Parent is or was required by Law to withhold or collect have been duly and timely withheld or collected in all material respects on behalf of its employees, independent contractors, stockholders, lenders, customers or other third parties and, have been timely paid to the proper Governmental Body or other Person or properly set aside in accounts for this purpose.

(d) There are no Encumbrances for Taxes (other than Taxes not yet due and payable) upon any of the assets of Parent.

(e) No deficiencies for income or other material Taxes with respect to Parent have been claimed, proposed or assessed by any Governmental Body in writing. There are no pending or ongoing, and to the Knowledge of Parent, threatened audits, assessments or other actions for or relating to any liability in respect of a material amount of Taxes of Parent. Neither Parent nor any of its predecessors has waived any statute of limitations in respect of any income or other material Taxes or agreed to any extension of time with respect to any income or other material Tax assessment or deficiency.

(f) Parent has not been a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code during the applicable period specified in Section 897(c)(1)(A)(ii) of the Code.

(g) Parent is not a party to any Tax allocation agreement, Tax sharing agreement, Tax indemnity agreement, or similar agreement or arrangement, other than customary commercial contracts entered into in the Ordinary Course of Business the principal subject matter of which is not Taxes.

(h) Parent will not be required to include any material item of income in, or exclude any material item of deduction from, taxable income for any Tax period (or portion thereof) ending after the Closing Date as a result of any: (i) change in method of accounting by Parent for Tax purposes; (ii) use of an improper method of accounting by Parent for a Tax period ending on or prior to the Closing Date; (iii) "closing agreement" as described in Section 7121 of the Code (or any similar provision of state, local or foreign Law) executed by Parent on or prior to the Closing Date; (iv) intercompany transaction or excess loss account described in Treasury Regulations under Section 1502 of the Code (or any similar provision of state, local or foreign Law) of Parent; (v) installment sale or open transaction disposition made by Parent on or prior to the Closing Date; (vi) prepaid amount received or deferred revenue accrued by Parent on or prior to the Closing Date; (vii) application of Section 367(d) of the Code to any transfer of intangible property by Parent on or prior to the Closing Date; (viii) application of Sections 951 or 951A of the Code (or any similar provision of state, local or foreign Law) to any income received or accrued by Parent on or prior to the Closing Date; or (ix) election under Section 108(i) of the Code (or any similar provision of state, local or foreign Law) made by Parent on or prior to the Closing Date. Parent has not made any election under Section 965(h) of the Code.

(i) Parent has never been (i) a member of a consolidated, combined or unitary Tax group (other than such a group the common parent of which is Parent) or (ii) a party to any joint venture, partnership, or other arrangement that is treated as a partnership for U.S. federal income Tax purposes. Parent has no Liability for any material Taxes of any Person (other than Parent and any of its Subsidiaries) under Treasury Regulations Section 1.1502-6 (or any similar provision of state, local, or foreign Law), or as a transferee or successor.

(j) Parent has not distributed stock of another Person, or had its stock distributed by another Person, in a transaction that was purported or intended to be governed in whole or in part by Section 355 of the Code or Section 361 of the Code (or any similar provisions of state, local or foreign Law).

(k) Parent (i) is not a “controlled foreign corporation” as defined in Section 957 of the Code; (ii) is not a “passive foreign investment company” within the meaning of Section 1297 of the Code; or (iii) has ever had a permanent establishment (within the meaning of an applicable Tax treaty) or otherwise had an office or fixed place of business in a country other than the country in which it is organized.

(l) Parent has not participated in or been a party to a transaction that, as of the date of this Agreement, constitutes a “listed transaction” that is required to be reported to the IRS pursuant to Section 6011 of the Code and applicable Treasury Regulations thereunder.

(m) Parent has not taken any action and does not know of any fact that would reasonably be expected to prevent the Merger from qualifying for the Intended Tax Treatment.

For purposes of this Section 3.16, each reference to Parent shall be deemed to include any Person that was liquidated into, merged with, or is otherwise a predecessor to, Parent.

### **3.17 Employee and Labor Matters: Benefit Plans**

(a) Section 3.17(a) of the Parent Disclosure Schedule is a list of all material Parent Benefit Plans, including, without limitation, each Parent Benefit Plan that provides for retirement, change in control, stay or retention deferred compensation, incentive compensation, severance or retiree medical or life insurance benefits. “**Parent Benefit Plan**” means each (i) “employee benefit plan” as defined in Section 3(3) of ERISA and (ii) other pension, retirement, deferred compensation, excess benefit, profit sharing, bonus, incentive, equity or equity-based, phantom equity, employment (other than at-will employment offer letters on Parent’s standard form and other than individual Parent Options, Parent RSUs or other compensatory equity award agreements made pursuant to Parent’s standard forms, in which case only representative standard forms of such agreements shall be scheduled), consulting, severance, change-of-control, retention, health, life, disability, group insurance, paid-time off, holiday, welfare and fringe benefit plan, program, contract, or arrangement (whether written or unwritten, qualified or nonqualified, funded or unfunded and including any that have been frozen or terminated), in any case, maintained, contributed to, or required to be contributed to, by Parent or Parent ERISA Affiliates for the benefit of any current or former employee, director, officer or independent contractor of Parent or under which Parent has any actual or contingent liability (including, without limitation, as to the result of it being treated as a single employer under Code Section 414 with any other person).

(b) As applicable with respect to each material Parent Benefit Plan, Parent has made available to the Company, true and complete copies of (i) each material Parent Benefit Plan, including all amendments thereto, and in the case of an unwritten material Parent Benefit Plan, a written description thereof, (ii) all current trust documents, investment management contracts, custodial agreements, administrative services agreements and insurance and annuity contracts relating thereto, (iii) the current summary plan description and each summary of material modifications thereto, (iv) the most recently filed annual reports with any Governmental Body (*e.g.*, Form 5500 and all schedules thereto), (v) the most recent IRS determination, opinion or advisory letter, (vi) the most recent summary annual reports, nondiscrimination testing reports,

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actuarial reports, financial statements and trustee reports, (vii) all records, notices and filings concerning IRS or Department of Labor or other Governmental Body audits or investigations, "prohibited transactions" within the meaning of Section 406 of ERISA or Section 4975 of the Code and (viii) all policies and procedures established to comply with the privacy and security rules of HIPAA.

(c) Each Parent Benefit Plan has been maintained, operated and administered in compliance in all material respects with its terms and any related documents or agreements and the applicable provisions of ERISA, the Code and all other Laws, and no event has occurred which will or could cause any such Parent Benefit Plan to fail to comply with such requirements and no notice has been issued by any governmental authority questioning or challenging such compliance.

(d) The Parent Benefit Plans which are "employee pension benefit plans" within the meaning of Section 3(2) of ERISA and which are intended to meet the qualification requirements of Section 401(a) of the Code have received determination or opinion letters from the IRS on which they may currently rely to the effect that such plans are qualified under Section 401(a) of the Code and the related trusts are exempt from federal income Taxes under Section 501(a) of the Code, respectively, and to the Knowledge of Parent nothing has occurred that would reasonably be expected to materially adversely affect the qualification of such Parent Benefit Plan or the tax exempt status of the related trust.

(e) Neither Parent nor any Parent ERISA Affiliate maintains, contributes to, is required to contribute to, or has or has had any actual or contingent liability with respect to, (i) any "employee pension benefit plan" (within the meaning of Section 3(2) of ERISA) that is subject to Title IV or Section 302 of ERISA or Section 412 of the Code, (ii) any "multiemployer plan" (within the meaning of Section 3(37) of ERISA), (iii) any "multiple employer plan" (within the meaning of Section 413 of the Code) or (iv) any "multiple employer welfare arrangement" (within the meaning of Section 3(40) of ERISA). None of the assets of any Parent Benefit Plan are invested in employer securities or employer real property.

(f) There are no pending audits or investigations by any Governmental Body involving any Parent Benefit Plan, and no pending or, to the Knowledge of Parent, threatened claims (except for individual claims for benefits payable in the normal operation of the Parent Benefit Plans), suits or proceedings involving any Parent Benefit Plan, any fiduciary thereof or service provider thereto, in any case except as would not be reasonably expected to result in material liability to Parent. All contributions and premium payments required to have been made under any of the Parent Benefit Plans or by applicable Law (without regard to any waivers granted under Section 412 of the Code), have been timely made and neither Parent nor any Parent ERISA Affiliate has any liability for any unpaid contributions with respect to any Parent Benefit Plan.

(g) Neither Parent or any Parent ERISA Affiliates, nor to the Knowledge of Parent, any fiduciary, trustee or administrator of any Parent Benefit Plan, has engaged in, or in connection with the transactions contemplated by this Agreement will engage in, any transaction with respect to any Parent Benefit Plan which would subject any such Parent



Benefit Plan, Parent or Parent ERISA Affiliates to a material Tax, material penalty or material liability for a “prohibited transaction” under Section 406 of ERISA or Section 4975 of the Code.

(h) No Parent Benefit Plan provides death, medical, dental, vision, life insurance or other welfare benefits beyond termination of service or retirement other than coverage mandated by Law and neither Parent nor any Parent ERISA Affiliates has made a written or oral representation promising the same.

(i) Except as set forth in Section 3.17(i) of the Parent Disclosure Schedule, neither the execution of, nor the performance of the transactions contemplated by, this Agreement will either alone or in connection with any other event(s) (i) result in any payment becoming due to any current or former employee, director, officer, or independent contractor of Parent, (ii) increase any amount of compensation or benefits otherwise payable under any Parent Benefit Plan, (iii) result in the acceleration of the time of payment, funding or vesting of any benefits under any Parent Benefit Plan, (iv) require any contribution or payment to fund any obligation under any Parent Benefit Plan or (v) limit the right to merge, amend or terminate any Parent Benefit Plan.

(j) Neither the execution of, nor the consummation of the transactions contemplated by this Agreement (either alone or when combined with the occurrence of any other event, including without limitation, a termination of employment) will result in the receipt or retention by any person who is a “disqualified individual” (within the meaning of Code Section 280G) with respect to Parent of any payment or benefit that is or could be characterized as a “parachute payment” (within the meaning of Code Section 280G), determined without regard to the application of Code Section 280G(b)(5).

(k) The exercise price of each Parent Option is not, never has been and can never be less than the fair market value of one share of Parent Common Stock as of the grant date of such Parent Option.

(l) Each Parent Benefit Plan providing for deferred compensation that constitutes a “nonqualified deferred compensation plan” (as defined in Section 409A(d)(1) of the Code and the regulations promulgated thereunder) is, and has been, established, administered and maintained in compliance with the requirements of Section 409A of the Code and the regulations promulgated thereunder in all material respects.

(m) No current or former employee, officer, director or independent contractor of Parent has any “gross up” agreements with Parent or other assurance of reimbursement by Parent for any Taxes imposed under Code Section 409A or Code Section 4999.

(n) Parent does not have any Parent Benefit Plan that is maintained outside of the United States.

(o) There have been no acts or omissions by Parent or any Parent ERISA Affiliates which have given rise to or may give rise to interest, fines, penalties, taxes or related charges under section 502 of ERISA or Chapters 43, 47, 68 or 100 of the Code for which

Parent or any Parent ERISA Affiliates may be liable or under Section 409A of the Code for which Parent, any Parent ERISA Affiliates or any participant in any Parent Benefit Plan that is a nonqualified deferred compensation plan (within the meaning of section 409A of the Code) may be liable. Parent, and each Parent Benefit Plan that is a Health Plan (i) is currently in compliance in all material respects with the Healthcare Reform Laws, and (ii) has been in compliance in all material respects with all applicable Healthcare Reform Laws since March 23, 2010. No event has occurred, and no conditions or circumstance exists, that would reasonably be expected to subject Parent, or any Health Plan, to material penalties or excise taxes under Sections 4980D, 4980H, or 4980I of the Code or any other provision of the Healthcare Reform Laws.

(p) Parent is not a party to, bound by, and does not have a duty to bargain under, any collective bargaining agreement or other Contract with a labor union, labor organization, or similar Person representing any of its employees, and there is no labor union, labor organization, or similar Person representing or, to the Knowledge of Parent, purporting to represent or seeking to represent any employees of Parent, including through the filing of a petition for representation election.

(q) Parent is, and since January 1, 2017 has been, in material compliance with all applicable Laws respecting labor, employment, employment practices, and terms and conditions of employment, including worker classification, discrimination, harassment and retaliation, equal employment opportunities, fair employment practices, meal and rest periods, immigration, employee safety and health, wages (including overtime wages), unemployment and workers' compensation, leaves of absence, and hours of work. Except as would not be reasonably likely to result in a material liability to Parent, with respect to employees of Parent, Parent, since January 1, 2017: (i) has withheld and reported all amounts required by Law or by agreement to be withheld and reported with respect to wages, salaries and other payments, benefits, or compensation to employees, (ii) is not liable for any arrears of wages (including overtime wages), severance pay or any Taxes or any penalty for failure to comply with any of the foregoing, and (iii) is not liable for any payment to any trust or other fund governed by or maintained by or on behalf of any Governmental Body, with respect to unemployment compensation benefits, disability, social security or other benefits or obligations for employees (other than routine payments to be made in the Ordinary Course of Business). There are no actions, suits, claims, charges, lawsuits, investigations, audits or administrative matters pending or, to the Knowledge of Parent, threatened or reasonably anticipated against Parent relating to any employee, applicant for employment, consultant, employment agreement or Parent Benefit Plan (other than routine claims for benefits).

(r) Except as would not be reasonably likely to result in a material liability to Parent, with respect to each individual who currently renders services to Parent, Parent has accurately classified each such individual as an employee, independent contractor, or otherwise under all applicable Laws and, for each individual classified as an employee, Parent has accurately classified him or her as overtime eligible or overtime ineligible under all applicable Laws. Parent does not have any material liability with respect to any misclassification of: (a) any Person as an independent contractor rather than as an employee, (b) any employee leased from another employer, or (c) any employee currently or formerly classified as exempt from overtime wages.

(s) There is not and has not been in the past three years, nor is there or has there been in the past three years any threat of, any strike, slowdown, work stoppage, lockout, union election petition, demand for recognition, or any similar activity or dispute, or, to the Knowledge of Parent, any union organizing activity, against Parent. No event has occurred, and no condition or circumstance exists, that might directly or indirectly be likely to give rise to or provide a basis for the commencement of any such strike, slowdown, work stoppage, lockout, union election petition, demand for recognition, any similar activity or dispute, or, to the Knowledge of Parent, any union organizing activity.

(t) There is no Legal Proceeding, claim, unfair labor practice charge or complaint, labor dispute or grievance pending or, to the Knowledge of Parent, threatened against Parent relating to labor, employment, employment practices, or terms and conditions of employment.

3.18 **Environmental Matters.** Parent is, and since January 1, 2013 has been, in compliance with all applicable Environmental Laws, which compliance includes the possession by Parent of all permits and other Governmental Authorizations required under applicable Environmental Laws and compliance with the terms and conditions thereof, except for any failure to be in such compliance that, either individually or in the aggregate, would not reasonably be expected to be material to Parent or its business. Parent has not received since January 1, 2013 (or prior to that time, which is pending and unresolved), any written notice or other communication (in writing or otherwise), whether from a Governmental Body or other Person, that alleges that Parent is not in compliance with or has liability pursuant to any Environmental Law and, to the Knowledge of Parent, there are no circumstances that would reasonably be expected to prevent or interfere with Parent's compliance in any material respects with any Environmental Law, except where such failure to comply would not reasonably be expected to be material to Parent or its business. Parent is not aware of any fact or circumstance which could involve Parent in any environmental litigation or impose any environmental liability upon Parent. No current or (during the time a prior property was leased or controlled by Parent) prior property leased or controlled by Parent has had a release of or exposure to Hazardous Materials in material violation of or as would reasonably be expected to result in any material liability of Parent pursuant to Environmental Law. No consent, approval or Governmental Authorization of or registration or filing with any Governmental Body is required by Environmental Laws in connection with the execution and delivery of this Agreement or the consummation of Contemplated Transactions. Prior to the date hereof, Parent has provided or otherwise made available to the Company true and correct copies of all material environmental reports, assessments, studies and audits in the possession or control of Parent with respect to any property leased or controlled by Parent or any business operated by it.

3.19 **Transactions with Affiliates.** Except as set forth in Section 3.19 of the Parent Disclosure Schedule, no event has occurred that would be required to be reported by Parent pursuant to Item 404 of Regulation S-K.

3.20 **Insurance.** Parent maintains insurance policies, including insurance covering directors and officers for securities law and other customary liabilities, with reputable insurance carriers against all risks of a character and in such amounts as are usually insured against

by similarly situated companies in the same or similar business and in such amounts and against such risks as Parent has reasonably determined is prudent, sufficient and adequate to cover the claims disclosed on Section 3.15(b) of the Parent Disclosure Schedule. Parent has delivered or made available to the Company accurate and complete copies of all material insurance policies and all material self-insurance programs and arrangements relating to the business, assets, liabilities and operations of Parent. Each of such insurance policies is in full force and effect and Parent is in compliance in all material respects with the terms thereof. Other than customary end of policy notifications from insurance carriers, since January 1, 2017, Parent has not received any notice or other communication regarding any actual or possible: (i) cancellation or invalidation of any insurance policy; or (ii) refusal or denial of any coverage, reservation of rights or rejection of any material claim under any insurance policy. Parent has provided timely written notice to the appropriate insurance carrier(s) of each Legal Proceeding that is currently pending against Parent for which Parent has insurance coverage, and no such carrier has issued a denial of coverage or a reservation of rights with respect to any such Legal Proceeding, or informed Parent of its intent to do so. Section 3.20 of the Parent Disclosure Schedule contains a complete and accurate list of all policies of fire, liability, workers' compensation, title and other forms of insurance owned, held by or otherwise applicable, as of the date of this Agreement, to the assets, properties or operations of Parent. Such policies are sufficient for compliance by Parent with (i) all requirements of applicable Law and (ii) all Contracts to which Parent is a party. There exists no event, occurrence, condition or act which, with the giving of notice, the lapse of time or the happening of any other event or condition would become a default thereunder. Parent has not been refused any insurance or suffered the cancellation of any insurance with respect to the assets, properties or operations of Parent, by any insurance carrier to which it has applied for any such insurance or with which it has carried insurance. There are no pending or, to the Knowledge of Parent, threatened material claims under any insurance policy except as described on Section 3.20 of the Parent Disclosure Schedule.

3.21 **No Financial Advisors.** Except as set forth on Section 3.21 of the Parent Disclosure Schedule, no broker, finder or investment banker is entitled to any brokerage fee, finder's fee, opinion fee, success fee, transaction fee or other fee or commission in connection with the Contemplated Transactions based upon arrangements made by or on behalf of Parent.

3.22 **Anti-Bribery.** Neither Parent nor any of its directors, officers, employees, agents or any other Person acting on its behalf has directly or indirectly (i) used any funds for unlawful contributions, gifts, entertainment or other unlawful expenses relating to political activity or (ii) made any bribes, rebates, payoffs, influence payments, kickbacks, illegal payments, illegal political contributions, or other payments, in the form of cash, gifts, or otherwise, or taken any other action, in violation of Anti-Bribery Laws. Parent is not or has not been the subject of any investigation or inquiry by any Governmental Body with respect to potential violations of Anti-Bribery Laws.

3.23 **Valid Issuance.** The Parent Common Stock to be issued in the Merger will, when issued in accordance with the provisions of this Agreement, be validly issued, fully paid and nonassessable.

3.24 **Opinion of Financial Advisor.** The Parent Board has received an opinion of MTS to the effect that, as of the date of this Agreement and subject to the assumptions,

qualifications, limitations and other matters set forth therein, the Exchange Ratio is fair, from a financial point of view, to the stockholders of Parent. It is agreed and understood that such opinion is for the benefit of the Parent Board and may not be relied upon by the Company.

3.25 **Disclaimer of Other Representations or Warranties.** Except as previously set forth in this Section 3 or in any certificate delivered by Parent or Merger Sub to the Company pursuant to this Agreement, neither Parent nor Merger Sub makes any representation or warranty, express or implied, at law or in equity, with respect to it or any of its assets, liabilities or operations, and any such other representations or warranties are hereby expressly disclaimed.

#### **Section 4. CERTAIN COVENANTS OF THE PARTIES**

##### **4.1 Operation of Parent's Business.**

(a) Except as set forth on Section 4.1(a) of the Parent Disclosure Schedule, as expressly permitted by this Agreement, as required by applicable Law or unless the Company shall otherwise consent in writing (which consent shall not be unreasonably withheld, delayed or conditioned), during the period commencing on the date of this Agreement and continuing until the earlier to occur of the termination of this Agreement pursuant to Section 9 and the Effective Time (the "**Pre-Closing Period**"): Parent shall conduct its business and operations in the Ordinary Course of Business and in compliance in all material respects with all applicable Laws and the requirements of all Contracts that constitute Parent Material Contracts.

(b) Except (i) as expressly permitted by this Agreement, (ii) as set forth in Section 4.1(b) of the Parent Disclosure Schedule, (iii) as required by applicable Law or (iv) with the prior written consent of the Company (which consent shall not be unreasonably withheld, delayed or conditioned), at all times during the Pre-Closing Period, Parent shall not:

(i) declare, accrue, set aside or pay any dividend or make any other distribution in respect of any shares of its capital stock or repurchase, redeem or otherwise reacquire any shares of its capital stock or other securities (except in connection with the payment of the exercise price and/or withholding Taxes incurred upon the exercise, settlement or vesting of any award granted under the Parent Stock Plan);

(ii) sell, issue, grant, pledge or otherwise dispose of or encumber or authorize any of the foregoing with respect to: (A) any capital stock or other security of Parent (except for Parent Common Stock issued upon the valid exercise of outstanding Parent Options, Parent RSUs or Parent Warrants); (B) any option, warrant or right to acquire any capital stock or any other security, other than option grants to employees and service providers in the Ordinary Course of Business; or (C) any instrument convertible into or exchangeable for any capital stock or other security of Parent;

(iii) except as required to give effect to anything in contemplation of the Closing, amend any of its Organizational Documents, or effect or be a party to any merger, consolidation, share exchange, business combination,

recapitalization, reclassification of shares, stock split, reverse stock split or similar transaction except, for the avoidance of doubt, the Contemplated Transactions;

(iv) form any Subsidiary or acquire any equity interest or other interest in any other Entity or enter into a joint venture with any other Entity;

(v) (A) lend money to any Person (except for the advance of expenses to employees, directors and consultants in the Ordinary Course of Business), (B) incur or guarantee any indebtedness for borrowed money, (C) guarantee any debt securities of others, or (D) make any capital expenditure in excess of the budgeted capital expenditure amounts set forth in the Parent operating budget delivered to the Company concurrently with the execution of this Agreement (the "**Parent Budget**"), in the case of (A) through (D) collectively, other than in an aggregate amount that does not exceed \$50,000;

(vi) other than as required by applicable Law or the terms of any Parent Benefit Plan as in effect on the date of this: (A) adopt, terminate, establish or enter into any Parent Benefit Plan; (B) cause or permit any Parent Benefit Plan to be amended in any material respect; (C) pay any bonus or make any profit-sharing or similar payment to, or increase the amount of the wages, salary, commissions, benefits or other compensation or remuneration payable to, any of its directors, officers or employees, other than increases in base salary and annual cash bonus opportunities and payments made in the Ordinary Course of Business consistent with past practice; (D) increase the severance or change of control benefits offered to any current or new employees, directors or consultants or (E) hire, terminate or give notice of termination to any (x) officer or (y) employee whose annual base salary is or is expected to be more than \$200,000 per year;

(vii) recognize any labor union, labor organization, or similar Person;

(viii) enter into any material transaction other than in the Ordinary Course of Business;

(ix) acquire any material asset or sell, lease or otherwise irrevocably dispose of any of its assets or properties, or grant any Encumbrance with respect to such assets or properties, except in the Ordinary Course of Business;

(x) sell, assign, transfer, license, sublicense or otherwise dispose of any material Parent IP (other than pursuant tonon-exclusive licenses in the Ordinary Course of Business);

(xi) make, change or revoke any material Tax election, fail to pay any income or other material Tax as such Tax becomes due and payable, file any amendment making any material change to any Tax Return, settle or compromise any income or other material Tax liability, enter into any Tax allocation, sharing, indemnification or other similar agreement or arrangement (other than customary commercial contracts entered into in the Ordinary Course of Business the principal subject

matter of which is not Taxes), request or consent to any extension or waiver of any limitation period with respect to any claim or assessment for any income or other material Taxes (other than pursuant to an extension of time to file any Tax Return granted in the Ordinary Course of Business of not more than six months), or adopt or change any material accounting method in respect of Taxes;

(xii) enter into, materially amend or terminate any Parent Material Contract;

(xiii) other than as required by Law or GAAP, take any action to change accounting policies or procedures;

(xiv) initiate or settle any material Legal Proceeding;

(xv) enter into or amend a Contract that would reasonably be expected to prevent or materially impede, interfere with, hinder or delay the consummation of the Merger; or

(xvi) agree, resolve or commit to do any of the foregoing.

Nothing contained in this Agreement shall give the Company, directly or indirectly, the right to control or direct the operations of Parent prior to the Effective Time. Prior to the Effective Time, Parent shall exercise, consistent with the terms and conditions of this Agreement, complete unilateral control and supervision over its business operations.

#### **4.2 Operation of the Company's Business.**

(a) Except as set forth on Section 4.2(a) of the Company Disclosure Schedule, as expressly permitted by this Agreement, as required by applicable Law or unless Parent shall otherwise consent in writing (which consent shall not be unreasonably withheld, delayed or conditioned), during the Pre-Closing Period: the Company shall conduct its business and operations in the Ordinary Course of Business and in compliance in all material respects with all applicable Laws and the requirements of all Contracts that constitute Company Material Contracts.

(b) Except (i) as expressly permitted by this Agreement, (ii) as set forth in Section 4.2(b) of the Company Disclosure Schedule, (iii) as required by applicable Law or (iv) with the prior written consent of Parent (which consent shall not be unreasonably withheld, delayed or conditioned), at all times during the Pre-Closing Period, the Company shall not do any of the following:

(i) declare, accrue, set aside or pay any dividend or make any other distribution in respect of any shares of capital stock; or repurchase, redeem or otherwise reacquire any shares of its capital stock or other securities (except for shares of Company Common Stock from terminated employees, directors or consultants of the Company);

(ii) sell, issue, grant, pledge or otherwise dispose of or encumber or authorize any of the foregoing with respect to: (A) any capital stock or other security of the Company (except for shares of outstanding Company Common Stock issued upon the valid exercise of Company Options); (B) any option, warrant or right to acquire any capital stock or any other security, other than option grants to employees and service providers in the Ordinary Course of Business; or (C) any instrument convertible into or exchangeable for any capital stock or other security of the Company;

(iii) except as required to give effect to anything in contemplation of the Closing, amend any of its Organizational Documents, or effect or be a party to any merger, consolidation, share exchange, business combination, recapitalization, reclassification of shares, stock split, reverse stock split or similar transaction except, for the avoidance of doubt, the Contemplated Transactions;

(iv) form any Subsidiary or acquire any equity interest or other interest in any other Entity or enter into a joint venture with any other Entity;

(v) (A) lend money to any Person (except for the advance of expenses to employees, directors and consultants in the Ordinary Course of Business), (B) incur or guarantee any indebtedness for borrowed money, (C) guarantee any debt securities of others, or (D) make any capital expenditure in excess of the budgeted capital expenditure amounts set forth in the Company operating budget delivered to Parent concurrently with the execution of this Agreement (the "**Company Budget**");

(vi) other than as required by applicable Law or the terms of any Company Benefit Plan as in effect on the date of this Agreement: (A) adopt, terminate, establish or enter into any Company Benefit Plan; (B) cause or permit any Company Benefit Plan to be amended in any material respect; (C) pay any bonus or make any profit-sharing or similar payment to, or increase the amount of the wages, salary, commissions, benefits or other compensation or remuneration payable to, any of its directors, officers or employees, other than increases in base salary and annual cash bonus opportunities and payments made in the Ordinary Course of Business consistent with past practice; (D) increase the severance or change of control benefits offered to any current or new employees, directors or consultants or (E) hire, terminate or give notice of termination to any (x) officer or (y) employee whose annual base salary is or is expected to be more than \$200,000 per year;

(vii) recognize any labor union, labor organization, or similar Person;

(viii) enter into any material transaction other than in the Ordinary Course of Business;

(ix) acquire any material asset or sell, lease or otherwise irrevocably dispose of any of its assets or properties, or grant any Encumbrance with respect to such assets or properties, except in the Ordinary Course of Business;



(x) sell, assign, transfer, license, sublicense or otherwise dispose of any material Company IP (other than pursuant to non-exclusive licenses in the Ordinary Course of Business);

(xi) make, change or revoke any material Tax election, fail to pay any income or other material Tax as such Tax becomes due and payable, file any amendment making any material change to any Tax Return, settle or compromise any income or other material Tax liability, enter into any Tax allocation, sharing, indemnification or other similar agreement or arrangement (other than customary commercial contracts entered into in the Ordinary Course of Business the principal subject matter of which is not Taxes), request or consent to any extension or waiver of any limitation period with respect to any claim or assessment for any income or other material Taxes (other than pursuant to an extension of time to file any Tax Return granted in the Ordinary Course of Business of not more than six months), or adopt or change any material accounting method in respect of Taxes;

(xii) enter into, materially amend or terminate any Company Material Contract;

(xiii) other than as required by Law or GAAP, take any action to change accounting policies or procedures;

(xiv) initiate or settle any material Legal Proceeding;

(xv) enter into or amend a Contract that would reasonably be expected to prevent or materially impede, interfere with, hinder or delay the consummation of the Merger; or

(xvi) agree, resolve or commit to do any of the foregoing.

(c) Nothing contained in this Agreement shall give Parent, directly or indirectly, the right to control or direct the operations of the Company prior to the Effective Time. Prior to the Effective Time, the Company shall exercise, consistent with the terms and conditions of this Agreement, complete unilateral control and supervision over its business operations.

**4.3 Access and Investigation.** Subject to the terms of the Confidentiality Agreement, which the Parties agree will continue in full force following the date of this Agreement, during the Pre-Closing Period, upon reasonable notice, Parent, on the one hand, and the Company, on the other hand, shall and shall use commercially reasonable efforts to cause such Party's Representatives to: (a) provide the other Party and such other Party's Representatives with reasonable access during normal business hours to such Party's Representatives, personnel, property and assets and to all existing books, records, Tax Returns, work papers and other documents and information relating to such Party and its Subsidiaries; (b) provide the other Party and such other Party's Representatives with such copies of the existing books, records, Tax Returns, work papers, product data, and other documents and information relating to such Party and its Subsidiaries, and with such additional financial, operating and other data and information

regarding such Party and its Subsidiaries as the other Party may reasonably request; (c) permit the other Party's officers and other employees to meet, upon reasonable notice and during normal business hours, with the chief financial officer and other officers and managers of such Party responsible for such Party's financial statements and the internal controls of such Party to discuss such matters as the other Party may deem necessary or appropriate and; (d) make available to the other Party copies of unaudited financial statements, material operating and financial reports prepared for senior management or the board of directors of such Party, and any material notice, report or other document filed with or sent to or received from any Governmental Body in connection with the Contemplated Transactions. Any investigation conducted by either Parent or the Company pursuant to this Section 4.3 shall be conducted in such manner as not to interfere unreasonably with the conduct of the business of the other Party. The Company shall provide Parent with unaudited cash balances and a statement of accounts payable of the Company as of the end of each calendar month, which shall be delivered within five Business Days after the end of such calendar month, or such longer period as Parent may agree to in writing.

Notwithstanding the foregoing, any Party may restrict the foregoing access to the extent that any Law applicable to such Party requires such Party to restrict or prohibit access to any such properties or information or as may be necessary to preserve the attorney-client privilege under any circumstances in which such privilege may be jeopardized by such disclosure or access.

#### **4.4 Parent Non-Solicitation.**

(a) Parent agrees that, during the Pre-Closing Period, it shall not, and shall not authorize any of its Representatives to, directly or indirectly: (i) solicit, initiate or knowingly encourage, induce or facilitate the communication, making, submission or announcement of any Acquisition Proposal or Acquisition Inquiry or take any action that could reasonably be expected to lead to an Acquisition Proposal or Acquisition Inquiry; (ii) furnish any non-public information regarding Parent to any Person in connection with or in response to an Acquisition Proposal or Acquisition Inquiry; (iii) engage in discussions (other than to inform any Person of the existence of the provisions in this Section 4.4) or negotiations with any Person with respect to any Acquisition Proposal or Acquisition Inquiry; (iv) approve, endorse or recommend any Acquisition Proposal (subject to Section 5.3); (v) execute or enter into any letter of intent or any Contract contemplating or otherwise relating to any Acquisition Transaction (other than a confidentiality agreement permitted under this Section 4.4); or (vi) publicly propose to do any of the foregoing; *provided, however*, that, notwithstanding anything contained in this Section 4.4 and subject to compliance with this Section 4.4, prior to obtaining the Required Parent Stockholder Vote, Parent may furnish non-public information regarding Parent to, and enter into discussions or negotiations with, any Person in response to a *bona fide* Acquisition Proposal by such Person, which the Parent Board determines in good faith, after consultation with Parent's outside financial advisors and outside legal counsel, constitutes, or could be reasonably likely to result in, a Superior Offer (and is not withdrawn) if: (A) neither Parent nor any of its Representatives shall have breached this Section 4.4 in any material respect, (B) the Parent Board concludes in good faith based on the advice of outside legal counsel, that the failure to take such action could be reasonably likely to be inconsistent with the fiduciary duties of the Parent Board under applicable Law; (C) Parent receives from such Person an executed confidentiality agreement containing provisions, in the aggregate, at least as favorable to Parent as those contained in the Confidentiality Agreement;

and (D) substantially contemporaneously with furnishing any such nonpublic information to such Person, Parent furnishes such nonpublic information to the Company (to the extent such information has not been previously furnished by Parent to the Company). Without limiting the generality of the foregoing, Parent acknowledges and agrees that, in the event any Representative of Parent (whether or not such Representative is purporting to act on behalf of Parent) takes any action that, if taken by Parent, would constitute a breach of this Section 4.4, the taking of such action by such Representative shall be deemed to constitute a breach of this Section 4.4 by Parent for purposes of this Agreement.

(b) If Parent or any Representative of Parent receives an Acquisition Proposal or Acquisition Inquiry at any time during the Pre-Closing Period, then Parent shall promptly (and in no event later than one Business Day after Parent becomes aware of such Acquisition Proposal or Acquisition Inquiry) advise the Company orally and in writing of such Acquisition Proposal or Acquisition Inquiry (including the identity of the Person making or submitting such Acquisition Proposal or Acquisition Inquiry, and the material terms thereof). Parent shall keep the Company reasonably informed with respect to the status and material terms of any such Acquisition Proposal or Acquisition Inquiry and any material modification or proposed material modification thereto.

(c) Parent shall immediately cease and cause to be terminated any existing discussions, negotiations and communications with any Person that relate to any Acquisition Proposal or Acquisition Inquiry that has not already been terminated as of the date of this Agreement and request the destruction or return of any nonpublic information of Parent provided to such Person.

#### **4.5 Company Non-Solicitation.**

(a) The Company agrees that, during the Pre-Closing Period, the Company shall not, nor shall it authorize any of its Representatives to, directly or indirectly: (i) solicit, initiate or knowingly encourage, induce or facilitate the communication, making, submission or announcement of any Acquisition Proposal or Acquisition Inquiry or take any action that could reasonably be expected to lead to an Acquisition Proposal or Acquisition Inquiry; (ii) furnish any non-public information regarding the Company to any Person in connection with or in response to an Acquisition Proposal or Acquisition Inquiry; (iii) engage in discussions (other than to inform any Person of the existence of the provisions in this Section 4.5) or negotiations with any Person with respect to any Acquisition Proposal or Acquisition Inquiry; (iv) approve, endorse or recommend any Acquisition Proposal; (v) execute or enter into any letter of intent or any Contract contemplating or otherwise relating to any Acquisition Transaction; or (vi) publicly propose to do any of the foregoing. The Company acknowledges and agrees that, in the event any Representative of the Company (whether or not such Representative is purporting to act on behalf of the Company) takes any action that, if taken by the Company, would constitute a breach of this Section 4.5, the taking of such action by such Representative shall be deemed to constitute a breach of this Section 4.5 by the Company for purposes of this Agreement.

(b) If the Company or any Representative of the Company receives an Acquisition Proposal or Acquisition Inquiry at any time during the Pre-Closing Period, then the

Company shall promptly (and in no event later than one Business Day after the Company becomes aware of such Acquisition Proposal or Acquisition Inquiry) advise Parent orally and in writing of such Acquisition Proposal or Acquisition Inquiry (including the identity of the Person making or submitting such Acquisition Proposal or Acquisition Inquiry, and the material terms thereof). The Company shall keep Parent reasonably informed with respect to the status and material terms of any such Acquisition Proposal or Acquisition Inquiry and any material modification or proposed material modification thereto.

(c) The Company shall immediately cease and cause to be terminated any existing discussions, negotiations and communications with any Person that relate to any Acquisition Proposal or Acquisition Inquiry that has not already been terminated as of the date of this Agreement and request the destruction or return of any nonpublic information of the Company provided to such Person.

#### **4.6 Notification of Certain Matters.**

(a) During the Pre-Closing Period the Company shall promptly notify Parent (and, if in writing, furnish copies of) if any of the following occurs: (i) any notice or other communication is received from any Person alleging that the Consent of such Person is or may be required in connection with any of the Contemplated Transactions; (ii) any Legal Proceeding against or involving or otherwise affecting the Company is commenced, or, to the Knowledge of the Company, threatened against the Company or, to the Knowledge of the Company, any director or officer of the Company; (iii) the Company becomes aware of any inaccuracy in any representation or warranty made by it in this Agreement; or (iv) the failure of the Company to comply with any covenant or obligation of the Company; in the case of (iii) and (iv) that could reasonably be expected to make the timely satisfaction of any of the conditions set forth in Sections 6 or 7, as applicable, impossible or materially less likely. No notification given to Parent pursuant to this Section 4.6 shall change, limit or otherwise affect any of the representations, warranties, covenants or obligations of the Company contained in this Agreement or the Company Disclosure Schedule for purposes of Sections 6 and 7, as applicable.

(b) During the Pre-Closing Period Parent shall promptly notify the Company (and, if in writing, furnish copies of) if any of the following occurs: (i) any notice or other communication is received from any Person alleging that the Consent of such Person is or may be required in connection with any of the Contemplated Transactions; (ii) any Legal Proceeding against or involving or otherwise affecting Parent is commenced, or, to the Knowledge of Parent, threatened against Parent or, to the Knowledge of Parent, any director or officer of Parent; (iii) Parent becomes aware of any inaccuracy in any representation or warranty made by it in this Agreement; (iv) the failure of Parent to comply with any covenant or obligation of Parent or Merger Sub or (v) if Parent Net Cash is less than \$30,000,000; in the case of (iii) and (iv) that could reasonably be expected to make the timely satisfaction of any of the conditions set forth in Section 6 or Section 8, as applicable, impossible or materially less likely. No notification given to the Company pursuant to this Section 4.6(b) shall change, limit or otherwise affect any of the representations, warranties, covenants or obligations of Parent contained in this Agreement or the Parent Disclosure Schedule for purposes of Section 6 and Section 8, as applicable.

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## Section 5. ADDITIONAL AGREEMENTS OF THE PARTIES

### 5.1 Proxy Statement

(a) As promptly as practicable after the date of this Agreement, the Parties shall prepare, and Parent shall cause to be filed with the SEC, the Proxy Statement. Parent covenants and agrees that the Proxy Statement, including any pro forma financial statements included therein (and the letter to stockholders, notice of meeting and form of proxy included therewith), will not, at the time that the Proxy Statement or any amendment or supplement thereto is filed with the SEC or is first mailed to the Parent stockholders contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements made therein, in light of the circumstances under which they were made, not misleading. The Company covenants and agrees that the information provided by the Company to Parent for inclusion in the Proxy Statement (including the Company Financials) will not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make such information not misleading. Notwithstanding the foregoing, Parent makes no covenant, representation or warranty with respect to statements made in the Proxy Statement (and the letter to stockholders, notice of meeting and form of proxy included therewith), if any, based on information provided by the Company or any of its Representatives specifically for inclusion therein. The Company and its legal counsel shall be given reasonable opportunity to review and comment on the Proxy Statement, including all amendments and supplements thereto, prior to the filing thereof with the SEC, and on the response to any comments of the SEC on the Proxy Statement, prior to the filing thereof with the SEC. Parent shall use commercially reasonable efforts to cause the Proxy Statement to comply with the applicable rules and regulations promulgated by the SEC and to respond promptly to any comments of the SEC or its staff. Parent shall use commercially reasonable efforts to cause the Proxy Statement to be mailed to Parent's stockholders as promptly as practicable after the resolution of SEC staff comments and the filing of the Definitive Proxy Statement on Schedule 14A. Each Party shall promptly furnish to the other Party all information concerning such Party and such Party's Affiliates and such Party's stockholders that may be required or reasonably requested in connection with any action contemplated by this Section 5.1. If Parent, Merger Sub or the Company become aware of any event or information that, pursuant to the Securities Act or the Exchange Act, should be disclosed in an amendment or supplement to the Proxy Statement, then such Party, as the case may be, shall promptly inform the other Parties thereof and shall cooperate with such other Parties in filing such amendment or supplement with the SEC and, if appropriate, in mailing such amendment or supplement to the Parent stockholders.

(b) The Company shall reasonably cooperate with Parent and provide, and require its Representatives to provide, Parent and its Representatives, with all true, correct and complete information regarding the Company that is required by Law to be included in the Proxy Statement or reasonably requested by Parent to be included in the Proxy Statement.

### 5.2 Stockholder Written Consent; Regulation D Requirements

(a) Promptly following the date hereof, the Company shall prepare and mail a notice (the "*Stockholder Notice*") to every stockholder of the Company that did not execute

the Company Stockholder Written Consent. The Stockholder Notice shall (i) be a statement to the effect that the Company Board determined that the Merger is advisable in accordance with Section 251(b) of the DGCL and in the best interests of the stockholders of the Company and approved and adopted this Agreement, the Merger and the other Contemplated Transactions, (ii) provide the stockholders of the Company to whom it is sent with notice of the actions taken in the Company Stockholder Written Consent, including the adoption and approval of this Agreement, the Merger and the other Contemplated Transactions in accordance with Section 228(e) of the DGCL and the certificate of incorporation and bylaws of the Company and (iii) include a description of the appraisal rights of the Company's stockholders available under the DGCL, along with such other information as is required thereunder and pursuant to applicable Law. All materials (including any amendments thereto) submitted to the stockholders of the Company in accordance with this [Section 5.2\(a\)](#) shall be subject to Parent's advance review and reasonable approval.

(b) The Company agrees that: (i) the Company Board has recommended that the Company's stockholders vote to approve the Company Stockholder Matters (the recommendation of the Company Board that the Company's stockholders vote to adopt and approve this Agreement being referred to as the "**Company Board Recommendation**"); and (ii) the Company Board Recommendation shall not be withdrawn or modified (and the Company Board shall not publicly propose to withdraw or modify the Company Board Recommendation) in a manner adverse to Parent, and no resolution by the Company Board or any committee thereof to withdraw or modify the Company Board Recommendation in a manner adverse to Parent or to adopt, approve or recommend (or publicly propose to adopt, approve or recommend) any Acquisition Proposal shall be adopted or proposed.

(c) Parent and the Company shall cooperate to cause to be mailed, distributed, or otherwise made available to those of its stockholders that do not qualify as "accredited investors" within the meaning of Regulation D, information meeting the requirements of Rule 502(b) of Regulation D.

(d) The Company's obligation to solicit the consent of its stockholders to sign the Company Stockholder Written Consent in accordance with [Section 5.2](#) shall not be limited or otherwise affected by the commencement, disclosure, announcement or submission of any Superior Offer or other Acquisition Proposal.

### **5.3 Parent Stockholders' Meeting.**

(a) As promptly as reasonably practicable after the resolution of SEC staff comments and the filing of the Definitive Proxy Statement on Schedule 14A, Parent shall take all action necessary under applicable Law to call, give notice of and hold a meeting of the holders of Parent Common Stock for the purpose of seeking approval of:

(i) the amendment of Parent's certificate of incorporation (A) to effect the Reverse Split and (B) for the authorization of shares of Parent Common Stock to be issued to the Company's stockholders and in respect of Company Options and Company Warrants in connection with the Contemplated Transactions; and

(ii) the change of control of Parent resulting from the Merger pursuant to the Nasdaq rules (the matters contemplated by clauses 5.3(a)(i) and (ii) are collectively referred to as the “**Parent Stockholder Matters**,” and the matters contemplated by clauses 5.3(a)(i)(B) and (ii) are collectively referred to as the “**Closing Parent Stockholder Matters**”, and such meeting, the “**Parent Stockholders’ Meeting**”).

(b) The Parent Stockholders’ Meeting shall be held as promptly as practicable (but in any event not later than 60 days) after the filing of a Definitive Proxy Statement on Schedule 14A with the SEC. Parent shall take reasonable measures to ensure that all proxies solicited in connection with the Parent Stockholders’ Meeting are solicited in compliance with all applicable Law. Notwithstanding anything to the contrary contained herein, if on the date of the Parent Stockholders’ Meeting, or a date preceding the date on which the Parent Stockholders’ Meeting is scheduled, Parent reasonably believes that (i) it will not receive proxies sufficient to obtain the Required Parent Stockholder Vote, whether or not a quorum would be present or (ii) it will not have sufficient shares of Parent Common Stock represented (whether in person or by proxy) to constitute a quorum necessary to conduct the business of the Parent Stockholders’ Meeting, Parent may postpone or adjourn, or make one or more successive postponements or adjournments of, the Parent Stockholders’ Meeting as long as the date of the Parent Stockholders’ Meeting is not postponed or adjourned more than an aggregate of 60 calendar days in connection with any postponements or adjournments.

(c) Parent agrees that, subject to Section 5.3(d): (i) the Parent Board shall recommend that the holders of Parent Common Stock vote to approve the Parent Stockholder Matters; (ii) the Proxy Statement shall include a statement to the effect that the Parent Board recommends that Parent’s stockholders vote to approve the Parent Stockholder Matters (the recommendation of the Parent Board with respect to the Parent Stockholder Matters being referred to as the “**Parent Board Recommendation**”); and (iii) the Parent Board Recommendation shall not be withheld, amended, withdrawn or modified (and the Parent Board shall not publicly propose to withhold, amend, withdraw or modify the Parent Board Recommendation) in a manner adverse to the Company (the actions set forth in the foregoing clause (iii), collectively, a “**Parent Board Adverse Recommendation Change**”).

(d) Notwithstanding anything to the contrary contained in this Agreement, if at any time prior to the approval of Parent Stockholder Matters by the Required Parent Stockholder Vote:

(i) if Parent has received a written Acquisition Proposal (which Acquisition Proposal did not arise out of a material breach of Section 4.4) from any Person that has not been withdrawn and after consultation with outside legal counsel, the Parent Board shall have determined, in good faith, that such Acquisition Proposal is a Superior Offer, (x) the Parent Board may make a Parent Board Adverse Recommendation Change or (y) Parent may terminate this Agreement pursuant to Section 9.1(h) to enter into a Permitted Alternative Agreement with respect to such Superior Offer, if and only if: (A) the Parent Board determines in good faith, after consultation with Parent’s outside legal counsel, that the failure to do so could be inconsistent with the fiduciary duties of the Parent Board to Parent’s stockholders under applicable Law; (B) Parent shall have given the

Company prior written notice of its intention to consider making a Parent Board Adverse Recommendation Change or terminate this Agreement pursuant to Section 9.1(h) at least three Business Days prior to making any such Parent Board Adverse Recommendation Change or termination (a “**Determination Notice**”) (which notice shall not constitute a Parent Board Adverse Recommendation Change); and (C) (1) Parent shall have provided to the Company a summary of the material terms and conditions of the Acquisition Proposal in accordance with Section 4.4(b), (2) Parent shall have given the Company the three Business Days after the Determination Notice to propose revisions to the terms of this Agreement or make another proposal and shall have made its Representatives reasonably available to negotiate in good faith with the Company (to the extent the Company desires to negotiate) with respect to such proposed revisions or other proposal, if any, and (3) after considering the results of any such negotiations and giving effect to the proposals made by the Company, if any, after consultation with outside legal counsel, the Parent Board shall have determined, in good faith, that such Acquisition Proposal is a Superior Offer and that the failure to make the Parent Board Adverse Recommendation Change or terminate this Agreement pursuant to Section 9.1(h) could be inconsistent with the fiduciary duties of the Parent Board to Parent’s stockholders under applicable Law. For the avoidance of doubt, the provisions of this Section 5.3(d)(i) shall also apply to any material change to the facts and circumstances relating to such Acquisition Proposal and require a new Determination Notice, except that the references to three Business Days shall be deemed to be two Business Days.

(ii) other than in connection with an Acquisition Proposal, the Parent Board may make a Parent Board Adverse Recommendation Change in response to a Parent Change in Circumstance, if and only if: (A) the Parent Board determines in good faith, after consultation with Parent’s outside legal counsel, that the failure to do so could be inconsistent with the fiduciary duties of the Parent Board to Parent’s stockholders under applicable Law; (B) Parent shall have given the Company a Determination Notice at least three Business Days prior to making any such Parent Board Adverse Recommendation Change; and (C) (1) Parent shall have specified the Parent Change in Circumstance in reasonable detail, (2) Parent shall have given the Company the three Business Days after the Determination Notice to propose revisions to the terms of this Agreement or make another proposal, and shall have made its Representatives reasonably available to negotiate in good faith with the Company (to the extent the Company desires to do so) with respect to such proposed revisions or other proposal, if any, and (3) after considering the results of any such negotiations and giving effect to the proposals made by the Company, if any, after consultation with outside legal counsel, the Parent Board shall have determined, in good faith, that the failure to make the Parent Board Adverse Recommendation Change in response to such Parent Change in Circumstance could be inconsistent with the fiduciary duties of the Parent Board to Parent’s stockholders under applicable Law. For the avoidance of doubt, the provisions of this Section 5.3(d)(ii) shall also apply to any material change to the facts and circumstances relating to such Parent Change in Circumstance and require a new Determination Notice, except that the references to three Business Days shall be deemed to be two Business Days.



(e) Nothing contained in this Agreement shall prohibit Parent or the Parent Board from (i) complying with Rules 14d-9 and 14e-2(a) promulgated under the Exchange Act, (ii) issuing a “stop, look and listen” communication or similar communication of the type contemplated by Section 14d-9(f) under the Exchange Act or (iii) otherwise making any disclosure to the Parent stockholders; *provided however*, that in the case of the foregoing clause (iii) the Parent Board determines in good faith, after consultation with its outside legal counsel, that failure to make such disclosure could be reasonably likely to be inconsistent with applicable Law, including its fiduciary duties under applicable Law.

#### 5.4 **Regulatory Approvals.**

(a) Each Party shall use reasonable best efforts to file or otherwise submit, as soon as practicable after the date of this Agreement, all applications, notices, reports, filings and other documents reasonably required to be filed by such Party with or otherwise submitted by such Party to any Governmental Body with respect to the Contemplated Transactions, and to submit promptly any additional information requested by any such Governmental Body.

(b) Without limiting the generality of the foregoing, each of Parent and the Company shall make any filings (“**Merger Notification Filings**”) required by any applicable Antitrust Laws. The parties hereto shall promptly supply one another with any information that may be required in order to make such filings or obtain such consents and approvals. Each party hereto shall (i) consult and cooperate with one another, and consider in good faith the views of one another, in connection with any analyses, appearances, presentations, memoranda, briefs, arguments, opinions and proposals made or submitted by or on behalf of any party hereto in connection with proceedings under or relating to any Antitrust Law, (ii) coordinate with one another in preparing and exchanging such materials and (iii) promptly provide one another (and its counsel) with copies of all filings, presentations or submissions made by such party to any Governmental Body in connection with this Agreement. In addition, any party may, as it deems advisable and necessary, reasonably designate any confidential and competitively sensitive material provided to the other parties under this Section 5.4 as “Outside Counsel Only” or redact information regarding valuation or negotiation strategy. Materials identified as “Outside Counsel Only” and the information contained therein shall be given only to the outside legal counsel of the recipient and will not be disclosed by such outside counsel to employees, officers, or directors of the recipient, unless express written permission is obtained in advance from the source of the materials.

(c) Each of Parent and the Company shall use its respective reasonable best efforts to resolve objections, if any, as may be asserted by any Governmental Body with respect to the Contemplated Transactions under any applicable Antitrust Laws, including responding promptly to and complying with any requests for information relating to this Agreement or the Merger Notification Filings from any Governmental Body charged with enforcing, applying, administering or investigating any Antitrust Laws.

(d) Notwithstanding anything to the contrary herein (i) Parent shall not have any obligation to litigate or contest any such Legal Proceeding or order resulting therefrom

and (ii) Parent shall be under no obligation to make proposals, execute or carry out agreements or submit to orders providing for (A) the sale, license, divestiture, or other disposition or holding separate of any assets of Parent or the Company or any of their respective Affiliates, (B) the imposition of any limitation or restriction on the ability of Parent or any of its Affiliates to freely conduct their business or, following the Closing, the business of the Company, or (C) any limitation or regulation on the ability of Parent or any of its Affiliates to exercise full rights of ownership of the Company.

#### **5.5 Company Options; Company Warrants and Company Convertible Notes**

(a) At the Effective Time, each Company Option that is outstanding and unexercised immediately prior to the Effective Time under the Company Plan, whether or not vested, shall be converted into and become an option to purchase Parent Common Stock, and Parent shall assume the Company Plan and each such Company Option in accordance with the terms (as in effect as of the date of this Agreement) of the Company Plan and the terms of the stock option agreement by which such Company Option is evidenced (but with changes to such documents as Parent in good faith determines are appropriate to reflect the substitution of the Company Options by Parent to purchase shares of Parent Common Stock). All rights with respect to Company Common Stock under Company Options assumed by Parent shall thereupon be converted into rights with respect to Parent Common Stock. Accordingly, from and after the Effective Time: (i) each Company Option assumed by Parent may be exercised solely for shares of Parent Common Stock; (ii) the number of shares of Parent Common Stock subject to each Company Option assumed by Parent shall be determined by multiplying (A) the number of shares of Company Common Stock that were subject to such Company Option, as in effect immediately prior to the Effective Time, by (B) the Exchange Ratio, and rounding the resulting number down to the nearest whole number of shares of Parent Common Stock; (iii) the per share exercise price for the Parent Common Stock issuable upon exercise of each Company Option assumed by Parent shall be determined by dividing (A) the per share exercise price of Company Common Stock subject to such Company Option, as in effect immediately prior to the Effective Time, by (B) the Exchange Ratio and rounding the resulting exercise price up to the nearest whole cent; and (iv) any restriction on the exercise of any Company Option assumed by Parent shall continue in full force and effect and the term, exercisability, vesting schedule and other provisions of such Company Option shall otherwise remain unchanged; *provided, however*, that: (A) Parent may amend the terms of the Company Options and the Company Plan to reflect Parent's substitution of the Company Options with options to purchase Parent Common Stock (such as by making any change in control or similar definition relate to Parent and having any provision that provides for the adjustment of Company Options upon the occurrence of certain corporate events relate to corporate events that relate to Parent and/or Parent Common Stock); and (B) the Parent Board or a committee thereof shall succeed to the authority and responsibility of the Company Board or any committee thereof with respect to each Company Option assumed by Parent.

(b) Parent shall file with the SEC, promptly after the Effective Time, a registration statement on FormS-8 (or any successor form), if available for use by Parent, relating to the shares of Parent Common Stock issuable with respect to Company Options assumed by Parent in accordance with Section 5.5(a).

(c) At the Effective Time, each Company Warrant that is outstanding and unexercised as of immediately prior to the Effective Time, if any, shall be converted into and become a warrant to purchase Parent Common Stock and Parent shall assume each such Company Warrant in accordance with its terms. All rights with respect to Company Capital Stock under Company Warrants assumed by Parent shall thereupon be converted into rights with respect to Parent Common Stock. Accordingly, from and after the Effective Time: (i) each Company Warrant assumed by Parent may be exercised solely for shares of Parent Common Stock; (ii) the number of shares of Parent Common Stock subject to each Company Warrant assumed by Parent shall be determined by multiplying (A) the number of shares of Company Common Stock, or the number of shares of Company Preferred Stock issuable upon exercise of the Company Warrant, as applicable, that were subject to such Company Warrant immediately prior to the Effective Time by (B) the Exchange Ratio and rounding the resulting number down to the nearest whole number of shares of Parent Common Stock; (iii) the per share exercise price for the Parent Common Stock issuable upon exercise of each Company Warrant assumed by Parent shall be determined by dividing the per share exercise price of Company Capital Stock subject to such Company Warrant, as in effect immediately prior to the Effective Time, by the Exchange Ratio and rounding the resulting exercise price up to the nearest whole cent; and (iv) any restriction on any Company Warrant assumed by Parent shall continue in full force and effect and the term and other provisions of such Company Warrant shall otherwise remain unchanged.

(d) Prior the Effective Time, the Company shall take all actions (including providing any required notices) that may be necessary to cause all of the outstanding Company Convertible Notes to be converted into shares of Company Capital Stock pursuant to the terms thereof.

(e) Prior to the Effective Time, the Company shall take all actions that may be necessary (under the Company Plan, the Company Warrants, the Company Convertible Notes and otherwise) to effectuate the provisions of this [Section 5.5](#) and to ensure that, from and after the Effective Time, holders of Company Options, Company Warrants and Company Convertible Notes have no rights with respect thereto other than those specifically provided in this [Section 5.5](#).

#### **5.6 Employee Benefits.**

(a) For purposes of vesting, eligibility to participate, and level of benefits under the benefit plans, programs, contracts or arrangements of Parent or any of its Subsidiaries (including, following the Closing, the Company) providing benefits to any Continuing Employee after the Closing (the “**Post-Closing Plans**”), each employee who continues to be employed by Parent, the Company or any of their respective Subsidiaries immediately following the Closing (“**Continuing Employees**”) shall be credited with his or her years of service with Parent, the Company or any of their respective Subsidiaries and their respective predecessors; provided that the foregoing shall not apply to the extent that its application would result in a duplication of benefits. In addition, and without limiting the generality of the foregoing, for purposes of each Post-Closing Plan providing medical, dental, pharmaceutical and/or vision benefits to a Continuing Employee, Parent shall cause all pre-existing condition exclusions and actively-at-work requirements of such Post-Closing Plan to be waived for such Continuing

Employee and his or her covered dependents to the extent and unless such conditions would have been waived or satisfied under the employee benefit plan whose coverage is being replaced under the Post-Closing Plan, and Parent shall use commercially reasonable efforts to cause any eligible expenses incurred by a Continuing Employee and his or her covered dependents during the portion of such plan year in which coverage is replaced with coverage under a Post-Closing Plan to be taken into account under such Post-Closing Plan with respect to the plan year in which participation in such Post-Closing Plan begins for purposes of satisfying all deductible, coinsurance and maximum out-of-pocket requirements applicable to such Continuing Employee and his or her covered dependents for such plan year as if such amounts had been paid in accordance with such Post-Closing Plan.

(b) The provisions of this Section 5.6 are for the sole benefit of Parent and the Company and no provision of this Agreement shall (i) create any third party beneficiary or other rights in any Person, including rights in respect of any benefits that may be provided, directly or indirectly, under any Company Benefit Plan, Parent Benefit Plan or Post-Closing Plan or rights to continued employment or service with the Company or Parent (or any Subsidiary thereof), (ii) be construed as an amendment, waiver or creation of or limitation on the ability to terminate any Company Benefit Plan, Parent Benefit Plan or Post-Closing Plan, or (iii) limit the ability of Parent to terminate the employment of any Continuing Employee.

**5.7 Parent Post-Closing Benefit Plan Obligations.**

(a) For a period of not less than 36 months following the Closing Parent shall continue to sponsor a group health insurance plan that: (i) is issued in California or otherwise provides California coverage, including Cal-COBRA or substantially similar continuing coverage election rights, (ii) provides for Pennsylvania coverage, including substantially similar continuing coverage election rights and (iii) provides medical and prescription drug benefits substantially similar to those provided under the group health insurance plan sponsored by Parent immediately prior to the Closing (a “*California and Pennsylvania Health Plan*”), such that any individuals employed by Parent prior to the Closing who will not be Continuing Employees (the “*COBRA Employees*”) will be provided with the opportunity to elect and continue COBRA and Cal-COBRA coverage under the California and Pennsylvania Health Plan following the Closing. The COBRA Employees are intended third-party beneficiaries of this Section 5.7.

(b) For a period of not less than 90 days following the Closing, Parent shall not take any action to terminate Parent’s 401(k) plan.

(c) From and following the Closing, Parent will continue to be a party to all Parent Benefit Plans and will honor its obligations under all Parent Benefit Plans in accordance with their terms.

**5.8 Indemnification of Officers and Directors.**

(a) From the Effective Time through the sixth anniversary of the date on which the Effective Time occurs, each of Parent and the Surviving Corporation, jointly and severally, shall indemnify and hold harmless each person who is now, or has been at any time prior

to the date hereof, or who becomes prior to the Effective Time, a director, officer, fiduciary or agent of Parent or the Company and their respective Subsidiaries, respectively (the “**D&O Indemnified Parties**”), against all claims, losses, liabilities, damages, judgments, fines and reasonable fees, costs and expenses, including attorneys’ fees and disbursements (collectively, “**Costs**”), incurred in connection with any claim, action, suit, proceeding or investigation, whether civil, criminal, administrative or investigative, arising out of or pertaining to the fact that the D&O Indemnified Party is or was a director, officer, fiduciary or agent of Parent or of the Company, whether asserted or claimed prior to, at or after the Effective Time, in each case, to the fullest extent permitted under applicable Law. Each D&O Indemnified Party will be entitled to advancement of expenses incurred in the defense of any such claim, action, suit, proceeding or investigation from each of Parent and the Surviving Corporation, jointly and severally, upon receipt by Parent or the Surviving Corporation from the D&O Indemnified Party of a request therefor; *provided* that any such person to whom expenses are advanced provides an undertaking to Parent, to the extent then required by the DGCL, to repay such advances if it is ultimately determined that such person is not entitled to indemnification.

(b) The provisions of the certificate of incorporation and bylaws of Parent with respect to indemnification, advancement of expenses and exculpation of present and former directors and officers of Parent that are presently set forth in the certificate of incorporation and bylaws of Parent shall not be amended, modified or repealed for a period of six years from the Effective Time in a manner that would adversely affect the rights thereunder of individuals who, at or prior to the Effective Time, were officers or directors of Parent. The certificate of incorporation and bylaws of the Surviving Corporation shall contain, and Parent shall cause the certificate of incorporation and bylaws of the Surviving Corporation to so contain, provisions no less favorable with respect to indemnification, advancement of expenses and exculpation of present and former directors and officers as those presently set forth in the certificate of incorporation and bylaws of Parent.

(c) From and after the Effective Time, (i) the Surviving Corporation shall fulfill and honor in all respects the obligations of the Company to its D&O Indemnified Parties as of immediately prior to the Closing pursuant to any indemnification provisions under the Company’s Organizational Documents and pursuant to any indemnification agreements between the Company and such D&O Indemnified Parties, with respect to claims arising out of matters occurring at or prior to the Effective Time and (ii) Parent shall fulfill and honor in all respects the obligations of Parent to its D&O Indemnified Parties as of immediately prior to the Closing pursuant to any indemnification provisions under Parent’s Organizational Documents and pursuant to any indemnification agreements between Parent and such D&O Indemnified Parties, with respect to claims arising out of matters occurring at or prior to the Effective Time.

(d) From and after the Effective Time, Parent shall maintain directors’ and officers’ liability insurance policies, with an effective date as of the Closing Date, on commercially available terms and conditions and with coverage limits customary for U.S. public companies similarly situated to Parent. In addition, Parent shall purchase, prior to the Effective Time, a six-year prepaid, “tail policy” for the non-cancellable extension of the directors’ and officers’ liability coverage of Parent’s existing directors’ and officers’ insurance policies for a claims reporting or discovery period of at least six years from and after the Effective Time with

respect to any claim related to any period of time at or prior to the Effective Time. During the term of the “tail” policy, Parent shall not take any action following the Effective Time to cause such “tail” policy to be cancelled or any provision therein to be amended or waived in any manner that would adversely affect in any material respect the rights of their former and current officers and directors.

(e) From and after the Effective Time, Parent shall pay all expenses, including reasonable attorneys’ fees, that are incurred by the persons referred to in this Section 5.8 in connection with their successful enforcement of the rights provided to such persons in this Section 5.8.

(f) All rights to exculpation, indemnification and advancement of expenses for acts or omissions occurring at or prior to the Effective Time, whether asserted or claimed prior to, at or after the Closing, now existing in favor of the current or former directors, officers or employees, as the case may be, of Parent or the Company as provided in their respective certificates of incorporation or by-laws or other organization documents or in any agreement shall survive the Merger and shall continue in full force and effect. The provisions of this Section 5.8 are intended to be in addition to the rights otherwise available to the current and former officers and directors of Parent and the Company by Law, charter, statute, bylaw or agreement, and shall operate for the benefit of, and shall be enforceable by, each of the D&O Indemnified Parties, their heirs and their representatives.

(g) In the event Parent or the Surviving Corporation or any of their respective successors or assigns (i) consolidates with or merges into any other Person and shall not be the continuing or surviving corporation or entity of such consolidation or merger, or (ii) transfers all or substantially all of its properties and assets to any Person, then, and in each such case, proper provision shall be made so that the successors and assigns of Parent or the Surviving Corporation, as the case may be, shall succeed to the obligations set forth in this Section 5.8. Parent shall cause the Surviving Corporation to perform all of the obligations of the Surviving Corporation under this Section 5.8. The obligations set forth in this Section 5.8 shall not be terminated, amended or otherwise modified in any manner that adversely affects any D&O Indemnified Party, or any person who is a beneficiary under the policies referred to in this Section 5.8 and their heirs and representatives, without the prior written consent of such affected D&O Indemnified Party or other person.

**5.9 Additional Agreements.** The Parties shall use commercially reasonable efforts to cause to be taken all actions necessary to consummate the Contemplated Transactions. Without limiting the generality of the foregoing, each Party to this Agreement: (a) shall make all filings and other submissions (if any) and give all notices (if any) required to be made and given by such Party in connection with the Contemplated Transactions; (b) shall use reasonable best efforts to obtain each Consent (if any) reasonably required to be obtained (pursuant to any applicable Law or Contract, or otherwise) by such Party in connection with the Contemplated Transactions or for such Contract (with respect to Contracts set forth in Schedule 5.9) to remain in full force and effect; (c) shall use commercially reasonable efforts to lift any injunction prohibiting, or any other legal bar to, the Contemplated Transactions; and (d) shall use

commercially reasonable efforts to satisfy the conditions precedent to the consummation of this Agreement.

5.10 **Disclosure.** The initial press release relating to this Agreement shall be a joint press release issued by the Company and Parent and thereafter Parent and the Company shall consult with each other before issuing any further press release(s) or otherwise making any public statement or making any announcement to Parent Associates or Company Associates (to the extent not previously issued or made in accordance with this Agreement) with respect to the Contemplated Transactions and shall not issue any such press release, public statement or announcement to Parent Associates or Company Associates without the other Party's written consent (which shall not be unreasonably withheld, conditioned or delayed). Notwithstanding the foregoing: (a) a Party may, without the prior consent of the other Party hereto but subject to giving advance notice to the other Party, issue any such press release or make any such public announcement or statement as may be required by any Law (including required disclosures in Parent SEC Documents); and (b) Parent need not consult with the Company in connection with such portion of any press release, public statement or filing to be issued or made pursuant to Section 5.3(e) or with respect to any Acquisition Proposal or Parent Board Adverse Recommendation Change.

5.11 **Listing.** Parent shall use its commercially reasonable efforts, (a) to the extent required by the rules and regulations of Nasdaq, to prepare and submit to Nasdaq a notification form for the listing of the shares of Parent Common Stock to be issued in connection with the Contemplated Transactions, and to cause such shares to be approved for listing (subject to official notice of issuance); (b) effect the Reverse Split subject to receipt of the applicable Required Parent Stockholder Vote; and (c) to the extent required by Nasdaq Marketplace Rule 5110, to file an initial listing application for the Parent Common Stock on Nasdaq (the "*Nasdaq Listing Application*") and to cause such Nasdaq Listing Application to be conditionally approved prior to the Effective Time. The Parties will use commercially reasonable efforts to coordinate with respect to compliance with Nasdaq rules and regulations. The Company agrees to pay all Nasdaq fees associated with the Nasdaq Listing Application. The Company will cooperate with Parent as reasonably requested by Parent with respect to the Nasdaq Listing Application and promptly furnish to Parent all information concerning the Company and its stockholders that may be required or reasonably requested in connection with any action contemplated by this Section 5.11.

5.12 **Tax Matters.**

(a) For United States federal income Tax purposes, (i) the Parties intend that the Merger qualify as a "reorganization" within the meaning of Section 368(a) of the Code (the "*Intended Tax Treatment*"), and (ii) this Agreement is intended to be, and is hereby adopted as, a "plan of reorganization" for purposes of Section 354 and 361 of the Code and Treasury Regulations Section 1.368-2(g) and 1.368-3(a), to which Parent, Merger Sub and the Company are parties under Section 368(b) of the Code.

(b) The Parties shall use their respective reasonable best efforts to cause the Merger to qualify, and will not take any action or cause any action to be taken which action

would reasonably be expected to prevent the Merger from qualifying, for the Intended Tax Treatment.

(c) The Company shall use reasonable best efforts to obtain an opinion of Mayer Brown LLP ("**Tax Counsel**") to the effect that it is more likely than not that the Merger qualifies for the Intended Tax Treatment (the "**Tax Opinion**"), dated as of the Closing and also dated as of any earlier date as may be required by the SEC in connection with the Proxy Statement. In rendering the Tax Opinion, the Tax Counsel may require and rely upon (and may incorporate by reference) reasonable and customary representations and covenants, including those contained in certificates of officers of Parent and the Company.

5.13 **Legends.** Parent shall be entitled to place appropriate legends on the book entries and/or certificates evidencing any shares of Parent Common Stock to be received in the Merger by equity holders of the Company who may be considered "affiliates" of Parent for purposes of Rules 144 and 145 under the Securities Act reflecting the restrictions set forth in Rules 144 and 145 and to issue appropriate stop transfer instructions to the transfer agent for Parent Common Stock.

5.14 **Directors and Officers.** The Parties shall use reasonable best efforts and take all necessary action so that immediately after the Effective Time, (a) the Parent Board is comprised of seven members, with two such members designated by Parent and five such members designated by the Company, (b) the board of directors of the Surviving Corporation is comprised of seven (7) members, with two (2) such members designated by Parent and five (5) such members designated by the Company and (c) the Persons listed in **Exhibit G** under the heading "Officers" are elected or appointed, as applicable, to the positions of officers of Parent and the Surviving Corporation, as set forth therein, to serve in such positions effective as of the Effective Time until successors are duly appointed and qualified in accordance with applicable Law. If any Person listed in **Exhibit G** is unable or unwilling to serve as an officer of Parent or the Surviving Corporation, as set forth therein, as of the Effective Time, the Parties shall mutually agree upon a successor. The Persons listed in **Exhibit G** under the heading "Board Designees – Parent" shall be Parent's designees pursuant to clause (a) of this Section 5.14 (which list may be changed by Parent at any time prior to the Closing by written notice to the Company to include different board designees who are reasonably acceptable to the Company) (the "**Parent Designees**"). To the extent a Parent Designee is currently classified as a Class III director of Parent, Parent shall following the Closing and at an appropriate time prior to Parent's 2019 annual meeting of shareholders, nominate such Parent Designee for reelection at Parent's 2019 annual meeting of shareholders. To the extent a Parent Designee is currently classified as a Class I director of Parent, Parent shall following the Closing and at an appropriate time prior to Parent's 2020 annual meeting of shareholders, nominate such Parent Designee for reelection at Parent's 2020 annual meeting of shareholders. The Persons listed in **Exhibit G** under the heading "Board Designees – Company" shall be the Company's designees pursuant to clause (a) of this Section 5.14 (which list may be changed by the Company at any time prior to the Closing by written notice to Parent to include different board designees who are reasonably acceptable to Parent).

5.15 **Termination of Certain Agreements and Rights.** The Company shall cause any Investor Agreements (excluding the Company Stockholder Support Agreements) to be



terminated immediately prior to the Effective Time, without any liability being imposed on the part of Parent or the Surviving Corporation.

5.16 **Section 16 Matters.** Prior to the Effective Time, Parent and the Company shall take all such steps as may be required (to the extent permitted under applicable Laws) to cause any acquisitions of Parent Common Stock, restricted stock awards to acquire Parent Common Stock and any options to purchase Parent Common Stock in connection with the Contemplated Transactions, by each individual who is reasonably expected to become subject to the reporting requirements of Section 16(a) of the Exchange Act with respect to Parent, to be exempt under Rule 16b-3 promulgated under the Exchange Act. Promptly following the date of this Agreement and at least 30 days prior to the Closing Date, the Company shall furnish the following information to Parent for each individual who, immediately after the Effective Time, will become subject to the reporting requirements of Section 16(a) of the Exchange Act with respect to Parent: (a) the number of shares of Company Capital Stock owned by such individual and expected to be exchanged for shares of Parent Common Stock pursuant to the Merger, and (b) the number of other derivative securities (if any) with respect to Company Capital Stock owned by such individual and expected to be converted into shares of Parent Common Stock, restricted stock awards to acquire Parent Common Stock or derivative securities with respect to Parent Common Stock in connection with the Merger.

5.17 **Cooperation.** Each Party shall cooperate reasonably with the other Party and shall provide the other Party with such assistance as may be reasonably requested for the purpose of facilitating the performance by each Party of its respective obligations under this Agreement and to enable the combined entity to continue to meet its obligations following the Effective Time.

5.18 **Allocation Certificates.**

(a) The Company will prepare and deliver to Parent at least ten Business Days prior to the Closing Date a certificate signed by the Chief Financial Officer of the Company in a form reasonably acceptable to Parent setting forth (as of immediately prior to the Effective Time) (i) each holder of Company Capital Stock, Company Options and Company Warrants, (ii) such holder's name and address; (iii) the number and type of Company Capital Stock held and/or underlying the Company Options and Company Warrants as of the immediately prior to the Effective Time for each such holder; and (iv) the number of shares of Parent Common Stock to be issued to such holder, or to underlie any Parent Option or Company Warrant to be issued to such holder, pursuant to this Agreement in respect of the Company Capital Stock, Company Options or Company Warrants held by such holder as of immediately prior to the Effective Time (the "*Allocation Certificate*").

(b) Parent will prepare and deliver to the Company at least ten Business Days prior to the Closing Date a certificate signed by the Chief Financial Officer of Parent in a form reasonably acceptable to the Company, setting forth, as of immediately prior to the Effective Time (i) each record holder of Parent Common Stock, Parent Options or Parent Warrants, (ii) such record holder's name and address, (iii) the number of shares of Parent Common Stock held and/or

underlying the Parent Options or Parent Warrants as of the Effective Time for such holder (the “*Parent Outstanding Shares Certificate*”).

5.19 **Company Financial Statements.** As promptly as reasonably practicable following the date of this Agreement (i) and no later than 15 days after the date hereof, the Company will furnish to Parent audited financial statements for the fiscal years ended 2016, 2017 and 2018 for inclusion in the Proxy Statement (the “*Company Audited Financial Statements*”) and (ii) the Company will furnish to Parent unaudited interim financial statements for each interim period completed prior to Closing that would be required to be included in the Proxy Statement (the “*Company Interim Financial Statements*”). Each of the Company Audited Financial Statements and the Company Interim Financial Statements will be suitable for inclusion in the Proxy Statement and prepared in accordance with GAAP as applied on a consistent basis during the periods involved (except in each case as described in the notes thereto) and on that basis will present fairly, in all material respects, the financial position and the results of operations, changes in stockholders’ equity, and cash flows of the Company as of the dates of and for the periods referred to in the Company Audited Financial Statements or the Company Interim Financial Statements, as the case may be.

5.20 **Takeover Statutes.** If any Takeover Statute is or may become applicable to the Contemplated Transactions, each of the Company, the Company Board, Parent and the Parent Board, as applicable, shall grant such approvals and take such actions as are necessary so that the Contemplated Transactions may be consummated as promptly as practicable on the terms contemplated by this Agreement and otherwise act to eliminate or minimize the effects of such statute or regulation on the Contemplated Transactions.

5.21 **Stockholder Litigation.** Parent shall conduct and control the settlement and defense of any stockholder litigation against Parent or any of its directors relating to this Agreement or the Contemplated Transactions; *provided* that any settlement or other resolution of any such stockholder litigation agreed to by Parent after the Closing shall be approved in advance by a majority of the Parent Designees for so long as any Parent Designees are still members of the Parent Board. Without limiting the foregoing, prior to the Closing, Parent shall give the Company the opportunity to consult with Parent in connection with the defense and settlement of any such stockholder litigation, and Parent shall keep the Company reasonably apprised of any material developments in connection with any such stockholder litigation.

## **Section 6. CONDITIONS PRECEDENT TO OBLIGATIONS OF EACH PARTY**

The obligations of each Party to effect the Merger and otherwise consummate the Contemplated Transactions to be consummated at the Closing are subject to the satisfaction or, to the extent permitted by applicable Law, the written waiver by each of the Parties, at or prior to the Closing, of each of the following conditions:

6.1 **No Restraints.** No temporary restraining order, preliminary or permanent injunction or other order preventing the consummation of the Contemplated Transactions shall have been issued by any court of competent jurisdiction or other Governmental Body of competent

jurisdiction and remain in effect and there shall not be any Law which has the effect of making the consummation of the Contemplated Transactions illegal.

6.2 **Stockholder Approval.** (a) Parent shall have obtained the Closing Parent Stockholder Vote and (b) the Company shall have obtained the Required Company Stockholder Vote.

6.3 **Listing.** The shares of Parent Common Stock to be issued in the Merger pursuant to this Agreement shall have been approved for listing (subject to official notice of issuance) on Nasdaq as of the Closing.

#### **Section 7. ADDITIONAL CONDITIONS PRECEDENT TO OBLIGATIONS OF PARENT AND MERGER SUB**

The obligations of Parent and Merger Sub to effect the Merger and otherwise consummate the transactions to be consummated at the Closing are subject to the satisfaction or the written waiver by Parent, at or prior to the Closing, of each of the following conditions:

7.1 **Accuracy of Representations.** The Company Fundamental Representations shall have been true and correct in all material respects as of the date of this Agreement and shall be true and correct in all material respects on and as of the Closing Date with the same force and effect as if made on and as of such date (except to the extent such representations and warranties are specifically made as of a particular date, in which case such representations and warranties shall be true and correct in all material respects as of such date). The representations and warranties of the Company contained in this Agreement (other than the Company Fundamental Representations) shall have been true and correct as of the date of this Agreement and shall be true and correct on and as of the Closing Date with the same force and effect as if made on the Closing Date except (a) in each case, or in the aggregate, where the failure to be true and correct would not reasonably be expected to have a Company Material Adverse Effect (without giving effect to any references therein to any Company Material Adverse Effect or other materiality qualifications), or (b) for those representations and warranties which address matters only as of a particular date (which representations shall have been true and correct, subject to the qualifications as set forth in the preceding clause (a), as of such particular date) (it being understood that, for purposes of determining the accuracy of such representations and warranties, any update of or modification to the Company Disclosure Schedule made or purported to have been made after the date of this Agreement shall be disregarded).

7.2 **Performance of Covenants.** The Company shall have performed or complied with in all material respects all agreements and covenants required to be performed or complied with by it under this Agreement at or prior to the Effective Time.

7.3 **Documents.** Parent shall have received the following documents, each of which shall be in full force and effect:

(a) a certificate executed by the Chief Executive Officer or Chief Financial Officer of the Company certifying (i) that the conditions set forth in Sections 7.1, 7.2,

7.5 and 7.6 have been duly satisfied and (ii) that the information set forth in the Allocation Certificate delivered by the Company in accordance with Section 5.18 is true and accurate in all respects as of the Closing Date;

(b) a written resignation, in a form reasonably satisfactory to Parent, dated as of the Closing Date and effective as of the Closing, executed by each of the officers and directors of the Company listed in Section 7.3(b) of the Company Disclosure Schedule; and

(c) the Allocation Certificate.

**7.4 FIRPTA Certificate.** Parent shall have received (i) an original signed statement from the Company that the Company is not, and has not been at any time during the applicable period specified in Section 897(c)(1)(A)(ii) of the Code, a “United States real property holding corporation,” as defined in Section 897(c)(2) of the Code, conforming to the requirements of Treasury Regulations Section 1.1445-2(c)(3) and 1.897-2(h), and (ii) an original signed notice to be delivered to the IRS in accordance with the provisions of Treasury Regulations Section 1.897-2(h)(2), together with written authorization for Parent to deliver such notice to the IRS on behalf of the Company following the Closing, each dated as of the Closing Date, duly executed by an authorized officer of the Company, and in form and substance reasonably acceptable to Parent.

**7.5 No Company Material Adverse Effect** Since the date of this Agreement, there shall not have occurred any Company Material Adverse Effect.

**7.6 Termination of Investor Agreements.** The Investor Agreements shall have been terminated.

**7.7 Company Lock-Up Agreements.** Parent shall have received the Company Lock-Up Agreements duly executed by holders of at least two-thirds (2/3) of the Company Capital Stock and each executive officer and director of the Company who is elected or appointed, as applicable, as an executive officer and director of Parent as of immediately following the Closing, each of which shall be in full force and effect.

**7.8 Accredited Investors.** No more than 10 stockholders of the Company shall have failed to certify in an Accredited Investor Questionnaire that such stockholder is an “accredited investor” pursuant to Regulation D.

**7.9 Funding Agreement.** The Funding Agreement shall be in full force and effect, and the terms of such Funding Agreement shall be reasonably satisfactory to Parent, and Parent shall have received a certificate executed by (a) the Chief Executive Officer or Chief Financial Officer of the Company certifying that the conditions set forth in Sections 2.4(a)(i) and (ii) of the Funding Agreement have been satisfied or waived and (b) an authorized officer of NovaQuest certifying that the conditions set forth in Sections 2.4(b)(i), (ii), (iii), (iv) and (vi) of the Funding Agreement have been satisfied or waived, such that the Concurrent Financing shall be consummated immediately following the Closing without the further satisfaction of any conditions.

7.10 **Company Net Working Capital.** The Company Net Working Capital as of the date of the Parent Stockholder Meeting is not less than - \$11,500,000.

7.11 **Company Stockholder Written Consent.** The Company Stockholder Written Consent shall have been executed by holders of at least two-thirds (2/3) of the Company Capital Stock (on an as-converted basis) and shall be in full force and effect.

7.12 **Dissenting Shares.** No stockholders of the Company shall have exercised statutory appraisal rights pursuant to Section 262 of the DGCL with respect to their shares of Company Capital Stock.

7.13 **Charter Amendment.** The certificate of incorporation of the Company as of the date hereof shall have been amended to (a) allow the satisfaction and discharge of dividend rights that have accrued through May 31, 2019 in favor of holders of Company Preferred Stock with shares of Company Common Stock and (b) increase the number of authorized shares of Company Common Stock consistent with the authorization of the Company Board as of the date hereof and Section 4.2(b) of the Company Disclosure Schedule.

#### **Section 8. ADDITIONAL CONDITIONS PRECEDENT TO OBLIGATION OF THE COMPANY**

The obligations of the Company to effect the Merger and otherwise consummate the transactions to be consummated at the Closing are subject to the satisfaction or the written waiver by the Company, at or prior to the Closing, of each of the following conditions:

8.1 **Accuracy of Representations.** The Parent Fundamental Representations shall have been true and correct in all material respects as of the date of this Agreement and shall be true and correct in all material respects on and as of the Closing Date with the same force and effect as if made on and as of such date (except to the extent such representations and warranties are specifically made as of a particular date, in which case such representations and warranties shall be true and correct in all material respects as of such date). The representations and warranties of Parent and Merger Sub contained in this Agreement (other than the Parent Fundamental Representations) shall have been true and correct as of the date of this Agreement and shall be true and correct on and as of the Closing Date with the same force and effect as if made on the Closing Date except (a) in each case, or in the aggregate, where the failure to be true and correct would not reasonably be expected to have a Parent Material Adverse Effect (without giving effect to any references therein to any Parent Material Adverse Effect or other materiality qualifications), or (b) for those representations and warranties which address matters only as of a particular date (which representations shall have been true and correct, subject to the qualifications as set forth in the preceding clause (a), as of such particular date) (it being understood that, for purposes of determining the accuracy of such representations and warranties, any update of or modification to the Parent Disclosure Schedule made or purported to have been made after the date of this Agreement shall be disregarded).

8.2 **Performance of Covenants.** Parent and Merger Sub shall have performed or complied with in all material respects all of their agreements and covenants required to be

performed or complied with by each of them under this Agreement at or prior to the Effective Time.

8.3 **Documents.** The Company shall have received the following documents, each of which shall be in full force and effect:

(a) a certificate executed by the Chief Executive Officer or Chief Financial Officer of Parent confirming that the conditions set forth in Sections 8.1, 8.2, and 8.4 have been duly satisfied;

(b) the Parent Outstanding Shares Certificate; and

(c) a written resignation, in a form reasonably satisfactory to the Company, dated as of the Closing Date and effective as of the Closing, executed by each of the directors of Parent who are not to continue as directors of Parent after the Closing pursuant to Section 5.14 hereof.

8.4 **No Parent Material Adverse Effect.** Since the date of this Agreement, there shall not have occurred any Parent Material Adverse Effect.

8.5 **Parent Net Cash.** Parent Net Cash as of the date of the Parent Stockholder Meeting is not less than \$30,000,000.

#### Section 9. TERMINATION

9.1 **Termination.** This Agreement may be terminated prior to the Effective Time (whether before or after approval of the Company Stockholder Matters by the Company's stockholders and whether before or after approval of the Parent Stockholder Matters by Parent's stockholders, unless otherwise specified below):

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

(b) by either Parent or the Company if the Contemplated Transactions shall not have been consummated by November 15, 2019 (the "**End Date**"); *provided, however*, that the right to terminate this Agreement under this Section 9.1(b) shall not be available to the Company, on the one hand, or to Parent, on the other hand, if such Party's action or failure to act has been a principal cause of the failure of the Contemplated Transactions to occur on or before the End Date and such action or failure to act constitutes a breach of this Agreement;

(c) by either Parent or the Company if a court of competent jurisdiction or other Governmental Body shall have issued a final and nonappealable order, decree or ruling, or shall have taken any other action, having the effect of permanently restraining, enjoining or otherwise prohibiting the Contemplated Transactions;

(d) by either Parent or the Company if (i) the Parent Stockholders' Meeting (including any adjournments and postponements thereof) shall have been held and completed and Parent's stockholders shall have taken a final vote on the Parent Stockholder

Matters and (ii) the Closing Parent Stockholder Matters shall not have been approved at the Parent Stockholders' Meeting (or at any adjournment or postponement thereof) by the Closing Parent Stockholder Vote;

(e) by the Company (at any time prior to the approval of the Closing Parent Stockholder Matters by the Closing Parent Stockholder Vote) if a Parent Triggering Event shall have occurred;

(f) by the Company, upon a breach of any representation, warranty, covenant or agreement set forth in Section 4.4 or Section 5.3(d) of this Agreement by Parent or Merger Sub or if any representation or warranty of Parent or Merger Sub shall have become inaccurate, in either case, such that the conditions set forth in Section 8.1 or Section 8.2 would not be satisfied as of the time of such breach or as of the time such representation or warranty shall have become inaccurate; *provided* that the Company is not then in material breach of any representation, warranty, covenant or agreement under this Agreement; *provided, further*, that if such inaccuracy in Parent's or Merger Sub's representations and warranties or breach by Parent or Merger Sub is curable by the End Date by Parent or Merger Sub, then this Agreement shall not terminate pursuant to this Section 9.1(f) as a result of such particular breach or inaccuracy until the expiration of a 30-day period commencing upon delivery of written notice from the Company to Parent or Merger Sub of such breach or inaccuracy and its intention to terminate pursuant to this Section 9.1(f) (it being understood that this Agreement shall not terminate pursuant to this Section 9.1(f) as a result of such particular breach or inaccuracy if such breach by Parent or Merger Sub is cured prior to such termination becoming effective);

(g) by Parent, upon a breach of any representation, warranty, covenant or agreement set forth in this Agreement by the Company or if any representation or warranty of the Company shall have become inaccurate, in either case, such that the conditions set forth in Section 7.1 or Section 7.2 would not be satisfied as of the time of such breach or as of the time such representation or warranty shall have become inaccurate; *provided* that Parent is not then in material breach of any representation, warranty, covenant or agreement under this Agreement; *provided, further*, that if such inaccuracy in the Company's representations and warranties or breach by the Company is curable by the End Date by the Company then this Agreement shall not terminate pursuant to this Section 9.1(g) as a result of such particular breach or inaccuracy until the expiration of a 30-day period commencing upon delivery of written notice from Parent to the Company of such breach or inaccuracy and its intention to terminate pursuant to this Section 9.1(g) (it being understood that this Agreement shall not terminate pursuant to this Section 9.1(g) as a result of such particular breach or inaccuracy if such breach by the Company is cured prior to such termination becoming effective);

(h) by Parent, at any time, if (i) Parent has received a Superior Offer, (ii) Parent has complied with its obligations under Section 5.3(d) in order to accept such Superior Offer, (iii) Parent concurrently terminates this Agreement and enters into a Permitted Alternative Agreement with respect to such Superior Offer and (iv) Parent pays to the Company the amount contemplated by Section 9.3(e);

(i) by Parent, if the Company Audited Financial Statements have not been provided by the Company to Parent within 15 days after the date hereof;

(j) by the Company if, at any time after the date hereof and prior to the Closing, Parent Net Cash has fallen below \$30,000,000; *provided* that this Agreement shall not terminate pursuant to this Section 9.1(j) until the expiration of a 10-day period commencing upon delivery of written notice from the Company to Parent of its intention to terminate pursuant to this Section 9.1(i) (it being understood that this Agreement shall not terminate pursuant to this Section 9.1(j) if Parent Net Cash is more than \$30,000,000 prior to such termination becoming effective);

(k) by Parent, if the Funding Agreement is terminated; or

(l) by Parent, if (i) the conditions set forth in Sections 6 and 8 (other than those conditions that by their nature are to be satisfied by actions taken at the Closing) have been satisfied, (ii) Parent has irrevocably confirmed by notice to the Company that all conditions set forth in Sections 6 and 8 have been satisfied as of the date of such notice (other than those conditions that by their nature are to be satisfied by actions taken at the Closing) and that it is willing to waive any unsatisfied conditions in Section 7 (other than the conditions set forth in Section 7.9 and those conditions that by their nature are to be satisfied by actions taken at the Closing) and (iii) the Merger shall not have been consummated within three Business Days after the delivery of such notice.

**9.2 Effect of Termination.** In the event of the termination of this Agreement as provided in Section 9.1, this Agreement shall be of no further force or effect; *provided, however*, that (a) this Section 9.2, Section 5.10, Section 9.3, Section 10 and the definitions of the defined terms in such Sections shall survive the termination of this Agreement and shall remain in full force and effect, and (b) the termination of this Agreement and the provisions of Section 9.3 shall not relieve any Party of any liability for fraud or for any willful and material breach of any representation, warranty, covenant, obligation or other provision contained in this Agreement.

**9.3 Expenses: Termination Fees.**

(a) Except as set forth in this Section 9.3, Section 5.8(d), and Section 5.11, all fees and expenses incurred in connection with this Agreement and the Contemplated Transactions shall be paid by the Party incurring such expenses, whether or not the Merger is consummated; provided that (i) the Company shall pay up to and including \$150,000 of the total usual and customary fees to file the Proxy Statement on this Merger with the SEC, and any amendments and supplements thereto, as well as any costs associated with printing these documents, with Parent being responsible for any and all such filing and printing expenses in excess of the amount paid by Company pursuant to this sub-section (a)(i) and (ii) Parent and Company shall each pay 50% of the fees and expenses incurred in relation to the drafting of the Proxy Statement and any amendments and supplements thereto. It is understood and agreed that all fees and expenses incurred or to be incurred by the Company in connection with the Contemplated Transactions and preparing, negotiating and entering into this Agreement and the



performance of its obligations under this Agreement shall be paid by the Company in cash at or prior to the Closing.

(b) If (i) this Agreement is terminated by the Company pursuant to Section 9.1(e), (ii) an Acquisition Proposal with respect to Parent shall have been publicly announced or disclosed to Parent or the Parent Board after the date of this Agreement but prior to the termination of this Agreement and (iii) within 9 months after the date of such termination, Parent consummates a Subsequent Transaction in respect of the Acquisition Proposal referred to in clause (ii), then Parent shall pay to the Company an amount equal to \$1,000,000 (the "**Company Termination Fee**") within ten Business Days of consummation of such Subsequent Transaction.

(c) If this Agreement is terminated (x) by Parent pursuant to Section 9.1(k) or (y) by the Company at a time at which Parent had the right to terminate the Agreement pursuant to Section 9.1(k), then the Company shall pay to Parent an amount equal to \$1,000,000 (the "**Parent Termination Fee**") within ten Business Days of such termination.

(d) If (i) this Agreement is terminated (x) by Parent pursuant to Section 9.1(l) or (y) by the Company at a time at which Parent had the right to terminate the Agreement pursuant to Section 9.1(l), the Company shall pay to Parent within ten Business Days of such termination the Parent Termination Fee.

(e) If this Agreement is terminated by Parent pursuant to Section 9.1(h), Parent shall pay to the Company within ten Business Days of such termination the Company Termination Fee.

(f) Any Company Termination Fee or Parent Termination Fee due under this Section 9.3 shall be paid by wire transfer of same day funds. If a Party fails to pay when due any amount payable by it under this Section 9.3, then such Party shall pay to the other Party interest on such overdue amount (for the period commencing as of the date such overdue amount was originally required to be paid and ending on the date such overdue amount is actually paid to the Company in full) at a rate per annum equal to the "prime rate" (as published in *The Wall Street Journal* or any successor thereto) in effect on the date such overdue amount was originally required to be paid.

(g) The Parties agree that, (i) subject to Section 9.2, payment of the Company Termination Fee shall, in the circumstances in which it is owed in accordance with the terms of this Agreement, constitute the sole and exclusive remedy of the Company following the termination of this Agreement, it being understood that in no event shall Parent be required to pay the amounts payable pursuant to this Section 9.3 on more than one occasion and (ii) following payment of the Company Termination Fee (x) Parent shall have no further liability to the Company in connection with or arising out of this Agreement or the termination thereof, any breach of this Agreement by Parent giving rise to such termination, or the failure of the Contemplated Transactions to be consummated, (y) neither the Company nor any of its Affiliates shall be entitled to bring or maintain any other claim, action or proceeding against Parent or Merger Sub or seek to obtain any recovery, judgment or damages of any kind against such Parties (or any partner, member, stockholder, director, officer, employee, Subsidiary, Affiliate, agent or other

Representative of such Parties) in connection with or arising out of this Agreement or the termination thereof, any breach by any such Parties giving rise to such termination or the failure of the Contemplated Transactions to be consummated and (z) the Company and its Affiliates shall be precluded from any other remedy against Parent, Merger Sub and their respective Affiliates, at law or in equity or otherwise, in connection with or arising out of this Agreement or the termination thereof, any breach by such Party giving rise to such termination or the failure of the Contemplated Transactions to be consummated; *provided, however*, that nothing in this Section 9.3(g) shall limit the rights of Parent and Merger Sub under Section 10.11.

(h) The Parties agree that, (i) subject to Section 9.2, payment of the Parent Termination Fee shall, in the circumstances in which it is owed in accordance with the terms of this Agreement, constitute the sole and exclusive remedy of Parent following the termination of this Agreement, it being understood that in no event shall the Company be required to pay the amounts payable pursuant to this Section 9.3 on more than one occasion and (ii) following payment of the Parent Termination Fee (x) the Company shall have no further liability to Parent in connection with or arising out of this Agreement or the termination thereof, any breach of this Agreement by the Company giving rise to such termination, or the failure of the Contemplated Transactions to be consummated, (y) neither Parent nor any of its Affiliates shall be entitled to bring or maintain any other claim, action or proceeding against the Company or seek to obtain any recovery, judgment or damages of any kind against such Parties (or any partner, member, stockholder, director, officer, employee, Subsidiary, Affiliate, agent or other Representative of such Parties) in connection with or arising out of this Agreement or the termination thereof, any breach by any such Parties giving rise to such termination or the failure of the Contemplated Transactions to be consummated and (z) Parent and its Affiliates shall be precluded from any other remedy against the Company and its Affiliates, at law or in equity or otherwise, in connection with or arising out of this Agreement or the termination thereof, any breach by such Party giving rise to such termination or the failure of the Contemplated Transactions to be consummated; *provided, however*, that nothing in this Section 9.3(h) shall limit the rights of the Company under Section 10.11.

(i) Each of the Parties acknowledges that (i) the agreements contained in this Section 9.3 are an integral part of the Contemplated Transactions, (ii) without these agreements, the Parties would not enter into this Agreement and (iii) any amount payable pursuant to this Section 9.3 is not a penalty, but rather is liquidated damages in a reasonable amount that will compensate the Company in the circumstances in which such amount is payable.

## **Section 10. MISCELLANEOUS PROVISIONS**

10.1 **Non-Survival of Representations and Warranties**. The representations and warranties of the Company, Parent and Merger Sub contained in this Agreement or any certificate or instrument delivered pursuant to this Agreement shall terminate at the Effective Time, and only the covenants that by their terms survive the Effective Time and this Section 10 shall survive the Effective Time.

10.2 **Amendment**. This Agreement may be amended with the approval of the respective boards of directors of the Company, Merger Sub and Parent at any time (whether before

or after obtaining the Required Company Stockholder Vote or before or after obtaining the Required Parent Stockholder Vote); *provided, however*, that after any such approval of this Agreement by a Party's stockholders, no amendment shall be made which by Law requires further approval of such stockholders without the further approval of such stockholders. This Agreement may not be amended except by an instrument in writing signed on behalf of each of the Company, Merger Sub and Parent.

**10.3 Waiver.**

(a) No failure on the part of any Party to exercise any power, right, privilege or remedy under this Agreement, and no delay on the part of any Party in exercising any power, right, privilege or remedy under this Agreement, shall operate as a waiver of such power, right, privilege or remedy; and no single or partial exercise of any such power, right, privilege or remedy shall preclude any other or further exercise thereof or of any other power, right, privilege or remedy.

(b) No Party shall be deemed to have waived any claim arising out of this Agreement, or any power, right, privilege or remedy under this Agreement, unless the waiver of such claim, power, right, privilege or remedy is expressly set forth in a written instrument duly executed and delivered on behalf of such Party and any such waiver shall not be applicable or have any effect except in the specific instance in which it is given.

**10.4 Entire Agreement; Counterparts; Exchanges by Electronic Transmission** This Agreement, the Company Disclosure Schedule, the Parent Disclosure Schedule and the other agreements referred to in this Agreement constitute the entire agreement and supersede all prior agreements and understandings, both written and oral, among or between any of the Parties with respect to the subject matter hereof and thereof; *provided, however*, that the Confidentiality Agreement shall not be superseded and shall remain in full force and effect in accordance with its terms. This Agreement may be executed in several counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument. The exchange of a fully executed Agreement (in counterparts or otherwise) by all Parties by electronic transmission in .PDF format shall be sufficient to bind the Parties to the terms and conditions of this Agreement.

**10.5 Applicable Law; Jurisdiction.** This Agreement shall be governed by, and construed in accordance with, the Laws of the State of Delaware, regardless of the Laws that might otherwise govern under applicable principles of conflicts of laws. In any action or proceeding between any of the Parties arising out of or relating to this Agreement or any of the Contemplated Transactions, each of the Parties: (a) irrevocably and unconditionally consents and submits to the exclusive jurisdiction and venue of the Court of Chancery of the State of Delaware or, to the extent such court does not have subject matter jurisdiction, the United States District Court for the District of Delaware or, to the extent that neither of the foregoing courts has jurisdiction, the Superior Court of the State of Delaware; (b) agrees that all claims in respect of such action or proceeding shall be heard and determined exclusively in accordance with clause (a) of this Section 10.5; (c) waives any objection to laying venue in any such action or proceeding in such courts; (d) waives any objection that such courts are an inconvenient forum or do not have jurisdiction over any Party;

(e) agrees that service of process upon such Party in any such action or proceeding shall be effective if notice is given in accordance with Section 10.8 of this Agreement; and (f) irrevocably and unconditionally waives the right to trial by jury.

10.6 **Attorneys' Fees.** In any action at law or suit in equity to enforce this Agreement or the rights of any of the Parties, the prevailing Party in such action or suit (as determined by a court of competent jurisdiction) shall be entitled to recover its reasonable out-of-pocket attorneys' fees and all other reasonable costs and expenses incurred in such action or suit.

10.7 **Assignability.** This Agreement shall be binding upon, and shall be enforceable by and inure solely to the benefit of, the Parties and their respective successors and permitted assigns; *provided, however,* that neither this Agreement nor any of a Party's rights or obligations hereunder may be assigned or delegated by such Party without the prior written consent of the other Party, and any attempted assignment or delegation of this Agreement or any of such rights or obligations by such Party without the other Party's prior written consent shall be void and of no effect.

10.8 **Notices.** All notices and other communications hereunder shall be in writing and shall be deemed to have been duly delivered and received hereunder (a) one Business Day after being sent for next Business Day delivery, fees prepaid, via a reputable international overnight courier service, (b) upon delivery in the case of delivery by hand, or (c) on the date delivered in the place of delivery if sent by email (with a written or electronic confirmation of delivery) prior to 5:00 p.m. San Diego time, otherwise on the next succeeding Business Day, in each case to the intended recipient as set forth below:

if to Parent or Merger Sub:

Vical Incorporated  
10390 Pacific Center Court  
San Diego, CA 92121-4340  
Attention: Vijay Samant  
Email: vbsamant@vical.com

with a copy to (which shall not constitute notice):

Cooley LLP  
4401 Eastgate Mall  
San Diego, CA 92121  
Attention: Rama Padmanabhan  
Email: rama@cooley.com

if to the Company:

Brickell Biotech, Inc.  
5777 Central Avenue, Suite 102  
Boulder, CO 80301

Attention: Andrew Sklawer  
Email: asklawer@brickellbio.com

with a copy to (which shall not constitute notice):

Mayer Brown LLP  
1221 Avenue of the Americas  
New York, NY 10020  
Attention: Anna T. Pinedo  
Email: apinedo@mayerbrown.com

**10.9 Cooperation.** Each Party agrees to cooperate fully with the other Party and to execute and deliver such further documents, certificates, agreements and instruments and to take such other actions as may be reasonably requested by the other Party to evidence or reflect the Contemplated Transactions and to carry out the intent and purposes of this Agreement.

**10.10 Severability.** Any term or provision of this Agreement that is invalid or unenforceable in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions of this Agreement or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction. If a final judgment of a court of competent jurisdiction declares that any term or provision of this Agreement is invalid or unenforceable, the Parties agree that the court making such determination shall have the power to limit such term or provision, to delete specific words or phrases or to replace such term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision, and this Agreement shall be valid and enforceable as so modified. In the event such court does not exercise the power granted to it in the prior sentence, the Parties agree to replace such invalid or unenforceable term or provision with a valid and enforceable term or provision that will achieve, to the extent possible, the economic, business and other purposes of such invalid or unenforceable term or provision.

**10.11 Other Remedies: Specific Performance.** Except as otherwise provided herein, any and all remedies herein expressly conferred upon a Party will be deemed cumulative with and not exclusive of any other remedy conferred hereby, or by law or equity upon such Party, and the exercise by a Party of any one remedy will not preclude the exercise of any other remedy. The Parties agree that irreparable damage for which monetary damages, even if available, would not be an adequate remedy, would occur in the event that any Party does not perform the provisions of this Agreement (including failing to take such actions as are required of it hereunder to consummate this Agreement) in accordance with its specified terms or otherwise breaches such provisions. Accordingly, the Parties acknowledge and agree that the Parties shall be entitled to an injunction, specific performance and other equitable relief to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof, in addition to any other remedy to which they are entitled at law or in equity. Each of the Parties agrees that it will not oppose the granting of an injunction, specific performance or other equitable relief on the basis that any other Party has an adequate remedy at law or that any award of specific performance is not an appropriate remedy for any reason at law or in equity. Any Party seeking an injunction or injunctions to

prevent breaches of this Agreement shall not be required to provide any bond or other security in connection with any such order or injunction.

10.12 **No Third Party Beneficiaries** Nothing in this Agreement, express or implied, is intended to or shall confer upon any Person (other than the Parties, the COBRA Employees to the extent of their respective rights in Section 5.7 and the D&O Indemnified Parties to the extent of their respective rights pursuant to Section 5.8) any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

10.13 **Construction.**

(a) References to “cash,” “dollars” or “\$” are to U.S. dollars.

(b) For purposes of this Agreement, whenever the context requires: the singular number shall include the plural, and vice versa; the masculine gender shall include the feminine and neuter genders; the feminine gender shall include the masculine and neuter genders; and the neuter gender shall include masculine and feminine genders.

(c) The Parties have participated jointly in the negotiating and drafting of this Agreement and agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not be applied in the construction or interpretation of this Agreement, and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement.

(d) As used in this Agreement, the words “include” and “including,” and variations thereof, shall not be deemed to be terms of limitation, but rather shall be deemed to be followed by the words “without limitation.”

(e) Except as otherwise indicated, all references in this Agreement to “Sections,” “Exhibits” and “Schedules” are intended to refer to Sections of this Agreement and Exhibits and Schedules to this Agreement, respectively.

(f) Any reference to legislation or to any provision of any legislation shall include any modification, amendment, re-enactment thereof, any legislative provision substituted therefore and all rules, regulations, and statutory instruments issued or related to such legislations.

(g) The bold-faced headings and table of contents contained in this Agreement are for convenience of reference only, shall not be deemed to be a part of this Agreement and shall not be referred to in connection with the construction or interpretation of this Agreement.

(h) Each of “delivered” or “made available” means, with respect to any documentation, that prior to 11:59 p.m. (San Diego time) on the date that is two calendar days prior to the date of this Agreement (i) a copy of such material has been posted to and made available by a Party to the other Party and its Representatives in the electronic data room maintained by such disclosing Party or (ii) such material is disclosed in the Parent SEC Documents filed with the SEC

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prior to the date hereof and publicly made available on the SEC's Electronic Data Gathering Analysis and Retrieval system.

(i) Whenever the last day for the exercise of any privilege or the discharge of any duty hereunder shall fall upon a Saturday, Sunday, or any date on which banks in San Diego, California are authorized or obligated by Law to be closed, the Party having such privilege or duty may exercise such privilege or discharge such duty on the next succeeding day which is a regular Business Day.

*(Remainder of page intentionally left blank)*

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IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the date first above written.

**VICAL INCORPORATED**

By: /s/ Vijay Samant

Name: Vijay Samant

Title: President and CEO

*[Signature Page to Merger Agreement]*



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IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the date first above written.

**VICTORY SUBSIDIARY, INC.**

By: /s/ Anthony Ramos

Name: Anthony Ramos

Title: Chief Financial Officer

*[Signature Page to Merger Agreement]*

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IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the date first above written.

**BRICKELL BIOTECH, INC.**

By: /s/ Robert Brown

Name: Robert Brown

Title: CEO

*[Signature Page to Merger Agreement]*

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**EXHIBIT A**

**CERTAIN DEFINITIONS**

(a) For purposes of this Agreement (including this Exhibit A):

“**Acquisition Inquiry**” means, with respect to a Party, an inquiry, indication of interest or request for information (other than an inquiry, indication of interest or request for information made or submitted by the Company, on the one hand, or Parent, on the other hand, to the other Party) that would reasonably be expected to lead to an Acquisition Proposal.

“**Acquisition Proposal**” means, with respect to a Party, any offer or proposal, whether written or oral (other than an offer or proposal made or submitted by or on behalf of the Company or any of its Affiliates, on the one hand, or by or on behalf of Parent or any of its Affiliates, on the other hand, to the other Party) contemplating or otherwise relating to any Acquisition Transaction with such Party.

“**Acquisition Transaction**” means any transaction or series of related transactions involving:

(i) any merger, consolidation, amalgamation, share exchange, business combination, issuance of securities, acquisition of securities, reorganization, recapitalization, tender offer, exchange offer or other similar transaction: (i) in which a Party is a constituent entity; (ii) in which a Person or “group” (as defined in the Exchange Act and the rules promulgated thereunder) of Persons directly or indirectly acquires beneficial or record ownership of securities representing more than 20% of the outstanding securities of any class of voting securities of a Party or any of its Subsidiaries; or (iii) in which a Party or any of its Subsidiaries issues securities representing more than 20% of the outstanding securities of any class of voting securities of such Party or any of its Subsidiaries; or

(ii) any sale, lease, exchange, transfer, license, acquisition or disposition of any business or businesses or assets that constitute or account for 20% or more of the consolidated book value or the fair market value of the assets of a Party and its Subsidiaries, taken as a whole.

Notwithstanding the foregoing, the Concurrent Financing will not be considered an “Acquisition Transaction” with respect to the Company.

“**Affiliate**” of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

“**Agreement**” means the Agreement and Plan of Merger and Reorganization to which this Exhibit A is attached, as it may be amended from time to time.

“**Antitrust Laws**” shall mean all applicable Laws and regulations (including non-U.S. laws and regulations) issued by a Governmental Body that are designed or intended to preserve or protect competition, prohibit and restrict agreements in restraint of trade or monopolization, attempted monopolization, restraints of trade and abuse of a dominant position, or to prevent acquisitions, mergers or other business combinations and similar transactions, the effect of which may be to lessen or impede competition or to tend to create or strengthen a dominant position or to create a monopoly.

“**Business Day**” means any day other than a Saturday, Sunday or other day on which banks in San Diego, California are authorized or obligated by Law to be closed.

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

“**Company Associate**” means any current or former employee, independent contractor, officer or director of the Company.

“**Company Board**” means the board of directors of the Company.

“**Company Capital Stock**” means the Company Common Stock and the Company Preferred Stock.

“**Company Common Stock**” means the Common Stock, \$0.0001 par value per share, of the Company.

“**Company Contract**” means any Contract: (a) to which the Company is a Party; (b) by which the Company or any Company IP or any other asset of the Company is or may become bound or under which the Company has, or may become subject to, any obligation; or (c) under which the Company has or may acquire any right or interest.

“**Company Convertible Notes**” means the unsecured convertible promissory notes of the Company, including those listed on **Exhibit J**.

“**Company ERISA Affiliate**” means any corporation or trade or business (whether or not incorporated) which is (or at any relevant time was) treated with the Company as a single employer within the meaning of Section 414 of the Code.

“**Company Fundamental Representations**” means the representations and warranties of the Company set forth in **Sections 2.1** (Due Organization; No Subsidiaries), **2.3** (Authority; Binding Nature of Agreement), **2.4** (Vote Required), **2.6** (Capitalization) and **2.20** (No Financial Advisors).

“**Company IP**” means all Intellectual Property Rights that are owned or purported to be owned by the Company.

**“Company Material Adverse Effect”** means any Effect that, considered together with all other Effects that have occurred prior to the date of determination of the occurrence of a Company Material Adverse Effect, has or would reasonably be expected to have a material adverse effect on the business, condition (financial or otherwise), assets, liabilities or results of operations of the Company; *provided, however*, that Effects arising or resulting from the following shall not be taken into account in determining whether there has been a Company Material Adverse Effect: (a) general business or economic conditions affecting the industry in which the Company operates, (b) acts of war, armed hostilities or terrorism, (c) changes in financial, banking or securities markets, (d) any change in, or any compliance with or action taken for the purpose of complying with, any Law or GAAP (or interpretations of any Law or GAAP) or (e) resulting from the taking of any action required to be taken by this Agreement; except in each case with respect to clauses (a) through (c), to the extent disproportionately affecting the Company, taken as a whole, relative to other similarly situated companies in the industries in which the Company operates.

**“Company Net Working Capital”** means the sum of (a) the Company’s cash, cash equivalents and marketable securities (other than the proceeds of the Concurrent Financing), in each case as of the date of the Parent Stockholder Meeting, determined in a manner consistent with the manner in which such items were historically determined and in accordance with the Company Financials and GAAP, plus (b) the Company’s accounts receivable as of the date of the Parent Stockholder Meeting determined in a manner consistent with the manner in which such items were historically determined and in accordance with the Company Financials and GAAP, minus (c) the sum of the Company’s accounts payable and accrued expenses as of the date of the Parent Stockholder Meeting determined in a manner consistent with the manner in which such items were historically determined and in accordance with the Company Financials and GAAP or as otherwise designated on Exhibit I-2, minus (d) the aggregate amount of all future payments under the Company’s notes payable and indebtedness for borrowed money outstanding as of the date of the Parent Stockholder Meeting.

**“Company Options”** means options or other rights to purchase shares of Company Capital Stock issued by the Company.

**“Company Stockholder Matters”** means (i) adopting and approving this Agreement and the Contemplated Transactions, (ii) acknowledging that the approval given thereby is irrevocable and that such stockholder is aware of its rights to demand appraisal for its shares pursuant to Section 262 of the DGCL, a true and correct copy of which was attached thereto, and that such stockholder has received and read a copy of Section 262 of the DGCL, and (iii) acknowledging that by its approval of the Merger it is not entitled to appraisal rights with respect to its shares in connection with the Merger and thereby waives any rights to receive payment of the fair value of its capital stock under the DGCL.

**“Company Unaudited Interim Balance Sheet”** means the unaudited consolidated balance sheet of the Company for the period ended March 31, 2019 provided to Parent prior to the date of this Agreement.

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“**Company Warrant**” means the warrants to purchase capital stock of the Company, including those listed on **Exhibit E**.

“**Confidentiality Agreement**” means the Confidentiality Agreement, dated as of January 31, 2019, between the Company and Parent.

“**Consent**” means any approval, consent, ratification, permission, waiver or authorization (including any Governmental Authorization).

“**Contemplated Transactions**” means the Merger and the other transactions and actions contemplated by this Agreement, including the Concurrent Financing and the Reverse Split.

“**Contract**” means, with respect to any Person, any agreement, contract, subcontract, lease (whether for real or personal property), mortgage, license, sublicense or other legally binding commitment or undertaking of any nature to which such Person is a party or by which such Person or any of its assets are bound or affected under applicable Law.

“**DGCL**” means the General Corporation Law of the State of Delaware.

“**Effect**” means any effect, change, event, circumstance, or development.

“**Encumbrance**” means any lien, pledge, hypothecation, charge, mortgage, security interest, lease, license, option, easement, reservation, servitude, adverse title, claim, infringement, interference, option, right of first refusal, preemptive right, community property interest or restriction or encumbrance of any nature (including any restriction on the voting of any security, any restriction on the transfer of any security or other asset, any restriction on the receipt of any income derived from any asset, any restriction on the use of any asset and any restriction on the possession, exercise or transfer of any other attribute of ownership of any asset).

“**Enforceability Exceptions**” means the (a) Laws of general application relating to bankruptcy, insolvency and the relief of debtors; and (b) rules of law governing specific performance, injunctive relief and other equitable remedies.

“**Entity**” means any corporation (including any non-profit corporation), partnership (including any general partnership, limited partnership or limited liability partnership), joint venture, estate, trust, company (including any company limited by shares, limited liability company or joint stock company), firm, society or other enterprise, association, organization or entity, and each of its successors.

“**Environmental Law**” means any federal, state, local or foreign Law relating to pollution or protection of human health or the environment (including ambient air, surface water, ground water, land surface or subsurface strata), including any Law or regulation relating to emissions, discharges, releases or threatened releases of Hazardous Materials, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of Hazardous Materials.

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“**ERISA**” means the Employee Retirement Income Security Act of 1974, as amended.

“**Exchange Act**” means the Securities Exchange Act of 1934.

“**Exchange Ratio**” means, subject to Section 1.5(g), the following ratio (rounded to four decimal places): the quotient obtained by dividing (a) the Company Merger Shares by (b) the Company Outstanding Shares, in which:

- “**Aggregate Valuation**” means the sum of (a) the Company Valuation, plus (b) the Parent Valuation.
- “**Company Valuation**” means \$60,000,000; *provided*, that (a) if the Company Net Working Capital as determined pursuant to Section 1.9 is less than -\$10,200,000, then the Company Valuation shall be reduced by one dollar for each dollar that the Company Net Working Capital is less than -\$10,200,000 and (b) if the Company Net Working Capital as determined pursuant to Section 1.9 is more than -\$9,200,000, then the Company Valuation shall be increased by one dollar for each dollar that the Company Net Working Capital is more than -\$9,200,000. For purposes of this definition, Company Net Working Capital shall be rounded down to the nearest whole dollar.
- “**Company Allocation Fraction**” the quotient (rounded to two decimal places) determined by dividing (i) the Company Valuation by (ii) the Aggregate Valuation.
- “**Company Merger Shares**” means the product determined by multiplying (i) the Post-Closing Parent Shares by (ii) the Company Allocation Fraction.
- “**Company Outstanding Shares**” means the total number of shares of Company Capital Stock outstanding immediately prior to the Effective Time expressed on a fully-diluted and as-converted to Company Common Stock basis, assuming, without limitation or duplication, (i) calculated in the case of clause (i) based on the treasury stock method, the issuance of shares of Company Capital Stock in respect of all Company Options, Company Warrants, Company Convertible Notes and other outstanding options, restricted stock awards, warrants, convertible notes or rights to receive such shares, in each case, outstanding as of immediately prior to the Effective Time (assuming cashless exercise using the implied share price based on proposed equity value in this transaction for purposes of the treasury stock method calculation) whether conditional or unconditional and including any outstanding options, warrants or rights triggered by or associated with the consummation of the Merger (but excluding any shares of Company Capital Stock reserved for issuance other than with respect to

outstanding Company Warrants, Company Options or Company Convertible Notes (for the avoidance of doubt including any Company Convertible Notes issued following the date hereof pursuant to the Note Purchase Agreement up to an aggregate amount of \$7.5 million) as of immediately prior to the Effective Time); and (ii) without applying the treasury stock method, (A) the issuance of shares of Parent Common Stock in respect of the Parent Warrants to be issued in connection with the Concurrent Financing and (B) unless otherwise consented to by Parent or pursuant to the Note Purchase Agreement (up to an aggregate amount of \$7.5 million), the issuance of shares of Company Capital Stock or Parent Common Stock in respect of (1) 75% of any Company Options and (2) any convertible debt, warrants or other equity securities of Company or Parent, in the case of (1) and (2), that the Company, during the Pre-Closing Period, issues or commits to issue (which shall, with respect to Company Options, be in accordance with Section 4.2(b) of the Company Disclosure Schedule). The definition of “Company Outstanding Shares” and the definition of “Parent Outstanding Shares” should be read with, and interpreted in a manner consistent with, the schedule attached hereto as **Schedule 1**.

- “**Parent Allocation Fraction**” means the quotient (rounded to two decimal places) determined by dividing (i) the Parent Valuation by (ii) the Aggregate Valuation.
- “**Parent Outstanding Shares**” means the total number of shares of Parent Common Stock outstanding immediately prior to the Effective Time expressed on a fully-diluted basis and using the treasury stock method, but assuming, without limitation or duplication, (i) the issuance of shares of Parent Common Stock pursuant to that certain Letter Agreement dated July 16, 2018, by and between Parent and MTS (to the extent authorized by Parent) and (ii) the issuance of shares of Parent Common Stock in respect of all Parent Options, Parent Warrants and other outstanding options, restricted stock awards, warrants or rights to receive such shares, in each case, outstanding as of immediately prior to the Effective Time (assuming cashless exercise using the Parent Closing Price for purposes of the treasury stock method calculation), whether conditional or unconditional and including any outstanding options, warrants or rights triggered by or associated with the consummation of the Merger, (but excluding any shares of Parent Common Stock reserved for issuance other than with respect to outstanding Parent Options and Parent Warrants as of immediately prior to the Effective Time). No out-of-the-money Parent Options or Parent Warrants shall be included in the total number of shares of Parent Common Stock outstanding for purposes of determining the Parent Outstanding Shares. The definition of “Company Outstanding Shares” and the definition



of “Parent Outstanding Shares” should be read with, and interpreted in a manner consistent with, the schedule attached hereto as **Schedule 1**.

- “**Parent Valuation**” means \$40,000,000; *provided*, that (a) if the Parent Net Cash as determined pursuant to Section 1.9 is less than \$34,200,000, then the Parent Valuation shall be reduced by one dollar for each dollar that the Parent Net Cash is less than \$34,200,000 and (b) if the Parent Net Cash as determined pursuant to Section 1.9 is more than \$35,200,000, then the Parent Valuation shall be increased by one dollar for each dollar that the Parent Net Cash is more than \$35,200,000. For purposes of this definition, Parent Net Cash shall be rounded down to the nearest whole dollar.
- “**Post-Closing Parent Shares**” means the quotient determined by dividing (i) the Parent Outstanding Shares by (ii) the Parent Allocation Fraction.

“**GAAP**” means generally accepted accounting principles and practices in effect from time to time within the United States applied consistently throughout the period involved.

“**Governmental Authorization**” means any: (a) permit, license, certificate, franchise, permission, variance, exception, order, clearance, registration, qualification or authorization issued, granted, given or otherwise made available by or under the authority of any Governmental Body or pursuant to any Law; or (b) right under any Contract with any Governmental Body.

“**Governmental Body**” means any: (a) nation, state, commonwealth, province, territory, county, municipality, district or other jurisdiction of any nature; (b) federal, state, local, municipal, foreign or other government; (c) governmental or quasi-governmental authority of any nature (including any governmental division, department, agency, commission, bureau, instrumentality, official, ministry, fund, foundation, center, organization, unit, body or Entity and any court or other tribunal, and for the avoidance of doubt, any taxing authority); or (d) self-regulatory organization (including Nasdaq).

“**Hazardous Materials**” means any pollutant, chemical, substance and any toxic, infectious, carcinogenic, reactive, corrosive, ignitable or flammable chemical, or chemical compound, or hazardous substance, material or waste, whether solid, liquid or gas, that is subject to regulation, control or remediation under any Environmental Law, including without limitation, crude oil or any fraction thereof, and petroleum products or by-products.

“**Intellectual Property Rights**” means and includes all past, present, and future rights of the following types: (a) rights associated with works of authorship, including exclusive exploitation rights, copyrights, moral rights, software, databases, and mask works; (b) trademarks, service marks, trade dress, trade names and other source identifiers, domain names and URLs and similar rights and any goodwill associated therewith; (c) rights associated with trade secrets, know how, inventions, invention disclosures, methods, processes, protocols, specifications, techniques and other forms of technology; (d) patents and industrial property rights; (e) other similar

proprietary rights in intellectual property of every kind and nature; (f) rights of privacy and publicity; and (g) all registrations, renewals, extensions, statutory invention registrations, provisionals, continuations, continuations-in-part, provisionals, divisions, or reissues of, and applications for, any of the rights referred to in clauses “(a)” through “(f)” above (whether or not in tangible form and including all tangible embodiments of any of the foregoing, such as samples, studies and summaries), along with all rights to prosecute and perfect the same through administrative prosecution, registration, recordation or other administrative proceeding, and all causes of action and rights to sue or seek other remedies arising from or relating to the foregoing.

“**IRS**” means the United States Internal Revenue Service.

“**Knowledge**” means, with respect to an individual, that such individual is actually aware of the relevant fact or such individual would reasonably be expected to know such fact in the ordinary course of the performance of such individual’s employment responsibilities. Any Person that is an Entity shall have Knowledge if any officer or director of such Person as of the date such knowledge is imputed has Knowledge of such fact or other matter.

“**Law**” means any federal, state, national, foreign, material local or municipal or other law, statute, constitution, principle of common law, resolution, ordinance, code, edict, decree, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Body (including under the authority of Nasdaq or the Financial Industry Regulatory Authority).

“**Legal Proceeding**” means any action, suit, litigation, arbitration, proceeding (including any civil, criminal, administrative, investigative or appellate proceeding), hearing, inquiry, audit, examination or investigation commenced, brought, conducted or heard by or before, or otherwise involving, any court or other Governmental Body or any arbitrator or arbitration panel.

“**Merger Sub Board**” means the board of directors of Merger Sub.

“**MTS**” means MTS Health Partners, L.P.

“**Nasdaq**” means the Nasdaq Stock Market, including the Nasdaq Global Select Market or such other Nasdaq market on which shares of Parent Common Stock are then listed.

“**Note Purchase Agreement**” means the Note and Warrant Purchase Agreement, dated March 18, 2019, among to the Company and the persons listed on Exhibit A thereto, as in effect on the date hereof (other than any additions to Exhibit A thereto during the Pre-Closing Period).

“**Ordinary Course of Business**” means, in the case of each of the Company and Parent, such actions taken in the ordinary course of its normal operations and consistent with its past practices.

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**“Organizational Documents”** means, with respect to any Person (other than an individual), (a) the certificate or articles of association or incorporation or organization or limited partnership or limited liability company, and any joint venture, limited liability company, operating or partnership agreement and other similar documents adopted or filed in connection with the creation, formation or organization of such Person, and (b) all bylaws, regulations and similar documents or agreements relating to the organization or governance of such Person, in each case, as amended or supplemented.

**“Parent Associate”** means any current or former employee, independent contractor, officer or director of Parent.

**“Parent Balance Sheet”** means the audited balance sheet of Parent as of December 31, 2018 (the **“Parent Balance Sheet Date”**), included in Parent’s Report on Form 10-K for the year ended December 31, 2018, as filed with the SEC.

**“Parent Board”** means the board of directors of Parent.

**“Parent Change in Circumstance”** means a change in circumstances (other than an Acquisition Proposal) that affects the business, assets or operations of Parent that occurs or arises after the date of this Agreement and that was neither known to Parent or Parent Board nor reasonably foreseeable as of date of this Agreement.

**“Parent Closing Price”** means the volume weighted average closing trading price of a share of Parent Common Stock on Nasdaq for the five consecutive trading days ending five trading days immediately prior to the date upon which the Merger becomes effective.

**“Parent Common Stock”** means the Common Stock, \$0.01 par value per share, of Parent.

**“Parent Contract”** means any Contract: (a) to which Parent is a party; (b) by which Parent or any Parent IP or any other asset of Parent is or may become bound or under which Parent has, or may become subject to, any obligation; or (c) under which Parent has or may acquire any right or interest.

**“Parent ERISA Affiliate”** means any corporation or trade or business (whether or not incorporated) which is (or at any relevant time was) treated with Parent or any of its Subsidiaries as a single employer within the meaning of Section 414 of the Code.

**“Parent Fundamental Representations”** means the representations and warranties of Parent and Merger Sub set forth in Sections 3.1 (Due Organization; Subsidiaries), 3.3 (Authority; Binding Nature of Agreement), 3.4 (Vote Required), 3.6 (Capitalization) and 3.21 (No Financial Advisors).

**“Parent IP”** means all Intellectual Property Rights that are owned or purported to be owned by Parent or its Subsidiaries.

**“Parent Material Adverse Effect”** means any Effect that, considered together with all other Effects that have occurred prior to the date of determination of the occurrence of a Parent Material Adverse Effect, has or would reasonably be expected to have a material adverse effect on the business, condition (financial or otherwise), assets, liabilities or results of operations of Parent; *provided, however*, that Effects arising or resulting from the following shall not be taken into account in determining whether there has been a Parent Material Adverse Effect: (a) general business or economic conditions affecting the industry in which Parent operates, (b) acts of war, armed hostilities or terrorism, (c) changes in financial, banking or securities markets, (d) the taking of any action required to be taken by this Agreement, (e) any change in the stock price or trading volume of Parent Common Stock (it being understood, however, that any Effect causing or contributing to any change in stock price or trading volume of Parent Common Stock may be taken into account in determining whether a Parent Material Adverse Effect has occurred, unless such Effects are otherwise excepted from this definition), (f) the failure of Parent to meet internal or analysts’ expectations or projections or the results of operations of Parent; (g) any clinical trial programs or studies, including any adverse data, event or outcome arising out of or related to any such programs or studies, (h) any change in, or any compliance with or action taken for the purpose of complying with, any Law or GAAP (or interpretations of any Law or GAAP), (i) resulting from the announcement of this Agreement or the pendency of the Contemplated Transactions, or (j) resulting from the taking of any action required to be taken by this Agreement, except in each case with respect to clauses (a) through (c), to the extent disproportionately affecting Parent relative to other similarly situated companies in the industries in which Parent operates.

**“Parent Net Cash”** means, without duplication, (a) Parent’s cash, cash equivalents and marketable securities as of as of the date of the Parent Stockholder Meeting determined in a manner consistent with the manner in which such items were historically determined and in accordance with the financial statements contained or incorporated by reference in the Parent SEC Documents and GAAP; plus (b) Parent’s accounts receivable as of the date of the Parent Stockholder Meeting determined in a manner consistent with the manner in which such items were historically determined and in accordance with the financial statements contained or incorporated by reference in the Parent SEC Documents and GAAP; minus (c) the sum of Parent’s accounts payable and accrued expenses (without duplication of any expenses otherwise accounted for in the definition of Parent Net Cash) as of the date of the Parent Stockholder Meeting determined in a manner consistent with the manner in which such items were historically determined and in accordance with the financial statements contained or incorporated by reference in the Parent SEC Documents and GAAP; minus (d) Parent Transaction Costs (unless paid prior to the Effective Time or otherwise accounted for in the definition of Parent Net Cash); plus (e) unless otherwise accounted for in Company Net Working Capital, the portion of the costs and expenses payable by the Company pursuant to Section 9.3(a)(i) and (ii) that are paid by Parent (and not reimbursed by the Company) prior to the date of the Parent Stockholders’ Meeting.

**“Parent Options”** means options or other rights to purchase shares of Parent Common Stock issued by Parent.

**“Parent RSUs”** means any restricted stock unit award granted pursuant to the Parent Stock Plan or otherwise.

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“**Parent Stock Plan**” means, as amended, the Amended and Restated Stock Incentive Plan of Parent.

“**Parent Transaction Costs**” means, without duplication, the aggregate amount of costs and expenses of Parent incurred in connection with the negotiation, preparation and execution of this Agreement and the consummation of the Contemplated Transactions, including: (a) any brokerage fees and commissions, finders’ fees or financial advisory fees, any fees and expenses of counsel or accountants payable by Parent and any transaction bonuses or similar items in connection with the Contemplated Transactions; (b) any bonus, severance, change-in-control payments or similar payment obligations (including payments with “single-trigger” provisions triggered at and as of the consummation of the Contemplated Transactions) that become due or payable to any director, officer, employee or consultant of Parent in connection with the consummation of the Contemplated Transactions; (c) the out of pocket costs of any insurance tail policies that may be purchased by Parent relating to insurance policies held by it prior to the Closing (including all premiums payable in connection therewith) and, for clarity, shall not include the deductible under any such policy, the cost of any insurance tail policies of the Company or the costs of Parent after the Effective Time for coverage of Parent’s then-serving directors or other insurance policies of Parent on or after the Effective Time; and (d) the costs and expenses payable by Parent pursuant to Section 9.3(a)(ii), in each case with respect to the foregoing matters (a)-(d), to the extent unpaid and not otherwise accounted for in the definition of Parent Net Cash.

“**Parent Triggering Event**” shall be deemed to have occurred if: (a) Parent shall have failed to include in the Proxy Statement the Parent Board Recommendation or shall have made a Parent Board Adverse Recommendation Change; (b) the Parent Board or any committee thereof shall have publicly approved, endorsed or recommended any Acquisition Proposal; or (c) Parent shall have entered into any letter of intent or similar document relating to any Acquisition Proposal (other than a confidentiality agreement permitted pursuant to Section 4.4).

“**Parent Warrants**” means the warrants to purchase capital stock of Parent listed on **Exhibit F**.

“**Party**” or “**Parties**” means the Company, Merger Sub and Parent.

“**Permitted Alternative Agreement**” means a definitive agreement that contemplates or otherwise relates to an Acquisition Transaction that constitutes a Superior Offer.

“**Permitted Encumbrance**” means: (a) any liens for current Taxes not yet due and payable or for Taxes that are being contested in good faith and for which adequate reserves have been made on the Company Unaudited Interim Balance Sheet or the Parent Balance Sheet, as applicable; (b) minor liens that have arisen in the Ordinary Course of Business and that do not (in any case or in the aggregate) materially detract from the value of the assets or properties subject thereto or materially impair the operations of the Company or Parent, as applicable; (c) statutory liens to secure obligations to landlords, lessors or renters under leases or rental agreements; (d) deposits or pledges made in connection with, or to secure payment of, workers’ compensation, unemployment insurance or similar programs mandated by Law; (e) non-exclusive licenses of

Intellectual Property Rights granted by the Company or Parent, as applicable, in the Ordinary Course of Business and that do not (in any case or in the aggregate) materially detract from the value of the Intellectual Property Rights subject thereto; and (f) statutory liens in favor of carriers, warehousemen, mechanics and materialmen, to secure claims for labor, materials or supplies.

“**Person**” means any individual, Entity or Governmental Body.

“**Proxy Statement**” means the proxy statement to be sent to Parent’s stockholders in connection with the Parent Stockholders’ Meeting.

“**Reference Date**” means May 31, 2019.

“**Registered IP**” means all Intellectual Property Rights that are registered or issued under the authority of any Governmental Body, including all patents, registered copyrights, registered mask works, and registered trademarks, service marks and trade dress, registered domain names, and all applications for any of the foregoing.

“**Representatives**” means directors, officers, employees, agents, attorneys, accountants, investment bankers, advisors and representatives.

**Reverse Split**” means a reverse stock split of all outstanding shares of Parent Common Stock at a reverse stock split ratio to be mutually agreed prior to filing the Proxy Statement by Parent and the Company that is effected by Parent.

“**Sarbanes-Oxley Act**” means the Sarbanes-Oxley Act of 2002.

“**SEC**” means the United States Securities and Exchange Commission.

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

“**Subsequent Transaction**” means any Acquisition Transaction (with all references to 20% in the definition of Acquisition Transaction being treated as references to 85% for these purposes).

An entity shall be deemed to be a “**Subsidiary**” of a Person if such Person directly or indirectly owns or purports to own, beneficially or of record, (a) an amount of voting securities or other interests in such entity that is sufficient to enable such Person to elect at least a majority of the members of such entity’s board of directors or other governing body, or (b) at least 50% of the outstanding equity, voting, beneficial or financial interests in such Entity.

“**Superior Offer**” means an unsolicited bona fide written Acquisition Proposal (with all references to 20% in the definition of Acquisition Transaction being treated as references to greater than 80% for these purposes) that: (a) was not obtained or made as a direct or indirect result of a breach of (or in violation of) this Agreement; and (b) is on terms and conditions that the Parent Board or the Company Board, as applicable, determines in good faith, based on such matters that it deems relevant (including the likelihood of consummation thereof), as well as any written

offer by the other Party to this Agreement to amend the terms of this Agreement, and following consultation with its outside legal counsel and outside financial advisors, if any, are more favorable, from a financial point of view, to Parent's stockholders or the Company's stockholders, as applicable, than the terms of the Contemplated Transactions.

**"Takeover Statute"** means any "fair price," "moratorium," "control share acquisition" or other similar anti-takeover Law.

**"Tax"** means any federal, state, local, foreign or other tax, including any income, capital gain, gross receipts, capital stock, profits, transfer, estimated, registration, stamp, premium, escheat, unclaimed property, customs duty, ad valorem, occupancy, occupation, alternative, add-on, windfall profits, value added, severance, property, business, production, sales, use, license, excise, franchise, escheat, unclaimed property, employment, payroll, social security, disability, unemployment, workers' compensation, national health insurance, withholding or other taxes, duties, fees, assessments or governmental charges, surtaxes or deficiencies thereof of any kind whatsoever, however denominated, and including any fine, penalty, addition to tax or interest (and any interest in respect of such deficiencies, assessments, additions to tax, penalties and fines) imposed by a Governmental Body with respect thereto.

**"Tax Return"** means any return (including any information return or attachment), report, statement, declaration, estimate, schedule, notice, notification, form, election, certificate or other document, and any amendment or supplement to any of the foregoing, filed with or submitted to, or required to be filed with or submitted to, any Governmental Body in connection with the determination, assessment, collection or payment of any Tax or in connection with the administration, implementation or enforcement of or compliance with any Law relating to any Tax.

**"Treasury Regulations"** means the United States Treasury regulations promulgated under the Code.

(b) Each of the following terms is defined in the Section set forth opposite such term:

<u>Term</u>	<u>Section</u>
Accredited Investor Questionnaire	Recitals
Agreement	Preamble
Allocation Certificate	5.18(a)
Anti-Bribery Laws	2.23
California and Pennsylvania Health Plan	5.7(a)
Certificate of Merger	1.3
Certifications	3.7(a)
Closing	1.3
Closing Date	1.3
Closing Parent Stockholder Matters	5.3(a)(ii)
Closing Parent Stockholder Vote	3.4
COBRA Employees	5.7(a)

<u>Term</u>	<u>Section</u>
Company	Preamble
Company Audited Financial Statements	5.19
Company Benefit Plan	2.17(a)
Company Board Recommendation	5.2(b)
Company Budget	4.2(b)(v)
Company Disclosure Schedule	2
Company Financials	2.7(a)
Company In-bound License	2.12(d)
Company Interim Financial Statements	5.19
Company Lock-Up Agreement	Recitals
Company Material Contract	2.13(a)
Company Material Contracts	2.13(a)
Company Out-bound License	2.12(d)
Company Permits	2.14(b)
Company Plan	2.6(c)
Company Preferred Stock	2.6(a)
Company Real Estate Leases	2.11
Company Signatories	Recitals
Company Stock Certificate	1.6
Company Stockholder Support Agreement	Recitals
Company Stockholder Written Consents	Recitals
Company Termination Fee	9.3(b)
Concurrent Financing	Recitals
Continuing Employees	5.6(a)
Costs	5.8(a)
Determination Notice	5.3(d)(i)
Dispute Notice	1.9
Dispute Resolution Period	1.9
Dissenting Shares	1.8(a)
D&O Indemnified Parties	5.8(a)
Drug Regulatory Agency	2.14(a)
Effective Time	1.3
End Date	9.1(b)
Exchange Agent	1.7(a)
Exchange Fund	1.7(a)
FDA	2.14(a)
FDCA	2.14(a)
Funding Agreement	Recitals
HCERA	2.17(o)
Healthcare Reform Laws	2.17(o)
Health Plan	2.17(o)
Intended Tax Treatment	5.12(a)
Investor Agreements	2.22(b)



<u>Term</u>	<u>Section</u>
Liability	2.9
Merger	Recitals
Merger Consideration	1.5(a)(ii)
Merger Notification Filings	5.4(b)
Merger Sub	Preamble
Nasdaq Listing Application	5.11
Net Cash Calculation	1.9
Net Cash Schedule	1.9
Net Working Capital Calculation	1.9
Net Working Capital Schedule	1.9
NovaQuest	Recitals
Parent	Preamble
Parent Benefit Plan	3.17(a)
Parent Board Adverse Recommendation Change	5.3(c)
Parent Board Recommendation	5.3(c)
Parent Budget	4.1(b)(v)
Parent Designees	5.14
Parent Disclosure Schedule	3
Parent In-bound License	3.12(d)
Parent Material Contract	3.13(a)
Parent Out-bound License	3.12(d)
Parent Outstanding Shares Certificate	5.18(b)
Parent Permits	3.14(b)
Parent Real Estate Leases	3.11
Parent SEC Documents	3.7(a)
Parent Stockholder Matters	5.3(a)(ii)
Parent Stockholders' Meeting	5.3(a)(ii)
Parent Termination Fee	9.3(c)
Post-Closing Plans	5.6(a)
PPACA	2.17(o)
Pre-Closing Period	4.1(a)
Regulation D	Recitals
Required Company Stockholder Vote	2.4
Closing Parent Stockholder Vote	3.4
Response Date	1.9
Sensitive Data	2.12(g)
Stockholder Notice	5.2(a)
Surviving Corporation	1.1
Tax Counsel	5.12(c)
Tax Opinion	5.12(c)

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**Exhibit G**

***Officers***

<u>Name</u>	<u>Title</u>
Robert Brown	Chief Executive Officer
Andrew Sklawer	Co-Founder, Chief Operating Officer and Secretary
Deepak Chadha	Chief R&D Officer
Robert M. Carruthers	Chief Financial Officer
David McAvoy	General Counsel

***Board Designees – Parent***

<u>Name</u>	<u>Title</u>
[ ] <sup>1</sup>	Director
[ ] <sup>1</sup>	Director

***Board Designees – Company***

<u>Name</u>	<u>Title</u>
Reginald Hardy	Chairman of the Board
Robert Brown	Director
Dennison Veru	Director
Dr. William Ju	Director
George Abercrombie	Director

<sup>1</sup> To be designated by Parent during the Pre-Closing Period.

**STOCKHOLDER SUPPORT AGREEMENT**

THIS STOCKHOLDER SUPPORT AGREEMENT (this “Agreement”), effective as of [●], 2019, is entered into by and among Vical Incorporated, a Delaware corporation (“Parent”) and the undersigned stockholder of the Company (as defined below) (the “Stockholder”). Capitalized terms used but not defined herein shall have the meanings given to them in the Merger Agreement (as defined below).

**RECITALS**

WHEREAS, concurrently with this Agreement, Brickell Biotech, Inc. (the “Company”), Parent, and Victory Subsidiary, Inc., a Delaware corporation and a wholly owned subsidiary of Parent (“Merger Sub”), are entering into an Agreement and Plan of Merger and Reorganization (as may be amended from time to time, the “Merger Agreement”), which provides for the merger of the Company with and into the Merger Sub, with the Company as the surviving corporation;

WHEREAS, the Stockholder is the record and beneficial owner (within the meaning of Rule 13d-3 under the Exchange Act, which meaning will apply for all purposes of this Agreement whenever the term “beneficial owner” or “beneficially own” is used) of shares of capital stock of the Company (“Shares”) as set forth on Schedule A hereto (the “Owned Shares”; the Owned Shares and any additional Shares or other voting securities of the Company of which the Stockholder acquires record or beneficial ownership after the date hereof, including, without limitation, by purchase, gift, as a result of a stock dividend, stock split, recapitalization, combination, reclassification, exchange, transfer or change of such shares, or upon exercise or conversion of any securities, the Stockholder’s “Covered Shares”);

WHEREAS, as a condition and inducement to Parent’s willingness to enter into the Merger Agreement and to proceed with the transactions contemplated thereby, including the Merger, Parent and the Stockholder are entering into this Agreement; and

WHEREAS, the Stockholder acknowledges that Parent and the Company are entering into the Merger Agreement in reliance on the representations, warranties, covenants and other agreements of the Stockholder set forth in this Agreement and would not enter into the Merger Agreement if the Stockholder did not enter into this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements herein contained, and intending to be legally bound hereby, Parent and the Stockholder hereby agree as follows:

**Section 1. Agreement to Vote.**

(a) The Stockholder agrees that it shall at any meeting of the stockholders of the Company (whether annual or special meeting and whether or not such meeting is adjourned, delayed or postponed), however called, and at any adjournment or postponement thereof, or in connection with any written consent of stockholders of the Company, (i) when a meeting is held, appear at such meeting or otherwise cause the Covered Shares to be counted as present thereat for the purpose of establishing a quorum, and respond to each request by the Company for written consent, if any, and (ii) vote (or consent), or cause to be voted at such meeting (or validly execute and return and cause such consent to be granted with respect to), all Covered Shares (A) (1) in favor of the Company Stockholder Matters, (2) to acknowledge that by its approval of the Merger it is not entitled to any appraisal rights with respect to its Covered Shares in connection with the Merger and thereby waives any rights to receive payment of the fair value of its capital stock under the DGCL, (3) to approve any proposal to adjourn or postpone the meeting

to a later date, if there are not sufficient votes for the adoption of the Merger Agreement on the date on which such meeting is held and (4) in favor of any other matters necessary to consummate the Contemplated Transactions; and (B) against any Restricted Matters (as defined below) (together with the Company Stockholder Matters, the "Covered Proposals").

(b) Except as expressly set forth in this Section 1 with respect to Covered Proposals, the Stockholder shall not be restricted from voting in favor of, against or abstaining with respect to any other matter presented to the stockholders of the Company.

(c) For purposes of this Agreement, "Restricted Matters" means (A) any Acquisition Proposal and (B) any other action, proposal, transaction or agreement that is intended or could reasonably be expected to impede, interfere with, delay, postpone or adversely affect the timely consummation of the Merger, or any of the other transactions contemplated by the Merger Agreement or this Agreement, or the satisfaction of any of Parent's, the Company's, or Merger Sub's conditions under the Merger Agreement.

Section 2. Grant of Irrevocable Proxy; Appointment of Proxy.

(a) THE STOCKHOLDER HEREBY IRREVOCABLY GRANTS TO, AND APPOINTS, PARENT AND ANY OTHER DESIGNEE OF PARENT, ALONE OR TOGETHER, THE STOCKHOLDER'S IRREVOCABLE PROXY AND ATTORNEY IN FACT (WITH FULL POWER OF SUBSTITUTION AND RESUBSTITUTION), FOR AND IN THE STOCKHOLDER'S NAME, TO VOTE OR GRANT CONSENT OR APPROVAL IN RESPECT OF THE COVERED SHARES IN ACCORDANCE WITH SECTION 1 AT ANY MEETING OF THE COMPANY'S STOCKHOLDERS OR AT ANY ADJOURNMENT THEREOF OR IN ANY OTHER CIRCUMSTANCES UPON WHICH THEIR VOTE, CONSENT OR OTHER APPROVAL IS SOUGHT IN FAVOR OF THE SUPPORTED MATTERS.

(b) The Stockholder agrees to execute in a timely manner such documents or certificates evidencing such proxy as Parent may reasonably request.

(c) The Stockholder represents that any proxies heretofore given in respect of the Covered Shares are not irrevocable, and that any such proxies are hereby revoked by entering this Agreement.

(d) THE STOCKHOLDER HEREBY AFFIRMS THAT THE PROXY SET FORTH IN THIS SECTION 2 IS COUPLED WITH AN INTEREST AND IS IRREVOCABLE UNTIL SUCH TIME AS THIS AGREEMENT TERMINATES IN ACCORDANCE WITH ITS TERMS. The proxy granted in this Section 2 shall automatically expire upon the termination of this Agreement.

(e) The Stockholder hereby affirms that the irrevocable proxy is given in connection with the execution of the Merger Agreement, and that such irrevocable proxy is given to secure the performance of the duties of the Stockholder under this Agreement. The Stockholder hereby ratifies and confirms all that such irrevocable proxy may lawfully do or cause to be done by virtue hereof. The power of attorney granted by the Stockholder hereof is a durable power of attorney and shall survive the bankruptcy, dissolution, death or incapacity (as applicable) of the Stockholder.

Section 3. Inconsistent Agreements. The Stockholder hereby represents, covenants and agrees that, except as contemplated by this Agreement, the Stockholder (a) has not entered into, and shall not enter into at any time prior to the Termination Date (as defined below), any voting agreement or voting trust with respect to any Covered Shares and (b) has not granted, and shall not grant, at any time prior to

the Termination Date, a proxy or power of attorney with respect to any Covered Shares, in either case, which is inconsistent or in conflict with the Stockholder's obligations pursuant to this Agreement.

Section 4. Termination. This Agreement shall terminate upon the earliest of (a) the Effective Time, (b) the termination of the Merger Agreement in accordance with its terms, and (c) written notice of termination of this Agreement by Parent to the Stockholder (such earliest date being referred to herein as the "Termination Date"); provided, that the provisions set forth in Sections 8, 9, 11 and 13 through 26 of this Agreement shall survive the termination of this Agreement; provided, further that no such termination will relieve any party hereto from any liability for any willful, knowing and/or material breach of this Agreement occurring prior to such termination.

Section 5. Representations and Warranties of the Stockholder. The Stockholder hereby represents and warrants to Parent that:

(a) The Stockholder is the record and beneficial owner of, and has good and valid title to, the Covered Shares, free and clear of Encumbrances other than as created by this Agreement. The Stockholder has sole voting power, sole power of disposition, sole power to demand appraisal rights, and sole power to agree to all of the matters set forth in this Agreement, in each case with respect to any and all of such Covered Shares, with no limitations, qualifications or restrictions on such rights, subject to applicable federal securities Laws and the terms of this Agreement. Other than the Owned Shares (and the equity awards relating thereto), the Stockholder does not own beneficially or of record any (i) shares of capital stock or voting securities of the Company, (ii) securities of the Company convertible into or exchangeable for shares of capital stock or voting securities of the Company, or (iii) options or other rights to acquire from the Company any capital stock, voting securities, or securities convertible into, or exchangeable for, capital stock or voting securities of the Company.

(b) The Stockholder has all requisite power and authority to execute and deliver this Agreement and to perform its obligations hereunder. This Agreement has been duly and validly executed and delivered by the Stockholder and, assuming due authorization, execution and delivery by Parent, constitutes a legal, valid and binding obligation of the Stockholder, enforceable against the Stockholder in accordance with its terms, except as enforcement may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity (regardless of whether considered in a proceeding in equity or at law).

(c) Except for the applicable requirements of the Exchange Act, (i) no filing with, and no permit, authorization, consent or approval of, any Governmental Body is necessary on the part of the Stockholder for the execution, delivery and performance of this Agreement by the Stockholder or the consummation by the Stockholder of the transactions contemplated hereby and (ii) neither the execution, delivery or performance of this Agreement by the Stockholder nor the consummation by the Stockholder of the transactions contemplated hereby nor compliance by the Stockholder with any of the provisions hereof shall result in any breach or violation of, or constitute a default (or an event which, with notice or lapse of time or both, would become a default) under, or give to others any rights of termination, amendment, acceleration or cancellation of, or result in the creation of an Encumbrance on such property or asset of the Stockholder pursuant to, any agreement to which the Stockholder is a party or by which the Stockholder or any property or asset of the Stockholder is bound or affected other than as would not restrict, prohibit or impair the exercise by Parent of its rights under this Agreement or the performance by any party of its obligations under this Agreement.

(d) There is no action, suit, investigation, complaint or other proceeding pending or, to the knowledge of the Stockholder, threatened against or affecting the Stockholder or any of its Affiliates

that would reasonably be expected to impair the ability of the Stockholder to perform its obligations under this Agreement or consummate the transactions contemplated by this Agreement in a timely manner.

(e) The Stockholder understands and acknowledges that Parent is entering into the Merger Agreement in reliance upon the Stockholder's execution and delivery of this Agreement and the covenants, representations and warranties of the Stockholder contained herein

(f) The Stockholder has had the opportunity to review the Merger Agreement, including the provisions relating to the payment and allocation of the consideration to be paid to the Company, and this Agreement with counsel of the Stockholder's own choosing. The Stockholder has had an opportunity to review with its own tax advisors the tax consequences of the Merger and the transactions contemplated by the Merger Agreement. The Stockholder understands that it must rely solely on its advisors and not on any statements or representations made by the Company, Parent or any of their respective agents or representatives. The Stockholder understands that such Stockholder (and not Parent, the Company or the Surviving Corporation) shall be responsible for such Stockholder's tax liability that may arise as a result of the Merger or the transactions contemplated by the Merger Agreement.

(g) The Company is an intended third-party beneficiary of this Section 5.

Section 6. Certain Covenants of the Stockholder. The Stockholder hereby covenants and agrees as follows:

(a) Prior to the Termination Date, and except as contemplated hereby, the Stockholder shall not: (i) tender into any tender or exchange offer, (ii) sell (constructively or otherwise), assign, transfer, pledge, hypothecate, grant, Encumber or otherwise dispose of (collectively "Transfer"), or enter into any contract, option, agreement or other arrangement or understanding with respect to the Transfer of any of the Covered Shares or beneficial ownership or voting power thereof or therein (including by operation of law), (iii) grant any proxies or powers of attorney, (iv) deposit any Covered Shares into a voting trust or enter into a voting agreement with respect to any Covered Shares, or (v) knowingly take any action that would make any representation or warranty of the Stockholder contained herein untrue or incorrect or have the effect of preventing or disabling the Stockholder from performing its obligations under this Agreement. Any Transfer in violation of this provision shall be void. To the extent a Transfer is permitted and consented to by Parent, such Transfer shall comply with all applicable Laws and the terms of this Agreement.

(b) The Stockholder shall use commercially reasonable efforts to take, or cause to be taken, all reasonable actions, and to do, or cause to be done, all things reasonably necessary to fulfill the Stockholder's obligations under this Agreement, including, without limitation, attending, or otherwise participating in, if applicable, any meeting of the Company's shareholders or any adjournment, postponement, or recess thereof.

(c) Prior to the Termination Date, in the event that the Stockholder acquires record or beneficial ownership of, or the power to vote or direct the voting of, any additional Shares or other voting interests with respect to the Company, such Shares or voting interests shall, without further action of the parties, be deemed Covered Shares and subject to the provisions of this Agreement, and the number of Shares held by the Stockholder set forth on Schedule A hereto will be deemed amended accordingly and such Shares or voting interests shall automatically become subject to the terms of this Agreement. The Stockholder shall promptly notify Parent in writing of any such event.

Section 7. No Solicitation of Transactions. The Stockholder shall not, directly or indirectly: (a) solicit, initiate or knowingly encourage, induce or facilitate the communication, making, submission or

announcement of any Acquisition Proposal or Acquisition Inquiry or take any action that could reasonably be expected to lead to an Acquisition Proposal or Acquisition Inquiry; (b) furnish any non-public information regarding the Company to any Person in connection with or in response to an Acquisition Proposal or Acquisition Inquiry; (c) engage in discussions or negotiations with any Person with respect to any Acquisition Proposal or Acquisition Inquiry; (d) approve, endorse or recommend any Acquisition Proposal; (e) execute or enter into any letter of intent or any Contract contemplating or otherwise relating to any Acquisition Transaction; or (f) publicly propose to do any of the foregoing. The Stockholder hereby represents and warrants that it has read Section 4.5 (Company Non-Solicitation) of the Merger Agreement and agrees not to engage in any actions prohibited thereby.

Section 8. Confidentiality. Except to the extent required by applicable Law, the Stockholder shall hold any non-public information regarding this Agreement, the Merger Agreement and the Merger in strict confidence and shall not divulge any such information to any third person until Parent has publicly disclosed its entry into the Merger Agreement and this Agreement; provided, however, that the Stockholder may disclose such information (a) to its attorneys, accountants, consultants, trustees, beneficiaries and other representatives (provided such representatives are subject to confidentiality obligations at least as restrictive as those contained herein), and (b) to any Affiliate, partner, member, shareholder, parent or subsidiary of the Stockholder, provided in each case that the Stockholder informs the Person receiving the information that such information is confidential and such Person agrees in writing to abide by the terms of this Section 8. Neither the Stockholder nor any of its Affiliates (other than the Company, whose actions shall be governed by the Merger Agreement), shall issue or cause the publication of any press release or other public announcement with respect to this Agreement, the Merger, the Merger Agreement or the other transactions contemplated hereby or thereby without the prior written consent of Parent, except as may be required by applicable Law in which circumstance such announcing party shall make reasonable efforts to consult with Parent to the extent practicable. The Company is an intended third-party beneficiary of this Section 8.

Section 9. Stockholder Capacity. This Agreement is being entered into by the Stockholder solely in its capacity as a record and/or beneficial owner of the Covered Shares, and nothing in this Agreement shall restrict or limit the ability of any Stockholder or its Affiliates who is a director, officer or employee of the Company to take any action in his or her capacity as a director, officer or employee of the Company. Nothing in this Agreement is intended to limit or restrict the Stockholder from taking any action or inaction or voting in favor, in the Stockholder's sole discretion, on any matter in his or her capacity as a director of the Company, and none of such actions in such capacity shall be deemed to constitute a breach of this Agreement.

Section 10. Appraisal Rights; Waivers. The Stockholder shall not exercise (a) any rights to demand appraisal of any Covered Shares or (b) the right to dissent that may arise with respect to the Merger, and hereby waives any such rights of appraisal or rights to dissent that the Stockholder may have under applicable Law or otherwise, including by contract. The Stockholder agrees that it will not bring, commence, institute, maintain, prosecute, participate in or voluntarily aid any action, claim, suit or cause of action, in law or in equity, in any court or before any Governmental Body, which (i) challenges the validity of or seeks to enjoin the operation of any provision of this Agreement or (ii) alleges that the execution and delivery of this Agreement by the Stockholder, or the approval of the Merger Agreement by the board of directors of the Company (the "**Company Board**"), breaches any fiduciary duty of the Company Board or any member thereof; provided that the Stockholder may defend against, contest or settle any such action, claim, suit or cause of action brought against the Stockholder that relates solely to the Stockholder's capacity as a director, officer or securityholder of the Company.

Section 11. Disclosure. The Stockholder hereby authorizes Parent to publish and disclose in any announcement or disclosure required by the SEC or other Governmental Body, or any disclosure

document that Parent or the Company reasonably determines to be necessary in connection with the Merger and any transactions contemplated by the Merger Agreement (including the Joint Proxy Statement/Prospectus) the Stockholder's identity and ownership of the Covered Shares, and the nature of the Stockholder's obligations under this Agreement. The Company is an intended third-party beneficiary of this Section 11.

Section 12. Further Assurances. From time to time, at the request of Parent and without further consideration, the Stockholder shall take such further action as may reasonably be deemed by Parent to be necessary or desirable to consummate and make effective the transactions contemplated by this Agreement.

Section 13. Non-Survival of Representations and Warranties. The representations and warranties of the Stockholder contained herein shall not survive the Termination Date.

Section 14. Notices. All notices and other communications hereunder shall be in writing and shall be deemed duly given (a) on the date of delivery if delivered personally, or if by facsimile, upon the first Business Day after such facsimile is sent if written confirmation of receipt by facsimile is obtained, (b) on the first Business Day following the date of dispatch if delivered utilizing a next-day service by a nationally recognized next-day courier if next Business Day delivery is requested, or (c) on the earlier of confirmed receipt or the fifth Business Day following the date of mailing if delivered by United States registered or certified mail, return receipt requested, postage prepaid. All notices hereunder shall be delivered to the addresses set forth below, or pursuant to such other instructions as may be designated in writing by the party to receive such notice and given to the other party:

if to Parent, to:

Vical Incorporated  
10390 Pacific Center Court  
San Diego, CA 92121-4340  
Attention: Vijay Samant  
Email: vbsamant@vical.com

with a copy (which shall not constitute notice) to:

Cooley LLP  
4401 Eastgate Mall  
San Diego, CA 92121  
Attention: Rama Padmanabhan  
Email: rama@cooley.com

if to the Stockholder, to the address(es) set forth on the signature page to this Agreement.

Section 15. Interpretation. When a reference is made in this Agreement to a Section, Article, Schedule or Exhibit, such reference shall be to a Section, Article, Schedule or Exhibit of this Agreement unless otherwise indicated. The table of contents and headings contained in this Agreement or in any Schedule or Exhibit are for convenience of reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. All words used in this Agreement will be construed to be of such gender or number as the circumstances require. Any capitalized terms used in any Schedule or Exhibit but not otherwise defined therein shall have the meaning set forth in this Agreement. All Schedules and Exhibits annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement



as if set forth herein. The word “including” and words of similar import when used in this Agreement will mean “including, without limitation,” unless otherwise specified.

Section 16. Entire Agreement. This Agreement (including the Schedules and Exhibits hereto) and the Merger Agreement constitute the entire agreement of the parties with regard to the purpose hereunder, and supersede all prior written agreements, arrangements, communications and understandings and all prior and contemporaneous oral agreements, arrangements, communications and understandings among the parties with respect to the purpose hereof and thereof.

Section 17. Parties in Interest. Other than as provided in Section 5, Section 8 and Section 11, this Agreement is not intended to, and shall not, confer upon any Person other than the parties and their respective successors and permitted assigns any rights or remedies hereunder. The representations and warranties in this Agreement are the product of negotiations among the parties hereto. In some instances, the representations and warranties in this Agreement may represent an allocation among the parties of risks associated with particular matters regardless of the knowledge, actual or constructive, of any of the parties. Consequently, Persons other than the parties may not rely upon the representations and warranties in this Agreement or the characterization of actual facts or circumstances as of the effective date of this Agreement or as of any other date.

Section 18. Governing Law. This Agreement and all disputes or controversies arising out of or relating to this Agreement or the transactions contemplated hereby shall be governed by, and construed in accordance with, the internal Laws of the State of Delaware, without regard to the laws of any other jurisdiction that might be applied because of the conflict of laws principles of the State of Delaware.

Section 19. Submission to Jurisdiction. Each of the parties irrevocably agrees that any legal action or proceeding arising out of or relating to this Agreement brought by any party or its Affiliates against any other party or its Affiliates of this Agreement shall be brought and determined in the courts of the Court of Chancery of the State of Delaware or, to the extent such court does not have subject matter jurisdiction, the United States District Court for the District of Delaware or, to the extent that neither of the foregoing courts has jurisdiction, the Superior Court of the State of Delaware. Each of the parties hereby irrevocably submits to the jurisdiction of the aforesaid courts for itself and with respect to its property, generally and unconditionally, with regard to any such action or proceeding arising out of or relating to this Agreement and the transactions contemplated hereby. Each of the parties agrees not to commence or maintain any action, suit or proceeding relating thereto except in the courts described above, other than actions in any court of competent jurisdiction to enforce any judgment, decree or award rendered by any such court in Delaware as described herein. Each of the parties further agrees that notice as provided herein shall constitute sufficient service of process and the parties further waive any argument that such service is insufficient. Each of the parties hereby irrevocably and unconditionally waives, and agrees not to assert, by way of motion or as a defense, counterclaim or otherwise, in any action or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby, (a) any claim that it is not personally subject to the jurisdiction of the courts in Delaware as described herein for any reason, (b) that it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise) and (c) that (i) the suit, action or proceeding in any such court is brought in an inconvenient forum, (ii) the venue of such suit, action or proceeding is improper, or (iii) this Agreement, or the subject matter hereof, may not be enforced in or by such courts.

Section 20. Assignment; Successors. Neither this Agreement nor any of the rights, interests or obligations under this Agreement may be assigned or delegated, in whole or in part, by operation of law or otherwise, by any party without the prior written consent of the other parties, and any such assignment

without such prior written consent shall be null and void. Subject to the preceding sentence, this Agreement will be binding upon, inure to the benefit of, and be enforceable by, the parties and their respective successors and assigns.

Section 21. Enforcement. The parties agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. Accordingly, subject to the limitations contained in this Section 21, each of Parent and the Stockholder shall be entitled to specific performance of the terms hereof, including an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement in any court of the State of Delaware located in New Castle County, Delaware or any federal court located in Wilmington, Delaware, this being in addition to any other remedy to which such party is entitled at Law or in equity. Each of the parties hereby further waives (a) any defense in any action for specific performance that a remedy at Law would be adequate and (b) any requirement under any Law to post security as a prerequisite to obtaining equitable relief.

Section 22. Severability. Whenever possible, each provision or portion of any provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable Law, but if any provision or portion of any provision of this Agreement is held to be invalid, illegal or unenforceable in any respect under any applicable Law or rule in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision or portion of any provision in such jurisdiction, and this Agreement shall be reformed, construed and enforced in such jurisdiction as if such invalid, illegal or unenforceable provision or portion of any provision had never been contained herein.

Section 23. Waiver of Jury Trial. EACH OF THE PARTIES TO THIS AGREEMENT HEREBY IRREVOCABLY WAIVES ALL RIGHT TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

Section 24. Counterparts. This Agreement may be executed in two or more counterparts, all of which shall be considered one and the same instrument and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other parties. This Agreement may be executed by signatures delivered by facsimile or email, and a copy hereof that is executed and delivered by a party by facsimile or email (including in .pdf format) will be binding upon that party to the same extent as a copy hereof containing that party's original signature.

Section 25. Facsimile or Electronic Signature. This Agreement may be executed by facsimile or electronic signature and a facsimile or electronic signature shall constitute an original for all purposes.

Section 26. No Presumption Against Drafting Party. Each of Parent and the Stockholder acknowledges that each party to this Agreement has been represented by legal counsel in connection with this Agreement and the transactions contemplated by this Agreement. Accordingly, any rule of Law or any judicial decision that would require interpretation of any claimed ambiguities in this Agreement against the drafting party has no application and is expressly waived.

**[The remainder of this page is intentionally left blank.]**

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

**VICAL INCORPORATED**

By: \_\_\_\_\_  
Name:  
Title:

*[Signature Page to Stockholder Support Agreement]*

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**[STOCKHOLDER]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_

Stockholder's Address for Notice:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Email: \_\_\_\_\_

*[Signature Page to Stockholder Support Agreement]*

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## FORM OF LOCK-UP AGREEMENT

[•], 2019

Vical Incorporated  
10390 Pacific Center Court  
San Diego, CA 92121-4340  
Attention: Vijay Samant  
Email: vbsamant@vical.com

Brickell Biotech, Inc.  
5777 Central Avenue, Suite 102  
Boulder, CO 80301  
Attention: Andrew Sklawer  
Email: asklawer@brickellbio.com

Ladies and Gentlemen:

The undersigned (the "Stockholder") understands that: (a) Vical Incorporated, a Delaware corporation ("Parent") has entered into an Agreement and Plan of Merger and Reorganization, dated as of [ ], 2019, with Brickell Biotech, Inc., a Delaware corporation (the "Company") and Victory Subsidiary, Inc., a Delaware corporation and wholly owned subsidiary of Parent ("Merger Sub") pursuant to which Merger Sub will be merged with an into the Company (the "Merger") and the separate corporate existence of Merger Sub will cease and the Company will continue as the surviving corporation; and (ii) in connection with the Merger, the Stockholder will receive shares of common stock, \$0.01 par value ("Common Stock") of Parent. Capitalized terms used but not otherwise defined herein shall have the respective meanings given to such terms in the Merger Agreement.

As a material inducement to the willingness of each of the Parties to enter in to the Merger Agreement, and for other good and valuable consideration, the Stockholder hereby agrees that, for a period of 180 days after the Effective Time (the "Restricted Period"), it will not, directly or indirectly, subject to the exceptions set forth in this letter agreement: (a) offer, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase, pledge, transfer, assign, or otherwise dispose of (or enter into any transaction that is designed to, or could reasonably be expected to, result in the disposition (whether by actual disposition or effective economic disposition due to cash settlement or otherwise) by the Stockholder or any affiliate of the Stockholder or any person in privity with the Stockholder or any affiliate of the Stockholder) or establish or increase a put equivalent position or liquidate or decrease a call equivalent position within the meaning of Section 16 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), with respect to, any shares of Common Stock, or any securities convertible into, or exercisable or exchangeable for, shares of Common Stock, including Common Stock or such other securities which may be deemed to be beneficially

owned by the Stockholder in accordance with the rules and regulations of the Securities and Exchange Commission and securities of Parent which may be issued upon exercise of a stock option or warrant (collectively, the "Stockholder's Shares"), or (b) make any demand for or exercise any right with respect to the registration of any shares of Common Stock or any security convertible into or exercisable or exchangeable for Common Stock, or, in the case of each of (a) and (b), publicly announce an intention to effect any such transaction; provided, however, that notwithstanding the foregoing, restrictions of this letter shall not prohibit such Stockholder from transfers or dispositions (a) as charitable gifts or donations, (b) to any trust for the direct or indirect benefit of Stockholder or the immediate family of the Stockholder, (c) by will, other testamentary document or intestate succession to the legal representative, heir, beneficiary or a member of the immediately family of the Stockholder, (d) to limited partners, members, or securityholders of the Stockholder, (e) to the Stockholder's affiliates or to any investment fund or other entity controlled (directly or indirectly) or managed by the Stockholder, (f) that occur by operation of law pursuant to a qualified domestic relations order or in connection with a divorce settlement, or (g) not involving a change in beneficial ownership; provided, in each case, that any such transferee agrees in writing to the same restrictions applicable to the Stockholder in this letter and either the Stockholder or the transferee provides Parent with a copy of such agreement promptly upon consummation of any such transfer); provided, further, that in each case no filing by any party (donor, donee, transferor or transferee) under the Exchange Act or other public announcement shall be required or shall be made voluntarily in connection with such transfer or distribution (other than filings made in respect of involuntary transfers or a filing of a Form 5 made after the expiration of the Restricted Period) and any such transfer or distribution shall not involve a disposition for value. For purposes of this letter agreement, "immediate family" shall mean any relationship by blood, marriage or adoption not more remote than first cousin. For the avoidance of doubt, in no event shall the terms of this Lock-Up Agreement apply to any shares purchased in the public market following the Effective Time.

Any attempted transfer in violation of this letter agreement will be of no effect and null and void, regardless of whether the purported transferee has any actual or constructive knowledge of the transfer restrictions set forth in this letter agreement, and will not be recorded on the stock transfer books of Parent. In order to ensure compliance with the restrictions referred to herein, the Stockholder agrees that Parent may issue appropriate "stop transfer" certificates or instructions. Parent may cause the legend set forth below, or a legend substantially equivalent thereto, to be placed upon any certificate(s) or other documents or instruments evidencing ownership of the Stockholder's Shares:

THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO AND MAY ONLY BE TRANSFERRED IN COMPLIANCE WITH A LOCK-UP AGREEMENT, A COPY OF WHICH IS ON FILE AT THE PRINCIPAL OFFICE OF THE COMPANY.

The Stockholder hereby represents and warrants that the Stockholder has full power and authority to enter into this letter agreement. All authority conferred or agreed to be conferred and any obligations of the Stockholder under this letter agreement will be binding upon the successors, assigns, heirs or personal representatives of the Stockholder.

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The Stockholder understands that each of Parent and the Company is relying upon this letter agreement in proceeding toward the consummation of the Merger. The Stockholder further understands that this letter agreement is irrevocable and is binding upon the Stockholder's heirs, legal representatives, successors and assigns.

This letter agreement and any claim, controversy or dispute arising under or related to this letter agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to any laws, rules or provisions that would cause the application of the laws of any other jurisdiction other than the State of Delaware.

This letter agreement may be executed by electronic (i.e., PDF) transmission, which is deemed an original.

**STOCKHOLDER:**

\_\_\_\_\_  
Name:



**FOR IMMEDIATE RELEASE**  
**June 3, 2019**

**Vical and Brickell Announce Merger Agreement**

- *Combined Company Well-Capitalized with Approximately \$35 Million in Cash and up to \$25 Million in Near-Term R&D Funding*
- *Pivotal Phase 3 Clinical Trials for Brickell's Lead Product Candidate, Solfipironium Bromide, in Patients with Axillary Hyperhidrosis Planned for Q4 2019*
- *Companies to Host Conference Call/Webcast at 8:30 a.m., Eastern Time, Monday June 3, 2019*

SAN DIEGO, CA and BOULDER, CO — June 3, 2019 — Vical Incorporated (“Vical”) (Nasdaq:VICL) and Brickell Biotech, Inc. (“Brickell”), a privately-held clinical-stage medical dermatology company, today announced they entered into a definitive merger agreement (the “Merger”) under which Brickell would merge with a wholly-owned subsidiary of Vical in an all-stock transaction. The Merger would create a pharmaceutical company focused on developing novel and differentiated prescription therapies addressing unmet patient needs in hyperhidrosis, cutaneous T-cell lymphoma, psoriasis, and other debilitating dermatologic disorders. Brickell’s lead pipeline asset, solfipironium bromide, is a pivotal Phase 3-ready topical soft anticholinergic intended for axillary hyperhidrosis. Brickell’s development partner, Kaken Pharmaceutical, Co, LTD (“Kaken”), has reported positive Phase 3 results in a clinical trial conducted in Japan. Upon closing of the transaction, the combined company would operate under the name, Brickell Biotech, Inc. and trade on the Nasdaq Capital Market under a new ticker symbol still to be determined.

**Proposed Transaction Details**

Under the terms of the Merger, it is anticipated that existing Vical stockholders will own 40% of the combined company and Brickell stockholders will own 60% of the combined company, in each case upon completion of the Merger and subject to assumptions regarding the calculation of the fully diluted shares of the parties. The ownership split is based on a \$60 million valuation for Brickell and a \$40 million valuation for Vical, a premium to the 30-day volume weighted average share price of Vical. The actual allocation between the two groups of stockholders is subject to adjustment based on Vical’s and Brickell’s

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respective net cash and net working capital balances prior to the completion of the Merger. The transaction has been approved by the boards of directors of both companies and the required percentage of stockholders of Brickell needed to approve the transaction. The Merger is anticipated to close in the third quarter of 2019, subject to customary closing conditions, including approval of the Merger by the stockholders of Vical, and the satisfaction of the closing conditions to the Funding Agreement (described below).

“Following an extensive review of many strategic alternatives, we decided that the proposed Merger with Brickell provides the best opportunity for Vical’s stockholders,” said Vijay B. Samant, President and Chief Executive Officer of Vical. “We believe that Brickell’s lead compound, sofpironium bromide, based upon all of the clinical data generated to-date, has the potential to be a best-in-class treatment for axillary hyperhidrosis. We are optimistic that the strength of the Brickell executive leadership team, which has experience launching several drugs with other pharmaceutical companies, coupled with an innovative pipeline of new chemical entities for impactful skin diseases, will enable the combined company to reach significant value inflection points.”

An affiliate of NovaQuest Capital Management, LLC (“NovaQuest”) has committed up to \$25 million in near-term research and development funding to Brickell following the closing of the Merger (the “Funding Agreement”). Immediately following the closing of the Funding Agreement, the combined company will issue a warrant to NovaQuest to purchase shares of Vical common stock in an amount based on 10% warrant coverage on the \$25 million funding commitment and the exchange ratio for the Merger. The combined company intends to use proceeds from NovaQuest, in addition to Vical’s cash balance expected to be approximately \$35 million at the closing of the Merger, to primarily fund the development of sofpironium bromide through Phase 3 clinical trials in axillary hyperhidrosis.

“We are excited about the opportunities created by this Merger as we expect it to provide us with the funding to complete our two planned pivotal Phase 3 trials of sofpironium bromide in patients axillary hyperhidrosis, with topline data expected in Q4 2020,” explained Robert B. Brown, Chief Executive Officer of Brickell. “In addition, the strong closing balance sheet would allow Brickell to further develop our key pipeline assets for the treatment of other skin diseases.”

For this transaction: MTS Health Partners, L.P. served as financial advisor, and Cooley LLP served as legal counsel to Vical, and BMO Capital Markets served as financial advisor, and Mayer Brown LLP

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served as legal counsel to Brickell. Wyrick Robbins Yates & Ponton LLP served as legal counsel to NovaQuest.

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## **Management and Board of Directors**

Following the Merger, the combined company will be led by the current Brickell management team, including, Robert Brown as Chief Executive Officer, Andy Sklawer, Co-Founder and Chief Operating Officer, Deepak Chadha, Chief R&D Officer, R. Michael Carruthers, Chief Financial Officer, Gary Walker, Chief Marketing Officer, and David McAvoy, General Counsel. The corporate headquarters will be located in Boulder, Colorado.

The board of directors of the combined company will be comprised of seven directors, including five current directors of Brickell: Reginald Hardy, Chairman, Robert Brown, Dennison Veru, Dr. William Ju and George Abercrombie, and two current directors of Vical. Charles Stiefel will serve as the Chairman of the combined company's Dermatology Advisory Board.

## **Conference Call and Webcast**

Vical and Brickell will host a conference call and webcast today, June 3, 2019, at 8:30 a.m. Eastern Time, to discuss the Merger. The call and webcast are open on a listen-only basis to any interested parties. To listen to the conference call, dial in approximately ten minutes before the scheduled call to 323-794-2149 (preferred), or 888-389-5992 (toll-free), and reference confirmation code 8101941. A replay of the call will be available for 48 hours beginning about two hours after the call. To listen to the replay, dial 719-457-0820 (preferred) or 888-203-1112 (toll-free) and enter replay passcode 8101941. The webcast will also be available live and archived through the events page at [www.vical.com](http://www.vical.com).

## **About Sofpironium Bromide**

Sofpironium bromide is a new molecular entity and "soft" drug that belongs to a class of medications called anticholinergics. Anticholinergics block the action of acetylcholine, a chemical that transmits signals within the nervous system that are responsible for a range of bodily functions, including the activation of sweat glands. Soft drugs, such as sofpiroonium bromide, exert their action topically and are rapidly metabolized once absorbed into the blood. This mechanism of action may allow for highly effective doses to be used while limiting systemic side effects associated with other drugs in this class.

Based upon the positive results achieved from three completed Phase 2b clinical trials (two in the United States and one in Japan via Kaken), Kaken's recently completed pivotal Phase 3 clinical trial in subjects

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with primary axillary hyperhidrosis in Japan (achieved statistical significance ( $p < 0.05$ ) for primary and all secondary efficacy endpoints), as well as Brickell's ongoing Phase 3 long-term safety study in 300 subjects with primary axillary hyperhidrosis in the United States (fully enrolled), Brickell intends to initiate two pivotal Phase 3 clinical trials in 450 subjects (per study) with primary axillary hyperhidrosis in the United States in the fourth quarter of 2019. Results from the pivotal Phase 3 clinical trials are expected in Q4 2020.

Kaken's recent success in Phase 3, coupled with both companies' positive Phase 2b clinical trial results, reinforces Brickell's confidence in sofpironium bromide as a potential best-in-class new treatment option for the millions of people in the United States and Japan suffering daily on a chronic basis with hyperhidrosis.

#### **About Hyperhidrosis**

Hyperhidrosis is a life-altering medical condition affecting an estimated 15.3 million people or 4.8% of the population in the United States. Of these, 70% report severe excessive sweating in at least one body area. The most common area is the underarms, followed by the face, palms of the hands and the soles of the feet. Nearly half (49%) of people with hyperhidrosis have not discussed their condition with a healthcare professional, either because they believe that it is not a medical condition or that no treatment options exist. Additionally, 75% of subjects with hyperhidrosis say that it has had negative impact on their social life, sense of well-being, and emotional and mental health. Doolittle et al. Arch Dermatol Res (2016).

#### **About Vical**

Vical Incorporated is a company historically focused on research and development of biopharmaceutical products for prevention and treatment of chronic or life-threatening infectious diseases, including antiviral and antifungal candidates in clinical development. In February 2019, Vical discontinued clinical development of its lead candidate, VL-2397. Additional information on Vical is available at [www.vical.com](http://www.vical.com).

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**About Brickell**

Brickell Biotech, Inc. is a clinical-stage pharmaceutical company focused on developing innovative and differentiated prescription therapeutics for treatment of skin diseases. The company's pipeline consists of potential novel therapeutics for hyperhidrosis, cutaneous T-cell lymphoma, psoriasis, and other prevalent severe skin diseases. Brickell's executive management team and board of directors bring extensive experience in product development and global commercialization, having served in leadership roles at several large global pharmaceutical companies and successful start-up biotechs while launching products around the world which achieved billion dollar blockbuster, first-in-class and/or iconic status, such as Prozac<sup>®</sup>, Gemzar<sup>®</sup>, Cialis<sup>®</sup>, Evista<sup>®</sup>, Talz<sup>®</sup>, Humulin<sup>®</sup>, Cymbalta<sup>®</sup>, Dysport<sup>®</sup>, Juvederm<sup>®</sup> and Kybella<sup>®</sup>. Brickell's strategy is to leverage this experience to in-license, acquire, develop and commercialize innovative products that Brickell believes can be successful in the currently under-served dermatology marketplace. For more information, visit [www.brickellbio.com](http://www.brickellbio.com).

**About NovaQuest**

NovaQuest Capital Management is a leading investor in life sciences and healthcare through its Product Finance and Private Equity strategies. NovaQuest formed in 2000 with the vision of building an investment platform to provide strategic capital to life sciences and healthcare companies. Today, NovaQuest Capital Management manages over \$2 billion through its Product Finance and Private Equity strategies. The investment team consists of highly seasoned operational and investment professionals with significant investment experience and deep life science and healthcare expertise. Furthermore, NovaQuest benefits from an extensive network of industry experts and relationships that assist in identifying, analyzing and growing NovaQuest portfolio companies and investments. For more information, please visit [www.novaquest.com](http://www.novaquest.com).

**Cautionary Note Regarding Forward-Looking Statements**

Any statements made in this press release relating to future financial, business and/or research and clinical performance, conditions, plans, prospects, trends, or strategies and other such matters, including without limitation, the potential closing date of the Merger, the amount of the combined company's cash balance at closing, the potential receipt of additional R&D funding and the timing thereof, the potential benefits of the Merger or of Brickell's product candidates, the anticipated ownership of the combined company, the anticipated timing, scope and design of future clinical trials, and the prospects for commercializing any product candidates, are forward-looking statements within the meaning of the Private Securities

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Litigation Reform Act of 1995. In addition, when or if used in this press release, the words “may,” “could,” “should,” “anticipate,” “believe,” “estimate,” “expect,” “intend,” “plan,” “predict” and similar expressions and their variants, as they relate to Brickell, Vical or the management of either company, before or after the Merger, may identify forward-looking statements. Brickell and Vical caution that these forward-looking statements are subject to numerous assumptions, risks, and uncertainties, which change over time, often in unanticipated ways. Important factors that may cause actual results to differ materially from the results discussed in the forward-looking statements or historical experience include risks and uncertainties, including the timing and completion of the Merger, the parties’ ability to satisfy the closing conditions of the Merger and the funding agreement with NovaQuest, whether or when the combined company will achieve any of the milestones in the funding agreement with NovaQuest, potential delays in product development, unanticipated demands on cash resources, risks associated with developing, obtaining regulatory approval for and commercializing novel therapeutics and whether any anticipated benefits of the Merger will be realized. Further information on the factors and risks that could cause actual results to differ from any forward-looking statements are contained in Vical’s filings with the United States Securities and Exchange Commission (SEC), which are available at [www.sec.gov](http://www.sec.gov). The forward-looking statements represent the estimates of Brickell and Vical as of the date hereof only, and Vical and Brickell specifically disclaim any duty or obligation to update forward-looking statements.

**Non-Solicitation**

This communication does not constitute an offer to sell or solicitation of an offer to buy any securities or the solicitation of an offer to buy any securities, nor will there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction.

**Important Information and Where to Find It**

This communication may be deemed to be solicitation material in respect of the proposed transaction between Vical and Brickell. In connection with the proposed transaction, Vical will file a definitive proxy statement and a proxy card with the SEC. BEFORE MAKING ANY VOTING OR INVESTMENT DECISION, INVESTORS AND STOCKHOLDERS ARE URGED TO READ THE VICAL PROXY STATEMENT (INCLUDING ANY AMENDMENTS OR SUPPLEMENTS THERETO) AND ANY OTHER RELEVANT DOCUMENTS THAT VICAL MAY FILE WITH THE SEC WHEN THEY

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BECOME AVAILABLE BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED TRANSACTIONS.

Stockholders may obtain, free of charge, copies of the definitive proxy statement and any other documents filed by Vical with the SEC in connection with the proposed transactions at the SEC's website (<http://www.sec.gov>), at Vical's website, or by directing a written request to: Vical Incorporated, 10390 Pacific Center Court, San Diego, CA 92121, *Attention: Investor Relations*.

Vical and its directors and executive officers and Brickell and its directors and executive officers may be deemed to be participants in the solicitation of proxies from the stockholders of Vical in connection with the proposed transaction. Information regarding the special interests of these directors and executive officers in the Merger will be included in the proxy statement referred to above. Additional information regarding the directors and executive officers of Vical is included in Vical's Definitive Proxy Statement on Schedule 14A relating to the 2018 Annual Meeting of Stockholders, filed with the SEC on April 9, 2018. This document is available free of charge at the SEC website ([www.sec.gov](http://www.sec.gov)), at Vical's website, or by directing a written request to Vical as described above.

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**VICAL INCORPORATED**

**June 3, 2019**  
**8:30 a.m. ET**

**OPENING**

Operator: Good day and welcome, ladies and gentlemen, to the Vical Incorporated and Brickell Biotech, Inc. merger conference call. At this time, I would like to inform you that this conference is being recorded and that all participants are in a listen-only mode. At the request of the company, we will open the conference up for questions and answers from invited participants after the presentation.

I will now turn the conference over to Mr. Tony Ramos, Vical's Vice President and Chief Financial Officer. Please go ahead, sir.

**INTRODUCTIONS**

Tony: Hello everyone. And thank you for joining us on today's call to discuss the proposed merger of Vical Incorporated with Brickell Biotech, Inc., as announced in a news release this morning. Joining me on the call today from Vical is President and Chief Executive Officer, Vijay Samant, and from Brickell, Chief Executive Officer, Rob Brown, and Co-founder and Chief Operating Officer Andy Sklawer.

Before we begin, I'd like to remind everyone that today's call will include statements relating to future financial, business and/or research and clinical performance, conditions, plans, prospects, trends, or strategies and other such matters, including without limitation, the potential closing date of the merger, the amount of the combined company's cash balance at closing, the potential receipt of additional R&D funding and

the timing thereof, the potential benefits of the merger or of Brickell's product candidates, the anticipated ownership of the combined company, the anticipated timing, scope and design of future clinical trials, and the prospects for commercializing any product candidates, are forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. In addition, when or if used in this conference call, the words "may," "could," "should," "anticipate," "believe," "estimate," "expect," "intend," "plan," "predict" and similar expressions and their variants, as they relate to Brickell, Vical or the management of either company, before or after the Merger, may identify forward-looking statements.

Brickell and Vical caution that these forward-looking statements are subject to numerous assumptions, risks, and uncertainties, which change over time, often in unanticipated ways. Important factors that may cause actual results to differ materially from the results discussed in the forward-looking statements or historical experience include risks and uncertainties, including the timing and completion of the merger, the parties' ability to satisfy the closing conditions of the merger and a separate funding agreement with NovaQuest Capital Management, whether or when the combined company will achieve any of the milestones in the funding agreement with NovaQuest, potential delays in product development, unanticipated demands on cash resources, risks associated with developing, obtaining regulatory approval for and commercializing novel therapeutics and whether any anticipated benefits of the merger will be realized. Further information on the factors and risks that could cause actual results to differ from any forward-looking statements are contained in Vical's filings with the United States Securities and Exchange Commission, or SEC, which are available at [www.sec.gov](http://www.sec.gov). The forward-looking statements represent the estimates of Brickell and Vical as of the date hereof only, and Vical and Brickell

specifically disclaim any duty or obligation to update forward-looking statements.

I have some important information for investors and stockholders. This communication does not constitute an offer to sell or solicitation of an offer to buy any securities or the solicitation of an offer to buy any securities, nor will there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction.

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the directors and executive officers of Vical is included in Vical's Definitive Proxy Statement on Schedule 14A relating to the 2018 Annual Meeting of Stockholders, filed with the SEC on April 9, 2018. This document is available free of charge at the SEC website, at Vical's website, or by directing a written request to Vical as described earlier.

I will now turn the call over to Vijay Samant, President and Chief Executive Officer of Vical.

#### **TRANSACTION OVERVIEW**

Vijay:

Thank you, Tony, and thank you to our participants for joining the call. As Tony noted, this morning we issued a press release to announce that Vical has entered into a definitive merger agreement with privately-held Brickell Biotech Inc whereby the companies would combine in an all-stock transaction. As you may recall, in July of 2018 Vical began a process to review strategic alternatives. That review is now concluded with the announcement of our merger agreement with Brickell. We are confident that this proposed merger provides the best path forward to both companies and is in the best interests of Vical's stockholders.

Under the terms of the agreement, it is anticipated that existing Vical stockholders will own 40% of the combined company and Brickell stockholders will own 60% of the combined company, in each case upon completion of the merger and subject to assumptions regarding calculation of the fully diluted shares of the parties. The ownership split was based on a \$60 million valuation for Brickell and a \$40 million valuation for Vical, a premium to the 30-day volume weighted average share price of Vical. The actual allocation between the two groups of stockholders is subject to adjustment based on Vical's and Brickell's

respective net cash and net working capital balances prior to the completion of the Merger.

The transaction has been approved by the boards of directors of both companies and the required percentage of Brickell stockholders needed to approve the transaction. The Merger is anticipated to close in the third quarter of 2019, subject to customary closing conditions, including approval of the Merger by the stockholders of Vical, and the satisfaction of closing conditions to a funding agreement between Brickell and an affiliate of NovaQuest Capital Management, LLC. Under this funding agreement, NovaQuest has committed up to \$25 million in near-term research and development funding to Brickell following the closing of the Merger.

The combined company intends to use proceeds from NovaQuest, in addition to Vical's cash balance at the closing of the Merger, to primarily fund the development of sofpironium bromide through Phase 3 clinical trials in axillary hyperhidrosis.

The decision to pursue this agreement was evaluated following an extensive review of strategic alternatives by Vical's Board and senior management in collaboration with our financial advisors, MTS Health Partners. The team thoroughly evaluated the potential of more than 50 private and public merger partners with extensive due diligence conducted on a large subset of these potential merger partners. After careful consideration, we believe this transaction with Brickell is in the best interests of Vical's stockholders.

Brickell is a Boulder, Colorado-based biotechnology company focused on the development of novel therapeutics to address unmet needs in dermatology. The combined company's goal is to be a leader in the

development of therapies to address hyperhidrosis and other debilitating skin diseases. At the heart of this transaction is sofpironium bromide, Brickell's Phase 3 ready lead drug candidate for the treatment of hyperhidrosis, which Rob Brown from Brickell will discuss in further detail in a moment. We believe the combination of Vical and Brickell offers stockholders a company that will be well capitalized to achieve significant milestones with a late-stage, novel lead program that has the potential for a fast to market strategy and substantial commercial opportunity in hyperhidrosis.

Upon the close of the transaction, the combined company will be known as Brickell Biotech Inc. and will continue to be publicly listed. The combined company's Board of Directors will be comprised of seven representatives, five from Brickell and two from Vical, with Reginald Hardy serving as Chairman of the Board. The combined company will be led by a seasoned group of executives with Rob Brown as Chief Executive Officer. Prior to joining Brickell, Rob was the Chief Marketing Officer of Eli Lilly, where he was responsible for launching a number of blockbuster products and leading the development of Lilly's commercial capabilities.

With that, I will now hand the call over to Rob Brown to share an overview of Brickell and the plan for the combined company.

#### **BRICKELL OVERVIEW**

Rob: Thank you, Vijay. And thank you to everyone who has joined us on the call. I'm very excited to share details about the combined company that we are proposing to create. As Vijay discussed, we believe following completion of the merger and the R&D funding agreement with NovaQuest, the combined company will have a sound financial footing

and a diverse clinical stage pipeline, including a pivotal, Phase-3-ready asset for the treatment of hyperhidrosis. Given the importance of our lead asset, let's start by diving into what is hyperhidrosis.

### **Background on Hyperhidrosis**

Hyperhidrosis is a medical condition that causes excessive sweating beyond what is required to regulate the body's temperature. This excessive sweating has a significant negative impact on quality of life for patients.

There are over 15 million hyperhidrosis sufferers in the United States. Axillary, or under arm, hyperhidrosis is the most common body type with over 10 million sufferers. Another common body area for hyperhidrosis is the hands, but the condition presents itself in many body locations. Approximately 80% of sufferers have multifocal hyperhidrosis, meaning they have excessive sweat in three or more body areas.

Currently the vast majority of sufferers are not aware that there are treatments available, although many have sought help from healthcare professionals through the years. Until 2018, patients who received treatment typically tried extra strength antiperspirants and when those failed they either gave up or started on Botox injections, which are only accessible to a small number of patients.

In October 2018, Dermira launched Qbrexza for axillary hyperhidrosis. Dermira is heavily investing in building the hyperhidrosis market to reach a wider audience. Qbrexza has a similar mechanism of action as our asset sofpironium bromide. Like most markets that need to be built, more entrants help build awareness with patients, improve physician confidence and understanding of the condition and the treatments, and

ultimately expand the market. We believe sofpironium bromide has the potential to be a “second and better” product, building off of Dermira’s launch and investments.

As more patients learn about effective, easy to use treatments, and physicians become more aware of treatment options and experience the efficacy of sofpironium bromide, if approved, we believe there is significant market potential.

#### **Background on Sofpironium Bromide**

So why are we excited about this asset? Sofpironium bromide, is a novel, soft anticholinergic that was designed to maximize the therapeutic effect and minimize systemic side effects. When sofpironium bromide enters the blood, it is rapidly metabolized into a significantly less pharmacologically active metabolite and is quickly eliminated. This novel feature may allow us to increase the dose, improving efficacy while maintaining a favorable safety profile.

To date, sofpironium bromide has been studied in over 1,200 patients. Three Phase 2b clinical trials and a pivotal Phase 3 trial in Japan have been completed, all with positive results. Two of the Phase 2 trials were conducted in the U.S. and one in Japan via Brickell’s partner, Kaken Pharmaceutical, Co, LTD. The pivotal Phase 3 trial was conducted by Kaken in subjects with primary axillary hyperhidrosis in Japan and achieved statistical significance with a p-value of less than 0.05 for the primary and all secondary efficacy endpoints.

Brickell is currently conducting a Phase 3 long-term safety study in 300 subjects with primary axillary hyperhidrosis in the U.S., and we are pleased to note that this study is fully enrolled. Brickell intends to initiate



two pivotal Phase 3 clinical trials in the U.S. We expect to enroll approximately 450 subjects with primary axillary hyperhidrosis into each study. We plan to open these trials for enrollment in the fourth quarter of 2019, and results are expected in Q4 2020.

Looking at the efficacy of sofpironium bromide, in the Phase 2b study conducted by Brickell, sofpironium bromide significantly reduced the amount of sweat produced by patients with hyperhidrosis. This was assessed using a tool called gravimetric sweat production along with a patient reported outcome. We believe that sofpironium bromide has the potential to be a best in class drug in terms of reduction in sweat production in patients with hyperhidrosis.

In terms of sofpironium bromide's safety profile, the most robust data comes from Brickell's ongoing open-label Phase 3 long-term safety study in the U.S. We look forward to sharing this data with you at a later date.

Finally, sofpironium bromide will be delivered to patients in a proprietary gel formulation via a metered dose pump and applicator which allows targeted axillary dosing without exposure to other areas of the body (such as the hands). This system allows patients to avoid touching the product when applying it, lowering the risk of transference side effects, for example caused by having an anticholinergic drug on the hands and then touching the eyes.

We expect to start two pivotal phase three studies in the US in Q4 of this year. We anticipate the studies to take around a year to complete, allowing us potentially to release top line results in Q4 2020. We believe the financial resources provided as a result of this merger and the NovaQuest R&D funding agreement should provide sufficient funds to

complete the Phase 3 program as well as begin to advance our pipeline portfolio. We are currently projecting our NDA submission will occur in Q2 2021.

I mentioned our Japanese partner, Kaken Pharmaceutical several times so far. Let me take a minute to explain the Brickell – Kaken alliance. Kaken is a \$1 billion+ specialty pharmaceutical company based in Tokyo, Japan. Dermatology is one of their strategic areas of company focus. Kaken licensed sofpironium bromide from Brickell in 2015 and has rights to commercialize in Japan, China, Korea and several other Asian markets. In return Brickell is entitled to receive milestones and royalties from Kaken, and Kaken will share some R&D costs with Brickell.

To date Brickell has received non-dilutive funding from Kaken in the form of an upfront fee, milestone and R&D payments. Kaken has also been responsible for a significant amount of the R&D development activities to-date, which has helped our development activities in the U.S. If Kaken is successful in Japan, Brickell has the potential to earn substantial income over the life of the asset.

Kaken was required to conduct only one Phase 3 study for regulatory approval in Japan. This study was completed in March of 2019, and achieved all of its primary and secondary endpoints including all the proposed US endpoints. We expect sofpironium bromide will be the first therapy approved for the treatment of hyperhidrosis in Japan.

One of the benefits of sofpironium bromide is it can be developed for multiple hyperhidrosis body areas other than the underarms, such as the hands. Separate Phase 3 studies would be needed but could offer

expanded commercial opportunities within this category and serve as a pipeline in a molecule.

So in summary, we are excited about the potential of sofpironium bromide. We believe we have a potentially best in class molecule in an area of significant unmet patient need. The FDA pathway to approval is well defined based on prior regulatory approvals, and we have an asset that has in three phase 2 trials and in one Japanese phase 3 clinical trial demonstrated a promising efficacy, safety, and tolerability profile, delivered in patient-friendly device.

#### **Background on Brickell pipeline assets**

Over the next year we also plan to advance our pipeline. There are two assets in addition to sofpironium bromide that we are particularly excited about. The first is BBI-3000, a novel, potent and highly selective oral retinoid for cutaneous T-cell lymphoma, or CTCL. The National Cancer Institute has an open IND with the oncology division of the FDA to study BBI-3000 for oral Chemoprevention of breast cancer. Brickell has the right of reference to the IND providing us with significant existing safety data on file. So far the NCI has conducted two Phase 1 trial and is currently recruiting subjects into a proof-of-concept trial in patients with early stage breast cancer.

We believe BBI 3000 can be used potentially in treating early 1B/2A stages of CTCL. Based on the current known safety profile of the asset, we have not yet reached dose-limiting toxicity, and therefore we have the opportunity to explore higher doses which may allow us to improve efficacy compared to the current standard of care. We expect to start a proof-of-concept clinical trial in 2020.

The second asset we wanted to highlight is BBI-6000 a novel small molecule ROR gamma inhibitor for treatment of mild to moderate Psoriasis. We see BBI 6000 potentially filling a gap in current psoriasis treatment by providing a topical formulation that hits the IL-17 pathway. Several *in-vitro* studies have been conducted confirming BBI-6000 is effective at downregulating IL-17. We believe that this asset has some unique properties that may allow us to mitigate some of the toxicity issues over other ROR gamma programs have experienced, particularly given the topical delivery and expected rapid metabolism of the compound. A lead and backup formulation have been developed and we hope to start a proof-of-concept clinical trial in early 2021.

**Brickell management team**

I know when you invest in a company you are not only investing in the assets but also the team. So I wanted to just take a minute and share a little of my background with you. I joined Brickell as CEO in January of this year. My previous position was EVP and Chief Marketing Officer at Eli Lilly. I spent my career building commercial capabilities around the world and launching drugs. For the last 10 years I was directly responsible for Lilly's launch capabilities. Earlier in my career I was the global commercial leader for the Cialis launch. Cialis launched several years after Viagra, and because of our commercial strategy ended up beating Viagra in sales in most countries around the world. Part of the reason I joined Brickell is because I see a very similar opportunity with sofipironium bromide.

But Brickell is more than just me. We have assembled a team of seasoned biotech executives, including Mike Carruthers as Chief Financial Officer, Deepak Chadha as head of R&D, and Andy Sklawer as Chief Operating Officer. Together the team we are building has a

track record of delivering on our commitments and winning in the marketplace.

In summary, Brickell is excited about this merger with Vical. We believe the combined company will be well capitalized to conduct the pivotal Phase 3 trials for sofpironium bromide. In addition, we are pleased with the development progress of our Japanese partner, Kaken. We are optimistic that the strength of our leadership team, coupled with an innovative pipeline of new chemical entities for impactful skin diseases, will enable the combined company to reach significant value inflection points.

With that I will hand the call back to Vijay.

**CONCLUSION**

Vijay:

Thank you, Rob.

That concludes our prepared comments for today. Operator, we are now ready to open the call to questions from our invited participants.

**Q&A**

Operator:

Thank you Mr. Samant.

[Operator instructions.] Please stand by for your first question.

Our first question comes from [Name] at [Company].

[Q&A as long as needed]

Operator: [Prompt for additional questions before connecting last caller in queue]

**CONCLUDING REMARKS**

Operator: At this time there are no further questions, so I'll turn the conference back to Mr. Samant to conclude.

Vijay Samant: Thank you all for participating and thank you for your support of Vical over the years. We are very excited about the proposed merger of Vical and Brickell. Please reach out to us if you have any additional questions. Thank you, and have a good day.

Operator: Ladies and gentlemen, this concludes our conference for today. All parties may now disconnect.

# Brickell Biotech, Inc. and Vical Incorporated Merger

Making Fresh Tracks in **Dermatology**<sup>®</sup>

June 2019

## Safe Harbor

Any statements made in this presentation relating to future financial, business and/or research and clinical performance, conditions, plans, prospects, trends, or strategies and other such matters, including without limitation, the potential closing of the proposed merger between Vical and Brickell, the amount of the combined company's cash balance at closing, the potential receipt of additional R&D funding and the timing thereof, the potential benefits of the merger or of Brickell's product candidates, the anticipated ownership of the combined company, the anticipated timing, scope and design of future clinical trials, and the prospects for commercializing any product candidates, are forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. In addition, when or if used in this presentation, the words "may," "could," "should," "anticipate," "believe," "estimate," "expect," "intend," "plan," "predict" and similar expressions and their variants, as they relate to Brickell, Vical or the management of either company, before or after the proposed merger, may identify forward-looking statements. Brickell and Vical caution that these forward-looking statements are subject to numerous assumptions, risks, and uncertainties, which change over time, often in unanticipated ways. Important factors that may cause actual results to differ materially from the results discussed in the forward-looking statements or historical experience include risks and uncertainties, including the timing and completion of the proposed merger, the parties' ability to satisfy the closing conditions of the proposed merger and funding agreement with NovaQuest, whether or when the combined company will receive additional R&D funding payments from NovaQuest, potential delays in product development, unanticipated demands on cash resources, risks associated with developing, obtaining regulatory approval for and commercializing novel therapeutics and whether any anticipated benefits of the proposed merger will be realized. Further information on the factors and risks that could cause actual results to differ from any forward-looking statements are contained in Vical's filings with the U.S. Securities and Exchange Commission, which are available at [www.sec.gov](http://www.sec.gov). The forward-looking statements represent the estimates of Brickell and Vical as of the date hereof only, and Vical and Brickell specifically disclaim any duty or obligation to update forward-looking statements.



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## Additional Information about the Merger and Where to Find It

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### Non-Solicitation

This communication does not constitute an offer to sell or solicitation of an offer to buy any securities or the solicitation of an offer to buy any securities, nor will there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction.

### Important Information and Where to Find It

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## Merger Aimed at Creating a Leading Innovative Dermatology Company

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- ▶ **Brickell and Vical (NASDAQ:VICL) announced signing of a definitive merger agreement on June 3**
  - ▶ Follows Vical's comprehensive review of strategic alternatives
  - ▶ All-stock transaction expected to be completed in third quarter of 2019
  - ▶ Transaction requires Vical stockholder approval, concurrent closing of NovaQuest Capital Management funding agreement and other customary conditions
  - ▶ Combined company to be called **Brickell Biotech, Inc.** and will trade on Nasdaq under a Ticker TBD
  - ▶ Leadership: Management team led by Rob Brown, CEO of Brickell; based in Boulder, CO
  - ▶ On a pro forma basis, current Vical stockholders would own approximately 40% of the combined company and current Brickell stockholders would own approximately 60% of the combined company\*
- ▶ **Funding anticipated to allow combined company to reach key milestones with a potentially best-in-class lead candidate**
  - ▶ Approximately \$35 million in cash expected at closing from Vical
  - ▶ Up to \$25 million in near-term R&D funding by NovaQuest
  - ▶ Post-closing cash on hand and NovaQuest R&D agreement expected to fund combined company Phase 3 trials through Q4 2020
  - ▶ Multiple potential value creation events in next 18 months

## Brickell Highlights: Striving to be Best-in-Class in Dermatology

### DIVERSIFIED, NOVEL CLINICAL STAGE PIPELINE

- ▶ Pipeline focused on three differentiated NCEs targeting skin diseases with significant unmet medical needs
- ▶ Goal to develop potential best-in-class product candidates
- ▶ Multiple issued patents with terms extending into the 2030s

### PHASE 3 PRODUCT

- ▶ Sofpironium bromide, a novel topical treatment being developed for hyperhidrosis
- ▶ Large market opportunity of >15 million people in U.S. alone
- ▶ Statistically significant efficacy results with favorable safety profile in Phase 2b

### STRONG PARTNERSHIP

- ▶ Sofpironium bromide is being co-developed with Kaken Pharmaceutical in Japan
- ▶ Kaken achieved statistically significant results in a Pivotal P3 trial
- ▶ Brickell has received substantial non-dilutive capital from Kaken

### EXPERIENCED LEADERSHIP

- ▶ Leadership team with proven track record
- ▶ History of successful development and launch of numerous products achieving first-in-class and/or blockbuster status

# Executing Strategy with Experienced Leadership Team

Brickell executives have successfully developed and launched numerous products achieving first-in-class and/or blockbuster status

**Robert Brown**  
Chief Executive Officer  
*Lilly*



**Mike Carruthers**  
Chief Financial Officer  
ARRAY Nivalis



**Andy Sklawer**  
Co-Founder & COO  
CONCORDIA PHARMACEUTICALS Verid



**David McAvoy**  
General Counsel  
*Lilly* Elanco ENDOCYTE  
A NeuroGenentec Company



**Deepak Chadha**  
Chief R&D Officer  
Allergan INAMED KYTHERA  
ACE-272 (P2X7) KYTHERA<sup>®</sup> (topiramate)



**Gary Walker**  
Chief Marketing Officer  
*Lilly* DOW



**taltz**  
(tekelimumab) injection  
80 mg/mL

*Humalog* KwikPen  
insulin lispro injection  
100 units/mL

**PROZAC**  
fluoxetine hydrochloride

**Cymbalta**  
duloxetine

**EVISTA**  
raloxifene HCl

**GEMZAR**  
(gemcitabine)

**Dysport**  
(abobotulinumtoxinA)

**Juvéderm**

*kybella*  
(deoxycholic acid) injection

# Pipeline of NCEs with Significant Potential in Dermatology

PRODUCT CANDIDATE	MOA & INDICATION	PRE-CLINICAL	PHASE 1	PHASE 2A	PHASE 2B	PHASE 3	ANTICIPATED KEY MILESTONES
<b>Sofpironium Bromide</b>	Topical soft anticholinergic for axillary hyperhidrosis						<ul style="list-style-type: none"> <li>Positive Pivotal P3 results received in March 2019 (Japan)</li> <li>Pivotal P3 initiation in Q4 2019 (US)</li> <li>Pivotal P3 data in Q4 2020 (US)</li> </ul>
<b>BBI-3000</b>	Oral rexinoid for cutaneous T-cell lymphoma						<ul style="list-style-type: none"> <li>Initiation of POC study in late 2020</li> </ul>
<b>BBI-6000</b>	Topical RORγ inhibitor for psoriasis						<ul style="list-style-type: none"> <li>Initiation of POC study in early 2021</li> </ul>
<b>Early Research Programs</b>	Targeting various skin diseases						

## Significant U.S. Market Opportunity in Hyperhidrosis



### Hyperhidrosis affects 4.8% of the U.S. population or 15.3M individuals with a real negative impact on quality of life

- Hyperhidrosis (HH) is a medical condition that causes **excessive sweating** beyond what is required for regulation of body temperature
- HH affects **8.8% ages 18-39** and **17.1% ages 12-17** of the U.S. population<sup>1,2</sup>
- Over 10 million individuals in the U.S. suffer from axillary HH and ~80% have multifocal HH (3 or more body areas)<sup>1,3</sup>
- Only **51%** of HH sufferers have seen a healthcare professional regarding their HH, with approx. **23%** currently receiving treatment<sup>1</sup>
- **75%** of HH sufferers report a negative impact on their social life, well-being, emotional and mental health<sup>1</sup>

<sup>1</sup>Hyperhidrosis: An update on prevalence and severity of hyperhidrosis in the United States, Doolittle, James, October 2016

<sup>2</sup>Prevalence of primary focal hyperhidrosis among teens 12-17 in US Population, Glaser, Ballard, Pieretti, Pariser, March 2017

<sup>3</sup>Prevalence of multifocal primary hyperhidrosis and symptom severity over time..., Glaser, Ballard, Pieretti, Pariser, 2016

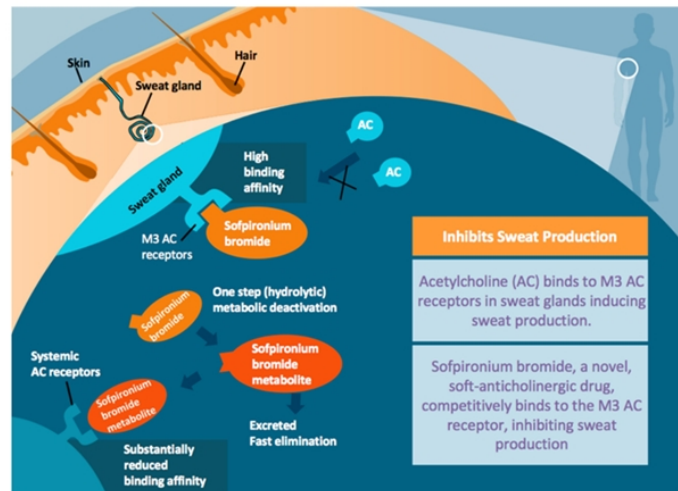
# Sofpironium Bromide: Potential Best-in-Class Therapy for Hyperhidrosis

## SEQUENCE OF THERAPEUTIC OPTIONS



## Sofpironium Bromide: A Novel Soft Anticholinergic

- ▶ **Retro-metabolically designed**
  - Provides the potential for enhanced therapeutic effect with minimal systemic side effects
  - Allows for various dosage strengths
- ▶ **Short plasma half life**
  - Rapid metabolic deactivation and fast elimination
  - Potential for a more favorable tolerability profile and/or enhanced efficacy at higher concentrations





## Target Product Profile: Sofpironium Bromide

Sofpironium bromide is well-positioned as a potential best-in-class topical axillary hyperhidrosis therapy



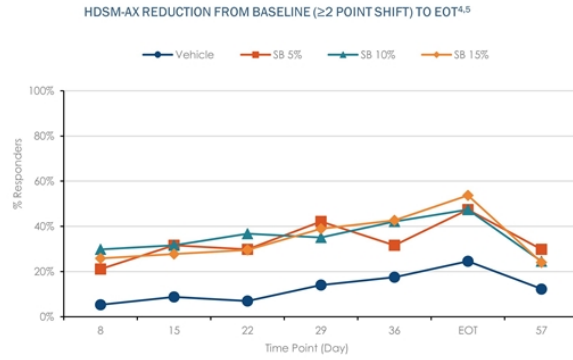
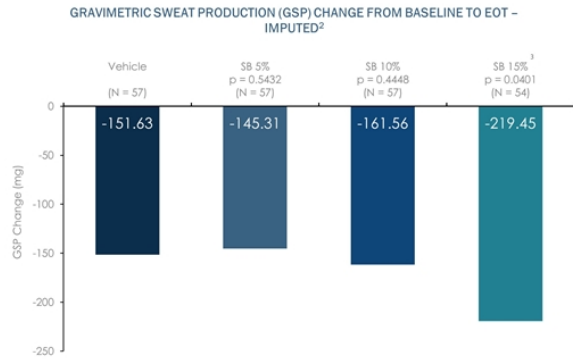
MOLECULE	Sofpironium bromide
MOA	Soft-anticholinergic (rapidly metabolized into inactive metabolite)
FORMULATION / ADMINISTRATION	Gel in a metered dose pump directly applied to underarms via applicator cap
SAFETY	MOA creates potential for fewer systemic AEs
EFFICACY	Potential for better efficacy (sweat reduction)
IP / EXCLUSIVITY	Patent protection through 2034+ / NCE
CLINICAL STAGE	U.S. Phase 3 registration trials to be initiated Q4 2019

### Brickell expects to complete all activities required to submit a NDA Q2 2021

- ▶ **FDA aligned with overall development plan**
  - Phase 3 study design and co-primary efficacy endpoints
- ▶ **Achieved Statistical Significance in Phase 2b Studies**
  - Demonstrated safety, tolerability and achieved statistically significant results on primary and key secondary endpoints
- ▶ **Pivotal Phase 3 in Japan (Kaken)**
  - Positive Phase 3 results (March 2019)
  - Achieved statistically significant results on primary and all secondary efficacy endpoints
- ▶ **Phase 3 Program in the U.S. (Brickell)**
  - Pivotal studies on track to initiate in Q4 2019 with topline results in Q4 2020
  - Long-Term Safety Study (LTSS) fully enrolled; data readout in H1 2020

# U.S. Phase 2b Study: Summary of Results

Sofpironium bromide (SB) gel, 15% demonstrated statistically significant response for absolute GSP reduction and all doses demonstrated statistically significant responses for HDSM-Ax; Most common AEs were dry mouth and blurred vision which were predominantly mild and resolved spontaneously following treatment<sup>1</sup>



<sup>1</sup> Data from U.S. Phase 2b clinical trial of sofopironium bromide gel, 0%, 5%, 10%, and 15% (1:1) in 227 subjects with primary axillary hyperhidrosis following 6-weeks of treatment (2-week follow-up)  
<sup>2</sup> End of Therapy Imputed includes subjects missing all end of therapy values, where data is imputed by the mean of the last three available post-baseline visits.  
<sup>3</sup> Reported p-value for the GSP endpoint is 1-sided (0.1 statistical significant) comparing active treatment to vehicle based on ANCOVA model  
<sup>4</sup> One-sided p-values comparing active treatment to vehicle are based on ANCOVA model, p-values: 0.0122 (5%); 0.0169 (10%); 0.0025 (15%).  
<sup>5</sup> Post-hoc analysis with the (7-Item HDSM-Ax Scale)

## Value of the Kaken Partnership to Brickell

 KAKEN PHARMACEUTICAL CO., LTD.

**Kaken is a leading specialty pharmaceutical company in Japan, the world's 2<sup>nd</sup> largest market for hyperhidrosis, focused on building their presence in dermatology**

Net Sales of \$1B (2018); R&D spend over \$100M

Developed & Launched Jublia/Clenafin (anti-fungal)

Sofpironium Bromide is most advanced clinical stage asset

 KAKEN

**Sofpironium Bromide**

Responsible for ALL non-clinical studies & portions of CMC activities

**Positive Phase 3 Topline Results**

Significant Upfront & Potential Near-Term Sales Milestones & Royalties

## Pivotal Phase 3 Study Overview (2 Identical Studies)

Phase 3 study design is based on Phase 2b; Planning is well underway and on track for initiation in Q4 2019 with topline results expected in Q4 2020

### STUDY TITLE

- ▶ A multicenter, randomized, double-blinded, vehicle-controlled study to evaluate the safety and efficacy of topically applied sofpironium bromide gel, 15% in subjects with axillary hyperhidrosis

### STUDY DURATION / NUMBER OF SUBJECTS

- ▶ 6-week treatment with a 2-week follow-up
- ▶ ~450 subjects across 80 sites (each study)

### RANDOMIZATION

- ▶ Subjects will be randomized to sofpironium bromide gel, 15% or vehicle (1:1)

### PRIMARY EFFICACY ENDPOINTS

- ▶ The proportion of subjects achieving at least a 2-point improvement in HDSM-Ax from baseline to end of treatment
- ▶ The absolute change in GSP from baseline to end of treatment

### STUDY POWER CALCULATIONS

- ▶ The overall study power to demonstrate a statistically significant treatment effect ( $p < 0.05$ ) for both co-primary endpoints is ~0.90 (>0.95 for HDSM-Ax and 0.95 for GSP)

## Key Achieved & Anticipated Development Milestones

Sofpironium Bromide	- Axillary Hyperhidrosis	• Completion of Enrollment of Phase 3 Long-term Safety in US	✓
		• Completion of P3 pivotal studies & positive topline results in Japan	✓
		• Initiation of Phase 3 pivotal studies in US	Q4 2019
		• Completion of Phase 3 pivotal studies in US	Q4 2020
		• NDA Submission	Q2 2021
BBI-3000	- Cutaneous T-Cell Lymphoma (CTCL)	• Completed two Phase 1 studies	✓
		• Initiation of POC study in CTCL	2020
BBI-6000	- Psoriasis	• Development of topical formulation & initiation of tox studies	✓
		• Initiation of POC study in psoriasis	Early 2021

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## Merger Enables Value-Creation Opportunities

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- ▶ **Starting Phase 3 in U.S. with a potential best-in-class, late-stage asset for hyperhidrosis**
  - ▶ An underserved and large market, just starting to gain attention, with significant growth potential
  - ▶ Positive Phase 2b data in the U.S., successful Phase 3 in Japan, and direct market comparables
- ▶ **Merger creates a compelling opportunity**
  - ▶ Vical stockholders will own approximately 40% and Brickell shareholders will own approximately 60% of the combined company\*
- ▶ **Combined company capitalized to achieve key inflection points**
  - ▶ Combined company cash plus NovaQuest R&D funding estimated to be sufficient to fund the company through Phase 3

# Brickell Biotech, Inc. and Vical Incorporated Merger

Contact:  
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Making Fresh Tracks in **Dermatology**<sup>®</sup>

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