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

FORM 8-K

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

Date of Report (Date of earliest event reported): **September 18, 2023**

PROSOMNUS, INC.
(Exact name of registrant as specified in its charter)

Delaware	**001-41567**	**88-2978216**
(State or other jurisdiction of incorporation)	(Commission file number)	(IRS Employer Identification No.)

5675 Gibraltar Avenue **Pleasanton, CA**	**94588**
(Address of principal executive offices)	(Zip Code)

(844) 537-5337
(Registrant's telephone number, including area code)

Not Applicable
(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communication 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**	**Name of each exchange on which registered**
Common Stock, par value $0.0001 per share	OSA	The Nasdaq Stock Market LLC
Warrants, each whole warrant exercisable for one share of Common Stock for $11.50 per share	OSAAW	The Nasdaq Stock Market LLC

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. ☐

Item 1.01. Entry into a Material Definitive Agreement

Securities Purchase Agreement

On September 20, 2023, ProSomnus, Inc. (the "Company") entered into a Securities Purchase Agreement (the "Securities Purchase Agreement") with the investors named therein (each an "Investor" and collectively the "Investors"). Pursuant to the Securities Purchase Agreement, the Company may issue (i) up to an aggregate of 25,000 shares (the "Maximum Preferred Shares") of the Company's Series A Convertible Preferred Stock, par value $0.001 per share (the "Series A Preferred Stock"), the terms of which are described below, for an aggregate purchase price of $25 million at a per share purchase price of $1,000, and (ii) (A) with respect to Investors that hold the Company's Senior Secured Convertible Notes due December 6, 2025 (the "Existing Senior Notes") or the Company's Subordinated Secured Convertible Notes due April 6, 2026 (the "Existing Subordinated Notes" and, together with the Existing Senior Notes, the "Existing Notes"; such Investors, the "Noteholder Investors"), new convertible notes on substantially similar terms to such Noteholder Investor's Existing Notes other than that such new notes will be convertible into shares of the Company's common stock, par value $0.001 per share ("Common Stock"), at an effective price of $1.00 per share subject to the terms and conditions of the applicable new indenture pursuant to which the applicable series of New Notes will be issued by the Company (the "New Notes"), in exchange for such Noteholder Investor's portion of the principal amount outstanding of the Existing Notes (the "Exchanges") pursuant to an exchange agreement (the "Exchange Agreement") that the Company will enter into as soon as practicable following the Initial Closing (as defined below) and/or (B) warrants to purchase shares of Common Stock at an exercise price of $1.00 per share (the "Warrants" and, together with the Preferred Shares, the PIK Shares (as defined below), Conversion Shares (as defined below) and the Warrant Shares (as defined below), the "Securities").

Each Investor that is not a Noteholder Investor will receive Warrants to purchase 1,000 shares of Common Stock for each share of Series A Preferred Stock purchased by such Investor. Each Noteholder Investor will receive New Notes in an Exchange in an amount that is up to 300% of the purchase price paid by such Noteholder Investor to purchase its Series A Preferred Stock and, to the extent such Noteholder Investor purchases additional shares of Series A Preferred Stock, Warrants to purchase 1,000 per share for each such additional share of Series A Preferred Stock.

Upon the execution of the Securities Purchase Agreement, the Company had agreed to sell and Investors committed to purchase an aggregate of 10,126 shares of Series A Preferred Stock, resulting in aggregate gross proceeds to the Company of approximately $10.1 million, and Warrants to purchase an aggregate of 5,154,524 shares of Common Stock under the Securities Purchase Agreement, the closing of substantially all of which (the "Initial Closing") occurred simultaneously with signing the Securities Purchase Agreement on September 20, 2023 (the "Initial Closing Date"). The Company expects to Exchange approximately $3.4 million in aggregate principal amount of Existing Senior Notes and approximately $11.6 million in aggregate principal amount of Existing Subordinated Notes related to the Initial Closing on or before September 30, 2023. Of the $10.1 million aggregated gross proceeds, approximately $1.25 million of shares of Series A Preferred Stock and Warrants to purchase approximately 1.25 million shares of Common Stock to be purchased by Investors is expected to close, in one or more closings, on or before October 20, 2023. The Company may issue up to the Maximum Preferred Shares and the corresponding New Notes and/or Warrants provided that any such issuance(s) occur on or before October 20, 2023.

The Company will use the proceeds from the sale of the Securities for general working capital.

The Securities Purchase Agreement contains customary representations, warranties and covenants of the Company and the Investors. Among such covenants, the Company agreed to use commercially reasonable efforts to obtain stockholder approval for all Common Stock issuable in respect of the Securities and the New Note Shares (as defined below) (such approval, the "Stockholder Approval") within 90 calendar days of the Initial Closing Date in accordance with the applicable rules and regulations of The Nasdaq Stock Market LLC ("Nasdaq"). The Company also agreed that, within 60 calendar days after the applicable closing date, the Company will file with the Securities and Exchange Commission (the "SEC"), at the Company's sole cost and expense, a registration statement registering the resale of the PIK Shares issuable in the three-year period following the applicable closing, the Conversion Shares, the Warrant Shares and the incremental shares of Common Stock issuable upon conversion of the New Notes as a result of the reduced conversion rate under the New Notes (such incremental shares, the "New Note Shares" and, such registration statement, the "Registration Statement"), and the Company will use its commercially reasonable efforts to have the Resale Registration Statement declared effective as soon as practicable after the filing thereof but no later than 120 calendar days following the applicable closing date.

The Investors include, among others, certain members of the Company's board of directors and certain executive officers of the Company, as well as affiliates and investment vehicles for such persons, who collectively have or will purchase 3,300 shares of Series A Preferred Stock and Warrants to purchase 2,228,484 shares of Common Stock and will Exchange for $3,256,549 in aggregate principal amount of the New Notes. Unless and until Stockholder Approval has been obtained by the Company, each director or officer of the Company that is an Investor or that beneficially owns or controls an entity that is an Investor agreed not to convert or cause such Investor to convert (in whole or in part) any shares of Series A Preferred Stock held by such Investor into Common Stock.

The description of the Securities Purchase Agreement is qualified in its entirety by reference to the text of the Securities Purchase Agreement, the form of which is filed as Exhibit 10.1 to this Current Report on Form 8-K and is incorporated herein by reference.

This Current Report on Form 8-K, including the exhibits filed herewith, is not an offer to sell or the solicitation of an offer to buy the Securities or any other securities of the Company, nor shall there by any offer, solicitation or sale of the Securities or any other securities of the Company in any state in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of such state.

Designation of Preferred Stock

Each share of Series A Preferred Stock has the powers, designations, preferences and other rights as are set forth in the Certificate of Designations, Preferences and Rights of the Series A Convertible Preferred Stock filed by the Company with the Delaware Secretary of State on September 20, 2023 (the "Certificate of Designations").

The "Stated Value" per share of Series A Preferred Stock is $1,000, subject to adjustment to preserve such value for stock splits, stock dividends, recapitalizations, reorganizations, reclassifications, combinations, reverse stock splits or other similar events relating to the Series A Preferred Stock.

The Series A Preferred Stock ranks senior to the Common Stock and any other capital stock of the Company with respect to dividends, distributions and payments upon a Liquidation Event (as defined in the Certificate of Designations); provided, however, that the Series A Preferred Stock shall be of junior rank to any indebtedness by the Company, excluding equity securities and non-convertible preferred stock.

In the event of a Liquidation Event, holders of Series A Preferred Stock (each, a "Holder" and, collectively, the "Holders") shall be entitled to receive in cash out of the assets of the Company legally available therefor (the "Liquidation Funds") upon such Liquidation Event, but before any amount shall be paid to the holders of Junior Stock (as defined in the Certificate of Designations), an amount in cash per share of Series A Preferred Stock equal to the greater of: (i) 150% of the Stated Value and (ii) the value of the per share consideration paid to the holders of the Common Stock in the Liquidation Event as if the Series A Preferred Stock held by such Holder had been converted prior to the Liquidation Event; provided that, if the Liquidation Funds are insufficient to pay the full amount due to the Holders and holders of shares of other classes or series of preferred stock of the Company, if any, that are of equal rank with the Series A Preferred Stock as to payments of Liquidation Funds (such stock being referred to hereinafter collectively as "Pari Passu Stock"), if any, then the Holders and the holders of any such Pari Passu Stock shall share ratably in any distribution of the Liquidation Funds in proportion to the respective amounts which would otherwise be payable in respect of the shares held by them upon such distribution if all amounts payable on or with respect to the shares of Series A Preferred Stock and Pari Passu Stock were paid in full. In addition, to the extent any Liquidation Funds remain following payment of the liquidation preference on the Series A Preferred Stock and any other payments that rank senior to payments on the Common Stock, each Holder shall be entitled to its pro rata portion of the remaining Liquidation Funds payable to the holders of the Common Stock in respect of any accrued but unpaid dividends on the Series A Preferred Stock as if any such accrued but unpaid dividends had been paid out in Common Stock immediately prior to the Liquidation Event.

From and after March 15, 2024 (the "Initial Dividend Date"), the Company shall pay the following dividends semi-annually on March 15 and September 15 of each year (or, if such day is not a Business Day, on the first Business Day following such date) (each a "Dividend Payment Date") to the Holders of record as they appear on the books of the Company on March 1 and September 1, respectively (even if such day is not a Business Day) (the "Dividend Record Date"): dividends per share of Series A Preferred Stock held on the applicable Dividend Record Date in arrears for the prior six-month period (except for the Dividend to be paid on the Initial Dividend Date, which shall be paid in arrears for the period from the Initial Closing Date through the Initial Dividend Date), payable as the number of shares of Common Stock (collectively, the "PIK Shares") equal to the Stated Value of each such share of Series A Preferred Stock multiplied by the dividend rate of 8.0% per annum and divided by $1.00, computed on the basis of a 360-day year and twelve 30-day months.

Each Holder shall have the right, at such Holder's option, subject to the conversion procedures and the limitations on conversion set forth of the Certificate of Designations, to convert any or all of its shares of Series A Preferred Stock at any time into the number of fully paid, validly issued and nonassessable shares of Common Stock (collectively, the "Conversion Shares") equal to the sum of (i) the quotient of the Stated Value of the shares of Series A Preferred Stock to be converted divided by the Conversion Rate (as defined below) and (ii) any PIK Shares accrued, but not yet issued with respect to such shares of Series A Preferred Stock being converted. No fractional shares of Common Stock are to be issued upon the conversion of any Series A Preferred Stock, but rather the number of shares of Common Stock to be issued shall be rounded up to the nearest whole number. The "Conversion Rate" shall initially be $1.00 and shall be subject to customary adjustments for stock dividends, stock splits, reclassifications and the like, and subject to price-based adjustment in the event of certain issuances of Common Stock, or securities convertible, exercisable or exchangeable for Common Stock, at a price below the then-applicable Conversion Price. Notwithstanding the foregoing, prior to the Company obtaining Stockholder Approval, each Holder, together with its transferees, may only convert their shares of Series A Preferred Stock into a number of shares of Common Stock equal to the product of (i) 19.95% of the number of outstanding shares of Common Stock immediately prior to the entrance into the Securities Purchase Agreement multiplied by (ii) such Holder's percentage of the aggregate proceeds raised under the Securities Purchase Agreement from the issuance of the Series A Preferred Stock, rounded down to the nearest whole share.

Subject to certain conditions, the Series A Preferred Stock will automatically convert into shares of Common Stock as follows: (i) 50% of the issued and outstanding Series A Preferred Stock held by each Holder will, subject to the conversion procedures set forth in the Certificate of Designations, automatically convert into shares of Common Stock if, at any time after the applicable Issuance Date, the VWAP (as defined in the Certificate of Designations) per share of Common Stock is greater than $4.50 per share for each of at least twenty (20) Trading Days in any period of thirty (30) consecutive Trading Days (such thirty (30) consecutive Trading Day period, the "Trading Period") and (ii) the remaining issued and outstanding Series A Preferred Stock will convert into shares of Common Stock if the VWAP per share of Common Stock is greater than $6.00 per share for each of at least twenty (20) Trading Days in any Trading Period.

Upon the occurrence of any transaction or series of related transactions pursuant to which the Company effects (i) any merger or consolidation of the Company where the Company is not the surviving entity, (ii) any sale of all or substantially all of its assets, or (iii) any reclassification of the Common Stock or any compulsory share exchange pursuant to which the Common Stock is effectively converted into or exchanged for other securities, cash or property (each a "Fundamental Transaction"), the Company shall purchase from each Holder, out of funds legally available therefor, all shares of Series A Preferred Stock held by such Holder (a "Fundamental Transaction Repurchase") for a purchase price per each such share of Series A Preferred Stock, payable in cash, equal to the greatest of (i) 150% of the Stated Value of such share of Series A Preferred Stock, (ii) the Stated Value of such share of Series A Preferred Stock, plus, to the extent holders of the Common Stock will receive cash consideration in exchange for their shares of Common Stock in any Fundamental Transaction, cash consideration equal to the value of any accrued but unpaid Dividends, and (iii) the value of the per share consideration paid to the holders of the Common Stock in the Fundamental Transaction as if the Series A preferred Stock held by such Holder had been converted prior to the Fundamental Transaction and accrued and unpaid Dividends had been issued on the date of the Fundamental Transaction Repurchase. To the extent holders of the Common Stock will receive shares of common stock or capital stock of any successor entity in any Fundamental Transaction, the Company shall, as applicable, issue Common Stock or use commercially reasonable efforts to cause any successor entity to issue securities in the successor entity of equivalent value to the value of any accrued but unpaid Dividends less any cash consideration paid in respect of accrued but unpaid Dividends.

Each Holder shall be entitled to the whole number of votes equal to the number of shares of Common Stock into which such Holder's Series A Preferred Stock would be convertible on the record date for the vote or consent of stockholders at a conversion price of $1.04 per share of Common Stock rounded to the nearest whole share (subject to the limitations on conversion set forth in the Certificate of Designations), and shall otherwise have voting rights and powers equal to the voting rights and powers of the Common Stock to the fullest extent permitted by applicable law, including, for the avoidance of doubt, with respect to the election of the Company's directors.

At any time when shares of Series A Preferred Stock are outstanding, certain matters will require the approval of the majority of the outstanding Series A Preferred Stock, voting as a separate class, including (i) amending, altering or changing the powers, privileges or preferences of the Series A Preferred Stock, (ii) amending, altering or repealing any provision of the Company's Certificate of Incorporation, the Certificate of Designations or bylaws of the Company in a manner that adversely affects the powers, preferences or rights of the Series A Preferred Stock, (iii) (a) reclassifying, altering or amending any existing security of the Company that is *pari passu* with or junior to the Series A Preferred Stock, if such reclassification, alteration or amendment would render such other security senior to or *pari passu* with, respectively, the Series A Preferred Stock or (b) reclassifying, altering or amending any existing security of the Company that is *pari passu* with or junior to the Series A Preferred Stock, if such reclassification, alteration or amendment would render such other security senior to or *pari passu* with, respectively, the Series A Preferred Stock, or (iv) purchasing or redeeming (or permitting any subsidiary to purchase or redeem) or paying or declaring any dividend or making any distribution on any shares of capital stock of the Company while any Dividend in respect of the Series A Preferred Stock is unpaid and accrued.

The description of the Certificate of Designations is qualified in its entirety by reference to the text of the Certificate of Designations, which is filed as Exhibit 3.1 to this Current Report on Form 8-K and is incorporated herein by reference.

Warrants

The Warrants will be exercisable for shares of Common Stock (the "Warrant Shares") once the Company has obtained Stockholder Approval, at an initial exercise price of $1.00 per share of Common Stock (the "Exercise Price") and expire five years from the Initial Closing Date. The Exercise Price is subject to customary adjustments for stock dividends, stock splits, reclassifications and the like and the Warrants are subject to automatic exercise in the event that the closing price of the Common Stock exceeds $10.00 per share for each of 20 trading days within any 30 trading day period.

The description of the Warrants is qualified in its entirety by reference to the text of the Form of Warrant, which is filed as Exhibit 4.1 to this Current Report on Form 8-K and is incorporated herein by reference.

Second Supplemental Indenture to Convertible Senior Notes Indenture

On September 20, 2023, the Company entered into the Second Supplemental Indenture (the "Second Senior Supplemental Indenture") to that certain Indenture, dated December 6, 2022, as supplemented by the First Senior Supplemental Indenture entered into on June 29, 2023, by and among the Company, ProSomnus Holdings, Inc. and ProSomnus Sleep Technologies, Inc., as guarantors, and Wilmington Trust, National Association, as trustee and collateral agent (as amended, the "Senior Indenture"), pursuant to which the Company issued the Existing Senior Notes. The Second Senior Supplemental Indenture amends the Senior Indenture to, among other things, permit the sale of the Securities and the Exchanges.

The description of the Second Senior Supplemental Indenture is qualified in its entirety by reference to the text of the Second Senior Supplemental Indenture, which is filed as Exhibit 4.2 to this Current Report on Form 8-K and is incorporated herein by reference.

Second Supplemental Indenture to Subordinated Notes Indenture

On September 20, 2023, the Company entered into the Second Supplemental Indenture (the "Second Subordinated Supplemental Indenture") to that certain Indenture, dated December 6, 2022, as supplemented by the First Subordinated Supplemental Indenture entered into on June 29, 2023, by and among the Company, ProSomnus Holdings, Inc. and ProSomnus Sleep Technologies, Inc., as guarantors, and Wilmington Trust, National Association, as trustee and collateral agent (as amended, the "Subordinated Indenture"), pursuant to which the Company issued the Existing Subordinated Notes. The Second Subordinated Supplemental Indenture amends the Subordinated Indenture to, among other things, permit the sale of the Securities and the Exchanges.

The description of the Second Subordinated Supplemental Indenture is qualified in its entirety by reference to the text of the Second Subordinated Supplemental Indenture, which is filed as Exhibit 4.3 to this Current Report on Form 8-K and is incorporated herein by reference.

Voting Support Agreement

In connection with the execution of the Securities Purchase Agreement, the Company entered into the Voting Support Agreements (the "Voting Support Agreement") with certain stockholders (the "Supporting Stockholders"). The Voting Support Agreement provides, among other things, that the Support Stockholders shall, with respect to the outstanding shares of Common Stock beneficially owned by such Supporting Stockholder as of the record date for the meeting of the Company's stockholders at which the requisite stockholder approvals will be sought (the "Covered Shares"), (a) if and when a stockholder meeting is held, appear at such meeting (and at every adjournment or postponement thereof) or otherwise cause the Covered Shares to be counted as present thereat for the purpose of establishing a quorum, (b) vote, or cause to be voted (including via proxy), at such meeting all of the Covered Shares beneficially owned as of the record date for such meeting to approve any matters necessary or reasonably requested by the Company for consummation of the transactions contemplated by the Securities Purchase Agreement and the Exchange Agreement and facilitate the Company's issuance of the Conversion Shares, the PIK Shares, the Warrant Shares, the shares of Common Stock issuable upon conversion of the New Notes and securities of the Company issuable pursuant to the Securities Purchase Agreement, the Warrants or the Exchange Agreement that may be deemed to be equity compensation under the rules of Nasdaq and (c) revoke or cause the holder(s) of record of any Covered Shares to revoke any and all previous proxies granted with respect to the Covered Shares.

The foregoing summary of the Voting Support Agreement does not purport to be complete and is subject to, and is qualified in its entirety by, the full text of the Voting Support Agreement, the form of which is filed as Exhibit 99.1 to this Current Report on Form 8-K and incorporated herein by reference.

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

The information contained in Item 1.01 of this Current Report on Form 8-K is incorporated by reference into this Item 2.03.

Item 3.01. Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.

On September 18, 2023, the Company received a notification letter (the "Notification Letter") from Nasdaq that the Company is not in compliance with the minimum Market Value of Publicly Held Shares (the "MVPHS") set forth in Nasdaq Listing Rule 5450(b)(2)(C) for continued listing on Nasdaq. Nasdaq Listing Rule 5450(b)(2)(C) requires the minimum MVPHS of $15,000,000 (the "MVPHS Requirement"), and Nasdaq Listing Rule 5810(c)(3)(D) provides that a failure to meet the minimum MVPHS Requirement exists if the deficiency continues for a period of 30 consecutive business days. Based on the MVPHS of the Common Stock between August 4, 2023 and September 15, 2023, the Company no longer meets the minimum MVPHS Requirement. The Notification Letter has no immediate effect on the listing or trading of the Common Stock on Nasdaq and, at this time, the Common Stock will continue to trade on Nasdaq under the symbol "OSA."

The Notification Letter provides that the Company has 180 calendar days, or until March 18, 2024, to regain compliance with Nasdaq Listing Rule 5450(b)(2)(C). To regain compliance, the minimum MVPHS must be at least $15,000,000 or more for a minimum of 10 consecutive business days. If the Company does not regain compliance by March 18, 2024, the Company will receive written notification from Nasdaq that its securities are subject to delisting. Alternatively, the Company may consider applying for a transfer to the Nasdaq Capital Market (the "Capital Market"). In order to transfer, the Company must submit an on-line Transfer Application, pay a $5,000 fee and meet the Capital Market's continued listing requirements.

Additionally, as previously disclosed on the Company's Current Report on Form 8-K filed with the SEC on August 18, 2023, the Company received a separate written notice from Nasdaq, indicating that the Company was no longer in compliance with the minimum Market Value of Listed Securities ("MVLS") of $50,000,000 required for continued listing on the Nasdaq Global Market, as set forth in Nasdaq Listing Rule 5450(b)(2)(A) (the "MVLS Requirement"). The Company was afforded an initial compliance period of 180 calendar days, which is set to expire on February 12, 2024. As of the date of this Current Report on Form 8-K, the Company has not been able to regain compliance with the MVLS Requirement.

The Company intends to monitor the minimum MVPHS and MLVS Requirements of its publicly held shares of its common stock and will consider implementing available options to regain compliance with the minimum MVPHS and MLVS Requirements under the Nasdaq Listing Rules.

Item 3.02. Unregistered Sales of Equity Securities

The information contained in Item 1.01 of this Current Report on Form 8-K is incorporated by reference into this Item 3.02.

The offering of the Securities was not registered under the Securities Act of 1933, as amended (the "Securities Act"). The offer and sale of the Securities was made in reliance on an exemption from registration under the Securities Act pursuant to Rule 506(b) promulgated thereunder.

Item 3.03. Material Modification to Rights of Security Holders

The information contained in Item 1.01 of this Current Report on Form 8-K is incorporated by reference into this Item 3.03.

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

The information in Item 1.01 of this Current Report on Form 8-K is incorporated by reference into this Item 5.03.

Forward-Looking Statements

This Current Report on Form 8-K contains forward-looking statements within the meaning of Section 27A of the Securities Act and Section 21E of the Securities Exchange Act of 1934, as amended. Forward-looking statements generally relate to future events. In some cases, you can identify forward-looking statements because they contain words such as "may," "will," "should," "expects," "plans," "anticipates," "could," "intends," "target," "projects," "contemplates," "believes," "estimates," "predicts," "potential" or "continue" or the negative of these words or other similar terms or expressions that concern the proposed transaction and the Company's expectations, strategy, plans or intentions regarding it. Forward-looking statements in this Current Report on Form 8-K include, but are not limited to, statements regarding the timing of subsequent closings of the transactions contemplated by the Securities Purchase Agreement, expectations for the Company following the closing of the transactions contemplated by the Securities Purchase Agreement, the estimated values of Company's shares of Series A Preferred Stock and the Warrants, the timing and terms of the Exchanges, the receipt and use of the net proceeds from the transactions contemplated by the Securities Purchase Agreement, the filing of the Resale Registration Statement, the ability of the Company to obtain the Stockholder Approval, the Company's ability to regain compliance with the MVPHS and MLVS Requirements, the Company's intentions to actively monitor its MVPHS and MLVS, the Company's plans to consider implementing available options to regain compliance with the MVPHS and MLVS Requirements, and the Company's intent to consider transferring the listing of its Common Stock to the Nasdaq Capital Market.

All forward-looking statements included in this Current Report on Form 8-K are made as of the date of this report, based on information currently available to the Company, deal with future events, are subject to various risks and uncertainties, including the risk that the Company is not able to consummate the exchanges of certain Senior Convertible Notes and Subordinated Convertible Notes or deliver the New Notes, the risk that the Stockholder Approval is not obtained on a timely basis or at all, the risk that the Company may not meet the MVPHS and MLVS Requirements by the required compliance date or in the future, the risk that the Company may not otherwise meet the requirements for continued listing under the Nasdaq Listing Rules, the risk that Nasdaq may not grant the Company relief from delisting if necessary, and the risk that the Company may not ultimately meet applicable Nasdaq requirements if any such relief is necessary, among other risks and uncertainties, and actual results could differ materially from those anticipated in those forward-looking statements. The risks and uncertainties that may cause actual results to differ materially from the Company's current expectations are more fully described in the Company's Annual Report on Form 10-K filed with the SEC on April 14, 2023, any subsequently filed Quarterly Reports on Form 10-Q, and its other reports, each as filed with the SEC. Except as required by law, the Company assumes no obligation to update any such forward-looking statement after the date of this report or to conform these forward-looking statements to actual results.

Item 9.01. Financial Statements and Exhibits.

(d) Exhibits.

Exhibit No.	Description
3.1	Certificate of Designations.
4.1	Form of Warrant.
4.2	Second Supplemental Indenture, dated as of September 20, 2023, by and among ProSomnus, Inc., ProSomnus Holdings, Inc. and ProSomnus Sleep Technologies, Inc., as guarantors, and Wilmington Trust, National Association.
4.3	Second Supplemental Indenture, dated as of September 20, 2023, by and among ProSomnus, Inc., ProSomnus Holdings, Inc. and ProSomnus Sleep Technologies, Inc., as guarantors, and Wilmington Trust, National Association.
10.1*	Form of Securities Purchase Agreement, dated as of September 20, 2023, by and among ProSomnus, Inc. and the investors named therein.
99.1	Form of Voting Support Agreement, dated as of September 20, 2023, by and among ProSomnus, Inc. and the supporting stockholder named therein.
104	Cover Page Interactive Data File (embedded within the Inline XBRL document).

* Schedules and exhibits omitted pursuant to Item 601(b)(2) of Regulation S-K. The Company will furnish supplementally a copy of any omitted schedule or exhibit to the SEC upon request. The Company may request confidential treatment pursuant to Rule 24b-2 of the Securities Exchange Act of 1934, as amended, for any schedules or exhibits so furnished.

SIGNATURE

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

Date: September 21, 2023

PROSOMNUS, INC.

By: /s/ Brian B. Dow
Name: Brian B. Dow
Title: Chief Financial Officer

Exhibit 3.1

CERTIFICATE OF DESIGNATIONS, PREFERENCES
AND RIGHTS OF SERIES A CONVERTIBLE PREFERRED STOCK,
PAR VALUE $0.0001,
OF
PROSOMNUS, INC.

Pursuant to Section 151 of the Delaware General Corporation Law (as amended, supplemented or restated from time to time, the "**DGCL**"), ProSomnus, Inc., a corporation organized and existing under the laws of the State of Delaware (the "**Company**"), in accordance with the provisions of Section 103 of the DGCL, DOES HEREBY CERTIFY:

That the Amended and Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware (as amended, the "**Certificate of Incorporation**"), currently authorizes the issuance of 101,000,000 shares of capital stock, consisting of 100,000,000 shares of Common Stock, par value $0.0001 per share (the "**Common Stock**"), and 1,000,000 shares of preferred stock, par value $0.0001 per share ("**Preferred Stock**");

That, subject to the Certificate of Incorporation, the board of directors of the Company (the "**Board**") is authorized to fix by resolution or resolutions the designation and number of the shares of a series of Preferred Stock and the powers, preferences and rights of such series, and the qualifications, limitations or restrictions thereof.

That, pursuant to the authority conferred upon the Board by the Certificate of Incorporation, the Board adopted the following resolution designating a new series of Preferred Stock as "Series A Convertible Preferred Stock":

RESOLVED, that, pursuant to the authority vested in the Board in accordance with the provisions of the Fourth Article of the Certificate of Incorporation and the provisions of Section 151 of the DGCL, a series of Preferred Stock of the Company is hereby authorized, and the number of the shares of such series and the powers, preferences and rights of such series, and the qualifications, limitations or restrictions of such series, shall be as follows:

(1) Designation and Number of Shares. The shares of such series of Preferred Stock shall be designated as "Series A Convertible Preferred Stock" (the "**Series A Preferred Stock**"). The number of authorized shares constituting the Series A Preferred Stock shall be 25,000. That number from time to time may be increased (but not above the lesser of (i) the total number of authorized shares of the class and (ii) the number of shares of Series A Preferred Stock issuable pursuant to the Securities Purchase Agreement) or decreased (but not below the greater of (i) the number of shares of Series A Preferred Stock then outstanding and (ii) the number of shares of Series A Preferred Stock issuable pursuant to the Securities Purchase Agreement) by further resolution duly adopted by the Board, or any duly authorized committee thereof, and by the filing of a certificate pursuant to the provisions of the DGCL stating that such increase or decrease, as applicable, has been so authorized. Unless otherwise determined by the Company, all shares of Series A Preferred Stock issued will be delivered on a book-entry basis. The Company shall not have the authority to issue fractional shares of Series A Preferred Stock.

(2) Ranking. The Series A Preferred Stock shall rank senior to all of the Common Stock and any other capital stock of the Company with respect to the preferences as to dividends, distributions and payments upon a Liquidation Event; however, the Series A Preferred Stock shall be of junior rank to any indebtedness by the Company, excluding equity securities and non-convertible preferred stock. The rights of the shares of Common Stock shall be of junior rank to and subject to the preferences and relative rights of the Series A Preferred Stock. Subject to the terms of the Series A Preferred Stock, the Company shall be permitted to issue capital stock, including Preferred Stock, that is junior in rank to the Series A Preferred Stock in respect of the rights, preferences, or privileges, including without limitation the preferences as to dividends and other distributions, as to redemption payments, and as to payments upon a Liquidation Event (such stock being referred to hereinafter collectively as "**Junior Stock**").

(3) Liquidation. In the event of a Liquidation Event, holders of Series A Preferred Stock (each, a "**Holder**" and, collectively, the "**Holders**") shall be entitled to receive in cash out of the assets of the Company legally available therefor, whether from capital or from earnings available for distribution to its stockholders (the "**Liquidation Funds**") upon such Liquidation Event, but before any amount shall be paid to the holders of Junior Stock, an amount in cash per share of Series A Preferred Stock equal to the greater of: (i) 150% of the Stated Value and (ii) the value of the per share consideration paid to the holders of the Common Stock in the Liquidation Event as if the Series A preferred Stock held by such Holder had been converted prior to the Liquidation Event; provided that, if the Liquidation Funds are insufficient to pay the full amount due to the Holders and holders of shares of other classes or series of preferred stock of the Company, if any, that are of equal rank with the Series A Preferred Stock as to payments of Liquidation Funds (such stock being referred to hereinafter collectively as "**Pari Passu Stock**"), if any, then the Holders and the holders of any such Pari Passu Stock shall share ratably in any distribution of the Liquidation Funds in proportion to the respective amounts which would otherwise be payable in respect of the shares held by them upon such distribution if all amounts payable on or with respect to the shares of Series A Preferred Stock and Pari Passu Stock were paid in full. In addition, to the extent any Liquidation Funds remain following payment of the liquidation preference on the Series A Preferred Stock and any other payments that rank senior to payments on the Common Stock, each Holder shall be entitled to its pro rata portion of the remaining Liquidation Funds payable to the holders of the Common Stock in respect of any accrued but unpaid dividends on the Series A Preferred Stock as if any such accrued but unpaid dividends had been paid out in Common Stock immediately prior to the Liquidation Event.

(4) Dividends.

(a) From and after March 15, 2024 (the "**Initial Dividend Date**"), the Company shall pay the following dividends semi-annually on March 15 and September 15 of each year (or, if such day is not a Business Day, on the first Business Day following such date) (each a "**Dividend Payment Date**") to the Holders of record as they appear on the books of the Company on March 1 and September 1, respectively, of such year (even if such day is not a Business Day) (the "**Dividend Record Date**"): dividends per share of Series A Preferred Stock held on the applicable Dividend Record Date in arrears for the prior six-month period (except for the Dividend to be paid on the Initial Dividend Date, which shall be paid in arrears for the period from the Initial Closing Date through the Initial Dividend Date), payable as the number of shares of Common Stock (collectively, the "**PIK Shares**") equal to the Stated Value of each such share of Series A Preferred Stock multiplied by the Dividend Rate and divided by $1.00, as adjusted from time to time to give effect to Section 9(e) (the "**Dividend Price**"), computed on the basis of a 360-day year and twelve 30-day months (the "**Dividends**").

(b) The Dividends will be satisfied solely by delivery of shares of Common Stock. No fractional shares of Common Stock are to be issued upon the payment of Dividends, but rather the number of shares of Common Stock to be issued shall be rounded up to the nearest whole number. To the extent not previously paid, Dividends shall be accelerated and paid in connection with the consummation of a conversion, redemption or Fundamental Transaction with respect to all shares of Series A Preferred Stock subject to such conversion, redemption or Fundamental Transaction.

(c) Notwithstanding the foregoing, to the extent that the issuance by the Company of PIK Shares pursuant to any Holder's right to participate in a Dividend would result in the Company exceeding the Exchange Cap prior to the receipt of Stockholder Approval (as defined below), then such Holder shall not be entitled to participate in any such Dividend to such extent (or in the beneficial ownership of any PIK Shares as a result of such dividend to such extent) and the portion of such PIK Shares that would cause the Company to exceed the Exchange Cap shall be held by the Company in abeyance for the benefit of such Holder (which shall not give the Holder any power to vote or dispose of such PIK Shares) until such time, if ever, as such Holder's beneficial ownership thereof would not result in such Holder exceeding the Exchange Cap.

(d) To the extent any required Dividends are not paid on the applicable Dividend Date, the amount of any such unpaid Dividends shall be deemed to have accrued over the applicable six-month (except for the Dividend to be paid on the Initial Dividend Date, which shall be paid in arrears for the period from the Initial Closing Date through the Initial Dividend Date). Such accrual of Dividends shall be cumulative and shall continue to accrue whether or not declared and whether or not in any relevant period there shall be net profits or surplus available for the payment of Dividends in such period, so that if in any period or periods, Dividends in whole or in part are not paid upon the Series A Preferred Stock for any reason, unpaid Dividends shall accumulate thereon on each applicable Dividend Date for which Dividends are not paid up to but excluding the day on which the Company delivers payment for all Dividends that are then in arrears or until the conversion or redemption of the applicable shares of Series A Preferred Stock or a Fundamental Transaction.

(5) Holder's Conversion Right. Each Holder shall have the right, at such Holder's option, subject to the conversion procedures set forth in Section 7 and the limitation on conversion set forth in Section 8, to convert any or all of its shares of Series A Preferred Stock at any time into the number of fully paid, validly issued and nonassessable shares of Common Stock equal to the sum of (i) the quotient of the Stated Value of the shares of Series A Preferred Stock to be converted divided by the Conversion Rate (as defined below) and (ii) any PIK Shares accrued, but not yet issued with respect to such shares of Series A Preferred Stock being converted. No fractional shares of Common Stock are to be issued upon the conversion of any Series A Preferred Stock, but rather the number of shares of Common Stock to be issued shall be rounded up to the nearest whole number. The "**Conversion Rate**" shall initially be $1.00 and from time to time in effect shall be subject to adjustment as hereinafter provided.

(6) Mandatory Conversion by the Company.

(a) Following receipt of the Stockholder Approval (as defined below), at any time when the Company has an effective and current registration statement covering the resale of the shares of Common Stock issuable in the Mandatory Conversion (as defined below) or such shares are then able to be sold pursuant to Rule 144 promulgated under the Securities Act (or a successor rule thereto) ("**Rule 144**") without regard to both the volume limitations for sales as provided in Rule 144 and the limitations for such sales provided in Rule 144(i), if applicable, as determined by the counsel to the Company, then the Series A Preferred Stock will automatically convert into shares of Common Stock as follows: (i) 50% of the issued and outstanding Series A Preferred Stock held by each Holder will, subject to the conversion procedures set forth in this Section 6, automatically convert into shares of Common Stock if, at any time after the applicable Issuance Date, the VWAP per share of Common Stock is greater than $4.50 per share for each of at least twenty (20) Trading Days in any period of thirty (30) consecutive Trading Days (such thirty (30) consecutive Trading Day period, the "**Trading Period**") and (ii) the remaining issued and outstanding Series A Preferred Stock will convert into shares of Common Stock if the VWAP per share of Common Stock is greater than $6.00 per share for each of at least twenty (20) Trading Days in any Trading Period (a "**Mandatory Conversion**"). In the case of a Mandatory Conversion, each share of Series A Preferred Stock then outstanding shall be converted into the number of fully paid, validly issued and nonassessable shares of Common Stock equal to the quotient of the Stated Value of such shares of Series A Preferred Stock divided by the Conversion Rate. In connection with a Mandatory Conversion, the Company shall, at the Company's expense and to the extent required by the Company's transfer agent, cause its counsel to deliver a legal opinion relating to the compliance with such Mandatory Conversion under applicable securities laws.

(b) Notice of Mandatory Conversion. The Company shall, within ten (10) Business Days following the completion of the applicable Trading Period referred to in Section 6(a) above, provide notice of the Mandatory Conversion to each Holder (such notice, a "**Notice of Mandatory Conversion**"). For the avoidance of doubt, a Notice of Mandatory Conversion does not limit a Holder's right to convert on a Conversion Date prior to the Mandatory Conversion Date (as defined below). The Company shall select a date for the conversion of any shares of Series A Preferred Stock pursuant to this Section 6, which date shall be no less than ten (10) Business Days and no more than twenty (20) Business Days after the date on which the Company provides the Notice of Mandatory Conversion to the Holders (the "**Mandatory Conversion Date**"). The Notice of Mandatory Conversion shall state, as appropriate: (i) the Mandatory Conversion Date selected by the Company; and (ii) the Conversion Rate as expected to be in effect on the Mandatory Conversion Date, the number of shares Series A Preferred Stock to be converted from such Holder and the number of shares of Common Stock to be issued to such Holder upon conversion of each such share of Series A Preferred Stock, plus the amount of any shares of Common Stock to be issued in respect of accrued and unpaid Dividends.

(c) Promptly following the Mandatory Conversion Date, the Company shall deliver to each Holder stock certificates or notices of uncertificated shares free of restrictive legends representing (i) the shares of Common Stock issuable upon conversion of such Holder's Series A Preferred Stock pursuant to Section 6(a); and (ii) any PIK Shares issuable to such Holder upon Mandatory Conversion pursuant to Section 4(b) as of the Mandatory Conversion Date; provided that, in order for such shares to be issued free of restrictive legends: (x) such Holder shall have held its Series A Preferred Stock for at least the minimum holding period as determined in accordance with Rule 144, (y) the Company shall have made all required filings for purpose of Rule 144(i) and (z) such Holder its broker shall have delivered to the Company reasonable and customary representations and certifications.

(d) If a Mandatory Conversion consummated in full would violate the limitation on conversion set forth in Section 8, such Holder shall continue to be a holder of Series A Preferred Stock entitled to all the rights of a holder of Series A Preferred Stock with respect to such Series A Preferred Stock. With respect to any Mandatory Conversion pursuant to this Section 6(d), the Company must simultaneously take the same action in the same proportion with respect to all shares of Series A Preferred Stock, to the extent practicable or, if the pro rata basis is not practicable for any reason, by lot or such other equitable method as the Company determines in good faith. At each Mandatory Conversion Date, each share of Series A Preferred Stock to be converted pursuant to such Mandatory Conversion shall automatically be converted into fully paid, validly issued and nonassessable shares of Common Stock as of the applicable Mandatory Conversion Date without any further act or deed on the part of the Company, any Holder or any other Person.

(7) Conversion Procedures and Effect of Conversion.

(a) Mechanics of Conversion. The conversion of shares of Series A Preferred Stock to Common Stock shall be conducted in the following manner:

(i) in the case of a conversion pursuant to Section 5, the Holder shall complete and manually sign the conversion notice substantially in the form attached as Exhibit A hereto (the "**Conversion Notice**"), and deliver such notice to the Transfer Agent; provided that a Conversion Notice may be conditional on the completion of a corporate transaction;

(ii) if required, the Holder shall furnish appropriate and as required endorsements and transfer documents; and

(iii) if required, the Holder shall pay any stock transfer, documentary, stamp or similar taxes not payable by the Company pursuant to Section 7(d).

The foregoing clauses (ii) and (iii) shall be conditions to the issuance of shares of Common Stock to the Holders in the event of a Mandatory Conversion pursuant to Section 6 (but, for the avoidance of doubt, failure on the part of the Holder to fulfill such conditions shall not impact the effectiveness of the Mandatory Conversion on the Mandatory Conversion Date).

The "**Conversion Date**" means (A) with respect to conversion of any shares of Series A Preferred Stock at the option of any Holder pursuant to Section 5, the date on which such Holder complies with the procedures in this Section 7(a) (including the satisfaction of any conditions to conversion set forth in the Conversion Notice) and (B) with respect to Mandatory Conversion pursuant to Section 6(a), the Mandatory Conversion Date.

In connection with a conversion, any shares of Common Stock issued will, unless otherwise determined by the Company, be delivered to the Holder on a book-entry basis and shall be delivered promptly after the applicable Conversion Date.

(b) Effect of Conversion. Effective immediately prior to the close of business on the Conversion Date applicable to any shares of Series A Preferred Stock, Dividends shall no longer be declared or, as applicable, accrue on any such shares of Series A Preferred Stock, and such shares of Series A Preferred Stock shall cease to be outstanding.

(c) Record Holder. The Person or Persons entitled to receive the shares of Common Stock issuable upon a conversion of shares of Series A Preferred Stock shall be treated for all purposes as the record holder or holders of such shares of Common Stock on the applicable Conversion Date.

(d) Taxes. (i) The Company shall pay any and all transfer, stamp and similar taxes owed by it that may be payable with respect to the issuance and delivery of Common Stock upon conversion of any Series A Preferred Stock. However, the Company shall not be required to pay any such tax that may be payable in respect of any transfer involved in the issuance or delivery of shares of Series A Preferred Stock, shares of Common Stock or other securities to a beneficial owner other than the beneficial owner of the Series A Preferred Stock immediately prior to such conversion, and shall not be required to make any such issuance, delivery or payment unless and until the Person otherwise entitled to such issuance, delivery or payment has paid to the Company the amount of any such tax or has established, to the satisfaction of the Company, that such tax has been paid or is not payable. (ii) All payments and distributions (or deemed distributions) on the shares of Series A Preferred Stock (and on the shares of Common Stock received upon their conversion) shall be subject to withholding and backup withholding of taxes to the extent required by law, subject to applicable exemptions, and amounts withheld, if any, shall be treated as received by the Holders.

(8) Principal Market Regulation. Notwithstanding any other provision in this Certificate of Designations, the Company shall not be permitted to issue any shares of Common Stock pursuant to the terms of this Certificate of Designations, and the Holders shall not have the right to receive any shares of Common Stock pursuant to the terms of this Certificate of Designations, to the extent the issuance of such shares of Common Stock would exceed the aggregate number of shares of Common Stock that is equal to 19.95% of the amount of Common Stock of the Company outstanding immediately preceding the date of the Securities Purchase Agreement, which is the maximum amount of shares that the Company may issue pursuant to the terms of this Certificate of Designations without breaching the Company's obligations under the rules or regulations of the Principal Market (the "**Exchange Cap**"), except that such limitation shall not apply in the event that the Company obtains the approval of its stockholders as provided by the applicable rules of the Principal Market for issuances of Common Stock in excess of such amount (the "**Stockholder Approval**"). Furthermore, until such Stockholder Approval is obtained, each initial purchaser of the Series A Preferred Stock party to the Securities Purchase Agreement ("**Initial Holder**") may only convert the shares of Series A Preferred Stock received by the Initial Holder into a number of shares of Common Stock equal to the product of the Exchange Cap multiplied by a fraction, the numerator of which is the number of shares of Series A Preferred Stock issued to such Initial Holder, and the denominator of which is the number of outstanding shares of Series A Preferred Stock, rounded down to the nearest whole share (with respect to each such Holder, the "**Exchange Cap Allocation**"). In the event that any Initial Holder shall sell or otherwise transfer any of such Initial Holder's Series A Preferred Stock, the transferee shall be allocated a pro rata portion of such Initial Holder's Exchange Cap Allocation with respect to such portion of the Series A Preferred Stock sold or otherwise transferred, and the restrictions of the prior sentence shall apply to such transferee with respect to the portion of the Exchange Cap Allocation allocated to such transferee. Within sixty (60) days of the Initial Closing Date, the Company agrees to use commercially reasonable efforts to call a meeting of its stockholders, which meeting shall be held within ninety (90) days of the Initial Closing Date, for the holders of Common Stock to vote on the issuance of shares of Common Stock upon conversion of the Series A Preferred Stock and the Dividends payable in respect thereof in excess of the Exchange Cap in accordance with applicable law and the rules and regulations of the Principal Market (the "**Stockholder Meeting**").

(9) Adjustments to Conversion Rate. The Conversion Rate will be subject to adjustment from time to time as provided in this Section 9.

(a) Adjustment of Conversion Rate upon Issuance of Common Stock. If and whenever on or after the Initial Closing Date, the Company issues or sells, or in accordance with this Section 9(a) is deemed to have issued or sold, any shares of Common Stock (including the issuance or sale of shares of Common Stock owned or held by or for the account of the Company, but excluding shares of Common Stock or securities convertible into or exercisable for Common Stock issued by the Company as a dividend or other distribution in respect of the Common Stock for which an adjustment is made pursuant to Section 9(b) or deemed to have been issued or sold by the Company in connection with any Excluded Securities) for a consideration per share less than a price (the "**Applicable Price**") equal to the Conversion Rate in effect immediately prior to such issuance or sale or deemed issuance or sale (the foregoing, a "**Dilutive Issuance**"), then immediately after such Dilutive Issuance, the Conversion Rate then in effect shall be reduced to an amount equal to the product of (i) the Conversion Rate in effect immediately prior to such Dilutive Issuance and (ii) the quotient determined by dividing (I) the sum of (1) the product derived by multiplying the Conversion Rate in effect immediately prior to such Dilutive Issuance and the number of shares of Common Stock Deemed Outstanding immediately prior to such Dilutive Issuance plus (2) the consideration, if any, received by the Company upon such Dilutive Issuance, by (II) the product derived by multiplying (1) the Conversion Rate in effect immediately prior to such Dilutive Issuance by (2) the number of shares of Common Stock Deemed Outstanding immediately after such Dilutive Issuance; provided, however, for purposes of determining whether issuances of Common Stock under an agreement that is designed to sell shares of the Company's Common Stock at market pricing from time to time (including but not limited to, any at the market offering, equity line of credit, committed equity facility or similarly structured agreement) collectively constitute a Dilutive Issuance and the resulting adjustment (if any) to the Conversion Ratio, the foregoing calculation shall be made (i) on a quarterly basis and be based on all shares sold in a Calendar Quarter under such agreement and the weighted-average per share consideration received in respect of such sales during such Calendar Quarter, or (ii) if a Liquidation Event is consummated prior to the quarterly calculation, immediately prior to the consummation of such Liquidation Event.

(b) Issuance of Convertible Securities. If the Company in any manner issues or sells any Convertible Securities and the lowest price per share for which one share of Common Stock is issuable upon the conversion, exercise or exchange thereof is less than the Applicable Price, then such share of Common Stock shall be deemed to be outstanding and to have been issued and sold by the Company at the time of the issuance or sale of such Convertible Securities for such price per share. For the purposes of this Section 9(b), the "lowest price per share for which one share of Common Stock is issuable upon the conversion, exercise or exchange thereof" shall be equal to the sum of the lowest amounts of consideration (if any) received or receivable by the Company with respect to any one share of Common Stock upon the issuance or sale of the Convertible Security and upon conversion, exercise or exchange of such Convertible Security less any consideration paid or payable by the Company with respect to such one share of Common Stock upon the issuance or sale of such Convertible Security and upon conversion, exercise or exchange of such Convertible Security. No further adjustment of the Conversion Rate shall be made upon the actual issuance of such shares of Common Stock upon conversion, exercise or exchange of such Convertible Securities.

(c) Calculation of Consideration Received. If any shares of Common Stock or Convertible Securities are issued or sold or deemed to have been issued or sold for cash, the consideration received therefor will be deemed to be the net amount received by the Company. If any shares of Common Stock or Convertible Securities are issued or sold for a consideration other than cash, the amount of such consideration received by the Company will be the fair value of such consideration determined by the Board in good faith, except where such consideration consists of publicly traded securities, in which case the amount of consideration received by the Company will be the closing sale price of such publicly traded securities on the date of receipt of such publicly traded securities. If any shares of Common Stock or Convertible Securities are issued to the owners of the non-surviving entity in connection with any merger in which the Company is the surviving entity, the amount of consideration therefor will be deemed to be the fair value of such portion of the net assets and business of the non-surviving entity as is attributable to such shares of Common Stock or Convertible Securities, as the case may be, in each case determined by the Board in good faith. Notwithstanding anything to the contrary contained herein, if any calculation pursuant to this Section 9(c) would result in a Conversion Rate that is lower than the par value of the Common Stock, then the Conversion Rate shall be deemed to equal the par value of the Common Stock.

(d) Voluntary Adjustment By Company. The Company may at any time, with the prior written consent of the Required Holders, reduce the then current Conversion Rate to any amount and for any period of time deemed appropriate by the Board.

(e) Adjustment of Conversion Rate upon Subdivision or Combination of Common Stock. If the Company subdivides (by any stock split, stock dividend, recapitalization or otherwise) its outstanding shares of Common Stock, or any series thereof, into a greater number of shares, the Conversion Rate and the Dividend Price in effect immediately prior to such subdivision will be proportionately reduced. If the Company combines (by combination, reverse stock split or otherwise) its outstanding shares of Common Stock, or any series thereof, into a smaller number of shares, the Conversion Rate and the Dividend Price in effect immediately prior to such combination will be proportionately increased. Any adjustment under this Section 9(e) shall become effective at the time that the subdivision or combination becomes effective.

(f) Notice of Adjustment. Promptly upon any adjustment of the Conversion Rate pursuant to this Section 9, the Company shall give written notice thereof to each Holder, setting forth in reasonable detail, and certifying, the calculation of such adjustment.

(10) Fundamental Transaction Repurchase Option.

(a) Fundamental Transaction Notices. On or before the twentieth (20th) Business Day prior to the anticipated effective date of a Fundamental Transaction (or, if later, promptly after the Company discovers that a Fundamental Transaction may occur), a written notice shall be sent by or on behalf of the Company to the Holders as they appear in the records of the Company, which notice shall set forth (i) a description of the anticipated Fundamental Transaction (including, for the avoidance of doubt, the details of any consideration to be delivered as a distribution on or in exchange for outstanding shares of Common Stock) and (ii) the date on which the Fundamental Transaction is anticipated to be effected.

(b) Within two (2) days following the effective date of a Fundamental Transaction or if the Company discovers later than such date that a Fundamental Transaction has occurred, promptly following the date of such discovery (such later date, the "**Fundamental Transaction Effective Date**"), a written notice (the "**Fundamental Transaction Repurchase Notice**") shall be sent by or on behalf of the Company to the Holders as they appear in the records of the Company, which notice shall contain:

(i) the scheduled date of the Fundamental Transaction Repurchase, which shall be no less than ten (10) nor more than thirty (30) Business Days following the date of such Fundamental Transaction Repurchase Notice (the "**Fundamental Transaction Repurchase Date**");

(ii) the applicable Fundamental Transaction Repurchase Price;

(iii) the instructions a Holder must follow to receive the applicable Fundamental Transaction Repurchase Price; and

(iv) a description of the Fundamental Transaction (including, for the avoidance of doubt, the details of any consideration delivered as a distribution on or in exchange for outstanding shares of Common Stock) and the applicable Fundamental Transaction Effective Date.

(c) Fundamental Transaction Repurchase or Conversion. Subject to the application of Section 10(f), the Company shall purchase from each Holder, out of funds legally available therefor, all shares of Series A Preferred Stock held by such Holder (a "**Fundamental Transaction Repurchase**") for a purchase price per each such share of Series A Preferred Stock, payable in cash, equal to the greatest of (i) 150% of the Stated Value of such share of Series A Preferred Stock as of the applicable Fundamental Transaction Repurchase Date, (ii) the Stated Value of such share of Series A Preferred Stock as of the applicable Fundamental Transaction Repurchase Date, plus, to the extent holders of the Common Stock will receive cash consideration in exchange for their shares of Common Stock in any Fundamental Transaction, cash consideration equal to the value of any accrued but unpaid Dividends, and (iii) the value of the per share consideration paid to the holders of the Common Stock in the Fundamental Transaction as if the Series A preferred Stock held by such Holder had been converted prior to the Fundamental Transaction and accrued and unpaid Dividends had been issued (the "**Fundamental Transaction Repurchase Price**") on the Fundamental Transaction Repurchase Date specified in the relevant Fundamental Transaction Repurchase Notice (or, in the event that a Fundamental Transaction Repurchase Date is not specified, the date that is thirty (30) Business Days after the Fundamental Transaction Effective Date). To the extent holders of the Common Stock will receive shares of common stock or capital stock of any Successor Entity in any Fundamental Transaction, the Company shall, as applicable, issue Common Stock or use commercially reasonable efforts to cause any Successor Entity to issue securities in the Successor Entity of equivalent value to the value of any accrued but unpaid Dividends less any cash consideration paid in respect of accrued but unpaid Dividends.

(d) Delivery upon Fundamental Transaction Repurchase. Upon a Fundamental Transaction Repurchase, subject to Section 10(f)below, the Company (or its successor) shall deliver or cause to be delivered to the Holder by wire transfer the Fundamental Transaction Repurchase Price for such Holder's shares of Series A Preferred Stock for which such Holder has elected to exercise the Fundamental Transaction Repurchase.

(e) Treatment of Shares. Until a share of Series A Preferred Stock is purchased by the payment in full of the applicable Fundamental Transaction Repurchase Price, such share of Series A Preferred Stock will remain outstanding and will be entitled to all of the powers, designations, preferences and other rights provided herein.

(f) Sufficient Funds. If the Company shall not have sufficient funds legally available under the DGCL to purchase all outstanding shares of Series A Preferred Stock, the Company shall (i) purchase, pro rata among the Holders of outstanding shares of Series A Preferred Stock with an aggregate Fundamental Transaction Repurchase Price equal to the amount legally available for the purchase of shares of Series A Preferred Stock under the DGCL and (ii) purchase any shares of Series A Preferred Stock not purchased because of the foregoing limitations at the applicable Fundamental Transaction Repurchase Price as soon as practicable after the Company is able to make such purchase out of funds legally available for the purchase of such share of Series A Preferred Stock. The inability of the Company (or its successor) to make a purchase payment for any reason shall not relieve the Company (or its successor) from its obligation to effect any required purchase when, as and if permitted by applicable law. Notwithstanding the foregoing, in the event a Fundamental Transaction Repurchase is expected to occur at a time when the Company is restricted or prohibited (under applicable law, contractually or otherwise) from redeeming some or all of the Series A Preferred Stock subject to the Fundamental Transaction Repurchase, the Company shall use its commercially reasonable efforts to obtain the requisite consents to remove or obtain an exception or waiver to such restrictions or prohibition. Nothing herein shall limit a Holder's right to pursue any other remedies available to it hereunder, at law or in equity, including, without limitation, a decree of specific performance and/or injunctive relief with respect to the Company's failure to comply with its obligations under this Section 10. In connection with any Fundamental Transaction, to the extent within the Company's control, the Company shall take all actions to permit the purchase of all shares of Series A Preferred Stock on the Fundamental Transaction Repurchase Date that it reasonably believes is permitted under Delaware law and will not render the Company insolvent until the entire amount of the Fundamental Transaction Repurchase Price is paid in full.

(g) Effect of Fundamental Transaction Repurchase. Upon full payment of the Fundamental Transaction Repurchase Price (or the irrevocable deposit thereof with the Transfer Agent) for any shares of Series A Preferred Stock subject to a Fundamental Transaction Repurchase, such shares will cease to be entitled to any Dividends that may thereafter be payable on the Series A Preferred Stock; such shares of Series A Preferred Stock will no longer be deemed to be outstanding for any purpose; and all rights (except the right to receive the Fundamental Transaction Repurchase Price) of the Holder of such shares of Series A Preferred Stock shall cease and terminate with respect to such shares.

(11) Other Rights of Holders and the Company.

(a) Assumption and Corporate Events. Subject to Section 3, upon the occurrence or consummation of any Fundamental Transaction, it shall be a required condition to the occurrence or consummation of any Fundamental Transaction that the Company and the Successor Entity or Successor Entities, jointly and severally, shall succeed to the Company, and the Company shall cause any Successor Entity or Successor Entities to jointly and severally succeed to the Company, and be added to the term "Company" under this Certificate of Designations (so that from and after the occurrence or consummation of such Fundamental Transaction, each and every provision of this Certificate of Designations referring to the "Company" shall refer instead to each of the Company and the Successor Entity or Successor Entities, jointly and severally), and the Successor Entity or Successor Entities, jointly and severally with the Company, may exercise every right and power of the Company prior thereto and the Successor Entity or Successor Entities shall assume all of the obligations of the Company prior thereto under this Certificate of Designations with the same effect as if the Company and such Successor Entity or Successor Entities, jointly and severally, had been named as the Company in this Certificate of Designations. In addition to and not in substitution for any other rights hereunder, prior to the occurrence or consummation of any Fundamental Transaction pursuant to which holders of shares of Common Stock become entitled to receive securities, cash, assets or other property with respect to or in exchange for shares of Common Stock (a "**Corporate Event**"), the Company shall make appropriate provision to ensure that, and any applicable Successor Entity or Successor Entities shall ensure that such Holder will have the right to receive upon conversion of such Holder's shares of Series A Preferred Stock at any time after the occurrence or consummation of such Corporate Event at its option upon surrender of such Holder's shares of Series A Preferred Stock upon the occurrence or consummation of the Corporate Event, shares of common stock or capital stock of the Successor Entity or Successor Entities, or if so elected by the Holder in lieu of the shares of Common Stock (or other securities, cash, assets or other property) such Holder is entitled to receive upon the conversion of such Holder's shares of Series A Preferred Stock prior to such Corporate Event (but not in lieu of such items still issuable under Sections 4 and 11(b), which shall continue to be receivable on the Common Stock or on such shares of stock, securities, cash, assets or any other property otherwise receivable with respect to or in exchange for shares of Common Stock), such shares of stock, securities, cash, assets or any other property whatsoever (including warrants or other purchase or subscription rights and any shares of Common Stock) which the Holders would have been entitled to receive upon the occurrence or consummation of such Corporate Event or the record, eligibility or other determination date for the event resulting in such Corporate Event, had such Holder's shares of Series A Preferred Stock been converted immediately prior to such Corporate Event or the record, eligibility or other determination date for the event resulting in such Corporate Event. The provisions of this Section 11(a) shall apply similarly and equally to successive Fundamental Transactions and Corporate Events and shall be applied without regard to any limitations on the conversion of the Series A Preferred Stock.

(b) Purchase Rights. If at any time the Company grants, issues or sells any rights to purchase stock, warrants, securities or other property pro rata to the record holders of any class of Common Stock (the "**Purchase Rights**"), then the Holders will be entitled to acquire, upon the terms applicable to such Purchase Rights, the aggregate Purchase Rights that such Holder could have acquired if such Holder had held the number of shares of Common Stock acquirable upon complete conversion of such Holder's Series A Preferred Stock (without regard to any limitations or restrictions on conversions of the Series A Preferred Stock) immediately before the date on which a record is taken for the grant, issuance or sale of such Purchase Rights, or, if no such record is taken, the date as of which the record holders of Common Stock are to be determined for the grant, issue or sale of such Purchase Rights.

(12) Reservation of Shares.

(a) Reservation. The Company shall at all times reserve out of its authorized and unissued shares of Common Stock a number of shares of Common Stock equal to 100% of the maximum number of shares of Common Stock issuable with respect to the then outstanding Series A Preferred Stock, including the payment of PIK Shares (assuming for purposes hereof that (i) the shares of Series A Preferred Stock are convertible at the initial Conversion Rate and (ii) dividends on the shares of Series A Preferred Stock are paid in the form of PIK Shares for a period of three years after the Initial Closing Date, and without taking into account any limitations on the conversion of the Series A Preferred Stock set forth herein). So long as any shares of Series A Preferred Stock are outstanding, the Company shall take all action necessary to reserve and keep available out of its authorized and unissued Common Stock, solely for the purpose of effecting the conversion of the Series A Preferred Stock, at least the number of shares of Common Stock specified above in this Section 12(a) as shall from time to time be necessary to effect the conversion of all of the Series A Preferred Stock then outstanding, assuming the Conversion Rate (the "**Required Reserve Amount**").

(b) Insufficient Authorized Shares. If at any time while any of the shares of Series A Preferred Stock remain outstanding the Company does not have a sufficient number of authorized and unreserved shares of Common Stock to satisfy its obligation to reserve for issuance upon conversion of the Series A Preferred Stock at least a number of shares of Common Stock equal to the Required Reserve Amount (an "**Authorized Share Failure**"), then the Company shall use its commercially reasonable efforts to promptly increase the Company's authorized shares of Common Stock to an amount sufficient to allow the Company to reserve the Required Reserve Amount for the shares of Series A Preferred Stock then outstanding. Without limiting the generality of the foregoing sentence, as soon as practicable after the date of the occurrence of an Authorized Share Failure, but in no event later than one year after the occurrence of such Authorized Share Failure, the Company shall either (i) hold a meeting of its stockholders for the approval of an increase in the number of authorized shares of Common Stock or (ii) obtain the written consent (to the extent permitted under the Company's certificate of incorporation) of its stockholders for the approval of an increase in the number of authorized shares of Common Stock and provide each stockholder with an information statement with respect thereto. In connection with such meeting, the Company shall provide each stockholder with a proxy statement and shall use its commercially reasonable efforts to solicit its stockholders' approval of such increase in authorized shares of Common Stock and to cause the Board to recommend to the stockholders that they approve such proposal. Notwithstanding the foregoing, if during any such time of an Authorized Share Failure, the Company is able to obtain the written consent of a majority of the shares of its issued and outstanding Common Stock to approve the increase in the number of authorized shares of Common Stock, the Company may satisfy this obligation by obtaining such consent and submitting for filing with the SEC an Information Statement on Schedule 14C.

(13) Voting Rights.

(a) Voting. Each Holder shall be entitled to the whole number of votes equal to the number of shares of Common Stock into which such Holder's Series A Preferred Stock would be convertible on the record date for the vote or consent of stockholders at a conversion price of $1.04 per share of Common Stock rounded to the nearest whole share (subject to the limitation on conversion set forth in Section 8), and shall otherwise have voting rights and powers equal to the voting rights and powers of the Common Stock to the fullest extent permitted by applicable law, including, for the avoidance of doubt, with respect to the election of the Company's directors. Each Holder shall be entitled to receive the same prior notice of any stockholders' meeting as is provided to the holders of Common Stock in accordance with the bylaws of the Company, as well as prior notice of all stockholder actions to be taken by legally available means in lieu of a meeting, and shall vote as a class with the holders of Common Stock as if they were a single class of securities upon any matter submitted to a vote of stockholders, except those matters required by Section 242 of the DGCL or by the terms hereof to be submitted to a class vote of the Holders, in which case the Holders only shall vote as a separate class. The Series A Preferred Stock, when voting along with the Common Stock, shall be counted for purposes of establishing a quorum.

(b) Protective Provisions. At any time when shares of Series A Preferred Stock are outstanding, the Company shall not, and shall not allow any subsidiary to, either directly or indirectly by amendment, merger, consolidation, recapitalization, reclassification, or otherwise, do any of the following without (in addition to any other vote required by law or the Certificate of Incorporation) the written consent or affirmative vote of the Requisite Holders given in writing or by vote at a meeting, consenting or voting (as the case may be) separately as a class, and any such act or transaction entered into without such consent or vote shall be null and void ab initio, and of no force or effect: (a) amend, alter or change the powers, privileges or preferences of the Series A Preferred Stock, (b) amend, alter or repeal any provision of this Certificate of Incorporation, this Certificate of Designations or bylaws of the Company in a manner that adversely affects the powers, preferences or rights of the Series A Preferred Stock, (c) (i) reclassify, alter or amend any existing security of the Company that is *pari passu* with or junior to the Series A Preferred Stock, if such reclassification, alteration or amendment would render such other security senior to or *pari passu* with, respectively, the Series A Preferred Stock or (ii) reclassify, alter or amend any existing security of the Company that is *pari passu* with or junior to the Series A Preferred Stock, if such reclassification, alteration or amendment would render such other security senior to or *pari passu* with, respectively, the Series A Preferred Stock, or (d) purchase or redeem (or permit any subsidiary to purchase or redeem) or pay or declare any dividend or make any distribution on any shares of capital stock of the Company while any Dividend in respect of the Series A Preferred Stock is unpaid and accrued.

(14) Equal Treatment of Holders. No consideration shall be offered or paid to any of the Holders to amend or waive or modify any provision of the Series A Preferred Stock unless the same consideration (other than the reimbursement of legal fees) is also offered to all of the Holders. This provision constitutes a separate right granted to each of the Holders by the Company and shall not in any way be construed as the Holders acting in concert or as a group with respect to the purchase, disposition or voting of securities or otherwise.

(15) Protective Provisions. The Company shall not, and shall not permit any of its Subsidiaries to, and neither the Company nor any Subsidiary shall enter into any agreement to, either directly or indirectly, by amendment, merger, consolidation or otherwise, do any of the following without (in addition to any other vote required by law or this Certificate of Designations) the written consent or affirmative vote of the Required Holders given in writing or by vote at a meeting, consenting or voting (as the case may be) separately as a class, and any such act or transaction entered into without such consent or vote shall be null and void *ab initio*, and of no force or effect (other than, for the avoidance of doubt, any such acts or transactions taken upon or immediately prior to a Fundamental Transaction):

(a) amend, alter or repeal any provision of this Certificate of Designations, aside from any amendments effecting increases or decreases of the authorized shares or Series A Preferred Stock; and

(b) amend, alter or repeal any provision of the Company's Certificate of Incorporation or Bylaws, in each case, in a manner that adversely affects the powers, preferences or rights of the Series A Preferred Stock but does not so affect the other shares of capital stock of the Company, it being understood that the authorization, issuance, conversion, reclassification, exchange or amendment of a new or existing class or series of capital stock that is, or that is convertible into, capital stock that is senior to the powers, privileges, preferences, rights or otherwise, of the Series A Preferred Stock shall be deemed to adversely affect the powers, preferences or rights of the Series A Preferred Stock.

For the avoidance of doubt, the foregoing consent rights shall not apply with respect to any such actions taken upon (or immediately prior to) a Fundamental Transaction, provided that the effectiveness of any such action shall be conditioned upon the consummation of such Fundamental Transaction and compliance with the other provisions of this Certificate of Designations applicable in the event of a Fundamental Transaction. Any amendment or waiver to this Certificate of Designations made in conformity with the provisions of this Section 15 shall be binding on all Holders. No such amendment or waiver shall be effective to the extent that it applies to less than all of the Holders. No vote of any class of stock other than the Series A Preferred Stock shall be required to change, amend or waive any provision of the Certificate of Designations with respect to the Series A Preferred Stock except as required by law or by another provision of the Company's Certificate of Incorporation.

(16) General Provisions.

(a) In addition to the above provisions with respect to Series A Preferred Stock, such Series A Preferred Stock shall be subject to and be entitled to the benefit of the provisions set forth in the Certificate of Incorporation of the Company with respect to preferred stock of the Company generally; provided, however, that in the event of any conflict between such provisions, the provisions set forth in this Certificate of Designations shall control.

(b) Any shares of Series A Preferred Stock that are converted, repurchased or redeemed in full shall automatically be deemed cancelled.

(c) The Series A Preferred Stock has not been registered under the Securities Act or any state securities laws, and may not be offered for sale, sold, assigned or transferred unless (1) subsequently registered thereunder, (2) such Holder shall have delivered to the Company an opinion of counsel selected by such Holder, in a form reasonably satisfactory to the Company, to the effect that such shares of Series A Preferred Stock to be sold, assigned or transferred may be sold, assigned or transferred pursuant to an exemption from such registration, or (3) such Holder provides the Company with reasonable assurance that such shares of Series A Preferred Stock can be sold, assigned or transferred pursuant to Rule 144 or Rule 144A promulgated under the Securities Act, as amended (or a successor rule thereto) ("**Rule 144A**"). Any sale of the Series A Preferred Stock made in reliance on Rule 144 or Rule 144A may be made only in accordance with the terms of Rule 144 or Rule 144A and further, if Rule 144 or Rule 144A is not applicable, any resale of the Series A Preferred Stock under circumstances in which the seller (or the Person) through whom the sale is made may be deemed to be an underwriter (as that term is defined in the Securities Act) may require compliance with some other exemption under the Securities Act or the rules and regulations of the SEC thereunder. Furthermore, the Series A Preferred Stock may not be transferred to any Person, directly or indirectly (including through any partnership, limited liability company, corporation, joint venture or similar arrangement (whether now existing or formed hereafter) who competes or is reasonably possible to compete with the Company, as determined by the Company in good faith ("**Competitors**"), with the Company keeping a list of such Competitors, which may be updated by the Company from time to time. For clarity, the limitation on transfers of the Series A Preferred Stock to Competitors does not apply to any Common Stock issued upon or in respect of the Series A Preferred Stock upon a conversion, redemption or a Fundamental Transaction, or as a Dividend.

(d) Whenever notice is required to be given under this Certificate of Designations, unless otherwise provided herein, such notice shall be given in accordance with Section 9(f) of the Securities Purchase Agreement.

(e) Whenever any payment of cash is to be made by the Company to any Person pursuant to this Certificate of Designations, such payment shall be made in lawful money of the United States of America via wire transfer of immediately available funds to an account designated by such Holder. Whenever any amount expressed to be due by the terms of this Certificate of Designations is due on any day which is not a Business Day, the same shall instead be due on the next succeeding day which is a Business Day without interest or penalty.

(17) Governing Law; Jurisdiction; Jury Trial. This Certificate of Designations shall be governed by and construed and enforced in accordance with, and all questions concerning the construction, validity, interpretation and performance of this Certificate of Designations shall be governed by, the internal laws of the State of Delaware, without giving effect to any choice of law or conflict of law provision or rule (whether of the State of Delaware or any other jurisdictions) that would cause the application of the laws of any jurisdictions other than the State of Delaware.

(18) Series A Preferred Stock Register. The Company shall maintain at its principal executive offices (or such other office or agency of the Company or its Transfer Agent as the Company may designate by notice to the Holders), a register for the Series A Preferred Stock, in which the Company shall record the name and address of the persons in whose name the shares of Series A Preferred Stock have been issued, as well as the name and address of each transferee. The Company may treat the person in whose name any share of Series A Preferred Stock is registered on the register as the owner and holder thereof for all purposes, notwithstanding any notice to the contrary, but in all events recognizing any properly made transfers.

(19) Stockholder Matters. Any stockholder action, approval or consent required, desired or otherwise sought by the Company pursuant to the rules and regulations of the Principal Market, the DGCL, this Certificate of Designations or otherwise with respect to the issuance of the Series A Preferred Stock or the Common Stock issuable upon conversion thereof may be effected at a duly called meeting of the Company's stockholders or by written consent (to the extent permitted under the Company's certificate of incorporation) of the Company's stockholders, all in accordance with the applicable rules and regulations of the Principal Market and the DGCL. This provision is intended to comply with the applicable sections of the DGCL permitting stockholder action, approval and consent affected by written consent in lieu of a meeting.

(20) Certain Definitions. For purposes of this Certificate of Designations the following terms shall have the following meanings:

(a) "**Approved Stock Plan**" means any employee stock option plan, management incentive plan, restricted stock plan, stock purchase plan or stock ownership plan, retirement plan or any similar compensation or benefit plan, program or agreement which has been approved by the Board, pursuant to which the Company's securities may be issued to any employee, officer or director for services provided to the Company.

(b) "**Business Day**" means any day other than Saturday, Sunday or other day on which commercial banks in The City of New York are authorized or required by law to remain closed; provided, however, for clarification, commercial banks shall not be deemed to be authorized or required by law to remain closed due to "stay at home", "shelter-in-place", "non-essential employee" or any other similar orders or restrictions or the closure of any physical branch locations at the direction of any governmental authority so long as the electronic funds transfer systems (including for wire transfers) of commercial banks in The City of New York are generally are open for use by customers on such day.

(c) "**Calendar Quarter**" means each of: (i) the period beginning on and including January 1 and ending on and including March 31; (ii) the period beginning on and including April 1 and ending on and including June 30; (iii) the period beginning on and including July 1 and ending on and including September 30; and (iv) the period beginning on and including October 1 and ending on and including December 31.

(d) "**Closing Date**" shall have the meaning ascribed to such term in the Securities Purchase Agreement.

(e) "**Common Stock**" means (i) the Company's shares of common stock, par value $0.0001 per share and (ii) any capital stock into which such Common Stock shall be changed or any capital stock resulting from a reorganization, recapitalization or reclassification of such Common Stock.

(f) "**Common Stock Deemed Outstanding**" means, at any given time, the number of shares of Common Stock outstanding at such time, plus the number of shares of Common Stock issuable upon exercise of Options outstanding at such time or upon conversion of Convertible Securities outstanding at such time, regardless of whether the Options or Convertible Securities are actually exercisable at such time, but excluding any shares of Common Stock owned or held by or for the account of the Company or issuable pursuant to the terms of the Certificate of Designations.

(g) "**Convertible Securities**" means any stock or securities (other than Options) directly or indirectly convertible into or exercisable or exchangeable for shares of Common Stock.

(h) "**Dividend Rate**" means, 8.0% per annum.

(i) "**Exchange Act**" means the Securities Exchange Act of 1934, as amended.

(j) "**Excluded Securities**" means any shares of Common Stock issued or issuable (including upon the exercise of Options): (i) under any Approved Stock Plan; (ii) pursuant to the terms of this Certificate of Designations and the Securities Purchase Agreement; (iii) upon conversion, exercise, modification or exchange of the Warrants, any Options or Convertible Securities that are outstanding on the day immediately preceding the Initial Closing Date, provided that the terms of the Warrants or such Options or Convertible Securities, as applicable, are not amended, modified or changed on or after the Initial Closing Date to increase the number of shares issued or issuable pursuant to such securities (other than in connection with stock splits or combinations) or decrease the price to be paid for shares issuable pursuant to such securities; (iv) pursuant to acquisitions or strategic transactions; (v) in connection with sponsored research, collaboration, technology license, development, original equipment manufacturer, marketing or other similar agreements or strategic partnerships; (vi) to banks, equipment lessors, real property lessors, financial institutions or other persons engaged in the business of making loans pursuant to a debt financing, commercial leasing or real property leasing transaction; and (vii) in connection with any "business combination" (as defined in the rules and regulations promulgated by the SEC) or otherwise in connection with bona fide acquisitions of securities or substantially all of the assets of another Person, business unit, division or business.

(k) "**Fundamental Transaction**" means any transaction or series of related transactions pursuant to which the Company effects (i) any merger or consolidation of the Company with or into another Person where the Company is not the surviving entity, (ii) any sale of all or substantially all of its assets in one transaction or a series of related transactions, or (iii) any reclassification of the Common Stock or any compulsory share exchange pursuant to which the Common Stock is effectively converted into or exchanged for other securities, cash or property.

(l) "**Initial Closing Date**" shall have the meaning ascribed to such term in the Securities Purchase Agreement.

(m) "**Issuance Date**" means, with respect to any share of Series A Preferred Stock, the date of issuance of such share.

(n) "**Liquidation Event**" means the voluntary or involuntary liquidation, dissolution or winding up of the Company, in a single transaction or series of transactions.

(o) "**Options**" means any rights, warrants or options to subscribe for or purchase shares of Common Stock or Convertible Securities.

(p) "**Person**" means an individual, a limited liability company, a partnership (limited or general), a joint venture, a corporation, a trust, an unincorporated organization, any other entity and a government or any department or agency thereof.

(q) "**Principal Market**" means The Nasdaq Global Market.

(r) "**Required Holders**" means the Holders representing at least a majority of the aggregate shares of Series A Preferred Stock then outstanding.

(s) "**SEC**" means the United States Securities and Exchange Commission.

(t) "**Securities Act**" means the Securities Act of 1933, as amended.

(u) "**Securities Purchase Agreement**" means that certain securities purchase agreement, dated on or about the date of filing of this Certificate of Designations, by and among the Company and the Initial Holders pursuant to which the Company will issue the Series A Preferred Stock, as may be amended, amended and restated, supplemented or otherwise modified from time to time.

(v) "**Stated Value**" means, per share of Series A Preferred Stock, $1,000, subject to adjustment to preserve such value for stock splits, stock dividends, recapitalizations, reorganizations, reclassifications, combinations, reverse stock splits or other similar events relating to the Series A Preferred Stock.

(w) "**Subsidiary**" means each of the Company's majority-owned, consolidated subsidiaries.

(x) "**Successor Entity**" means one or more Person or Persons formed by, resulting from or surviving any Fundamental Transaction or one or more Person or Persons with which such Fundamental Transaction shall have been entered into.

(y) "**Trading Day**" means any day on which the Common Stock is traded on the Principal Market, or, if the Principal Market is not the principal trading market for the Common Stock on such day, then on the principal securities exchange or securities market on which the Common Stock is then traded.

(z) "**Transfer Agent**" means Continental Stock Transfer & Trust Company, or such other agent or agents of the Company as may be designated by the Board as the transfer agent for the Preferred Stock and/or the Common Stock, as applicable.

(aa) "**Warrants**" has the meaning ascribed to such term in the Securities Purchase Agreement and shall include all warrants issued in exchange therefor or replacement thereof.

* * * * *

IN WITNESS WHEREOF, the Company has caused this Certificate of Designations to be signed as of September 20, 2023.

PROSOMNUS, INC.

By: /s/ Brian B. Dow
Name: Brian B. Dow
Title: Chief Financial Officer

Exhibit A

FORM OF CONVERSION NOTICE

Reference is made to the Certificate of Designations, Preferences and Rights (the "**Certificate of Designations**") of the Series A Convertible Preferred Stock, par value $0.0001 per share (the "**Series A Preferred Stock**"), of ProSomnus, Inc., a Delaware corporation (the "**Company**"). In accordance with and pursuant to the Certificate of Designations, the undersigned hereby elects to convert the number of shares of Series A Preferred Stock indicated below into shares of Common Stock, par value $0.0001 per share (the "**Common Stock**"), of the Company, [as of the date specified below] [upon] [immediately prior to, and subject to the occurrence of, [·]].

Date of Conversion (if applicable):_____

Number of shares of Series A Preferred Stock to be converted:_____

Tax ID Number (if applicable):_____

Please confirm the following information:

Conversion Rate:_____

Number of shares of Common Stock to be issued:_____

Please issue the shares of Common Stock into which the shares of Series A Preferred Stock are being converted in the following name and to the following address:

Issue to:_____

Address:_____

Telephone Number:_____

Email:_____

Authorization:_____

By:_____

Title:_____

Dated:_____

Account Number (if electronic book entry transfer):_____

Transaction Code Number (if electronic book entry transfer):_____

[Exhibit A to Certificate of Designations]

Exhibit 4.1

NEITHER THE ISSUANCE AND SALE OF THESE SECURITIES NOR THE SECURITIES INTO WHICH THESE SECURITIES ARE CONVERTIBLE HAVE BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR APPLICABLE STATE SECURITIES LAWS. THE SECURITIES MAY NOT BE OFFERED FOR SALE, SOLD, TRANSFERRED OR ASSIGNED IN THE ABSENCE OF AN EFFECTIVE REGISTRATION STATEMENT FOR THE SECURITIES UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), OR PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE ACT. THE NUMBER OF SHARES OF COMMON STOCK ISSUABLE UPON EXERCISE OF THIS WARRANT MAY BE LESS THAN THE AMOUNTS SET FORTH ON THE FACE HEREOF PURSUANT TO SECTION 2.1 OF THIS WARRANT.

COMMON STOCK PURCHASE WARRANT
PROSOMNUS, INC.

Warrant Shares: [•]

Issue Date: [•], 2023

THIS COMMON STOCK PURCHASE WARRANT (this "**Warrant**") certifies that, for value received, [•] or its permitted assigns (the "**Holder**") is entitled, upon the terms and subject to the limitations on exercise and the conditions hereinafter set forth, at any time on or after the date hereof and on or prior to 5:00 p.m. (New York City time) on September 20, 2028 (the "**Termination Date**") but not thereafter, to subscribe for and purchase from ProSomnus, Inc., a Delaware corporation (the "**Company**"), up to [•] shares (as subject to adjustment hereunder, the "**Warrant Shares**") of the Company's Common Stock. The purchase price of one share of Common Stock under this Warrant shall be equal to the Warrant Price, as defined in Section 2.1. This Warrant is one of the warrants to purchase Common Stock (collectively, the "**Warrants**") issued pursuant to that certain Securities Purchase Agreement, dated as of September 20, 2023, by and among the Company and the investors referred to therein, as amended from time to time (the "**Securities Purchase Agreement**"). Capitalized terms used and not otherwise defined herein shall have the meanings set forth in that certain Securities Purchase Agreement.

1. Warrants.

1.1 Registration.

1.1.1 Warrant Register. The Company shall maintain books ("**Warrant Register**") for the registration of original issuance and the registration of transfer of the Warrants. Upon the initial issuance of the Warrants, the Company shall issue and register the Warrants in the names of the respective holders thereof.

1.1.2 Registered Holder. Prior to due presentment for registration of transfer of any Warrant, the Company may deem and treat the person in whose name such Warrant is then registered in the Warrant Register ("**registered holder**") as the absolute owner of such Warrant and of this Warrant represented thereby (notwithstanding any notation of ownership or other writing on any Warrant certificate made by anyone other than the Company), for the purpose of any exercise thereof, and for all other purposes, and the Company shall not be affected by any notice to the contrary.

2. Terms and Exercise.

2.1 Warrant Price. This Warrant shall entitle the registered holder, subject to the provisions hereof, to purchase from the Company the number of Warrant Shares stated therein, at the price of $1.00 per share, subject to the adjustments provided in Section 3 hereof and in the last sentence of this Section 2.1. The term "**Warrant Price**" as used in herein refers to the price per share at which the Common Stock may be purchased at the time this Warrant is exercised. The Company in its sole discretion may lower the Warrant Price at any time prior to the Expiration Date (as defined below) for a period of not less than twenty (20) Business Days; provided, that the Company shall provide at least twenty (20) days' prior written notice of such reduction to registered holders of the Warrants and, provided further, that any such reduction shall be applied consistently to all of the Warrants.

2.2 Duration. This Warrant may be exercised at any point from the time the Company has obtained Stockholder Approval (as defined in the Securities Purchase Agreement) until the Termination Date. The period of time from the date this Warrant will first become exercisable until the expiration of this Warrant shall hereafter be referred to as the "**Exercise Period**." If this Warrant is not exercised on or before the Expiration Date, it shall become void, and all rights hereunder shall cease at the close of business on the Expiration Date. The Company in its sole discretion may extend the duration of this Warrant by delaying the Expiration Date; provided, however, that the Company will provide at least twenty (20) days' prior written notice of any such extension to registered holders of the Warrants and, provided further, that any such extension shall be applied consistently to all of the Warrants.

2.3 Exercise.

2.3.1 Payment. Subject to the provisions herein, this Warrant may be exercised by the Holder thereof by surrendering it and by paying in full the Warrant Price for each share of Common Stock as to which the Warrant is exercised and any and all applicable taxes due in connection with the exercise of the Warrant, as follows:

(a) in lawful money of the United States, by good certified check or good bank draft payable to the order of the Company or wire transfer;

(b) in the event of an Automatic Exercise (as defined below) pursuant to Section 5 hereof in which all of the Warrants are exercised on a "cashless basis," for that number of Warrant Shares equal to the quotient obtained by dividing (i) the product of the number of Warrant Shares underlying the Warrants, multiplied by the difference between the Warrant Price and the "Fair Market Value" (defined below) by (ii) the Fair Market Value. Solely for purposes of this Section 2.3.1(b), the "**Fair Market Value**" shall mean the average reported closing price of the Common Stock for the ten (10) trading days ending on the third trading day prior to the Determination Date; or

(c) to the extent the Company is not in compliance with its registration obligations under Section 8 of the Securities Purchase Agreement, by surrendering such Warrants for that number of shares of Common Stock equal to the quotient obtained by dividing (i) the product of the number of Warrant Shares underlying the Warrants, multiplied by the difference between the exercise price of the Warrants and the "Fair Market Value" by (ii) the Fair Market Value; provided, however, that no cashless exercise shall be permitted unless the Fair Market Value is equal to or higher than the exercise price. Solely for purposes of this Section 2.3.1(c), the "**Fair Market Value**" shall mean the average reported last sale price of the Common Stock for the ten (10) trading days ending on the trading day prior to the date of exercise.

2.3.2 Issuance of Common Stock. As soon as practicable after the exercise of any Warrant and the clearance of the funds in payment of the Warrant Price (if any), the Company shall issue to the Holder a certificate or certificates, or book entry position, for the number of Warrant Shares to which he, she or it is entitled, registered in such name or names as may be directed by him, her or it, and if such Warrant shall not have been exercised in full, a new countersigned Warrant, or book entry position, for the number of shares as to which such Warrant shall not have been exercised. Notwithstanding the foregoing, in no event will the Company be required to net cash settle the Warrant exercise. No Warrant shall be exercisable for cash and the Company shall not be obligated to issue Common Stock upon exercise of this Warrant unless the offering or resale of the Common Stock issuable upon such Warrant exercise has been registered, qualified or deemed to be exempt under the securities laws of the state of residence of the registered holder of the Warrants. In the event that the condition in the immediately preceding sentence is not satisfied with respect to this Warrant, the Holder shall not be entitled to exercise this Warrant for cash and this Warrant may have no value and expire worthless. This Warrant may not be exercised by, or securities issued to, any registered holder in any state in which such exercise or issuance would be unlawful.

2.3.3 Valid Issuance. All Common Stock issued upon the proper exercise of this Warrant in conformity with the terms hereof shall be validly issued, fully paid and nonassessable.

2.3.4 Date of Issuance. Each person in whose name any book entry position or certificate for Common Stock is issued shall for all purposes be deemed to have become the Holder of record of such shares on the date on which the Warrant, or book entry position representing such Warrant, was surrendered and payment of the Warrant Price was made, irrespective of the date of delivery of such certificate, except that, if the date of such surrender and payment is a date when the share transfer books of the Company are closed, such person shall be deemed to have become the holder of such shares at the close of business on the next succeeding date on which the share transfer books or book entry system are open.

3. Adjustments.

3.1 Stock Dividends; Split Ups. If after the date hereof, the number of outstanding shares of Common Stock is increased by a stock dividend payable in Common Stock, or by a split up of Common Stock, or other similar event, then, on the effective date of such stock dividend, split up or similar event, the number of Warrant Shares issuable on exercise of this Warrant shall be increased in proportion to such increase in outstanding Common Stock.

3.2 Aggregation of Shares. If after the date hereof, the number of outstanding shares of Common Stock is decreased by a consolidation, combination, reverse stock split or reclassification of Common Stock or other similar event, then, on the effective date of such consolidation, combination, reverse stock split, reclassification or similar event, the number of Warrant Shares issuable on exercise of this Warrant shall be decreased in proportion to such decrease in outstanding Common Stock.

3.3 Adjustments in Warrant Price. Whenever the number of Warrant Shares purchasable upon the exercise of the Warrants is adjusted, as provided in Sections 3.1 and 3.2 above, the Warrant Price shall be adjusted (to the nearest cent) by multiplying such Warrant Price immediately prior to such adjustment by a fraction (i) the numerator of which shall be the number of Warrant Shares purchasable upon the exercise of the Warrants immediately prior to such adjustment, and (ii) the denominator of which shall be the number of Warrant Shares so purchasable immediately thereafter.

3.4 Replacement of Securities upon Reorganization, etc. In case of any reclassification or reorganization of the outstanding Common Stock (other than a change covered by Section 3.1 or 3.2 hereof or that solely affects the par value of the Common Stock), or in the case of any merger or consolidation of the Company with or into another corporation (other than a consolidation or merger in which the Company is the continuing corporation and that does not result in any reclassification or reorganization of the outstanding Common Stock), or in the case of any sale or conveyance to another corporation or entity of the assets or other property of the Company as an entirety or substantially as an entirety in connection with which the Company is dissolved, the Warrant holders shall thereafter have the right to purchase and receive, upon the basis and upon the terms and conditions specified in the Warrants and in lieu of the Common Stock of the Company immediately theretofore purchasable and receivable upon the exercise of the rights represented thereby, the kind and amount of shares of stock or other securities or property (including cash) receivable upon such reclassification, reorganization, merger or consolidation, or upon a dissolution following any such sale or transfer, that the Holder would have received if the Holder had exercised his, her or its Warrant(s) immediately prior to such event. If any reclassification also results in a change in the Common Stock covered by Section 3.1 or 3.2, then such adjustment shall be made pursuant to Sections 3.1, 3.2, 3.3 and this Section 3.4. The provisions of this Section 3.4 shall similarly apply to successive reclassifications, reorganizations, mergers or consolidations, sales or other transfers. In no event will the Warrant Price be reduced to less than the par value per share issuable upon exercise of the Warrant. Notwithstanding anything to the contrary herein, in the event of any tender offer for shares of Common Stock, the offeror shall not make any tender offer for the Warrants if the effect of such offer would be to require the Warrants to be accounted for as liabilities under applicable accounting principles.

3.5 Notices of Changes in Warrant. Upon the occurrence of any event specified in Sections 3.1, 3.2, 3.3 or 3.4, then, in any such event, the Company shall give written notice to the Holder, at the last address set forth for such Holder in the Warrant Register, of the record date or the effective date of the event. Failure to give such notice, or any defect therein, shall not affect the legality or validity of such event.

3.6 No Fractional Warrants or Shares. Notwithstanding any provision contained in this Warrant to the contrary, the Company shall not issue fractional shares upon exercise of this Warrant. If, by reason of any adjustment made pursuant to this Section 3, the Holder would be entitled, upon the exercise of such Warrant, to receive a fractional interest in a share, the Company shall, upon such exercise, round up to the nearest whole number of Warrant Shares to be issued to the Holder.

3.7 Other Events. In case any event shall occur affecting the Company as to which none of the provisions of preceding subsections of this Section 3 are strictly applicable, but which would require an adjustment to the terms of the Warrants in order to (i) avoid a material and adverse impact on the Warrants and (ii) effectuate the intent and purpose of this Section 3, then, in each such case, the Company shall make a good faith determination as to whether or not any adjustment to the rights represented by the Warrants is necessary to effectuate the intent and purpose of this Section 3 and, if the Company determines that an adjustment is necessary, the terms of such adjustment. The Company shall then adjust the terms of the Warrants accordingly.

4. Transfer and Exchange of Warrants.

4.1 Registration of Transfer. The Company shall register the transfer, from time to time, of any outstanding Warrant upon the Warrant Register, upon surrender of such Warrant for transfer, properly endorsed with signatures, in the case of certificated Warrants, properly guaranteed and accompanied by appropriate instructions for transfer. Upon any such transfer, a new Warrant representing an equal aggregate number of Warrants shall be issued and the old Warrant shall be cancelled.

4.2 Procedure for Surrender of Warrants. Warrants may be surrendered to the Company, either in book entry position or, if applicable, certificated form, together with a written request for exchange or transfer, and thereupon the Company shall issue in exchange therefor one or more new Warrants, or book entry positions, as requested by the Holder, representing an equal aggregate number of Warrants; provided, however, that in the event that this Warrant surrendered for transfer bears a restrictive legend, the Company shall not cancel such Warrant and issue new Warrants in exchange therefor until the Company, based on the advice of counsel, determines that such transfer may be made in compliance with applicable laws. Unless otherwise determined by the Company, based on the advice of counsel, such new Warrants shall bear the same restrictive legends as were on the surrendered Warrants.

4.3 Fractional Warrants. The Company shall not be required to effect any registration of transfer or exchange that will result in the issuance of a warrant certificate or book-entry position for a fraction of this Warrant.

4.4 Service Charges. No service charge shall be made for any exchange or registration of transfer of Warrants.

5. Automatic Exercise. All of the outstanding Warrants shall be exercised automatically, and without any further action by or on behalf of the Holder, on a cashless basis in accordance with Section 2.3.1(b) above ("**Automatic Exercise**") in the event that (i) the closing price of the Common Stock equals or exceeds $10.00 per share (subject to adjustment in accordance with Section 3 hereof), on each of twenty (20) trading days within any thirty (30) trading day period commencing on the first day of the Exercise Period and ending the Terminate Date (such 20th trading day, the "**Determination Date**"), and (ii) there is an effective registration statement covering the Common Stock issuable upon exercise of the Warrants, and a current prospectus relating thereto or the Holder is then otherwise able to sell the resulting Common Stock without volume restrictions under Rule 144 promulgated under the Securities Act of 1933 (or a successor rule thereto). The date of the Automatic Exercise shall be the first trading day immediately after the Determination Date.

6. Other Provisions Relating to Rights of Holder.

6.1 No Rights as Stockholder. This Warrant does not entitle the Holder to any of the rights of a stockholder of the Company, including, without limitation, the right to receive dividends, or other distributions, exercise any preemptive rights to vote or to consent or to receive notice as shareholders in respect of the meetings of shareholders or the election of directors of the Company or any other matter.

6.2 Lost, Stolen, Mutilated, or Destroyed Warrants. If this Warrant is lost, stolen, mutilated, or destroyed, the Company may on such terms as to indemnity or otherwise as they may in their discretion impose (which shall, in the case of a mutilated Warrant, include the surrender thereof), issue a new Warrant of like denomination, tenor, and date as the Warrant so lost, stolen, mutilated, or destroyed. Any such new Warrant shall constitute a substitute contractual obligation of the Company, whether or not the allegedly lost, stolen, mutilated, or destroyed Warrant shall be at any time enforceable by anyone.

6.3 Reservation of Common Stock. The Company shall at all times reserve and keep available a number of its authorized but unissued Common Stock that will be sufficient to permit the exercise in full of all outstanding Warrants (the "**Warrant Required Reserve Amount**").

6.4 Payment of Taxes. The Company will from time to time promptly pay all taxes and charges that may be imposed upon the Company in respect of the issuance or delivery of Common Stock upon the exercise of Warrants, but the Company shall not be obligated to pay any transfer taxes in respect of the Warrants or such Common Stock.

6.5 No Impairment. Except and to the extent as waived or consented to by the Holder, the Company will not, by amendment of its certificate of incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Company, but will at all times in good faith assist in the carrying out of all the provisions of this Warrant and in the taking of all such action as may be necessary or appropriate in order to protect the exercise rights of the Holder against impairment.

7. Miscellaneous Provisions.

7.1 Successors. All the covenants and provisions of this Warrant by or for the benefit of the Company shall bind and inure to the benefit of the Company's respective successors and assigns.

7.2 Notices. Any notice, statement or demand authorized by this Warrant to be given or made to the Company shall be sufficiently given (i) if by email when the email is sent, (ii) if by hand or overnight delivery, when so delivered, or (iii) if sent by certified mail or private courier service within five (5) days after deposit of such notice, postage prepaid, addressed (until another address is provided in writing by the Company), as follows:

ProSomnus, Inc.
5675 Gibraltar Avenue
Pleasanton, CA
Telephone: (844) 537-5337
Attention: Len Liptak
Email: lliptak@prosomnus.com

And if to the Holder, at such address or other contact information delivered by the Holder to Company or as is on the books and records of the Company.

7.3 Jurisdiction. All questions concerning the construction, validity, enforcement and interpretation of this Warrant shall be determined in accordance with the similar provisions of the Securities Purchase Agreement, which shall apply *mutatis mutandis*.

7.4 Persons Having Rights under this Warrant. Nothing in this Warrant expressed and nothing that may be implied from any of the provisions hereof is intended, or shall be construed, to confer upon, or give to, any person or corporation other than the registered holder hereof, any right, remedy, or claim under or by reason of this Warrant or of any covenant, condition, stipulation, promise, or agreement hereof. All covenants, conditions, stipulations, promises, and agreements contained in this Warrant shall be for the sole and exclusive benefit of the registered holder of this Warrant.

7.5 Electronic Signature. This Warrant may be executed by the Company in an original, facsimile, .pdf signature or any electronic signature complying with the U.S. federal ESIGN Act of 2000 (e.g., www.docusign.com).

7.6 Effect of Headings. The section headings herein are for convenience only and are not part of this Warrant and shall not affect the interpretation thereof.

7.7 Amendments. This Warrant may be amended by the Company without the consent of any registered holder for the purpose of curing any ambiguity, or of curing, correcting or supplementing any defective provision contained herein or adding or changing any other provisions with respect to matters or questions arising under this Warrant as the Company may deem necessary or desirable and that the parties deem shall not adversely affect the interest of the registered holders. All other modifications or amendments, including any amendment to increase the Warrant Price or shorten the Exercise Period, shall require the written consent or vote of the registered holders of a majority of the then outstanding Warrants. Notwithstanding the foregoing, the Company may lower the Warrant Price or extend the duration of the Exercise Period pursuant to Sections 2.1 and 2.2, respectively, without the consent of the registered holders.

7.8 Severability. This Warrant shall be deemed severable, and the invalidity or unenforceability of any term or provision hereof shall not affect the validity or enforceability of this Warrant or of any other term or provision hereof. Furthermore, in lieu of any such invalid or unenforceable term or provision, the Company and the registered holder hereof intend that there shall be added as a part of this Warrant a provision as similar in terms to such invalid or unenforceable provision as may be possible and be valid and enforceable.

7.9 Saturdays, Sundays, Holidays, etc. If the last or appointed day for the taking of any action or the expiration of any right required or granted herein shall not be a trading day, then such action may be taken or such right may be exercised on the next succeeding trading day.

[Signature Page Follows]

IN WITNESS WHEREOF, the Company has caused this Warrant to be executed by its officer thereunto duly authorized as of the first above written.

PROSOMNUS, INC.

By: _____
Name:
Title:

[Signature Page to Warrant]

Exhibit 4.2

SECOND SUPPLEMENTAL INDENTURE

dated as of September 20, 2023

among

ProSomnus, Inc.,

the Subsidiary Guarantors Party Hereto

and

Wilmington Trust, National Association,
as Trustee and Collateral Agent

Senior Secured Convertible Notes due December 6, 2025

THIS SECOND SUPPLEMENTAL INDENTURE (this "**Second Supplemental Indenture**"), entered into as of September 20, 2023, among (i) ProSomnus, Inc., a Delaware corporation (the "**Company**"), (ii) ProSomnus Holdings, Inc. and ProSomnus Sleep Technologies, Inc. (each, a "**Subsidiary Guarantor**"), and (iii) Wilmington Trust, National Association, as trustee (in such capacity, the "**Trustee**") and collateral agent ("**Collateral Agent**").

RECITALS

WHEREAS, the Company, the Subsidiary Guarantors party thereto and the Trustee and Collateral Agent entered into the Indenture, dated as of December 6, 2022 (together with the First Supplemental Indenture, dated as of June 29, 2023, among the Company, the Subsidiary Guarantors and the Trustee and Collateral Agent, the "**Indenture**"), relating to the Company's Senior Secured Convertible Notes due December 6, 2025 (the "**Notes**");

WHEREAS, the Company intends to (i) issue and sell up to $25,000,000 of its Series A Preferred Stock, par value $0.0001 per share (the "**Series A Preferred**" and such issuance, the "**Preferred Stock Issuance**"), and (ii) exchange a portion of the Notes and the Company's outstanding Subordinated Secured Convertible Notes due April 6, 2026 for new convertible notes (the "**Notes Exchange**");

WHEREAS, the Company and the Holders of not less than a majority in aggregate principal amount of the Outstanding Notes desire to make certain amendments to the Indenture to, among other things, permit the Notes Exchange, the Preferred Stock Issuance and the performance of the Company's obligations set forth in the certificate of designations describing the rights and preferences of the Series A Preferred, and have delivered to the Company and the Trustee an Act of such Holders approving this Second Supplemental Indenture; and

WHEREAS, pursuant to Section 8.02 of the Indenture, the Company, the Subsidiary Guarantors, the Trustee and the Collateral Agent are entering into this Second Supplemental Indenture.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained and intending to be legally bound, the parties to this Second Supplemental Indenture hereby agree as follows:

Section 1. **Defined Terms**. Capitalized terms used herein and not otherwise defined herein are used as defined in the Indenture.

Section 2. **Amendments to Indenture**.

(a) Clause (i) of the definition of Change of Control set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

(i) any "person" or "group" (within the meaning of Section 13(d) of the Exchange Act), other than an Excluded Person, is or becomes the direct or indirect "beneficial owner," as defined in Rule 13d-3 under the Exchange Act, of the Company's Common Equity representing 50% or more of the total voting power of the Company's Common Equity, or has the power, directly or indirectly, to elect a majority of the members of the Company's Board of Directors;

(b) The below definition of Conversion Shares is hereby added to Section 1.01 of the Indenture immediately following the definition of Conversion Rate:

"**Conversion Shares**" means the shares of Common Stock issuable upon conversion of the Notes, the Subordinated Debt and the Pari Passu Debt.

(c) The definition of Disqualified Capital Stock set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Disqualified Capital Stock**" of any Person means any class of Capital Stock of such Person that, by its terms, or by the terms of any related agreement or of any security into which it is convertible, puttable or exchangeable, is, or upon the happening of any event or the passage of time would be, required to be redeemed by such Person, whether or not at the option of the holder thereof, or matures or is mandatorily redeemable, pursuant to a sinking fund obligation or otherwise, in whole or in part, on or prior to the date which is 91 days after the final maturity date of the Notes; *provided, however*, that any class of Capital Stock of such Person that, by its terms, authorizes such Person to satisfy in full its obligations with respect to the payment of dividends or upon maturity, redemption (pursuant to a sinking fund or otherwise) or repurchase thereof or otherwise by the delivery of Capital Stock that are not Disqualified Capital Stock, and that is not convertible, puttable or exchangeable for Disqualified Capital Stock or Indebtedness, will not be deemed to be Disqualified Capital Stock so long as such Person satisfies its obligations with respect thereto solely by the delivery of Capital Stock that are not Disqualified Capital Stock; *provided, further, however*, that any Capital Stock that would not constitute Disqualified Capital Stock but for provisions thereof giving holders thereof (or the holders of any security into or for which such Capital Stock are convertible, exchangeable or exercisable) the right to require Company to redeem such Capital Stock upon the occurrence of a Change of Control occurring prior to the 91st day after the final maturity date of the Notes shall not constitute Disqualified Capital Stock if the change of control provisions applicable to such Capital Stock are no more favorable to such holders than the provisions of Section 4.19 of the Securities Purchase Agreement and such Capital Stock specifically provide that Company will not redeem any such Capital Stock pursuant to such provisions prior to Company's purchase of the Notes as required pursuant to Section 4.19 of the Securities Purchase Agreement. Notwithstanding anything in this Agreement to the contrary, the Series A Preferred Stock shall not constitute Disqualified Capital Stock of the Company.

(d) The below definition of Excluded Person is hereby added to Section 1.01 of the Indenture immediately following the definition of Exchange Act:

"**Excluded Person**" means each of HealthpointCapital, LLC, a Delaware limited liability company, and its Affiliates.

(e) The definition of Indenture Documents set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Indenture Documents**" means this Indenture, the Notes, the Security Documents, the Subsidiary Guarantees included in this Indenture, the Intercreditor Agreement and any other instrument or agreement entered into, now or in the future, by the Company, any Subsidiary Guarantor and/or any Grantor Subsidiary, on the one hand, and, if necessary, the Collateral Agent and/or Trustee, on the other hand, in connection with the Indenture.

(f) The definition of Intercreditor Agreement set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Intercreditor Agreement**" means that certain Intercreditor Agreement, dated as of December 6, 2022, by and among Wilmington Trust, National Association, as collateral agent for the Junior Secured Parties (as defined therein) and the Collateral Agent, the Company and each Subsidiary Guarantor, as amended, amended and restated, supplemented or otherwise modified from time to time in accordance with the terms thereof and of this Indenture.

(g) The below definition of Pari Passu Debt is hereby added to Section 1.01 of the Indenture immediately following the definition of Outstanding:

"**Pari Passu Debt**" means the Company's Senior Secured Convertible Exchange Notes due December 6, 2025 issued on or about September 27, 2023.

(h) The definition of Permitted Indebtedness set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Permitted Indebtedness**" means (a) the indebtedness evidenced by the Notes, (b) the Indebtedness existing on the Original Issue Date and set forth on Schedule 3.01(bb) attached to the Purchase Agreement, (c) lease obligations and purchase money indebtedness of up to $3,000,000, in the aggregate, incurred in connection with the acquisition of capital assets and lease obligations with respect to newly acquired or leased assets used in manufacturing the Company's and its Subsidiaries' products, (d) indebtedness that (i) is expressly subordinate to the Notes pursuant to a written subordination agreement with the Holders that is acceptable to each Holder in its sole and absolute discretion and (ii) matures at a date later than the 91st day following the Maturity Date, (e) financing for premiums on general business or director and officer insurance up to $3 million per calendar year, (f) the Subordinated Debt and (g) the Pari Passu Debt.

(i) The below definition of Series A Preferred Stock is hereby added to Section 1.01 of the Indenture immediately following the definition of Senior Security Agreement:

"**Series A Preferred Stock**" means the Company's Series A Preferred Stock, par value $0.0001 per share.

(j) The definition of Subordinated Debt set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Subordinated Debt**" means (i) the Company's Subordinated Secured Convertible Notes due April 6, 2026 issued on December 6, 2022 and (ii) the Company's Subordinated Secured Convertible Exchange Notes due April 6, 2026 issued on or around September 27, 2023.

(k) The definition of Transaction Documents set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Transaction Documents**" means this Indenture, the Notes, the Intercreditor Agreement, the Senior Security Agreement, the Security Documents, the Subsidiary Guarantee, any lock-up agreements entered into in connection therewith, all exhibits and schedules thereto and hereto and any other documents or agreements executed in connection with the transactions contemplated hereunder.

(l) The second paragraph of Section 2.01 of the Indenture is hereby amended and restated in its entirety as follows:

The Notes shall be known and designated as "Senior Secured Convertible Notes due 2025" of the Company. The Company shall repay to Holders the aggregate outstanding principal amount of the Notes in consecutive quarterly installments equal to $678,392 (each such payment, a "**Mandatory Redemption**") on January 1, April 1, July 1 and October 1, commencing with October 1, 2024 (each, a "**Mandatory Redemption Date**"), until the earlier of the Maturity Date or the Notes no longer being Outstanding because earlier repaid, purchased or converted in accordance with this Indenture. The Outstanding principal amount of the Notes shall be payable on the Maturity Date.

(m) Section 4.06 of the Indenture is hereby amended and restated in its entirety as follows:

If the Company or any Subsidiary, as applicable, sells or grants any option to purchase or sells or grants any right to reprice, or otherwise disposes of or issues (or announces any sale, grant or any option to purchase or other disposition), any Common Stock or Common Stock Equivalents (other than the Pari Passu Debt, the Subordinated Debt, the Series A Preferred Stock, or the Warrants) entitling any Person to acquire shares of Common Stock at an effective price per share that is lower than the then Conversion Price (such lower price, the "**Base Conversion Price**" and such issuances, collectively, a "**Dilutive Issuance**") (if the holder of the Common Stock or Common Stock Equivalents so issued shall at any time, whether by operation of purchase price adjustments, reset provisions, floating conversion, exercise or exchange prices or otherwise, or due to warrants, options or rights per share which are issued in connection with such issuance, be entitled to receive shares of Common Stock at an effective price per share that is lower than the Conversion Price then in effect, such issuance shall be deemed to have occurred for less than the Conversion Price on such date of the Dilutive Issuance), then simultaneously with the consummation (or, if earlier, the announcement) of each Dilutive Issuance, the Conversion Rate shall be adjusted in order to reduce and only reduce the Conversion Price to equal the Base Conversion Price, provided that the Base Conversion Price shall not be less than $5.50 (subject to adjustment for reverse and forward stock splits, recapitalizations and similar transactions following the date of the Purchase Agreement). Notwithstanding the foregoing, no adjustment will be made under this Section 4.06 in respect of an Exempt Issuance. If the Company enters into a Variable Rate Transaction, the Company shall be deemed to have issued Common Stock or Common Stock Equivalents at the lowest possible conversion price at which such securities may be converted or exercised. The Company shall notify the Holders in writing (with a copy to the Trustee and Conversion Agent), no later than the Trading Day following the issuance of any Common Stock or Common Stock Equivalents subject to this Section 4.06, indicating therein the applicable issuance price, or applicable reset price, exchange price, conversion price and other pricing terms (such notice, the "**Dilutive Issuance Notice**"). For purposes of clarification, whether or not the Company provides a Dilutive Issuance Notice pursuant to this Section 4.06, upon the occurrence of any Dilutive Issuance, the Holders are entitled to receive a number of shares of Common Stock upon conversion of Notes based upon the Base Conversion Price on or after the date of such Dilutive Issuance, regardless of whether such Holder accurately refers to the Base Conversion Price in the Conversion Notice.

(n) The definition of Warrants set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Warrants**" means, collectively, (i) the Common Stock purchase warrants delivered to the Holders at the Closing in accordance with Section 2.2(a) of the Purchase Agreement, which Warrants shall be exercisable immediately and have a term of exercise equal to five years, in the form of Exhibit C attached thereto, (ii) the Common Stock purchase warrants delivered in connection with that certain Subordinated Securities Purchase Agreement, by and among Lakeshore Acquisition I Corp, a Cayman Islands exempted company, the Company and the purchasers identified on the signature pages thereto and (iii) the Common Stock purchase warrants delivered in connection with that certain Securities Purchase Agreement, dated on or about September 20, 2023, by and among the Company and the investors listed on Annex A-1 attached thereto.

(o) Section 5.14(a)(iii) of the Indenture is hereby amended and restated in its entirety as follows:

(iii) amend its charter documents, including, without limitation, its certificate of incorporation and bylaws, in any manner that materially and adversely affects any rights of the Holders, other than the filing of a certificate of designations in connection with the issuance of the Series A Preferred Stock;

(p) Section 5.14(a)(iv) of the Indenture is hereby amended and restated in its entirety as follows:

(iv) repay, repurchase or offer to repay, repurchase or otherwise acquire more than a de minimis number of shares of its Common Stock or Common Stock Equivalents other than as to (i) the Conversion Shares or Warrant Shares as permitted or required under the Transaction Documents, (ii) repurchases of Common Stock or Common Stock Equivalents of departing officers and directors of the Company, provided that such repurchases shall not exceed an aggregate of $100,000 for all officers and directors during the term of this Indenture and (iii) repurchases of the Series A Preferred Stock;

(q) Section 5.14(a)(v) of the Indenture is hereby amended and restated in its entirety as follows:

(v) repay, repurchase or offer to repay, repurchase or otherwise acquire any Indebtedness, other than (A) the Notes pursuant to the terms of this Indenture, (B) the Subordinated Debt to the extent paid in accordance with the terms of the Intercreditor Agreement, and (C) the Pari Passu Debt, provided that with respect to the Subordinated Debt (i) such payments shall not be permitted if, at such time, or after giving effect to such payment, any Event of Default exists or occurs and (ii) such payments shall not be permitted unless financial covenants are satisfied;

(r) Section 5.14(a)(viii) of the Indenture is hereby amended and restated in its entirety as follows:

(viii) enter into any transaction with any Affiliate of the Company which would be required to be disclosed in any public filing with the Commission (other than any transaction in connection with the Company's issuance of the Series A Preferred Stock, the Pari Passu Debt or the Subordinated Debt or the performance of the Company's obligations with respect to the Series A Preferred Stock, the Pari Passu Debt or the Subordinated Debt) unless such transaction is made on an arm's-length basis and expressly approved by a majority of the disinterested directors of the Company (even if less than a quorum otherwise required for board approval); or

(s) Section 5.17(c) of the Indenture is hereby amended and restated in its entirety as follows:

(c) Minimum Cash. The Company shall have on hand at all times, on the first of each calendar month, not less than $4.5 million, in an account (from and after October 31, 2023, subject to an account control agreement in favor of the Collateral Agent) subject to no other Liens other than the Permitted Liens.

(t) A new Section 14.17 of the Indenture is hereby added as follows:

Section 14.17. ***Intercreditor Agreement.***

This Indenture is subject to the restrictions contained in the Intercreditor Agreement, and each party hereto shall be bound by said Intercreditor Agreement. In the event of any conflict between the terms of the Intercreditor Agreement and this Indenture, the terms of the Intercreditor Agreement shall govern and control.

Section 3. **Reference to and Effect on Indenture**. On and after the effective date of this Second Supplemental Indenture, each reference in the Indenture to "this Indenture," "hereunder," "hereof," or "herein" shall mean and be a reference to the Indenture as amended and restated by this Second Supplemental Indenture unless the context otherwise requires, and every Holder heretofore or hereafter authenticated and delivered shall be bound hereby.

Section 4. **Reaffirmation**. In connection with the execution and delivery of this Second Supplemental Indenture, (a) the Company and each Grantor Subsidiary reaffirms, acknowledges, agrees and confirms that it has granted to the Collateral Agent, to the extent so required by and upon the terms set forth in the Senior Security Agreement, a security interest in the Collateral in order to secure all of its present and future Obligations and acknowledges and agrees that such security interest, and all Collateral heretofore pledged as security for the Obligations, continues to be and remains in full force and effect on and as of the date hereof (to the extent so required by and upon the terms set forth in the Senior Security Agreement) and (b) each Subsidiary Guarantor ratifies and confirms its guaranty of the Obligations provided pursuant to the Subsidiary Guarantee, including without limitation all of the terms and conditions set forth in Article 12 of the Indenture, and each Subsidiary Guarantor acknowledges and agrees that its obligations under the Indenture shall remain unchanged and in full force and effect, notwithstanding the amendment of the Indenture pursuant to the terms of this Second Supplemental Indenture and that the obligations of each Subsidiary Guarantor under Article 12 of the Indenture continue to be and remain in full force and effect on and as of the date hereof.

Section 5. **Direction to Execute Amended and Restated Intercreditor Agreement**. By its execution hereof, the Company hereby directs the Collateral Agent to execute the amended and restated Intercreditor Agreement, to be executed on or about September 27, 2023, and the Collateral Agent shall be fully protected in executing the Intercreditor Agreement.

Section 6. **Payment of Interest in Connection with Notes Exchange.** For the avoidance of doubt, Holders of all Notes will receive the full interest payment due on October 1, 2023, regardless of their participation in the Notes Exchange.

Section 7. **Acknowledgement of Supplemental Indenture for Subordinated Convertible Notes**. The Holders acknowledge and agree that, concurrently with this Second Supplemental Indenture, the Company and the Subsidiary Guarantors are entering into a Second Supplemental Indenture to the Indenture, dated as of December 6, 2022, among the Company, the subsidiary guarantors party thereto, and Wilmington Trust, National Association, as trustee and collateral agent, relating to the Company's Subordinated Secured Convertible Notes due April 6, 2026 (the "**Subordinated Supplement**") and the Holders hereby consent to the execution and delivery of such Subordinated Supplement.

Section 8. **Governing Law**. This Second Supplemental Indenture, and any dispute, claim or controversy arising under or related to this Second Supplemental Indenture, shall be governed by and construed in accordance with the laws of the State of New York (without regard to the conflicts of laws provisions thereof other than Section 5-101 of the General Obligations Law).

Section 9. **Counterparts**. This Second Supplemental Indenture may be executed in any number of counterparts, each of which shall be an original, but such counterparts shall together constitute but one and the same instrument. The exchange of copies of this Second Supplemental Indenture and of signature pages by facsimile or PDF transmission shall constitute effective execution and delivery of this Second Supplemental Indenture as to the parties hereto and may be used in lieu of the original Second Supplemental Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes. The words "execution", "signed", "signature," and words of similar import in this Second Supplemental Indenture shall be deemed to include electronic or digital signatures or the keeping of records in electronic form, each of which shall be of the same effect, validity, and enforceability as manually executed signatures or a paper based recordkeeping system, as the case may be, to the extent and as provided under applicable law, including the Electronic Signatures in Global and National Commerce Act of 2000 (15 U.S.C. §§ 7001-7006), the Electronic Signatures and Records Act of 1999 (N.Y. State Tech. §§ 301-309).

Section 10. **Severability**. In case any provision of this Second Supplemental Indenture or the Indenture is invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired thereby.

Section 11. **Waiver of Jury Trial; Submission to Jurisdiction**. The provisions of Section 14.10 (Waiver of Jury Trial) and Section 14.13 (Submission to Jurisdiction) of the Indenture shall apply to this Second Supplemental Indenture, *mutatis mutandis*.

Section 12. **Disclaimer**. Neither the Trustee nor the Collateral Agent shall be responsible in any manner whatsoever for or in respect of the validity or sufficiency of this Second Supplemental Indenture with respect to the Company or any Subsidiary Guarantor or for or in respect of the recitals contained herein, all of which recitals are made solely by the Company and the Subsidiary Guarantors. In entering into this Second Supplemental Indenture, the Trustee and the Collateral Agent shall be entitled to the benefit of every provision of the Indenture relating to the conduct or affecting the liability of or affording protection to the Trustee or the Collateral Agent, as applicable, whether or not elsewhere herein so provided.

[*Signature Page to Follow*]

IN WITNESS WHEREOF, the parties hereto have caused this Second Supplemental Indenture to be duly executed as of the date first above written.

PROSOMNUS, INC.

By: /s/ Brian Dow
Name: Brian B. Dow
Title: Chief Financial Officer

PROSOMNUS HOLDINGS, INC.

By: /s/ Brian Dow
Name: Brian B. Dow
Title: Chief Financial Officer

PROSOMNUS SLEEP TECHNOLOGIES, INC.,

By: /s/ Brian Dow
Name: Brian B. Dow
Title: Chief Financial Officer

WILMINGTON TRUST, NATIONAL ASSOCIATION, as Trustee and as Collateral Agent

By: /s/ Sarah Vilhauer
Name: Sarah Vilhauer
Title: Assistant Vice President

[Signature Page to Second Supplemental Indenture]

Exhibit 4.3

SECOND SUPPLEMENTAL INDENTURE

dated as of September 20, 2023

among

ProSomnus, Inc.,

the Subsidiary Guarantors Party Hereto

and

Wilmington Trust, National Association,
as Trustee and Collateral Agent

Subordinated Secured Convertible Notes due April 6, 2026

THIS SECOND SUPPLEMENTAL INDENTURE (this "**Second Supplemental Indenture**"), entered into as of September 20, 2023, among (i) ProSomnus, Inc., a Delaware corporation (the "**Company**"), (ii) ProSomnus Holdings, Inc. and ProSomnus Sleep Technologies, Inc. (each, a "**Subsidiary Guarantor**"), and (iii) Wilmington Trust, National Association, as trustee (in such capacity, the "**Trustee**") and collateral agent ("**Collateral Agent**").

RECITALS

WHEREAS, the Company, the Subsidiary Guarantors party thereto and the Trustee and Collateral Agent entered into the Indenture, dated as of December 6, 2022 (together with the First Supplemental Indenture, dated as of June 29, 2023, among the Company, the Subsidiary Guarantors and the Trustee and Collateral Agent, the "**Indenture**"), relating to the Company's Subordinated Secured Convertible Notes due April 6, 2026 (the "**Notes**");

WHEREAS, the Company intends to (i) issue and sell up to $25,000,000 of its Series A Preferred Stock, par value $0.0001 per share (the "**Series A Preferred**" and such issuance, the "**Preferred Stock Issuance**"), and (ii) exchange a portion of the Notes and the Company's outstanding Senior Secured Convertible Notes due December 6, 2025 for new convertible notes (the "**Notes Exchange**");

WHEREAS, the Company and the Holders of not less than a majority in aggregate principal amount of the Outstanding Notes desire to make certain amendments to the Indenture to, among other things, permit the Notes Exchange, the Preferred Stock Issuance and the performance of the Company's obligations set forth in the certificate of designations describing the rights and preferences of the Series A Preferred, and have delivered to the Company and the Trustee an Act of such Holders approving this Second Supplemental Indenture; and

WHEREAS, pursuant to Section 8.02 of the Indenture, the Company, the Subsidiary Guarantors, the Trustee and the Collateral Agent are entering into this Second Supplemental Indenture.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained and intending to be legally bound, the parties to this Second Supplemental Indenture hereby agree as follows:

Section 1. **Defined Terms**. Capitalized terms used herein and not otherwise defined herein are used as defined in the Indenture.

Section 2. **Amendments to Indenture**.

(a) Clause (i) of the definition of Change of Control set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

(i) any "person" or "group" (within the meaning of Section 13(d) of the Exchange Act), other than an Excluded Person, is or becomes the direct or indirect "beneficial owner," as defined in Rule 13d-3 under the Exchange Act, of the Company's Common Equity representing 50% or more of the total voting power of the Company's Common Equity, or has the power, directly or indirectly, to elect a majority of the members of the Company's Board of Directors;

(b) The below definition of Conversion Shares is hereby added to Section 1.01 of the Indenture immediately following the definition of Conversion Rate:

"**Conversion Shares**" means the shares of Common Stock issuable upon conversion of the Notes, the Senior Debt and the Pari Passu Debt.

(c) The definition of Disqualified Capital Stock set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Disqualified Capital Stock**" of any Person means any class of Capital Stock of such Person that, by its terms, or by the terms of any related agreement or of any security into which it is convertible, puttable or exchangeable, is, or upon the happening of any event or the passage of time would be, required to be redeemed by such Person, whether or not at the option of the holder thereof, or matures or is mandatorily redeemable, pursuant to a sinking fund obligation or otherwise, in whole or in part, on or prior to the date which is 91 days after the final maturity date of the Notes; *provided, however*, that any class of Capital Stock of such Person that, by its terms, authorizes such Person to satisfy in full its obligations with respect to the payment of dividends or upon maturity, redemption (pursuant to a sinking fund or otherwise) or repurchase thereof or otherwise by the delivery of Capital Stock that are not Disqualified Capital Stock, and that is not convertible, puttable or exchangeable for Disqualified Capital Stock or Indebtedness, will not be deemed to be Disqualified Capital Stock so long as such Person satisfies its obligations with respect thereto solely by the delivery of Capital Stock that are not Disqualified Capital Stock; *provided, further, however*, that any Capital Stock that would not constitute Disqualified Capital Stock but for provisions thereof giving holders thereof (or the holders of any security into or for which such Capital Stock are convertible, exchangeable or exercisable) the right to require Company to redeem such Capital Stock upon the occurrence of a Change of Control occurring prior to the 91st day after the final maturity date of the Notes shall not constitute Disqualified Capital Stock if the change of control provisions applicable to such Capital Stock are no more favorable to such holders than the provisions of Section 4.19 of the Securities Purchase Agreement and such Capital Stock specifically provide that Company will not redeem any such Capital Stock pursuant to such provisions prior to Company's purchase of the Notes as required pursuant to Section 4.19 of the Securities Purchase Agreement. Notwithstanding anything in this Agreement to the contrary, the Series A Preferred Stock shall not constitute Disqualified Capital Stock of the Company.

(d) The below definition of Excluded Person is hereby added to Section 1.01 of the Indenture immediately following the definition of Exchange Act:

"**Excluded Person**" means each of HealthpointCapital, LLC, a Delaware limited liability company, and its Affiliates.

(e) The definition of Indenture Documents set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Indenture Documents**" means this Indenture, the Notes, the Security Documents, the Subsidiary Guarantees included in this Indenture, the Intercreditor Agreement and any other instrument or agreement entered into, now or in the future, by the Company, any Subsidiary Guarantor and/or any Grantor Subsidiary, on the one hand, and, if necessary, the Collateral Agent and/or Trustee, on the other hand, in connection with the Indenture.

(f) The definition of Intercreditor Agreement set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Intercreditor Agreement**" means that certain Intercreditor Agreement, dated as of December 6, 2022, by and among Wilmington Trust, National Association, as collateral agent for the Senior Secured Parties (as defined therein) and the Collateral Agent, the Company and each Subsidiary Guarantor, as amended, amended and restated, supplemented or otherwise modified from time to time in accordance with the terms thereof and of this Indenture.

(g) The below definition of Pari Passu Debt is hereby added to Section 1.01 of the Indenture immediately following the definition of Outstanding:

"**Pari Passu Debt**" means the Company's Subordinated Secured Convertible Exchange Notes due April 6, 2026 issued on or about September 27, 2023.

(h) The definition of Permitted Indebtedness set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Permitted Indebtedness**" means (a) the indebtedness evidenced by the Notes, (b) the Indebtedness existing on the Original Issue Date and set forth on Schedule 3.01(bb) attached to the Purchase Agreement, (c) lease obligations and purchase money indebtedness of up to $3,000,000, in the aggregate, incurred in connection with the acquisition of capital assets and lease obligations with respect to newly acquired or leased assets used in manufacturing the Company's and its Subsidiaries' products, (d) indebtedness that (i) is expressly subordinate to the Notes pursuant to a written subordination agreement with the Holders that is acceptable to each Holder in its sole and absolute discretion and (ii) matures at a date later than the 91st day following the Maturity Date, (e) financing for premiums on general business or director and officer insurance up to $3 million per calendar year, (f) the Senior Debt and (g) the Pari Passu Debt.

(i) The definition of Senior Debt set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Senior Debt**" means (i) the Company's Senior Secured Convertible Notes due December 6, 2025 issued on December 6, 2022 and (ii) the Company's Senior Secured Convertible Exchange Notes due December 6, 2025 issued on or around September 27, 2023.

(j) The below definition of Series A Preferred Stock is hereby added to Section 1.01 of the Indenture immediately following the definition of Senior Debt:

"**Series A Preferred Stock**" means the Company's Series A Preferred Stock, par value $0.0001 per share.

(k) The definition of Transaction Documents set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Transaction Documents**" means this Indenture, the Notes, the Intercreditor Agreement, the Subordinated Security Agreement, the Security Documents, the Subsidiary Guarantee, any lock-up agreements entered into in connection therewith, all exhibits and schedules thereto and hereto and any other documents or agreements executed in connection with the transactions contemplated hereunder.

(l) Section 4.06 of the Indenture is hereby amended and restated in its entirety as follows:

If the Company or any Subsidiary, as applicable, sells or grants any option to purchase or sells or grants any right to reprice, or otherwise disposes of or issues (or announces any sale, grant or any option to purchase or other disposition), any Common Stock or Common Stock Equivalents (other than the Pari Passu Debt, the Senior Debt, the Series A Preferred Stock, or the Warrants) entitling any Person to acquire shares of Common Stock at an effective price per share that is lower than the then Conversion Price (such lower price, the "**Base Conversion Price**" and such issuances, collectively, a "**Dilutive Issuance**") (if the holder of the Common Stock or Common Stock Equivalents so issued shall at any time, whether by operation of purchase price adjustments, reset provisions, floating conversion, exercise or exchange prices or otherwise, or due to warrants, options or rights per share which are issued in connection with such issuance, be entitled to receive shares of Common Stock at an effective price per share that is lower than the Conversion Price then in effect, such issuance shall be deemed to have occurred for less than the Conversion Price on such date of the Dilutive Issuance), then simultaneously with the consummation (or, if earlier, the announcement) of each Dilutive Issuance, the Conversion Rate shall be adjusted in order to reduce and only reduce the Conversion Price to equal the Base Conversion Price, provided that the Base Conversion Price shall not be less than $5.50 (subject to adjustment for reverse and forward stock splits, recapitalizations and similar transactions following the date of the Purchase Agreement). Notwithstanding the foregoing, no adjustment will be made under this Section 4.06 in respect of an Exempt Issuance. If the Company enters into a Variable Rate Transaction, the Company shall be deemed to have issued Common Stock or Common Stock Equivalents at the lowest possible conversion price at which such securities may be converted or exercised. The Company shall notify the Holders in writing (with a copy to the Trustee and Conversion Agent), no later than the Trading Day following the issuance of any Common Stock or Common Stock Equivalents subject to this Section 4.06, indicating therein the applicable issuance price, or applicable reset price, exchange price, conversion price and other pricing terms (such notice, the "**Dilutive Issuance Notice**"). For purposes of clarification, whether or not the Company provides a Dilutive Issuance Notice pursuant to this Section 4.06, upon the occurrence of any Dilutive Issuance, the Holders are entitled to receive a number of shares of Common Stock upon conversion of Notes based upon the Base Conversion Price on or after the date of such Dilutive Issuance, regardless of whether such Holder accurately refers to the Base Conversion Price in the Conversion Notice.

(m) The definition of Warrants set forth in Section 1.01 of the Indenture is hereby amended and restated in its entirety as follows:

"**Warrants**" means, collectively, (i) the Common Stock purchase warrants delivered to the Holders at the Closing in accordance with Section 2.2(a) of the Purchase Agreement, which Warrants shall be exercisable immediately and have a term of exercise equal to five years, in the form of Exhibit C attached thereto, (ii) the Common Stock purchase warrants delivered in connection with that certain Senior Securities Purchase Agreement, dated as of August 26, 2022, by and among Lakeshore Acquisition I Corp, a Cayman Islands exempted company, the Company and the purchasers identified on the signature pages thereto and (iii) the Common Stock purchase warrants delivered in connection with that certain Securities Purchase Agreement, dated on or about September 20, 2023, by and among the Company and the investors listed on Annex A-1 attached thereto.

(n) Section 5.14(a)(iii) of the Indenture is hereby amended and restated in its entirety as follows:

(iii) amend its charter documents, including, without limitation, its certificate of incorporation and bylaws, in any manner that materially and adversely affects any rights of the Holders, other than the filing of a certificate of designations in connection with the issuance of the Series A Preferred Stock;

(o) Section 5.14(a)(iv) of the Indenture is hereby amended and restated in its entirety as follows:

(iv) repay, repurchase or offer to repay, repurchase or otherwise acquire more than a de minimis number of shares of its Common Stock or Common Stock Equivalents other than as to (i) the Conversion Shares or Warrant Shares as permitted or required under the Transaction Documents, (ii) repurchases of Common Stock or Common Stock Equivalents of departing officers and directors of the Company, provided that such repurchases shall not exceed an aggregate of $100,000 for all officers and directors during the term of this Indenture and (iii) repurchases of the Series A Preferred Stock;

(p) Section 5.14(a)(v) of the Indenture is hereby amended and restated in its entirety as follows:

(v) repay, repurchase or offer to repay, repurchase or otherwise acquire any Indebtedness, other than (A) the Senior Debt, (B) the Notes to the extent paid in accordance with the terms of the Intercreditor Agreement, and (C) the Pari Passu Debt, provided that with respect to the Notes and the Pari Passu Debt (i) such payments shall not be permitted if, at such time, or after giving effect to such payment, any Event of Default exists or occurs and (ii) such payments shall not be permitted unless financial covenants are satisfied;

(q) Section 5.14(a)(viii) of the Indenture is hereby amended and restated in its entirety as follows:

(viii) enter into any transaction with any Affiliate of the Company which would be required to be disclosed in any public filing with the Commission (other than any transaction in connection with the Company's issuance of the Series A Preferred Stock, the Pari Passu Debt or the Senior Debt or the performance of the Company's obligations with respect to the Series A Preferred Stock, the Pari Passu Debt or the Senior Debt) unless such transaction is made on an arm's-length basis and expressly approved by a majority of the disinterested directors of the Company (even if less than a quorum otherwise required for board approval); or

(r) Section 5.17(c) of the Indenture is hereby amended and restated in its entirety as follows:

(c) Minimum Cash. The Company shall have on hand at all times, on the first of each calendar month, not less than $4.5 million, in an account (from and after October 31, 2023, subject to an account control agreement in favor of the Collateral Agent) subject to no other Liens other than the Permitted Liens.

(s) A new Section 14.17 of the Indenture is hereby added as follows:

Section 14.17. ***Intercreditor Agreement.***

This Indenture is subject to the restrictions contained in the Intercreditor Agreement, and each party hereto shall be bound by said Intercreditor Agreement. In the event of any conflict between the terms of the Intercreditor Agreement and this Indenture, the terms of the Intercreditor Agreement shall govern and control.

Section 3. **Reference to and Effect on Indenture**. On and after the effective date of this Second Supplemental Indenture, each reference in the Indenture to "this Indenture," "hereunder," "hereof," or "herein" shall mean and be a reference to the Indenture as amended and restated by this Second Supplemental Indenture unless the context otherwise requires, and every Holder heretofore or hereafter authenticated and delivered shall be bound hereby.

Section 4. **Reaffirmation**. In connection with the execution and delivery of this Second Supplemental Indenture, (a) the Company and each Grantor Subsidiary reaffirms, acknowledges, agrees and confirms that it has granted to the Collateral Agent, to the extent so required by and upon the terms set forth in the Subordinated Security Agreement, a security interest in the Collateral in order to secure all of its present and future Obligations and acknowledges and agrees that such security interest, and all Collateral heretofore pledged as security for the Obligations, continues to be and remains in full force and effect on and as of the date hereof (to the extent so required by and upon the terms set forth in the Subordinated Security Agreement) and (b) each Subsidiary Guarantor ratifies and confirms its guaranty of the Obligations provided pursuant to the Subsidiary Guarantee, including without limitation all of the terms and conditions set forth in Article 12 of the Indenture, and each Subsidiary Guarantor acknowledges and agrees that its obligations under the Indenture shall remain unchanged and in full force and effect, notwithstanding the amendment of the Indenture pursuant to the terms of this Second Supplemental Indenture and that the obligations of each Subsidiary Guarantor under Article 12 of the Indenture continue to be and remain in full force and effect on and as of the date hereof.

Section 5. **Direction to Execute Amended and Restated Intercreditor Agreement**. By its execution hereof, the Company hereby directs the Collateral Agent to execute the amended and restated Intercreditor Agreement, to be executed on or about September 27, 2023, and the Collateral Agent shall be fully protected in executing the Intercreditor Agreement.

Section 6. **Acknowledgement of Supplemental Indenture for Senior Convertible Notes**. The Holders acknowledge and agree that, concurrently with this Second Supplemental Indenture, the Company and the Subsidiary Guarantors are entering into a Second Supplemental Indenture to the Indenture, dated as of December 6, 2022, among the Company, the subsidiary guarantors party thereto, and Wilmington Trust, National Association, as trustee and collateral agent, relating to the Company's Senior Secured Convertible Notes due December 6, 2025 (the "**Senior Supplement**") and the Holders hereby consent to the execution and delivery of such Senior Supplement.

Section 7. **Governing Law**. This Second Supplemental Indenture, and any dispute, claim or controversy arising under or related to this Second Supplemental Indenture, shall be governed by and construed in accordance with the laws of the State of New York (without regard to the conflicts of laws provisions thereof other than Section 5-101 of the General Obligations Law).

Section 8. **Counterparts**. This Second Supplemental Indenture may be executed in any number of counterparts, each of which shall be an original, but such counterparts shall together constitute but one and the same instrument. The exchange of copies of this Second Supplemental Indenture and of signature pages by facsimile or PDF transmission shall constitute effective execution and delivery of this Second Supplemental Indenture as to the parties hereto and may be used in lieu of the original Second Supplemental Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes. The words "execution", "signed", "signature," and words of similar import in this Second Supplemental Indenture shall be deemed to include electronic or digital signatures or the keeping of records in electronic form, each of which shall be of the same effect, validity, and enforceability as manually executed signatures or a paper based recordkeeping system, as the case may be, to the extent and as provided under applicable law, including the Electronic Signatures in Global and National Commerce Act of 2000 (15 U.S.C. §§ 7001-7006), the Electronic Signatures and Records Act of 1999 (N.Y. State Tech. §§ 301-309).

Section 9. **Severability**. In case any provision of this Second Supplemental Indenture or the Indenture is invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired thereby.

Section 10. **Waiver of Jury Trial; Submission to Jurisdiction**. The provisions of Section 14.10 (Waiver of Jury Trial) and Section 14.13 (Submission to Jurisdiction) of the Indenture shall apply to this Second Supplemental Indenture, *mutatis mutandis*.

Section 11. **Disclaimer**. Neither the Trustee nor the Collateral Agent shall be responsible in any manner whatsoever for or in respect of the validity or sufficiency of this Second Supplemental Indenture with respect to the Company or any Subsidiary Guarantor or for or in respect of the recitals contained herein, all of which recitals are made solely by the Company and the Subsidiary Guarantors. In entering into this Second Supplemental Indenture, the Trustee and the Collateral Agent shall be entitled to the benefit of every provision of the Indenture relating to the conduct or affecting the liability of or affording protection to the Trustee or the Collateral Agent, as applicable, whether or not elsewhere herein so provided.

[*Signature Page to Follow*]

IN WITNESS WHEREOF, the parties hereto have caused this Second Supplemental Indenture to be duly executed as of the date first above written.

PROSOMNUS, INC.

By: /s/ Brian Dow
Name: Brian B. Dow
Title: Chief Financial Officer

PROSOMNUS HOLDINGS, INC.

By: /s/ Brian Dow
Name: Brian B. Dow
Title: Chief Financial Officer

PROSOMNUS SLEEP TECHNOLOGIES, INC.,

By: /s/ Brian Dow
Name: Brian B. Dow
Title: Chief Financial Officer

WILMINGTON TRUST, NATIONAL ASSOCIATION, as Trustee and as Collateral Agent

By: /s/ Sarah Vilhauer
Name: Sarah Vilhauer
Title: Assistant Vice President

[Signature Page to Second Supplemental Indenture]

Exhibit 10.1

FORM OF SECURITIES PURCHASE AGREEMENT

This SECURITIES PURCHASE AGREEMENT (this "**Agreement**"), dated as of September 20, 2023, is by and among ProSomnus, Inc., a Delaware corporation (the "**Company**"), and the investors listed on Annex A-1 attached hereto (each, a "**Noteholder Investor**") and the investors listed on Annex A-2 attached hereto (each, a "**Non-Noteholder Investor**" and, together with the Noteholder Investors, the "**Investors**" and, each, an "**Investor**"). Annex A-1 and Annex A-2 are collectively referred to herein as the "**Investor Schedules**."

WHEREAS:

A. The Company and, as applicable, each Investor are or will execute and deliver this Agreement and the Exchange Agreement (as defined below) in reliance upon the exemption from securities registration afforded by Section 4(a)(2) of the Securities Act of 1933, as amended (the "**Securities Act**"), or Rule 506(b) of Regulation D ("**Regulation D**") as promulgated by the United States Securities and Exchange Commission (the "**SEC**") under the Securities Act.

B. The Company has authorized (i) the filing of a Certificate of Designations, Preferences and Rights, in the form attached hereto as Exhibit A (the "**Certificate of Designations**"), creating a new series of convertible preferred stock of the Company designated as Series A Convertible Preferred Stock, the terms of which are set forth in the Certificate of Designations (the "**Series A Preferred Stock**"), with the holders of the Series A Preferred Stock being entitled to, among other things, receive shares of the Company's common stock, par value $0.0001 per share ("**Common Stock**"), as dividends in accordance with the Certificate of Designations (the "**PIK Shares**"), and such Series A Preferred Stock being convertible into Common Stock (as converted, collectively, the "**Conversion Shares**"), in accordance with the terms of the Certificate of Designations; (ii) the issuance and sale to the Investors pursuant to this Agreement of up to 25,000 shares of Series A Preferred Stock (the "**Offered Shares**"), at a price of $1,000 per share; (iii) the issuance and sale of the Warrants (as defined below) and the issuance of the Warrant Shares (as defined below) upon the exercise of the Warrants in accordance with the terms of the Warrant; (iv) the issuance of new convertible notes (the "**New Notes**") in exchange for a portion of the principal amount outstanding of the Company's existing convertible notes held by the Noteholder Investors as set forth on Annex A-1 (such principal amount of the existing convertible notes, the "**Existing Notes**") in accordance with the terms of the Exchange Agreement; and (v) one or more reservation of a sufficient number of shares of Common Stock to provide for the Series A Preferred Required Reserve Amount (as defined in the Certificate of Designations) and the Warrant Required Reserve Amount (as defined in the Warrant).

C. Each Investor wishes to purchase, and the Company wishes to sell at the applicable Closing (as defined below), upon the terms and conditions stated in this Agreement, the number of shares of Series A Preferred Stock set forth on Annexes A-1 and A-2 opposite such Investor's name. In addition: (i) each Non-Noteholder Investor will receive a warrant substantially in the form attached hereto as Exhibit B (each, a "**Warrant**") to purchase up to that aggregate number of shares of Common Stock set forth opposite such Investor's name in column (4) on Annex A-1 (such shares of Common Stock, collectively, the "**Non-Noteholder Warrant Shares**") and (ii) each Noteholder Investor will receive (a) pursuant to an Exchange Agreement to be entered into as soon as practicable following the date hereof in a form reasonably acceptable to the Company and such Noteholder Investor (the "**Exchange Agreement**"), the New Notes in exchange for the Existing Notes, which New Notes shall, upon Stockholder Approval (as defined below), be convertible into Common Stock at an effective price of $1.00 per share subject to the terms and conditions of the applicable new indenture pursuant to which the applicable series of New Notes will be issued by the Company (such incremental shares of Common Stock issuable upon conversion of the New Notes as a result of the reduced conversion rate under the New Notes upon the Stockholder Approval, the "**Note New Shares**"), and (b) to the extent set forth on Annex A-2, a Warrant to purchase up to the aggregate number of shares of Common Stock set forth opposite such Noteholder Investor's name in column (6) on Annex A-2 (such shares of Common Stock, collectively, the "**Noteholder Warrant Shares**" and, together with Non-Noteholder Warrant Shares, the "**Warrant Shares**"; the Offered Shares, the PIK Shares, the Conversion Shares, the Warrants and the Warrant Shares are, collectively, the "**Securities**").

NOW, THEREFORE, **IN CONSIDERATION** of the mutual covenants contained in this Agreement, and for other good and valuable consideration the receipt and adequacy of which are hereby acknowledged, the Company and each Investor hereby agree as follows:

1. PURCHASE AND SALE OF SERIES A PREFERRED STOCK AND WARRANTS.

(a) Purchase of Securities. Subject to the satisfaction (or waiver) of the conditions set forth in Sections 6 and 7 below, on the applicable Closing Date (as defined below), the Company shall issue and sell to each Investor, and each Investor severally, and not jointly, shall purchase from the Company, the number of shares of Series A Preferred Stock and, if applicable, a Warrant to purchase the number of Warrant Shares each as set forth opposite each such Investor's name in the applicable Investor Schedule.

(b) Purchase Price. Each Investor shall pay the Purchase Price (as defined below) for each Offered Share to be purchased by such Investor at the applicable Closing (the "**Purchased Shares**") and, if applicable, such Investor's Warrant at the applicable Closing, each as set forth on the applicable Investor Schedule. The aggregate purchase price for the Series A Preferred Stock and Warrants shall be the product of (i) $1,000 and (ii) the aggregate number of shares of Series A Preferred Stock purchased by the applicable Investor at the applicable Closing plus, if applicable, the cash value of any dividends that will be payable in respect of such shares of Series A Preferred Stock from the Initial Closing Date through the applicable Closing Date for each Offered Share to be purchased in the applicable Closing (the "**Purchase Price**").

2. CLOSING.

(a) The purchase, sale and issuance of the Offered Shares and Warrants pursuant to this Agreement shall take place at one or more closings, each of which is referred to in this Agreement as a closing (each, a "**Closing**" and, the applicable date of such closing, the "**Closing Date**"). The initial Closing (the "**Initial Closing**") shall be held on the date hereof, subject to the satisfaction or waiver of all conditions set forth in Sections 6 and 7 (the "**Initial Closing Date**").

(b) If less than all the Offered Shares are sold and issued at the Initial Closing, or if the Company and any Investor agree to delay all or a portion of such Investor's purchase of the Securities under this Agreement, the Company may sell and issue at one or more subsequent Closings (each, a "**Subsequent Closing**") on or prior the one-month anniversary of the Initial Closing, up to the balance of unissued Offered Shares to such persons or entities as may be approved by the Company in its sole discretion or, in the case of an agreed upon delayed closing for an Investor, the balance of the unissued Securities that such Investor has agreed to purchase under this Agreement. Any such sale and issuance in a Subsequent Closing shall be on the same terms (other than the differences in the consideration provided in respect of the Noteholder Investors and the Non-Noteholder Investors) and conditions as those contained herein, and such persons or entities shall, upon execution and delivery of the relevant signature pages, become parties to, and be bound by, the Transaction Documents (as defined below), without the need for an amendment to any of such agreements except to add such person's or entity's name to the appropriate exhibit to such agreements, and shall have the rights and obligations hereunder and thereunder, in each case as of the date of the applicable Subsequent Closing. Each Subsequent Closing shall take place at such date, time and place as shall be approved by the Company in its sole discretion.

(c) The Company may amend the Investor Schedules to reflect subsequent subscriptions to purchase the Offered Shares and Warrants, which future subscriptions may not provide for improved economic terms to any such Investor relative to other similarly positioned Investors without the consent of the holders of a majority of the Purchased Shares. The Company will furnish to each Investor upon request copies of the Investor Schedules.

(d) On the applicable Closing Date, (i) each Investor shall pay its applicable Purchase Price to the Company for the applicable Purchased Shares and Warrants, by wire transfer of immediately available funds, payable to the order of the Company in accordance with the Company's written wire instructions; and (ii) upon receipt by the Company of such payment, the Company shall (a) issue to such Investor in book-entry form on the books and records of the Transfer Agent such Investor's Purchased Shares and (b) as applicable, issue to such Investor a Warrant registered in the name of such Investor and duly executed on behalf of the Company.

3. INVESTOR'S REPRESENTATIONS AND WARRANTIES. Each Investor, severally and not jointly, represents and warrants with respect to only itself that, as of the applicable Closing Date:

(a) Organization and Qualification. If such Investor is not a natural person, such Investor is duly organized and validly existing and in good standing under the laws of the jurisdiction in which it is formed, and has the requisite power and authorization to own its properties and to carry on its business as now being conducted and as presently proposed to be conducted. If such Investor is not a natural person, such Investor is duly qualified as a foreign entity to do business and is in good standing in every jurisdiction in which its ownership of property or the nature of the business conducted by it makes such qualification necessary, except to the extent that the failure to be so qualified or be in good standing would not, individually or in the aggregate, reasonably be expected to have an Investor Material Adverse Effect. As used in this Agreement, "**Investor Material Adverse Effect**" means any effect, change, event or occurrence that would prevent or materially delay, interfere with, hinder or impair (i) the consummation by such Investor of any of the transactions contemplated hereby on a timely basis or (ii) the material compliance by such Investor with its obligations under the Transaction Documents (as defined below).

(b) Authorization; Validity; Enforcement. If such Investor is not a natural person, such Investor has the requisite power and authority to enter into and perform its obligations under the Transaction Documents to which such Investor is a party. If such Investor is a natural person, such Investor has the authority to enter into and perform its obligations under the Transaction Documents to which such Investor is a party. The execution and delivery of this Agreement and the other applicable Transaction Documents to which such Investor is a party by such Investor and the consummation by such Investor of the transactions contemplated hereby and thereby have been duly authorized by such Investor. This Agreement and the other Transaction Documents to which such Investor is a party have been duly and validly authorized, executed and delivered on behalf of such Investor and shall constitute the legal, valid and binding obligations of such Investor enforceable against such Investor in accordance with their respective terms, except as such enforceability may be limited by general principles of equity or applicable bankruptcy, insolvency, reorganization, moratorium, liquidation and other similar laws relating to, or affecting generally, the enforcement of applicable creditors' rights and remedies.

(c) Consents. Such Investor is not required to obtain any consent, authorization or order of, or make any filing or registration with any court, governmental agency or any regulatory or self-regulatory agency or any other Person (as defined below) in order for it to execute, deliver or perform any of its obligations under or contemplated by the Transaction Documents, in each case in accordance with the terms hereof or thereof. All consents, authorizations, orders, filings and registrations which such Investor is required to obtain pursuant to the preceding sentence have been obtained or effected on or prior to the applicable Closing Date, and such Investor is unaware of any facts or circumstances that might prevent such Investor from obtaining or effecting any of the consent, registration, application or filings pursuant to the preceding sentence.

(d) Sufficient Funds. Such Investor has and, at the applicable Closing, will have available funds necessary to pay to the Company the applicable Purchase Price for its Purchased Shares and, as applicable, Warrant, as contemplated by Section 1(b).

(e) No Public Sale or Distribution. Such Investor is acquiring the Purchased Shares and, as applicable, Warrant for its own account and not with a view towards, or for resale in connection with, the public sale or distribution thereof, except pursuant to sales registered or exempted under the Securities Act; provided, however, that except as otherwise set forth in the Transaction Documents, by making the representations herein, such Investor does not agree to hold any of the Securities for any minimum or other specific term and reserves the right to dispose of the Securities at any time in accordance with or pursuant to a registration statement or an exemption under the Securities Act. Such Investor is acquiring the Securities hereunder in the ordinary course of its business. Such Investor does not presently have any agreement or understanding, directly or indirectly, with any Person (as defined below) to distribute any of the Securities. For purposes of this Agreement, "**Person**" means an individual, a limited liability company, a partnership, a joint venture, a corporation, a trust, an unincorporated organization, any other entity and any governmental entity or any department or agency thereof.

(f) Investor Status. At the time such Investor was offered the Securities it was, and as of the date hereof such Investor is, either a qualified institutional buyer (within the meaning of Rule 144A) or an "accredited investor" as that term is defined in Rule 501(a) of Regulation D satisfying the requirements set forth in the Investor Suitability Questionnaire in the form attached hereto as Exhibit D (the "**Investor Suitability Questionnaire**"). The information such Investor has or shall provide in the Investor Suitability Questionnaire is, or shall be, complete and accurate. Such Investor (i) has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of its prospective investment in the Securities and (ii) can bear the economic risk of (1) an investment in the Securities indefinitely and (2) a total loss in respect of such investment.

(g) Reliance on Exemptions. Such Investor understands that the Securities have not been registered under the Securities Act and are being offered and sold to it on the basis of the statutory exemption provided by Section 4(a)(2) under the Securities Act or Regulation D promulgated thereunder, or both, and that the Company is relying in part upon the truth and accuracy of, and such Investor's compliance with, the representations, warranties, agreements, acknowledgments and understandings of such Investor set forth herein in order to determine the availability of such exemptions and the eligibility of such Investor to acquire the Securities.

(h) Information. Such Investor and its advisors, if any, have been furnished with or have had full access to the Transaction Documents (including all exhibits and schedules thereto), and all materials relating to the business, finances and operations of the Company and materials relating to the offer and sale of the Securities that have been requested by such Investor. Such Investor and its advisors, if any, have been afforded the opportunity to ask questions of the Company or its representatives, it being understood that neither such inquiries nor any other due diligence investigations conducted by such Investor or its advisors, if any, or its representatives shall modify, amend or affect such Investor's right to rely on the Company's representations and warranties contained herein. Such Investor understands that its investment in the Securities involves a high degree of risk. Such Investor has sought such accounting, legal and tax advice as it has considered necessary to make an informed investment decision with respect to its acquisition of the Securities.

(i) Certain Transactions and Confidentiality. Other than consummating the transactions contemplated hereunder, the Investor has not, nor has any Person acting on behalf of or pursuant to any understanding with such Investor, directly or indirectly executed any purchases or sales, including short sales, of the securities of the Company during the period commencing as of the time that such Investor first received a term sheet (written or oral) from the Company or any other Person representing the Company setting forth the material terms of the transactions contemplated hereunder and ending immediately prior to the execution hereof. Notwithstanding the foregoing, in the case of an Investor that is a multi-managed investment vehicle whereby separate portfolio managers manage separate portions of such Investor's assets and the portfolio managers have no direct knowledge of the investment decisions made by the portfolio managers managing other portions of such Investor's assets, the representation set forth above shall only apply with respect to the portion of assets managed by the portfolio manager that made the investment decision to purchase the Securities covered by this Agreement. Other than to other Persons party to this Agreement or to such Investor's representatives, including, without limitation, its officers, directors, partners, legal and other advisors, employees, agents and Affiliates, such Investor has maintained the confidentiality of all disclosures made to it in connection with this transaction (including the existence and terms of this transaction). Notwithstanding the foregoing, for the avoidance of doubt, nothing contained herein shall constitute a representation or warranty against, or a prohibition of, any actions with respect to the borrowing of, arrangement to borrow, identification of the availability of, and/or securing of, securities of the Company in order for such Investor (or its broker or other financial representative) to effect short sales or similar transactions in the future.

(j) No Governmental Review. Such Investor understands that no United States federal or state agency or any other government or governmental agency has passed on or made any recommendation or endorsement of the Securities or the fairness or suitability of the investment in the Securities nor have such authorities passed upon or endorsed the merits of the offering of the Securities.

(k) General Solicitation. Investor became aware of this offering of the Securities solely by means of direct contact between the Investor and the Company and, to such Investor's knowledge, neither such Investor nor any of its officers, directors, employees, agents, representatives, stockholders or partners has been offered an opportunity to purchase the Securities through any form of general solicitation or advertising, including but not limited to: (i) any advertisement, article, notice or other communication published in any newspaper, magazine or similar media or broadcast over television or radio or (ii) any seminar or meeting whose attendees were invited by any general solicitation or general advertising.

(l) Brokers; Finders. No broker, investment banker, financial advisor or other Person is entitled to any broker's, finder's, financial advisors or other similar fee or commission, or the reimbursement of expenses in connection therewith, in connection with the transactions contemplated by the Transaction Documents based upon arrangements made by or on behalf of such Investor.

(m) No Conflicts. The execution, delivery and performance by such Investor of this Agreement and the other Transaction Documents to which such Investor is a party and the consummation by such Investor of the transactions contemplated hereby and thereby will not (i) if such Investor is not a natural person, result in a violation of the organizational documents of such Investor or (ii) conflict with, or constitute a default (or an event which with notice or lapse of time or both would become a default) in any respect under, or give to others any rights of termination, amendment, acceleration or cancellation of, any agreement, indenture or instrument to which such Investor is a party, or (iii) result in a violation of any law, rule, regulation, order, judgment or decree (including foreign, federal and state securities laws and regulations and applicable laws of any foreign, federal, and other state laws) applicable to such Investor or by which any property or asset of such Investor is bound or affected, in each case other than (in the cases of clauses (ii) and (iii)) such other consents, approvals, filings, licenses, permits or authorizations, declarations or registrations that, if not obtained, made or given, would not, individually or in the aggregate, reasonably be expected to have an Investor Material Adverse Effect.

4. REPRESENTATIONS AND WARRANTIES OF THE COMPANY.

The Company represents and warrants to each of the Investors that, except as disclosed in all reports, schedules, forms, statements and other documents (including all exhibits included therein and amendments, financial statements, notes and schedules thereto) filed by it with, or furnished by it to, the SEC (all of the foregoing filed or furnished, and all exhibits included therein and amendments, financial statements, notes and schedules thereto and documents incorporated by reference therein being hereinafter referred to as the "**SEC Documents**"):

(a) Organization and Qualification. Each of the Company and its subsidiaries listed in Exhibit 21.1 to the Company's Form 10-K for the fiscal year ended December 31, 2022 (such entities, the "**Subsidiaries**") is duly organized and validly existing and in good standing under the laws of the jurisdiction in which it was formed, and has the requisite power and authorization to own its properties and to carry on its business as now being conducted and as presently proposed to be conducted, except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect (as defined below). Each of the Company and its Subsidiaries is duly qualified as a foreign entity to do business and is in good standing in every jurisdiction in which its ownership of property or the nature of the business conducted by it makes such qualification necessary, except to the extent that the failure to be so qualified or be in good standing would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. As used in this Agreement, "**Material Adverse Effect**" means any event, change, development, circumstance, condition, state of facts or occurrence that individually or in the aggregate is, or would reasonably be expected to be, materially adverse to (i) the business, properties, results of operations or financial condition of the Company and its Subsidiaries, taken as a whole, or (ii) the Company's ability to consummate any of the transactions contemplated hereby, or (iii) the authority or ability of the Company to perform its obligations under the Transaction Documents.

(b) Authorization; Enforcement; Validity. The Company has the requisite corporate power and authority to enter into and, subject to the receipt of the Required Approvals (as defined below), perform its obligations under this Agreement, the Certificate of Designations and the Warrants (collectively, the "**Transaction Documents**"). The execution and delivery of the Transaction Documents by the Company and the consummation by the Company of the transactions contemplated hereby and thereby, including, without limitation, the issuance of the shares of Series A Preferred Stock and the Warrants and the reservation for issuance and issuance of the PIK Shares, Conversion Shares and Warrant Shares, have been duly authorized by the board of directors of the Company (the "**Board**") and, other than the Required Approvals, no further filing, consent, or further authorization is required by the Company, the Board or its stockholders to issue the Securities. This Agreement has been duly executed and delivered by the Company, and constitutes the legal, valid and binding obligations of the Company, enforceable against the Company in accordance with its terms, except as such enforceability may be limited by general principles of equity or applicable bankruptcy, insolvency, reorganization, moratorium, liquidation or similar laws relating to, or affecting generally, the enforcement of applicable creditors' rights and remedies. The Certificate of Designations shall be filed on the date hereof, prior to the issuance of any shares of Series A Preferred Stock, with the Secretary of State of the State of Delaware pursuant to Section 7(g) and, as of such filing, shall be in full force and effect on the applicable Closing Date.

(c) Issuance of Securities. When shares of Series A Preferred Stock are issued in accordance with the terms of this Agreement, such shares of Series A Preferred Stock will be validly issued, fully paid and non-assessable and free from all preemptive or similar rights, taxes, liens, charges and other encumbrances with respect to the issue thereof, with the holders thereof being entitled to the rights and preferences set forth in the Certificate of Designations. The Warrants, when issued and paid for in accordance with the applicable Transaction Documents, will be valid and binding obligations of the Company, enforceable against the Company in accordance with their terms, except to the extent that (i) enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general equitable principles and (ii) the indemnification provisions of certain agreements may be limited by federal or state securities laws or public policy considerations in respect thereof. Upon issuance of the PIK Shares and the conversion of Series A Preferred Stock in accordance with the Certificate of Designations and upon issuance of the Warrant Shares once paid for and issued in accordance with the terms of the Warrants, the applicable PIK Shares, Conversion Shares and Warrant Shares will be validly issued, fully paid and nonassessable and free from all preemptive or similar rights, taxes, liens, charges and other encumbrances with respect to the issue thereof, with the holders being entitled to all rights accorded to a holder of Common Stock. Assuming in part the accuracy of each of the representations and warranties of the Investors set forth in Section 3 of this Agreement, no registration under the Securities Act is required for the offer and sale of the Series A Preferred Stock and Warrants or the issuance of the PIK Shares or Conversion Shares by the Company to the Investors in the manner contemplated by this Agreement and the Certificate of Designations.

(d) No Conflicts. The execution, delivery and performance of the Transaction Documents by the Company, and the consummation by the Company of the transactions contemplated hereby and thereby (including, without limitation, the issuance of Series A Preferred Stock, the Warrants, the PIK Shares, the Conversion Shares and the Warrant Shares), will not (i) result in a violation of the Company's Amended and Restated Certificate of Incorporation, as amended and as in effect on the applicable Closing Date (the "**Certificate of Incorporation**"), or the Company's Amended and Restated Bylaws, as amended and as in effect on the applicable Closing Date (the "**Bylaws**"), or (ii) conflict with, or constitute a default (or an event which with notice or lapse of time or both would become a default) in any respect under, or give to others any rights of termination, amendment, acceleration or cancellation of, any agreement, indenture or instrument to which the Company is a party, or (iii) subject to the Required Approvals, result in a violation of any law, rule, regulation, order, judgment or decree (including foreign, federal and state securities laws and regulations and the rules and regulations of The Nasdaq Global Market (the "**Principal Market**") and applicable laws of the State of Delaware and any foreign, federal, and other state laws) applicable to the Company or any of its Subsidiaries or by which any property or asset of the Company or any of its Subsidiaries is bound or affected, in each case other than such other violations, conflicts, defaults or rights that would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(e) Consents. The Company is not required to obtain any consent, authorization or order of, or make any filing or registration with (other than (i) the filing with the SEC of a Form D (if applicable), (ii) the filing with the SEC of Current Reports on Form 8-K disclosing the material terms of the transactions contemplated hereby, (iii) the notice and/or application to the Principal Market for the issuance and sale of the Securities and the listing of the Conversion Shares, (iv) the Stockholder Approval, (v) one or more Registration Statements in accordance with the requirements of the Registration Rights granted pursuant to Section 8, (vi) such other filings as may be required by state securities agencies and (vii) the filing of the Certificate of Designations with the Secretary of State for the State of Delaware (collectively, the "**Required Approvals**")), any court, governmental agency or any regulatory or self-regulatory agency in order for it to execute, deliver or perform any of its obligations under or contemplated by the Transaction Documents, in each case in accordance with the terms hereof or thereof and other than such other consents, approvals, filings, licenses, permits or authorizations, declarations or registrations (1) that have been obtained or effected on or prior to the applicable Closing Date (or in the case of the filings detailed above, will be made timely after the applicable Closing Date) or (2) that, if not obtained, made or given, would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. The Company is in compliance in all material respects with the listing and listing maintenance requirements of the Principal Market applicable to it for the continued trading of its Common Stock on the Principal Market and has no knowledge of any facts or circumstances that are reasonable likely to occur, or would reasonably be expected, to lead to delisting or suspension of the Common Stock from the Principal Market.

(f) No General Solicitation; Placement Agent's Fees. Neither the Company, nor any of its Subsidiaries, to the knowledge of the Company, nor any Person acting on its or their behalf, has engaged in any form of general solicitation or general advertising (within the meaning of Regulation D) in connection with the offer or sale of the Securities, including but not limited to: (i) any advertisement, article, notice or other communication published in any newspaper, magazine or similar media or broadcast over television or radio or (ii) any seminar or meeting whose attendees were invited by any general solicitation or general advertising.

(g) Brokers; Finders. No broker, investment banker, financial advisor or other Person is entitled to any broker's, finder's, financial advisors or other similar fee or commission, or the reimbursement of expenses in connection therewith, in connection with the transactions contemplated by the Transaction Documents based upon arrangements made by or on behalf of such the Company.

(h) No Integrated Offering. Neither the Company nor any of its Subsidiaries, nor, to the knowledge of the Company, any Person acting on its or their behalf has, directly or indirectly, made any offers or sales of any security or solicited any offers to buy any security, under circumstances that would cause the offering or the issuance of the Purchased Share or the Warrants under this Agreement to be integrated with prior offerings by the Company, for purposes of the Securities Act, in a manner that would cause neither Regulation D nor any other applicable exemption from registration under the Securities Act to be available, or that would cause this offering of the Securities to require the approval of the stockholders of the Company for purposes of the Securities Act or any applicable stockholder approval provisions, including, without limitation, under the rules and regulations of the Principal Market, other than the Stockholder Approval.

(i) SEC Documents; Financial Statements; No Undisclosed Liabilities. Since January 1, 2023, the Company has timely filed (giving effect to permissible extensions in accordance with Rule 12b-25 under the Exchange Act) all the SEC Documents required to be filed by it with the SEC pursuant to the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). As of their respective filing dates (or, if amended prior to the date hereof, the date of the filing of such amendment, with respect to the disclosures that are amended), the SEC Documents complied in all material respects with the requirements of the Exchange Act (and the rules and regulations of the SEC promulgated thereunder) applicable to the SEC Documents. As of their respective filing dates, the financial statements of the Company included in the SEC Documents complied as to form in all material respects with applicable accounting requirements and the published rules and regulations of the SEC with respect thereto as in effect as of the time of filing. Such financial statements have been prepared in accordance with United States generally accepted accounting principles, consistently applied, during the periods involved ("**GAAP**") (except (i) as may be otherwise indicated in such financial statements or the notes thereto, (ii) in the case of unaudited interim statements, to the extent they may exclude footnotes or may be condensed or summary statements or (iii) as otherwise permitted by Regulation S-X and the other rules and regulations of the SEC) and fairly present in all material respects the financial position of the Company and its Subsidiaries as of the dates thereof and the results of its operations and cash flows for the periods then ended (subject, in the case of unaudited statements, to normal year-end audit adjustments).

(j) Absence of Certain Changes. Subsequent to January 1, 2023, except for the execution and performance of this Agreement and the discussions, negotiations and transactions related thereto, the business of the Company and its Subsidiaries has been carried on and conducted in all material respects in the ordinary course of business and there has not been any Material Adverse Effect or any event, change or occurrence that would, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. Neither the Company nor any of its Subsidiaries has taken any steps to seek protection pursuant to any law or statute relating to bankruptcy insolvency, reorganization, receivership, liquidation or winding up nor does the Company or any Subsidiary have any knowledge or reason to believe that any of its respective creditors intend to initiate involuntary bankruptcy proceedings or any actual knowledge of any fact that would reasonably lead a creditor to do so.

(k) Permits. The Company and its Subsidiaries possess all permits, franchises, certificates, approvals, authorizations and licenses of governmental authorities that are required to conduct their business, except as has not had, and would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(l) Transactions With Affiliates. Other than the transactions contemplated by the Transaction Documents and except as disclosed in the SEC Documents, none of the officers, directors or employees of the Company or any of its Subsidiaries is presently a party to any transaction with the Company or any of its Subsidiaries (other than for ordinary course services as employees, officers or directors), including any contract, agreement or other arrangement providing for the furnishing of services to or by, providing for rental of real or personal property to or from, or otherwise requiring payments to or from any such officer, director or employee or, to the knowledge of the Company, any corporation, partnership, trust or other entity in which any such officer, director, or employee has a substantial interest or is an officer, director, employee, trustee or partner, in each case that would require disclosure under Item 404 of Regulation S-K under the Exchange Act in an SEC filing made by the Company (if such filing were being made on the date hereof).

(m) Equity Capitalization; Preferential Rights. The authorized capital stock of the Company and the shares thereof issued and outstanding were as set forth in the SEC Documents as of the dates reflected therein. All of such outstanding shares have been validly issued and are fully paid and nonassessable. As of the Initial Closing Date, (i) the Series A Preferred Stock shall rank senior to all capital stock of the Company and (ii) there will be no Pari Passu Stock or stock that is senior in rank to the Series A Preferred Stock in respect of the preferences as to dividends and other distributions, redemption payments and payments upon a Liquidation Event (each as defined in the Certificate of Designations) as of such Closing Date. Except as disclosed in the SEC Documents: (1) none of the Company's capital stock is subject to preemptive rights or any other similar rights or any liens or encumbrances suffered or permitted by the Company; (2) there are no outstanding options, warrants, scrip, rights to subscribe to, calls or commitments of any character whatsoever relating to, or securities or rights convertible into, or exercisable or exchangeable for, any shares of capital stock of the Company or any of its Subsidiaries, or contracts, commitments, understandings or arrangements by which the Company or any of its Subsidiaries is or may become bound to issue additional shares of capital stock of the Company or any of its Subsidiaries or options, warrants, scrip, rights to subscribe to, calls or commitments of any character whatsoever relating to, or securities or rights convertible into, or exercisable or exchangeable for, any shares of capital stock of the Company or any of its Subsidiaries; (iii) there are no agreements or arrangements under which the Company or any of its Subsidiaries is obligated to register the sale of any of their securities under the Securities Act (except pursuant to Section 8); (iv) there are no outstanding securities or instruments of the Company or any of its Subsidiaries which contain any redemption or similar provisions, and there are no contracts, commitments, understandings or arrangements by which the Company or any of its Subsidiaries is or may become bound to redeem a security of the Company or any of its Subsidiaries; (v) there are no securities or instruments containing anti-dilution or similar provisions that will be triggered by the issuance of the Securities; and (vi) neither the Company nor any Subsidiary has any stock appreciation rights or "phantom stock" plans or agreements or any similar plan or agreement.

(n) Indebtedness. Neither the Company nor any Subsidiary is in default under or in violation of (and no event is occurring that has not been waived that, with notice or lapse of time or both, would result in a default by the Company or any Subsidiary under), nor has the Company or any Subsidiary received notice of a claim that it is in default under or that it is in violation of, any indenture, loan or credit agreement or any other agreement or instrument to which it is a party or by which it or any of its properties is bound (whether or not such default or violation has been waived), except as would not have or reasonably be expected to result in a Material Adverse Effect.

(o) Absence of Litigation. The Company has received no written notice of any action, suit, proceeding, inquiry or investigation before or by the Principal Market, any court, public board, government agency, self-regulatory organization or body pending or, to the knowledge of the Company, threatened against or affecting the Company or any of its Subsidiaries, the Common Stock or any of the Company's or its Subsidiaries' officers or directors, whether of a civil or criminal nature or otherwise, in their capacities as such, except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(p) Insurance. The Company and each of its Subsidiaries are insured by insurers of recognized financial responsibility against such losses and risks and in such amounts (a) as management of the Company believes to be prudent and customary in the businesses in which the Company and its Subsidiaries are engaged, and (b) as are required by any contract to which the Company and each of its Subsidiaries is a party except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. Neither the Company nor any such Subsidiary has any reason to believe that it will not be able to renew its existing insurance coverage as and when such coverage expires or to obtain similar coverage from similar insurers as may be necessary to continue its business, in each case, at a cost that would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(q) Absence of Labor Dispute. No labor dispute exists or, to the knowledge of the Company, is imminent with respect to any of the employees of the Company or any Subsidiary, which would reasonably be expected to result in a Material Adverse Effect.

(r) Title. The Company and its Subsidiaries have good and marketable title to all real property owned by them, and good and marketable title to all personal property owned by them which is material to the business of the Company and its Subsidiaries, in each case free and clear of all liens, encumbrances and defects except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. Any real property and facilities held under lease by the Company or any of its Subsidiaries are held by them under valid, subsisting and enforceable leases except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(s) Intellectual Property. The Company and its Subsidiaries own or possess adequate rights or licenses to use all trademarks, trade names, service marks, service mark registrations, service names, original works of authorship, patents, patent rights, copyrights, inventions, licenses, approvals, governmental authorizations, trade secrets and other intellectual property rights described in the SEC Documents as being owned or licensed by them or which is necessary to conduct their respective businesses as now conducted ("**Intellectual Property**"), except where failure to own or possess such rights would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. To the Company's knowledge, (i) there is no existing infringement by third parties of any Intellectual Property; (ii) there is no pending or threatened action, suit, proceeding or claim by others challenging the Company's rights in or to any Intellectual Property; (iii) there is no pending or threatened action, suit, proceeding or claim by others challenging the validity, enforceability or scope of any Intellectual Property; (iv) there is no pending or threatened action, suit, proceeding or claim by others that the Company infringes or otherwise violates, or would, upon the commercialization of any product or service described in the SEC Documents as under development, infringe or violate, any patent, trademark, tradename, service name, copyright, trade secret or other proprietary rights of others; (v) the Company has materially complied with the terms of each agreement pursuant to which Intellectual Property has been licensed to the Company, and all such agreements are in full force and effect; (vi) there is no patent or patent application that contains claims that interfere with the issued or pending claims of any of the Intellectual Property or that challenges the validity, enforceability or scope of any of the Intellectual Property; and (vii) there is no prior art that may render any patent application within the Intellectual Property unpatentable that has not been disclosed to the U.S. Patent and Trademark Office or of which the Company is otherwise aware. The Company and its Subsidiaries have taken reasonable security measures to protect the secrecy, confidentiality and value of all of their Intellectual Property, except where failure to do so would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(t) Environmental Laws. The Company and its Subsidiaries (i) are in compliance with any and all Environmental Laws (as hereinafter defined), (ii) have obtained all permits, licenses or other approvals required of them under applicable Environmental Laws to conduct their respective businesses and (iii) are in compliance with all terms and conditions of any such permit, license or approval, except where, in each of the foregoing clauses (i), (ii) and (iii), the failure to so comply or the failure to obtain such permit, license or approval would, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. The term "**Environmental Laws**" means all federal, state, local or foreign laws relating to human health (to the extent related to exposure to Hazardous Materials (as hereinafter defined)), pollution or protection of the environment (including, without limitation, ambient air, surface water, groundwater, land surface or subsurface strata), including, without limitation, laws relating to emissions, discharges, releases or threatened releases of pollutants, contaminants, or toxic or hazardous substances or wastes (collectively, "**Hazardous Materials**") into the environment, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of Hazardous Materials, as well as all codes, decrees, injunctions, judgments, orders, or regulations issued, entered, promulgated or approved thereunder.

(u) Investment Company Status. The Company is not, and immediately after receipt of payment for the Securities, will not be, required to register as an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

(v) Tax Status. The Company and each of its Subsidiaries (i) has timely and properly made or filed all U.S. federal, state and foreign tax returns, reports and declarations (including, without limitation, any information returns and any required schedules or attachments thereto) required to be filed by any jurisdiction to which it is subject and (ii) has timely paid all taxes and other governmental assessments and charges, except those being contested in good faith by appropriate proceedings and for which adequate reserves have been established, except where the failure to so file or pay would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. The Company has no knowledge of any unpaid taxes in any material amount claimed to be due by the taxing authority of any jurisdiction.

(w) Compliance with Anti-Money Laundering Laws. The operations of the Company and its Subsidiaries are and have been conducted at all times in compliance with all applicable U.S. and non-U.S. anti-money laundering laws, rules and regulations, including, but not limited to, the Currency and Foreign Transactions Reporting Act of 1970, as amended, the United States Bank Secrecy Act, as amended by the USA PATRIOT Act of 2001, and the United States Money Laundering Control Act of 1986 (18 U.S.C. §§1956 and 1957), and the implementing rules and regulations promulgated thereunder (collectively, the "**Anti-Money Laundering Laws**"), except where failure to be in compliance would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(x) No Conflicts with Sanctions Laws. Neither the Company nor any Subsidiary nor, to the Company's knowledge, any director, officer, agent, employee or affiliate of the Company or any Subsidiary is currently subject to any "**Sanctions**," which shall include but are not limited to any U.S. sanctions administered by the Office of Foreign Assets Control of the U.S. Treasury Department ("**OFAC**") and the Company will not, directly or indirectly, use the proceeds from the sale of the Securities, or lend, contribute or otherwise make available such proceeds to any subsidiary, joint venture partner or other person or entity, for the purpose of financing the activities of any person known by the Company to currently be subject to any Sanctions, including but not limited to U.S. sanctions administered by OFAC.

(y) Anti-Bribery. Neither the Company nor any of its Subsidiaries, nor, to the Company's knowledge, any director, officer, employee, or agent thereof, in each case acting in their capacity as such, has, within the last five (5) years, either directly or indirectly through any third party, (i) made, promised, offered or authorized any unlawful payment or gift to or for the benefit of any foreign or domestic government official or employee, political party or candidate for political office; (ii) violated or is in violation of the U.S. Foreign Corrupt Practices Act of 1977, as amended ("**FCPA**") or any other anti-bribery or anti-corruption law of any other jurisdiction in which the Company operates its business, including, in each case, the rules and regulations thereunder (the "**Anti-Bribery Laws**"), or (iii) otherwise made any unlawful bribe, payoff, influence payment, or kickback in violation of Anti-Bribery Laws; the Company has instituted and has maintained policies and procedures reasonably designed to promote and achieve material compliance with the Anti-Bribery Laws; neither the Company nor any of its Subsidiaries will, directly or indirectly, use the proceeds of the Securities or lend, contribute or otherwise make available such proceeds to finance or facilitate any activity that would violate any Anti-Bribery Law. No action, suit, investigation, or proceeding by or before any court or governmental agency, authority or body or involving the Company or any of its Subsidiaries with respect to the Anti-Money Laundering Laws, the Sanctions, or the Anti-Bribery Laws is pending or, to the knowledge of the Company, threatened.

(z) Sarbanes-Oxley; Internal Accounting Controls. Except as set forth in the SEC Documents, the Company and the Subsidiaries are in compliance with any and all applicable requirements of the Sarbanes-Oxley Act of 2002 that are effective as of the date hereof, and any and all applicable rules and regulations promulgated by the SEC thereunder that are effective as of the date hereof and as of the applicable Closing.

(aa) Disclosure to Investors. All of the disclosure furnished by or on behalf of the Company to the Investors regarding the Company and its Subsidiaries, their respective businesses and the transactions contemplated hereby is true and correct and does not contain any untrue statement of a material fact. The press releases disseminated by the Company since January 1, 2023 taken as a whole do not contain any untrue statement of a material fact or omit 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 and when made, not misleading.

(bb) Accountants. The Company's accounting firm is set forth in the SEC Documents. To the knowledge and belief of the Company, the accounting firm: (i) is a registered public accounting firm as required by the Exchange Act, and (ii) shall be able to express its opinion with respect to the financial statements to be included in the Company's Annual Report for the fiscal year ending December 31, 2023.

(cc) Disagreements with Accountants and Lawyers. Assuming the fees to be paid in connection with the applicable Closing have been, or will be paid in connection with such Closing, there are no material disagreements presently existing, or reasonably anticipated by the Company to arise, between the Company and the accountants and lawyers formerly or presently employed by the Company, and the Company is current with respect to any fees owed to its accountants and lawyers which could affect the Company's ability to perform any of its obligations under any of the Transaction Documents.

(dd) Regulation M Compliance. The Company has not, and no one acting on its behalf has, (i) taken, directly or indirectly, any action designed to cause or to result in the stabilization or manipulation of the price of any security of the Company to facilitate the sale or resale of any of the Securities, (ii) sold, bid for, purchased, or paid any compensation for soliciting purchases of, any of the Securities, or (iii) paid or agreed to pay to any Person any compensation for soliciting another to purchase any other securities of the Company.

5. COVENANTS.

(a) Commercially Reasonable Efforts. Each party shall use its commercially reasonable efforts to timely satisfy each of the covenants and the conditions to be satisfied by it as provided in Sections 6 and 7 of this Agreement.

(b) Voting Support Agreements. The Company shall use its commercially reasonable efforts to enter into, at or prior to the Initial Closing Date, voting support agreements with stockholders of the Company representing a majority of the outstanding Common Stock as of the date hereof (the "**Supporting Stockholders**") in substantially the form attached hereto as Exhibit C (together, the "**Voting Support Agreements**").

(c) Non-Conversion Covenant for Directors and Officers. Unless and until Stockholder Approval has been obtained by the Company, each director or officer of the Company that is an Investor or that beneficially owns or controls an entity that is an Investor agrees not to convert or cause such Investor to convert (in whole or in part) any shares of Series A Preferred Stock held by such Investor into Common Stock.

(d) Form D and Blue Sky. The Company agrees to file a Form D with respect to the Securities if required under Regulation D and shall provide a copy thereof to any Investor promptly upon such Investor's request. Following the applicable Closing Date, the Company shall make all filings and reports relating to the offer and sale of the Securities required under applicable securities or "Blue Sky" laws of the states of the United States.

(e) Furnishing of Information; Reporting Status. The Company shall use commercially reasonable efforts to timely file (or obtain extensions in respect thereof and file within the applicable grace period) all reports required to be filed with the SEC pursuant to the Exchange Act, so long as the Company is then subject to the reporting requirements of the Exchange Act.

(f) Use of Proceeds. The Company shall use the proceeds from the sale of the Offered Securities and the Warrants solely for general working capital.

(g) Fees. At the Initial Closing, the Company shall reimburse SMC Holdings II, LP (the "**Lead Investor**") and Intrepid Capital Management, Inc. ("**Intrepid**") for all their respective reasonable and documented fees and out-of-pocket expenses actually incurred in connection with the transactions contemplated hereby, up to an aggregate amount of $30,000 for the Lead Investor and up to an aggregate amount of $15,000 for Intrepid (collectively, the "**Reimbursement Cap**"), which payment will be made by the Company at the Initial Closing. Except as otherwise set forth in the Transaction Documents, each party to this Agreement shall bear its own expenses in connection with the sale of the Securities to the Investors.

(h) Disclosure of Transactions. The Company shall (a) no later than 9:00 a.m., New York City time, on the first (1st) Business Day after the Initial Closing Date, publicly disclose the terms of the transactions contemplated by the Transaction Documents, and (b) file a Current Report on Form 8-K, including the required Transaction Documents as exhibits thereto, with the SEC within the time required by the Exchange Act. From and after the issuance of such public disclosure of the terms of the transaction, the Company represents to the Investors who are not director or officers of the Company that the Company shall have publicly disclosed all material, non-public information delivered to any of the Investors who are not director or officers of the Company by the Company or any of its Subsidiaries, or any of their respective officers, directors, employees or agents in connection with the transactions contemplated by the Transaction Documents. The Company and each Investor shall consult with each other in issuing any other press releases with respect to the transactions contemplated hereby, and neither the Company nor any Investor shall issue any such press release nor otherwise make any such public statement without the prior consent of the Company, with respect to any press release of any Investor, or without the prior consent of each Investor, with respect to any press release of the Company, which consent shall not unreasonably be withheld or delayed, except if such disclosure is required by law, in which case the disclosing party shall promptly provide the other party with prior notice of such public statement or communication. The Company shall not, and shall cause each of its Subsidiaries and its and each of their respective officers, directors, employees, affiliates and agents, not to, provide any Investor that is not a director, officer or employee of the Company (or is not an affiliate of any director, officer or employee of the Company) with any material, nonpublic information regarding the Company or any of its Subsidiaries in respect of the offering of the Securities from and after the date hereof without the express prior written consent of such Investor. If an Investor has, or believes it has, received any such material, nonpublic information regarding the Company or any of its Subsidiaries in respect of the offering of the Securities from the Company, any of its Subsidiaries or any of their respective officers, directors, employees, affiliates or agents, it may provide the Company with written notice thereof. The Company shall, within two (2) full Trading Days of receipt of such notice, unless the Company reasonably objects to such information being material, nonpublic information of the Company or any of its Subsidiaries, make public disclosure of such material, nonpublic information. No Investor shall have any liability to the Company, its Subsidiaries, or any of its or their respective officers, directors, employees, affiliates, stockholders or agents for any such disclosure. To the extent that the Company delivers any material, nonpublic information to an Investor in respect of the offering of the Securities without such Investor's consent at any time that Investor is not a director, officer or employee of the Company (or is not an affiliate of any director, officer or employee of the Company), the Company hereby covenants and agrees that such Investor shall not have any duty of confidentiality to the Company, any of its Subsidiaries or any of their respective officers, directors, employees, affiliates or agent with respect to, or a duty to the Company, any of its Subsidiaries or any of their respective officers, directors, employees, affiliates or agent not to trade on the basis of, such material, nonpublic information. Notwithstanding the foregoing, the Company shall not publicly disclose the name of any Investor, or include the name of any Investor in any filing with the SEC or any regulatory agency or Trading Market, without the prior written consent of such Investor, except: (a) as required by federal securities law in connection with the filing of final Transaction Documents with the SEC and (b) to the extent such disclosure is required by law or Trading Market regulations, in which case the Company shall provide the Investor with prior notice of such disclosure permitted under this clause (b).

(i) Legends. The book-entry accounts maintained by the Company's transfer agent representing the Series A Preferred Stock and, subject to the provisions of the Certificate of Designations and Section 8 hereof, the PIK Shares, the Conversion Shares and the Warrant Shares shall bear a restrictive legend in substantially the following form (and a stop-transfer order may be placed against transfer of such Securities bearing such legend):

> NEITHER THE ISSUANCE AND SALE OF THESE SECURITIES NOR THE SECURITIES INTO WHICH THESE SECURITIES ARE CONVERTIBLE HAVE BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR APPLICABLE STATE SECURITIES LAWS. THE SECURITIES MAY NOT BE OFFERED FOR SALE, SOLD, TRANSFERRED OR ASSIGNED IN THE ABSENCE OF AN EFFECTIVE REGISTRATION STATEMENT FOR THE SECURITIES UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), OR PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE ACT.

(j) Stockholder Approval. Within sixty (60) calendar days after the Initial Closing Date, the Company shall use commercially reasonable efforts to file with the SEC a definitive proxy statement, at the expense of the Company, for a meeting (special or otherwise) of holders of Common Stock (the "**Stockholder Meeting**") to be held within ninety (90) calendar days after the Initial Closing Date, soliciting each such stockholder's affirmative vote at the Stockholder Meeting for approval of resolutions providing for the Company's issuance of Common Stock (including, to the maximum extent allowable under the rules and regulations of the Principal Market, issuances of Conversion Shares, PIK Shares and Warrant Shares, taking into consideration the adjustment clauses set forth in Section 9 of the Certificate of Designations) in excess of the Exchange Cap (as defined in the Certificate of Designations) in accordance with applicable law and the rules and regulations of the Principal Market without giving effect to any limitation on conversions of the Series A Preferred Stock or on the exercise of the Warrants (such affirmative approval being referred to herein collectively as the "**Stockholder Approval**"), and the Company shall use commercially reasonable efforts to solicit its stockholders' approval of such resolutions in connection with the Stockholder Approval.

(k) No Integrated Offering. The Company and its Subsidiaries will not take any action or step that would reasonably be expected to cause the offering of any of the Series A Preferred Stock or Warrants to be integrated with other offerings by the Company for purposes of the Securities Act.

(l) Nasdaq Listing. At or prior to the applicable Closing, the Company shall have applied to cause the PIK Shares, Conversion Shares and Warrant Shares issuable in respect of the Offered Shares and Warrants issued at such Closing to be approved for listing on the Principal Market, subject to the Company obtaining Stockholder Approval and delivery of official notice of issuance. The Company shall provide timely notice to the Principal Market of the issuance of the Securities following the applicable Closing Date.

(m) Reservation of Common Stock. At or prior to the applicable Closing Date, the Company shall have reserved, free of preemptive rights, a sufficient number of shares of Common Stock to meet the Series A Preferred Required Reserve Amount and the Warrant Required Reserve Amount with respect to the Conversion Shares, PIK Shares and Warrant Shares issuable in respect of the Series A Preferred Stock and Warrants issued at such Closing (collectively, the "**Reserve**"), which Reserve shall be increased at each Closing Date to reflect the incremental Series A Preferred Stock and Warrants issued at such Closing Date.

(n) Exchange Agreement. The Company and each Noteholder Investor agree to enter into the Exchange Agreement as soon as practicable following the date hereof.

6. CONDITIONS TO THE COMPANY'S OBLIGATION TO SELL.

The obligation of the Company hereunder to issue and sell the applicable Purchased Shares and, as applicable, Warrants to each Investor at the applicable Closing, is subject to the satisfaction, at or before the applicable Closing Date of each of the following conditions, provided that these conditions are for the Company's sole benefit and may be waived (in whole or in part) by the Company at any time in its sole discretion by providing each Investor with prior written notice thereof:

(a) Such Investor shall have delivered its applicable Purchase Price to the Company for the shares of Series A Preferred Stock and any Warrant being purchased by such Investor at the applicable Closing by wire transfer of immediately available funds pursuant to the wire instructions provided by the Company.

(b) The representations and warranties of such Investor shall be true and correct in all respects on and as of the applicable Closing Date with the same effect as though such representations and warranties had been made on and as of the applicable Closing Date (except for representations and warranties that speak as of a specific date other than the applicable Closing Date, which shall be true and correct in all material respects as of such specified date).

(c) Such Investor shall have delivered to Company a completed and executed Investor Suitability Questionnaire.

(d) Such Investor shall have performed, satisfied and complied in all material respects with the covenants, agreements and conditions required by this Agreement to be performed, satisfied or complied with by such Investor at or prior to the applicable Closing Date.

(e) Such Investor shall have executed and delivered such additional documents and certificates and take such additional actions as may be reasonably requested by the Company for the purposes of consummating the transactions contemplated by this Agreement.

7. CONDITIONS TO EACH INVESTOR'S OBLIGATION TO PURCHASE.

The obligation of each Investor hereunder to purchase its Purchased Shares and, as applicable, Warrant at the applicable Closing is subject to the satisfaction, at or before the applicable Closing Date of each of the following conditions, provided that these conditions are for each Investor's sole benefit and may be waived (in whole or in part) by such Investor at any time in its sole discretion by providing the Company with prior written notice thereof:

(a) The Company shall have delivered an instruction letter to its transfer agent instructing the Company's transfer agent to (i) issue the number of Purchased Shares to each Investor as set forth in Annex A hereto, (ii) create the Reserve applicable to the applicable Closing.

(b) The Company shall have delivered to the Investor true, complete and correct copies of the Voting Support Agreements, each executed by the Company and the relevant Supporting Stockholder party thereto.

(c) For each Closing other than the Initial Closing, the Company shall have delivered to such Investor a certificate, executed by the Chief Executive Officer or the Chief Financial Officer of the Company and dated as of the applicable Closing Date, certifying that the Company has performed, satisfied and complied in all material respects (or, to the extent representations or warranties are qualified by materiality or Material Adverse Effect, in all respects) with the covenants, agreements and conditions required by the Transaction Documents to be performed, satisfied or complied with by the Company at or prior to the applicable Closing Date.

(d) The representations and warranties of the Company shall be true and correct in all respects on and as of the applicable Closing Date with the same effect as though such representations and warranties had been made on and as of the applicable Closing Date (except for representations and warranties that speak as of a specific date other than the applicable Closing Date, which shall be true and correct in all material respects as of such specified date).

(e) The Company shall have performed, satisfied and complied in all material respects with the covenants, agreements and conditions required by the Transaction Documents to be performed, satisfied or complied with by the Company at or prior to the applicable Closing Date.

(f) The Common Stock (i) shall be designated for quotation or listed on the Principal Market and (ii) shall not, on the applicable Closing Date, be suspended by the SEC or the Principal Market from trading on the Principal Market.

(g) The Certificate of Designations shall have been filed with the Secretary of State of the State of Delaware and shall be in full force and effect.

(h) The Company shall have executed and delivered such additional documents and certificates and take such additional actions as may be reasonably requested by the Investor for the purposes of consummating the transactions contemplated by this Agreement.

8. REGISTRATION RIGHTS.

(a) The Company agrees that, within sixty (60) calendar days after the applicable Closing Date (the "**Filing Date**"), the Company will file with the SEC (at the Company's sole cost and expense) a registration statement (the "**Registration Statement**"), registering the resale of the PIK Shares issuable in the three-year period following the applicable Closing, the Conversion Shares, the Warrant Shares, and the New Note Shares, and the Company shall use commercially reasonable efforts to have the Registration Statement declared effective as soon as practicable after the filing thereof, but no later than one hundred and twenty (120) calendar days following the applicable Closing Date (such date, the "**Effectiveness Date**"); provided, however, that if the SEC is closed for operations or otherwise operating at a substantially reduced capacity due to a government shutdown, the Effectiveness Date shall be extended by the same amount of days that the SEC remains closed for operations or at a substantially reduced capacity; provided, further, that the Company's obligations to include securities in the Registration Statement are contingent upon the holder of the Series A Preferred Stock (each, a "**Holder**") furnishing in writing to the Company such information regarding such Holder, the securities of the Company held by such Holder and the intended method of disposition of such securities as shall be reasonably requested by the Company to effect the registration of such securities, and such Holder shall execute such documents in connection with such registration as the Company may reasonably request that are customary of a selling stockholder in similar situations, including providing that the Company shall be entitled to postpone and suspend the effectiveness or use of the Registration Statement as permitted hereunder. Upon notification by the SEC that the Registration Statement has been declared effective, the Company shall promptly file the final prospectus under Rule 424 under the Securities Act. The Company will provide a draft of the Registration Statement to each Holder for review at least two (2) Business Days in advance of filing the Registration Statement.

(b) Furthermore, to the extent the Registration Statement ceases to be effective during the period from the initial effective date of the Registration Statement through the fifth anniversary of the Initial Closing Date, the Holders shall be entitled to (i) cause the Company to file up to two additional registration statements registering the resale of the PIK Shares issued or issuable in the three-year period following the applicable Closing, the Conversion Shares, the Warrant Shares, and the New Note Shares and (ii) have their Conversion Shares, Warrant Shares, New Note Shares, and any issued PIK Shares included in any offering in which shares of Common Stock are sold by the Company to an underwriter for reoffer; provided that such right to have their shares included in a Company underwritten offering shall be subordinate to all similar obligations of the Company in effect on the date hereof. To the extent such rights are exercised, any exercising Holder shall be required to promptly provide any reasonably requested information, documentation, certifications and arrangements, including customary lock-up agreements.

(c) Notwithstanding any provision herein to the contrary, the Company shall not have any obligations with respect to the registration of offerings to the extent any such share (i) may be sold under Rule 144 without volume or manner of sale restrictions, (ii) has been sold transferred, disposed of or exchanged in an offering registered under the Securities Act, (iii) has been otherwise transferred, new certificates for them not bearing a legend restricting further transfer shall have been delivered by Holder and subsequent public distribution of them shall not require registration under the Securities Act, (iv) is transferred to a new Holder and such Holder does not agree to be bound by the terms of this Section 8 in connection with such transfer or (v) has ceased to be issuable or outstanding.

(d) In the case of the registration effected by the Company pursuant to this Agreement, the Company shall, upon reasonable request, inform each Holder whose Securities are included in such registration as to the status of such registration. At its expense, the Company shall:

(i) except for such times as the Company is permitted hereunder to suspend the use of the prospectus forming part of a Registration Statement, use its commercially reasonable efforts to keep such registration continuously effective with respect to a Holder, and to keep the applicable Registration Statement or any subsequent shelf registration statement free of material misstatements or omissions, until five (5) years from the Effectiveness Date of the Registration Statement.

(ii) promptly advise such Holder:

(1) when a Registration Statement or any amendment thereto has been filed with the SEC and when such Registration Statement or any post-effective amendment thereto has become effective;

(2) of any request by the SEC for amendments or supplements to any Registration Statement or the prospectus included therein or for additional information;

(3) of the issuance by the SEC of any stop order suspending the effectiveness of any Registration Statement or the initiation of any proceedings for such purpose;

(4) of the receipt by the Company of any notification with respect to the suspension of the qualification of the Securities included therein for sale in any jurisdiction or the initiation or threatening of any proceeding for such purpose; and

(5) subject to the provisions in this Agreement, of the occurrence of any event that requires making changes in any Registration Statement or prospectus so that, as of such date, any Registration Statement does not contain an untrue statement of a material fact or does not omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or any prospectus does not include an untrue statement of a material fact or does not omit to state a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading.

Notwithstanding anything to the contrary set forth herein, the Company shall not, when advising a Holder of such events, provide such Holder with any material, nonpublic information regarding the Company other than to the extent required to provide notice to such Holder of the occurrence of the events listed in (1) through (5) above may be deemed to be material, nonpublic information;

(iii) use its commercially reasonable efforts to obtain the withdrawal of any order suspending the effectiveness of any Registration Statement as soon as reasonably practicable;

(iv) upon the occurrence of any event contemplated above, except for such times the Company is permitted hereunder to suspend, and has suspended, the use of a prospectus forming part of a Registration Statement, the Company shall use its commercially reasonable efforts to, as soon as reasonably practicable, prepare a post-effective amendment to such Registration Statement or a supplement to the related prospectus, or file any other required document so that, as thereafter delivered to purchasers of the Securities included therein, such prospectus will not include any untrue statement of a material fact or omit to state any material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; and

(v) subject to receipt from such Holder and Holder's broker by the Company and its transfer agent of customary representations and other documentation reasonably acceptable to the Company and the transfer agent in connection therewith, including, if required by the transfer agent, an opinion of the Company's counsel, to be provided by the Company, at the Company's sole expense, to the effect that the removal of such restrictive legends in such circumstances may be effected under the Securities Act, a Holder may request that the Company remove any legend from the Conversion Shares, the PIK Shares, the Warrant Shares, and the New Note Shares, if issued, following the earliest time such shares (1) have been sold or transferred pursuant to an effective registration statement or (2) may be sold under Rule 144 without volume or manner of sale restrictions. If restrictive legends may be removed for such shares pursuant to the foregoing, the Company shall, in accordance with the provisions of this Section 8 and promptly following receipt of such customary and reasonably acceptable representations and other documentation referred to above establishing that restrictive legends are no longer required, deliver to the transfer agent instructions that the transfer agent shall replace such legended shares with a new, unlegended entry for such book-entry shares. The Company shall be responsible for the fees of its legal counsel and transfer agent associated with such issuance.

(e) Notwithstanding anything to the contrary in this Agreement, the Company shall be entitled to delay or postpone the effectiveness of the Registration Statement, and from time to time to require Holders not to sell under the Registration Statement or to suspend the effectiveness thereof, if the negotiation or consummation of a transaction by the Company or its subsidiaries is pending or an event has occurred, which negotiation, consummation or an event the Board reasonably believes, upon the advice of legal counsel, would require additional disclosure by the Company in the Registration Statement of material information that the Company has a bona fide business purpose for keeping confidential and the non-disclosure of which in the Registration Statement would be expected, in the reasonable determination of the Board, upon the advice of legal counsel, to cause the Registration Statement to fail to comply with applicable disclosure requirements (each such circumstance, a "**Suspension Event**"); provided, however, that the Company may not delay or suspend the Registration Statement on more than two occasions, for more than sixty (60) consecutive calendar days or more than ninety (90) total calendar days, in each case during any twelve-month period. Upon receipt of any written notice from the Company of a Suspension Event (which notice shall not contain any material, nonpublic information other than to the extent such notice alone constitutes material, nonpublic information) while the Registration Statement is effective or if as a result of a Suspension Event the Registration Statement contains any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, or any related prospectus includes any untrue statement of a material fact or omits to state any material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading, each Holder agrees that (i) it will immediately discontinue offers and sales of the shares under the Registration Statement until such Holder receives copies of a supplemental or amended prospectus (which the Company agrees to promptly prepare) that corrects the misstatements or omissions referred to above and receives notice that any post-effective amendment has become effective or unless otherwise notified by the Company that it may resume such offers and sales and (ii) it will maintain the confidentiality of information included in such written notice, and the fact that such notice has been delivered by the Company, unless otherwise required by law or subpoena. If so directed by the Company, each Holder will deliver to the Company or, in such Holder's sole discretion destroy, all copies of the prospectus covering the shares in such Holder's possession; provided, however, that this obligation to deliver or destroy shall not apply (1) to the extent such Holder is required to retain a copy of such prospectus (x) to comply with applicable legal, regulatory, self-regulatory or professional requirements or (y) in accordance with a bona fide pre-existing document retention policy or (2) to copies stored electronically on archival servers as a result of automatic data back-up.

(f) A Holder may deliver written notice (an "**Opt-Out Notice**") to the Company requesting that such Holder not receive notices from the Company otherwise required by this Section 8; provided, however, that any such Holder may later revoke any such Opt-Out Notice in writing. Following receipt of an Opt-Out Notice from a Holder (unless subsequently revoked), (i) the Company shall not deliver any such notices to such Holder and such Holder shall no longer be entitled to the rights associated with any such notice and (ii) each time prior to such Holder's intended use of an effective Registration Statement, such Holder will notify the Company in writing at least two (2) Business Days in advance of such intended use, and if a notice of a Suspension Event was previously delivered (or would have been delivered but for the provisions of this Section 8(f)) and the related suspension period remains in effect, the Company will so notify such Holder, within one (1) Business Day of such Holder's notification to the Company, by delivering to such Holder a copy of such previous notice of Suspension Event, and thereafter will provide such Holder with the related notice of the conclusion of such Suspension Event immediately upon its availability.

(g) The Company shall, notwithstanding any termination of this Agreement, indemnify, defend and hold harmless each Holder (to the extent a seller under the Registration Statement), its directors, officers and employees and each person who controls such Holder (within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act) and the directors, officers and employees of such controlling person to the fullest extent permitted by applicable law, from and against any and all out-of-pocket losses, claims, damages, liabilities, costs (including reasonable external attorneys' fees) and expenses (collectively, "**Losses**"), as incurred, that arise out of or are based upon (i) any untrue or alleged untrue statement of a material fact contained in the Registration Statement or in any amendment or supplement thereto, required to be stated therein or necessary to make the statements therein not misleading or (ii) any untrue or alleged untrue statement of a material fact included in any prospectus included in the Registration Statement or any form of prospectus or in any amendment or supplement thereto or in any preliminary prospectus, or arising out of or relating to any omission or alleged omission to state a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading, except for any such untrue statements, alleged untrue statements, omissions or alleged omissions based upon information regarding such Holder furnished in writing to the Company by such Holder expressly for use therein or resulting from an omission by such Holder of a material fact from such information or from any other violation by such Holder of the Securities Act, Exchange Act or any state securities law or any rule or regulation thereunder; provided, however, that the indemnification contained in this Section 8 shall not apply to amounts paid in settlement of any Losses if such settlement is effected without the consent of the Company (which consent shall not be unreasonably withheld, conditioned or delayed), nor shall the Company be liable for any Losses to the extent they arise out of or are based upon a violation which occurs (1) in reliance upon and in conformity with written information furnished by such Holder expressly for use in the Registration Statement, (2) in connection with any failure of such person, to the extent required, to deliver or cause to be delivered a prospectus made available by the Company in a timely manner or (3) in connection with any offers or sales effected by or on behalf of such Holder in violation of Section 8(c) hereof. The Company shall notify such Holder reasonably promptly of the institution, threat or assertion of any proceeding arising from or in connection with the transactions contemplated by this Section 8(g) of which the Company receives notice in writing. Such indemnity shall survive the transfer of the shares by such Holder.

(h) Each Holder shall, severally and not jointly with any other Holder, indemnify and hold harmless the Company, its directors, officers and employees, and each person who controls the Company (within the meaning of Section 15 of the Securities Act and Section 20 of the Exchange Act), to the fullest extent permitted by applicable law, from and against all Losses, as incurred, that arise out of or are based upon (i) any untrue or alleged untrue statement of a material fact contained in any Registration Statement or in any amendment or supplement thereto or arising out of or relating to any omission or alleged omission of a material fact required to be stated therein or necessary to make the statements therein not misleading or (ii) any untrue or alleged untrue statement of a material fact included in any prospectus included in the Registration Statement or any form of prospectus or in any amendment or supplement thereto or in any preliminary prospectus or arising out of or relating to any omission or alleged omission of a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading, with respect to (i) and/or (ii), relating to such untrue or alleged untrue statements or omissions or alleged omissions based upon information regarding such Holder furnished in writing to the Company by such Holder expressly for use therein; provided, however, that the indemnification contained in this Section 8(h) shall not apply to amounts paid in settlement of any Losses if such settlement is effected without the consent of such Holder (which consent shall not be unreasonably withheld, conditioned or delayed). In no event shall the liability of any Holder be greater in amount than the dollar amount of the net proceeds received by such Holder upon the sale of the shares giving rise to such indemnification obligation. Each Holder shall notify the Company promptly of the institution, threat or assertion of any proceeding arising from or in connection with the transactions contemplated by this Section 8(h) of which such Holder is aware. Such indemnity shall survive the transfer of the shares by such Holder.

(i) Any person or entity entitled to indemnification herein shall (1) give prompt written notice to the indemnifying party of any claim with respect to which it seeks indemnification (provided that the failure to give prompt notice shall not impair any person's or entity's right to indemnification hereunder to the extent such failure has not prejudiced the indemnifying party) and (2) unless in such indemnified party's reasonable judgment a conflict of interest between such indemnified and indemnifying parties may exist with respect to such claim, permit such indemnifying party to assume the defense of such claim with counsel reasonably satisfactory to the indemnified party. If such defense is assumed, the indemnifying party shall not be subject to any liability for any settlement made by the indemnified party without its consent (but such consent shall not be unreasonably withheld). An indemnifying party who is not entitled to, or elects not to, assume the defense of a claim shall not be obligated to pay the fees and expenses of more than one counsel for all parties indemnified by such indemnifying party with respect to such claim, unless in the judgment of any indemnified party, based on advice of counsel, a conflict of interest may exist between such indemnified party and any other of such indemnified parties with respect to such claim. No indemnifying party shall, without the consent of the indemnified party, consent to the entry of any judgment or enter into any settlement that cannot be settled in all respects by the payment of money (and such money is so paid by the indemnifying party pursuant to the terms of such settlement) or which settlement includes a statement or admission of fault and culpability on the part of such indemnified party or which does not include as an unconditional term thereof the giving by the claimant or plaintiff to such indemnified party of a release from all liability in respect to such claim or litigation.

(j) If the indemnification provided under this Section 8 from the indemnifying party is unavailable or insufficient to hold harmless an indemnified party in respect of any Losses, then the indemnifying party, in lieu of indemnifying the indemnified party, shall contribute to the amount paid or payable by the indemnified party as a result of such Losses in such proportion as is appropriate to reflect the relative fault of the indemnifying party and the indemnified party, as well as any other relevant equitable considerations; provided, however, that the liability of any such Holder shall be limited to the net proceeds received by such Holder from the sale of shares giving rise to such indemnification obligation. The relative fault of the indemnifying party and indemnified party shall be determined by reference to, among other things, whether any action in question, including any untrue or alleged untrue statement of a material fact or omission or alleged omission to state a material fact, was made by (or not made by, in the case of an omission), or relates to information supplied by (or not supplied by, in the case of an omission), such indemnifying party or indemnified party, and the indemnifying party's and indemnified party's relative intent, knowledge, access to information and opportunity to correct or prevent such action. No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution pursuant to this Section 8(j) from any person or entity who was not guilty of such fraudulent misrepresentation.

9. MISCELLANEOUS.

(a) Governing Law; Jurisdiction; Jury Trial. All questions concerning the construction, validity, enforcement and interpretation of this Agreement shall be governed by the internal laws of the State of Delaware, without giving effect to any choice of law or conflict of law provision or rule (whether of the State of Delaware or any other jurisdictions) that would cause the application of the laws of any jurisdictions other than the State of Delaware. Each of the parties hereto irrevocably consents to the exclusive jurisdiction and venue of the Court of Chancery of the State of Delaware, provided, that if subject matter jurisdiction over the matter that is the subject of the legal proceeding is vested exclusively in the U.S. federal courts, such legal proceeding shall be heard in the U.S. District Court for the District of Delaware (together with the Court of Chancery of the State of Delaware "**Chosen Courts**"), in connection with any matter based upon or arising out of this Agreement. Each party hereto hereby waives, and shall not assert as a defense, in any legal dispute, that (i) such Person is not personally subject to the jurisdiction of the Chosen Courts for any reason, (ii) such legal proceeding may not be brought or is not maintainable in the Chosen Courts, (iii) such Person's property is exempt or immune from execution, (iv) such legal proceeding is brought in an inconvenient forum or (v) the venue of such legal proceeding is improper. Each party hereby irrevocably waives personal service of process and consents to process being served in any such suit, action or proceeding by mailing a copy thereof to such party at the address for such notices to it under this Agreement and agrees that such service shall constitute good and sufficient service of process and notice thereof. Nothing contained herein shall be deemed to limit in any way any right to serve process in any manner permitted by law. **EACH PARTY HEREBY IRREVOCABLY WAIVES ANY RIGHT IT MAY HAVE, AND AGREES NOT TO REQUEST, A JURY TRIAL FOR THE ADJUDICATION OF ANY DISPUTE HEREUNDER OR IN CONNECTION WITH OR ARISING OUT OF THIS AGREEMENT OR** ANY **TRANSACTION CONTEMPLATED HEREBY.**

(b) Counterparts. This Agreement may be executed in two or more identical counterparts, all of which shall be considered one and the same agreement (it being understood that the parties need not sign the same counterpart) and shall become effective when counterparts have been signed by each party and delivered to the other party; provided that a facsimile, .pdf signature or any electronic signature complying with the U.S. federal ESIGN Act of 2000 (e.g., www.docusign.com) shall be considered due execution and shall be binding upon the signatory thereto with the same force and effect as if the signature were an original, not a facsimile or .pdf signature.

(c) Headings. The headings of this Agreement are for convenience of reference and shall not form part of, or affect the interpretation of, this Agreement.

(d) Severability. If any provision of this Agreement is prohibited by law or otherwise determined to be invalid or unenforceable by a court of competent jurisdiction, the provision that would otherwise be prohibited, invalid or unenforceable shall be deemed amended to apply to the broadest extent that it would be valid and enforceable, and the invalidity or unenforceability of such provision shall not affect the validity of the remaining provisions of this Agreement so long as this Agreement as so modified continues to express, without material change, the original intentions of the parties as to the subject matter hereof and the prohibited nature, invalidity or unenforceability of the provision(s) in question does not substantially impair the respective expectations or reciprocal obligations of the parties or the practical realization of the benefits that would otherwise be conferred upon the parties. The parties will endeavor in good faith negotiations to replace the prohibited, invalid or unenforceable provision(s) with a valid provision(s), the effect of which comes as close as possible to that of the prohibited, invalid or unenforceable provision(s).

(e) Entire Agreement; Amendments. This Agreement and the other Transaction Documents supersede all other prior oral or written agreements between the Investors, the Company, their affiliates and Persons acting on their behalf with respect to the matters discussed herein, and this Agreement, the other Transaction Documents, and the instruments referenced herein and therein contain the entire understanding of the parties with respect to the matters covered herein and therein and, except as specifically set forth herein or therein, neither the Company nor any Investor makes any representation, warranty, covenant or undertaking with respect to such matters. Provisions of this Agreement may be amended only with the written consent of the Company and the holders of at least a majority of the aggregate number of Conversion Shares issued or issuable pursuant to the terms of the Series A Preferred Stock, including the Lead Investor to the extent such Lead Investor still holds any shares of Series A Preferred Stock (the "**Required Holders**"). The obligations under this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively) by the party against whom enforcement of any such waived provision is sought. Any amendment or waiver effected in accordance with this Section 9(e) shall be binding upon each Investor and holder of Securities and the Company.

(f) Notices. Any notices, consents, waivers or other communications required or permitted to be given under the terms of this Agreement or any of the other Transaction Documents must be in writing and will be deemed to have been delivered: (i) upon receipt, when delivered personally; (iii) upon delivery, when sent by electronic mail; or (iii) two (2) Business Days after deposit with a U.S. nationally recognized overnight courier service, in each case properly addressed to the party to receive the same. The addresses, facsimile numbers and e-mail addresses for such communications shall be:

If to the Company:

ProSomnus, Inc.
5675 Gibraltar Avenue
Pleasanton, CA 94588
Telephone:
Attention: Len Liptak
Email: lliptak@prosomnus.com

with a copy (for informational purposes only) to:

Wilson Sonsini Goodrich & Rosati, P.C.
650 Page Mill Road
Palo Alto, CA 94304
Telephone: (650) 849-3240
Attention: Andrew Hoffman
Email: ahoffman@wsgr.com

If to an Investor, to its address, facsimile number and e-mail address set forth on the applicable Investor Schedule, with copies to such Investor's representatives as set forth on the applicable Investor Schedule, or to such other address, facsimile number and/or e-mail address and/or to the attention of such other Person as the recipient party has specified by written notice given to each other party five (5) calendar days prior to the effectiveness of such change. Written confirmation of receipt (1) given by the recipient of such notice, consent, waiver or other communication, (2) mechanically or electronically generated by the sender's facsimile machine or e-mail containing the time, date, recipient facsimile number or (3) provided by an overnight courier service shall be rebuttable evidence of personal service, receipt by facsimile or receipt from an overnight courier service in accordance with clause (i), (ii) or (iii) above, respectively.

(g) Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns, including any purchasers of the Series A Preferred Stock. The Company shall not assign this Agreement or any rights or obligations hereunder without the prior written consent of the Required Holders. No Investor shall assign this Agreement or any rights or obligations hereunder without the prior written consent of the Company; provided, however, that the registration rights of any Investor under Section 8 may and shall be transferred in connection with any transfer of Offered Shares or Warrants to the extent such registration rights are to be assumed as a part of such transfer (in which case, any such transferee must execute a joinder to this Agreement before obtaining the benefits of the registration rights and indemnification provisions of Section 8).

(h) No Third Party Beneficiaries. This Agreement is intended for the benefit of the parties hereto and their respective permitted successors and assigns, and is not for the benefit of, nor may any provision hereof be enforced by, any other Person, except that each Indemnitee shall have the right to enforce the obligations of the Company with respect to Section 8(g).

(i) Survival. The representations and warranties of the Company and the Investors contained herein shall survive the applicable Closing and the delivery and exercise or conversion of Securities, as applicable, for a period of one (1) year from the applicable Closing Date. Each Investor shall be responsible only for its own representations, warranties, agreements and covenants hereunder.

(j) Further Assurances. Each party shall do and perform, or cause to be done and performed, all such further acts and things, and shall execute and deliver all such other agreements, certificates, instruments and documents, as any other party may reasonably request in order to carry out the intent and accomplish the purposes of this Agreement and the consummation of the transactions contemplated hereby.

(k) No Strict Construction. The parties agree that each of them and/or their respective counsel have reviewed and had an opportunity to review and revise the Transaction Documents and, therefore, the language used in this Agreement will be deemed to be the language chosen by the parties to express their mutual intent, and no rules of strict construction will be applied against any party.

(l) Remedies. In addition to being entitled to exercise all rights provided herein or granted by law, including recovery of damages, each of the Investors and the Company will be entitled to specific performance under the Transaction Documents. The parties agree that monetary damages may not be adequate compensation for any loss incurred by reason of any breach of obligations contained in the Transaction Documents and hereby agree to waive and not to assert in any action for specific performance of any such obligation the defense that a remedy at law would be adequate.

(m) Adjustments. All Series A Preferred Stock and Purchase Prices per share of Series A Preferred Stock set forth in this Agreement shall be adjusted as appropriate for any stock dividend, stock split, stock combination, reclassification or similar transaction relating to the Series A Preferred Stock occurring after the date hereof.

(n) Independent Nature of Investors' Obligations and Rights. The obligations of each Investor under any Transaction Document are several and not joint with the obligations of any other Investor, and no Investor shall be responsible in any way for the performance of the obligations of any other Investor under any Transaction Document. Nothing contained herein or in any other Transaction Document, and no action taken by any Investor pursuant hereto or thereto, shall be deemed to constitute the Investors as, and the Company acknowledges that the Investors do not so constitute, a partnership, an association, a joint venture or any other kind of entity, or create a presumption that the Investors are in any way acting in concert or as a group, and the Company shall not assert any such claim with respect to such obligations or the transactions contemplated by the Transaction Documents and the Company acknowledges that the Investors are not acting in concert or as a group with respect to such obligations or the transactions contemplated by the Transaction Documents. The Company acknowledges and each Investor confirms that it has independently participated in the negotiation of the transaction contemplated hereby with the advice of its own counsel and advisors. Each Investor shall be entitled to independently protect and enforce its rights, including, without limitation, the rights arising out of this Agreement or out of any other Transaction Documents, and it shall not be necessary for any other Investor to be joined as an additional party in any proceeding for such purpose.

(o) Business Days; Saturdays, Sundays, Holidays, etc. "**Business Day**" means any day other than Saturday, Sunday or other day on which commercial banks in The City of New York are authorized or required by law to remain closed; provided, however, for clarification, commercial banks shall not be deemed to be authorized or required by law to remain closed due to "stay at home", "shelter-in-place", "non-essential employee" or any other similar orders or restrictions or the closure of any physical branch locations at the direction of any governmental authority so long as the electronic funds transfer systems (including for wire transfers) of commercial banks in The City of New York are generally are open for use by customers on such day. If the last or appointed day for the taking of any action or the expiration of any right required or granted herein shall not be a Business Day, then such action may be taken or such right may be exercised on the next succeeding Business Day.

(p) Currency. Unless otherwise stated, all dollar amounts and references to "$" in this Agreement refer to the lawful currency of the United States.

[**Signature Page Follows**]

IN WITNESS WHEREOF, each Investor and the Company have caused their respective signature page to this Agreement to be duly executed as of the date first written above.

COMPANY:

PROSOMNUS, INC.

By: _____
Name:
Title:

[Signature Page to Securities Purchase Agreement]

IN WITNESS WHEREOF, each Investor and the Company have caused their respective signature page to this Agreement to be duly executed as of the date first written above.

INVESTOR:

[•]

By: _____
Name:
Title:

[Signature Page to Securities Purchase Agreement]

Annex A-1

Non-Noteholder Investors

(1) Investor	(2) Address, Facsimile Number and Email	(3) Number of Shares of Series A Preferred Stock	(4) Number of Warrant Shares	(5) Purchase Price	(6) Legal Representative's Address, Facsimile Number and Email

Annex A-2

Noteholder Investors

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(7)
Investor	**Address, Facsimile Number and Email**	**Number of Shares of Series A Preferred Stock**	**Aggregate Principal Amount of Convertible Notes Held (i.e., the Existing Notes)**	**Aggregate Principal Amount of Convertible Notes to be Exchanged (i.e., the New Notes)**	**Number of Warrant Shares**	**Purchase Price**	**Legal Representative's Address, Facsimile Number and Email**

Exhibit A

Certificate of Designations

Exhibit B

Form of Warrant

Exhibit C

Form of Voting Support Agreement

Exhibit D

Investor Suitability Questionnaire

Exhibit 99.1

FORM OF

VOTING SUPPORT AGREEMENT

This Voting Support Agreement (this "**Agreement**"), dated as of September 20, 2023, is entered into by and between ProSomnus, Inc., a Delaware corporation (the "**Company**"), and [●] (the "**Supporting Stockholder**"). Capitalized terms used but not otherwise defined in this Agreement shall have the meanings ascribed to them in the Securities Purchase Agreement (as defined below).

RECITALS

WHEREAS, the Company is entering into, or has entered into: (i) a Securities Purchase Agreement (the "**Securities Purchase Agreement**") with certain investors identified on the signature pages thereto (together, the "**Investors**"), pursuant to which (and subject to the terms and conditions set forth therein) the Company will issue and sell to the Investors, and the Investors will purchase from the Company, certain shares of the Company's Series A Preferred Stock and warrants (the "**Warrants**") to purchase the Company's common stock ("**Common Stock**"), and (ii) an Exchange Agreement (the "**Exchange Agreement**") with certain Investors identified on the signature pages thereto, pursuant to which (and subject to the terms and conditions set forth therein) the Company will exchange such Investors' existing convertible notes of the Company for new convertible notes of the Company (the "**New Notes**");

WHEREAS, as of the date hereof, the Supporting Stockholder is the record and/or "beneficial owner" (within the meaning of Rule 13d-3 under the Securities Exchange Act of 1934, as amended (together with the rules and regulations promulgated thereunder, the "**Exchange Act**")), of and is entitled to dispose of, or to direct the disposition of, and vote, or to direct the voting of, the shares of the Company's Common Stock indicated on the Supporting Stockholder's signature page below (the "**Owned Shares**"; the Owned Shares and any additional securities of the Company (or any securities convertible into or exercisable or exchangeable for shares of the Company's Common Stock) in which the Supporting Stockholder acquires record and/or beneficial ownership after the date hereof, including, without limitation, by purchase, as a result of a stock dividend, stock split, recapitalization, combination, reclassification, exchange or change of such securities, or upon exercise or conversion of any securities, the "**Covered Shares**"); and

WHEREAS, as a condition and inducement to the willingness of the Investors to enter into the Securities Purchase Agreement and, as appliable, the Exchange Agreement, the Company agreed to deliver Voting Support Agreements executed by the Supporting Stockholders at or prior to the closing of the consummation of the transactions contemplated by the Securities Purchase Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the Company and the Supporting Stockholder hereby agree as follows:

(1) Agreement to Vote. Subject to the earlier termination of this Agreement in accordance with Section 2, the Supporting Stockholder, in its capacity as a stockholder of the Company, irrevocably and unconditionally agrees that, at any meeting of the of the Company Stockholders (whether annual or special and whether or not an adjourned or postponed meeting, however called and including any adjournment or postponement thereof), the Supporting Stockholder shall, and shall cause any other holder of record of any of the Supporting Stockholder's Covered Shares to:

(a) if and when such meeting is held, appear at such meeting (and at every adjournment or postponement thereof) or otherwise cause the Covered Shares to be counted as present thereat for the purpose of establishing a quorum;

(b) vote, or cause to be voted (including via proxy), at such meeting all of the Covered Shares owned as of the record date for such meeting to approve any matters necessary or reasonably requested by the Company for consummation of the transactions contemplated by the Securities Purchase Agreement and the Exchange Agreement and facilitate the Company's issuance of (i) the shares of Common Stock issuable upon conversion of, and as dividends in respect of, the Series A Preferred Stock; (ii) the shares of Common Stock issuable upon exercise of the Warrants; (iii) the shares of Common Stock issuable upon conversion of the New Notes; and (iv) securities of the Company issuable pursuant to the Securities Purchase Agreement, the Warrants or the Exchange Agreement that may be deemed to be equity compensation under the rules of the Principal Market; and

(c) The Supporting Stockholder hereby revokes any and all previous proxies granted or has caused the holder(s) of record of any Covered Shares to revoke any and all previous proxies granted with respect to the Covered Shares.

(2) Termination. This Agreement shall automatically terminate, without any notice or other action by any parties hereto, be void *ab initio* and no parties hereto shall have any further obligations or liabilities under this Agreement, upon the earliest of (a) the Company obtaining Stockholder Approval or (b) the time this Agreement is terminated upon the mutual written agreement of the Company, the Supporting Stockholder and Investors representing the purchasers of a majority of the Series A Preferred Stock under the Securities Purchase Agreement (the earliest such date under clause (a) or (b) being referred to herein as the "**Termination Date**"); provided, that termination of this Agreement shall not relieve any parties hereto from any liability for any breach of, or actual and intentional fraud in connection with, this Agreement prior to such termination.

(3) Representations and Warranties of the Supporting Stockholder. The Supporting Stockholder hereby represents and warrants as follows:

(a) The Supporting Stockholder is the beneficial owner (within the meaning of Rule 13d-3 under the Exchange Act) and/or record owner of, and, directly or indirectly, has good, valid and marketable title to, the Owned Shares, free and clear of liens (other than as created by this Agreement or the organizational documents of the Company or arising under applicable securities laws). As of the date hereof, other than the Owned Shares, the Supporting Stockholder does not own beneficially or of record any shares of capital stock of the Company (or any securities convertible into shares of capital stock of the Company).

(b) The Supporting Stockholder (i) except as provided in this Agreement, has full or, with an Affiliate of the Supporting Stockholder, shared voting power, full power of disposition and full power to issue instructions with respect to the matters set forth herein, in each case, with respect to the Supporting Stockholder's Covered Shares, (ii) has not entered into or caused or permitted any Affiliate to enter into any voting agreement or voting trust with respect to any of the Supporting Stockholder's Covered Shares that is inconsistent with the Supporting Stockholder's obligations pursuant to this Agreement, (iii) has not granted or caused or permitted any Affiliate to grant a proxy or power of attorney with respect to any of the Supporting Stockholder's Covered Shares that is inconsistent with the Supporting Stockholder's obligations pursuant to this Agreement and (iv) has not entered into or caused or permitted any Affiliate to enter into any agreement or undertaking that is otherwise inconsistent with, or would interfere with, or prohibit or prevent it from satisfying, its obligations pursuant to this Agreement.

(c) The Supporting Stockholder, (i) if a legal entity, is duly organized, validly existing and, to the extent such concept is applicable, in good standing under the laws of the jurisdiction of its organization and has all requisite corporate or other power and authority and has taken all corporate or other action necessary in order to, execute, deliver and perform its obligations under this Agreement and to consummate the transactions contemplated hereby or, (ii) if an individual, has legal competence and capacity to enter into this Agreement and all necessary authority to execute, deliver and perform its obligations under this Agreement and to consummate the transactions contemplated hereby. This Agreement has been duly executed and delivered by the Supporting Stockholder and constitutes a valid and binding agreement of the Supporting Stockholder enforceable against the Supporting Stockholder in accordance with its terms.

(d) Other than the filings, notices and reports pursuant to, in compliance with or required to be made under the Exchange Act, no filings, notices, reports, consents, registrations, approvals, permits, waivers, expirations of waiting periods or authorizations are required to be obtained by the Supporting Stockholder from, or to be given by the Supporting Stockholder to, or be made by the Supporting Stockholder with, any governmental authority in connection with the execution, delivery and performance by the Supporting Stockholder of this Agreement and the consummation of the transactions contemplated hereby.

(e) The execution, delivery and performance of this Agreement by the Supporting Stockholder do not, and the consummation of the transactions contemplated hereby, will not, constitute or result in, (i) if the Supporting Stockholder is a legal entity, a breach or violation of, or a default under, the certificate of incorporation, bylaws, limited liability company agreement or similar governing documents of the Supporting Stockholder, (ii) with or without notice, lapse of time or both, a breach or violation of, a termination (or right of termination) of or a default under, the loss of any benefit under, the creation, modification or acceleration of any obligations under or the creation of a lien (other than as created by this Agreement or the organizational documents of the Company or arising under applicable securities laws) on the Covered Shares pursuant to any contract binding upon the Supporting Stockholder or, assuming (solely with respect to performance of this Agreement and the transactions contemplated hereby) compliance with the matters referred to in Section 3(d), under any applicable law to which the Supporting Stockholder is subject, (iii) a conflict with, or constitute breach, violation, or default (or an event which with notice or lapse of time or both would become a default) in any respect under, or give to others any rights of termination, amendment, acceleration or cancellation of, any contract, agreement, indenture or instrument to which the Supporting Stockholder is a party, or (iv) any change in the rights or obligations of any parties hereto under any contract legally binding upon the Supporting Stockholder, except, in the case of clauses (ii) through (iv) directly above, for any such breach, violation, termination, default, creation, loss, acceleration, lien or change that would not, individually or in the aggregate, reasonably be expected to prevent or materially delay or impair the Supporting Stockholder's ability to perform its obligations hereunder or to consummate the transactions contemplated hereby.

(f) As of the date of this Agreement, there is no action, proceeding or, to the Supporting Stockholder's knowledge, investigation pending against the Supporting Stockholder or, to the knowledge of the Supporting Stockholder, threatened against the Supporting Stockholder that questions the beneficial or record ownership of the Supporting Stockholder's Owned Shares, the validity of this Agreement or the performance by the Supporting Stockholder of its obligations under this Agreement.

(4) Certain Covenants of the Supporting Stockholder. Except in accordance with the terms of this Agreement, the Supporting Stockholder hereby covenants and agrees as follows:

(a) The Supporting Stockholder hereby agrees not to, or cause or permit any Affiliate to, directly or indirectly, prior to the Termination Date, except in connection with the consummation of the transactions contemplated by the Securities Purchase Agreement or the Exchange Agreement, (i) sell, transfer, pledge, encumber, assign, hedge, swap, convert or otherwise dispose of (including by merger (including by conversion into securities or other consideration), by tendering into any tender or exchange offer, by operation of law or otherwise), either voluntarily or involuntarily (collectively, "**Transfer**"), or enter into any contract or option with respect to the Transfer of any of the Supporting Stockholder's Covered Shares, or (ii) take any action that would make any representation or warranty of the Supporting Stockholder contained herein untrue or incorrect or have the effect of preventing or materially delaying the Supporting Stockholder from or in performing its obligations under this Agreement; provided, however, that nothing herein shall prohibit a Transfer (A) to an Affiliate of the Supporting Stockholder that remains an Affiliate of the Supporting Stockholder through the termination of this Agreement; provided, that any subsequent holder of such shares shall promptly transfer such shares back to the Supporting Stockholder if at any point prior to the termination of this Agreement such subsequent holder ceases to be an Affiliate of the Supporting Stockholder, (B) occurring by will, testamentary document or intestate succession upon the death of a Supporting Stockholder who is an individual, (C) pursuant to community property laws or divorce decree, or (D) to be held in "street name" pursuant to a 10b5-1 plan entered into after the date hereof so long as no trades under such plan occur prior to the termination of this Agreement and the Supporting Stockholder remains the beneficial owner of such Covered Shares entitled to vote such Covered Shares, directly or indirectly (each, a "**Permitted Transfer**"); provided, further, that any Permitted Transfer (other than pursuant to clause (D)) shall be permitted only if, as a precondition to such Transfer, the transferee also agrees in a writing, reasonably satisfactory in form and substance to the Company, to assume all of the obligations of the Supporting Stockholder under, and be bound by all of the terms of, this Agreement in respect of the Covered Shares so Transferred and any Covered Shares subsequently acquired; provided, further, that any Transfer permitted under this Section 4(a) shall not relieve the Supporting Stockholder of its obligations under this Agreement. Any Transfer in violation of this Section 4(a) with respect to the Supporting Stockholder's Covered Shares shall be null and void. Nothing in this Agreement shall prohibit direct or indirect transfers of equity or other interests in a Supporting Stockholder.

(b) The Supporting Stockholder hereby covenants and agrees that the Supporting Stockholder shall not, and shall cause each of its Affiliates not to, at any time prior to the Termination Date, (i) enter into any voting agreement or voting trust with respect to any of the Supporting Stockholder's Covered Shares that is inconsistent with the Supporting Stockholder's obligations pursuant to this Agreement, (ii) grant a proxy or power of attorney with respect to any of the Supporting Stockholder's Covered Shares that is inconsistent with the Supporting Stockholder's obligations pursuant to this Agreement, or (iii) enter into any agreement or undertaking that is otherwise inconsistent with, or would interfere with, or prohibit or prevent it from satisfying, its obligations pursuant to this Agreement.

(5) Definitions. When used in this Agreement, the following terms shall have the meanings assigned to them in this Section 5.

"**Affiliate**" shall mean with respect to any Person, any other Person that, directly or indirectly, controls, is controlled by or is under common control with such Person, including, without limitation, any general partner, managing member, officer, director or trustee of such Person, or any venture capital fund or other investment fund now or hereafter existing that is controlled by one (1) or more general partners, managing members or investment adviser of, or shares the same management company or investment adviser with, such Person; provided, however, that in no case shall the Company or any of its Subsidiaries be deemed to be an Affiliate of the Supporting Stockholder. For purposes of this definition, the term "**control**" (including, with correlative meanings, the terms "controlling," "controlled by" and "under common control with"), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of that Person, whether through the ownership of voting securities, by contract or otherwise.

"**Person**" means an individual, a limited liability company, a partnership, a joint venture, a corporation, a trust, an unincorporated organization, any other entity and any governmental entity or any department or agency thereof.

(6) Further Assurances. From time to time, at the Company's request and without further consideration, the Supporting Stockholder shall execute and deliver such additional documents and take all such further action as may be reasonably necessary or reasonably requested to effect the actions and consummate the transactions contemplated by this Agreement. The Supporting Stockholder further agrees not to, and to cause or direct its Affiliates not to, commence or participate in, and to take all actions necessary to opt out of any class action with respect to, any action or claim, derivative or otherwise, against the Company or any of its successors and assigns relating to the negotiation, execution or delivery of this Agreement, the Securities Purchase Agreement or the Exchange Agreement or the consummation of the transactions contemplated hereby and thereby.

(7) Amendment and Modification. This Agreement may not be amended, modified or supplemented in any manner, whether by course of conduct or otherwise, except by an instrument in writing signed the Company and the Supporting Stockholder.

(8) Notices. All notices, requests and other communications to any of the parties hereto shall be in writing (including email transmission, so long as a receipt of such email is requested and received) and shall be given,

(a) if to the Company:

ProSomnus, Inc.
5675 Gibraltar Avenue
Pleasanton, CA 94588
Telephone:
Attention: Len Liptak
Email: lliptak@prosomnus.com

with a copy (for informational purposes only) to:

Wilson Sonsini Goodrich & Rosati, P.C.
650 Page Mill Road
Palo Alto, CA 94304
Telephone: (650) 849-3240
Attention: Andrew Hoffman
Email: ahoffman@wsgr.com

(b) if to the Supporting Stockholder, to such address indicated on the Company's records with respect to the Supporting Stockholder or to such other address or addresses as the Supporting Stockholder may from time to time designate in writing.

All such notices, requests and other communications will be deemed to have been delivered: (i) upon receipt, when delivered personally; (iii) upon delivery, when sent by electronic mail; or (iii) two (2) Business Days after deposit with a U.S. nationally recognized overnight courier service, in each case properly addressed to the party to receive the same.

(9) Entire Agreement. This Agreement and the documents and instruments and other agreements among the parties hereto as contemplated by or referred to herein constitute the entire agreement among the parties hereto with respect to the subject matter hereof and supersede all prior agreements and understandings, both written and oral, among the parties hereto with respect to the subject matter hereof.

(10) Third-Party Beneficiaries. Each of the Supporting Stockholder and the Company acknowledges and agrees that (a) this Agreement is being entered into in order to induce the Investors to execute and deliver the Securities Purchase Agreement and, as applicable, the Exchange Agreement, and without the representations, warranties, covenants and agreements of the Supporting Stockholder set forth herein, the Investors would not enter into the Securities Purchase Agreement or, as applicable, the Exchange Agreement; and (b) each representation, warranty, covenant and agreement of the Supporting Stockholder hereunder is being made also for the benefit of the Investors. Except as otherwise set forth in this Section 10, this Agreement is intended only for the benefit of the parties hereto and their respective permitted successors and assigns, and is not for the benefit of, nor may any provision hereof be enforced by, any other Person.

(11) Governing Law and Venue; Service of Process; Waiver of Jury Trial. All questions concerning the construction, validity, enforcement and interpretation of this Agreement shall be governed by the internal laws of the State of Delaware, without giving effect to any choice of law or conflict of law provision or rule (whether of the State of Delaware or any other jurisdictions) that would cause the application of the laws of any jurisdictions other than the State of Delaware. Each of the parties hereto irrevocably consents to the exclusive jurisdiction and venue of the Court of Chancery of the State of Delaware, provided, that if subject matter jurisdiction over the matter that is the subject of the legal proceeding is vested exclusively in the U.S. federal courts, such legal proceeding shall be heard in the U.S. District Court for the District of Delaware (together with the Court of Chancery of the State of Delaware "**Chosen Courts**"), in connection with any matter based upon or arising out of this Agreement. Each party hereto hereby waives, and shall not assert as a defense in any legal dispute, that (a) such Person is not personally subject to the jurisdiction of the Chosen Courts for any reason, (b) such legal proceeding may not be brought or is not maintainable in the Chosen Courts, (c) such Person's property is exempt or immune from execution, (d) such legal proceeding is brought in an inconvenient forum or (e) the venue of such legal proceeding is improper. Each party hereby irrevocably waives personal service of process and consents to process being served in any such suit, action or proceeding by mailing a copy thereof to such party at the address for such notices to it under this Agreement and agrees that such service shall constitute good and sufficient service of process and notice thereof. Nothing contained herein shall be deemed to limit in any way any right to serve process in any manner permitted by law. **EACH PARTY HEREBY IRREVOCABLY WAIVES ANY RIGHT IT MAY HAVE, AND AGREES NOT TO REQUEST, A JURY TRIAL FOR THE ADJUDICATION OF ANY DISPUTE HEREUNDER OR IN CONNECTION WITH OR ARISING OUT OF THIS AGREEMENT OR** ANY **TRANSACTION CONTEMPLATED HEREBY.**

(12) Assignment; Successors. No party hereto may assign either this Agreement or any of its rights, interests, or obligations hereunder, by operation of law or otherwise, without the prior written approval of the other party hereto and, in the case of assignment by the Supporting Stockholder, without the prior written approval of the purchasers of a majority of the Series A Preferred Stock under the Securities Purchase Agreement. Subject to the preceding sentence, this Agreement will be binding upon and will inure to the benefit of, and be enforceable by, the parties hereto and their respective successors and permitted assigns. Any purported assignment of this Agreement without the consent required by this Section 12 is null and void.

(13) Remedies. In addition to being entitled to exercise all rights provided herein or granted by law, including recovery of damages, the Company will be entitled to specific performance hereunder. The parties agree that monetary damages may not be adequate compensation for any loss incurred by reason of any breach of obligations contained in this Agreement and hereby agree to waive and not to assert in any action for specific performance of any such obligation the defense that a remedy at law would be adequate.

(14) Severability. If any provision of this Agreement is prohibited by law or otherwise determined to be invalid or unenforceable by a court of competent jurisdiction, the provision that would otherwise be prohibited, invalid or unenforceable shall be deemed amended to apply to the broadest extent that it would be valid and enforceable, and the invalidity or unenforceability of such provision shall not affect the validity of the remaining provisions of this Agreement so long as this Agreement as so modified continues to express, without material change, the original intentions of the parties as to the subject matter hereof and the prohibited nature, invalidity or unenforceability of the provision(s) in question does not substantially impair the respective expectations or reciprocal obligations of the parties or the practical realization of the benefits that would otherwise be conferred upon the parties. The parties will endeavor in good faith negotiations to replace the prohibited, invalid or unenforceable provision(s) with a valid provision(s), the effect of which comes as close as possible to that of the prohibited, invalid or unenforceable provision(s).

(15) Counterparts. This Agreement may be executed in two or more identical counterparts, all of which shall be considered one and the same agreement (it being understood that the parties need not sign the same counterpart) and shall become effective when counterparts have been signed by each party and delivered to the other party; provided that a facsimile, .pdf signature or any electronic signature complying with the U.S. federal ESIGN Act of 2000 (e.g., www.docusign.com) shall be considered due execution and shall be binding upon the signatory thereto with the same force and effect as if the signature were an original, not a facsimile or ..pdf signature.

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

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed (where applicable, by their respective officers or other authorized Persons thereunto duly authorized) as of the date first written above.

COMPANY:

PROSOMNUS, INC.

By: _____
Name:
Title:

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed (where applicable, by their respective officers or other authorized Persons thereunto duly authorized) as of the date first written above.

SUPPORTING STOCKHOLDER:

[•]

By: _____
Name:
Title:

Owned Shares Held Directly:

Common Stock:

[•]

[Covered Shares Held Indirectly:]

[Common Stock: [•]___]

[Record Owner: [•]___]

[Common Stock: [•]___]

[Record Owner: [•]___]