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# FORM OF LEGAL OPINION

*Below is an example of the legal opinions that might be given in a typical venture-backed preferred stock financing. As most law firms have their own forms and the opinions given depend on the specific circumstances, this is meant only as a starting point for reference purposes.*

*NOTE: The following assumes a Delaware corporation headquartered in California.*

Based upon the foregoing and subject to the additional qualifications set forth below, we are of the opinion that:

1. The Company is validly existing as a corporation[1] and in good standing under Delaware law and is qualified as a foreign corporation and in good standing in [California].

2. The Company has the corporate power to execute and deliver the Transaction Documents[2] in which it is named as a party and to perform its obligations thereunder.[3]

3. The Company has duly authorized, executed and delivered the Transaction Documents in which it is named as a party, and such Transaction Documents constitute its valid and binding obligations[4] enforceable against it in accordance with their terms. [5]

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[1] Opinion recipients sometimes request an opinion that the Company is "duly incorporated." This opinion requires the opinion preparers to conduct a more extensive inquiry into the past than an opinion that the "Company is validly existing as a corporation," and at least in the venture financing context, often is not cost justified. See *Third-Party "Closing" Opinions: A Report of The TriBar Opinion Committee*, 53 Bus. Law 591, 651–652 (1998). Ordinarily, an opinion that a Company has been "duly organized" should be avoided because of uncertainty as to what additional matters, if any, it covers.

[2] Opinion preparers should take care that the Company's certificate of incorporation is not included in the definition of "Transaction Documents." Inclusion of the certificate of incorporation would be both illogical (*e.g.*, in the case of the due execution and delivery opinion) and troublesome (*e.g.*, in the case of the enforceability opinion).

[3] Opinion recipients sometimes ask that this opinion be broadened, for example to cover the Company's corporate power to conduct its business. If given, this broader opinion typically is based on a description in a disclosure document or an officer's certificate.

[4] Note that this opinion covers only obligations of the Company and, therefore, does not cover obligations of other parties to the Transaction Documents, such as investors and other stockholders. Sometimes, an opinion recipient requests that the enforceability opinion be expanded to cover those parties to give the recipient comfort that important obligations, such as promises by those parties to vote stock in favor of the election of directors designated by the recipient, also are enforceable. Since the law of many states permits the enforcement of promises to vote stock, in appropriate circumstances, counsel to the Company might be able to give that opinion based on an assumption as to status and due authorization, execution and delivery in the case of parties that are entities, and legal capacity, due execution and delivery in the case of parties who are natural persons. Such an opinion, however, may be of limited value to an opinion recipient whose principal concern is the availability of specific performance as a remedy, since equitable remedies are excluded from the opinion's coverage by the equitable principles limitation.

[5] Often, the law covered by the opinion letter is the same as the law chosen as the governing law in the Transaction Documents. When that is not the case, apart from obtaining an opinion of counsel in the state whose law is chosen as the governing law, several alternatives are available. These include giving an opinion on whether the law chosen as the governing law will be given effect under the law covered by the opinion or, alone or in combination with the choice-of-law opinion, giving an opinion on the enforceability of the Transaction Documents as though the law covered by the opinion governed the Transaction Documents. If the Company is incorporated in

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4. The execution and delivery by the Company of the Transaction Documents and the performance by the Company of its obligations under the Transaction Documents, including its issuance and sale of the Preferred Shares and issuance of shares of Common Stock upon conversion of the Preferred Shares in accordance with the Company's certificate of incorporation (the "**Conversion Shares**"), do not and will not (i) violate the Delaware General Corporation Law ("**DGCL**"), the law of [indicate state whose law is generally covered by the opinion letter] or United States federal law,[6] (ii) violate any court order, judgment or decree, if any, listed in [Schedule __ to this opinion letter] [Schedule __ to the Purchase Agreement], (iii) result in a breach of, or constitute a default under, any of the agreements or instruments listed in Schedule __ to this opinion letter[7], or (iv) violate the Company's certificate of incorporation or bylaws.

5. The Company is not required to obtain any consent, approval, license or exemption by, or order or authorization of, or to make any filing, recording or registration with, any governmental authority pursuant to the DGCL, the law of [*indicate state whose law is generally covered by the opinion letter*] or United States federal law in connection with the execution and delivery by the Company of the Transaction Documents in which it is named as a party or the performance by it of its obligations other than those that have been obtained or made.[8]

6. The authorized capital stock of the Company consists of (i) _____ shares of Common Stock, $0.01 par value, of which _____ shares are issued and outstanding, and (ii) _____ shares of Preferred Stock, $0.01 par value, of which _____ shares have been designated Series A Preferred Stock, _____ shares of which are issued and outstanding, and _____ shares have been designated Series B Preferred Stock, none of which are issued

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Delaware rather than the state whose law is generally covered by the opinion letter, the opinion letter typically will state that it also covers the DGCL. Unless otherwise expressly stated, the enforceability opinion will cover the DGCL to the extent the internal affairs doctrine of the state whose law is generally covered by the enforceability opinion deems the DGCL applicable to the agreement. Among the provisions of the agreement to which the DGCL is likely to be deemed applicable are provisions relating to the governance of the Company.

[6] For the law covered, see part II of the ABA Legal Opinion Principles, 53 Bus. Law. 831 (1998). Opinion recipients and preparers should agree on whether this opinion should be drafted to cover industry-specific laws that are applicable to the business of the Company and could have applicability to the transaction but are not generally reviewed in connection with the types of transactions covered by the Transaction Documents, such as laws applicable to companies in the financial services industry.

[7] Consideration should be given to which contracts should be covered in light of the cost constraints of many venture financings.

[8] Securities law approvals and filings are understood as a matter of customary practice not to be covered by this opinion unless referred to specifically. Some lawyers, however, choose to make this explicit by including an exception (such as: ", except [the filing of a Form D pursuant to Regulation D of the Securities Act] and the notice filing required by [Section 25102(f) or 25102.1 of the California Corporate Securities Law of 1968, as amended]") or a statement indicating that the only opinion covering securities laws is in numbered paragraph 8. Such an exclusion does not mean that other laws customarily understood to be excluded are covered.

and outstanding.[9] All such issued and outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.[10]

7. The Preferred Shares have been duly authorized, and when issued, delivered and paid for in accordance with the Purchase Agreement, will be validly issued, fully paid and nonassessable.[11] The Conversion Shares have been duly authorized and, when issued in accordance with the Company's certificate of incorporation upon conversion of the Preferred Shares, will be validly issued, fully paid and nonassessable.[12] Neither the issuance or sale of the Preferred Shares nor the issuance of the Conversion Shares is subject to any preemptive rights under the DGCL or the Company's certificate of incorporation or bylaws.[13]

8. Based on, and assuming the accuracy of, the representations of each of the Purchasers in the Purchase Agreement, the sale of the Preferred Shares pursuant to the Purchase Agreement does not, and the issuance of the Conversion Shares upon conversion of the Preferred Shares in accordance with the Company's certificate of incorporation will not (assuming no

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[9] Because of its factual nature, some law firms are unwilling to give an opinion on the number of outstanding shares. To avoid any misunderstanding that an opinion on the number of outstanding shares is in essence anything more than a factual confirmation, law firms that are willing to give that opinion often do so only if they also are giving an opinion on the valid issuance of the Company's outstanding shares (see note 10).

[10] Because the opinion on the valid issuance of the outstanding shares will require a review of each issuance of shares, in many situations it will not be cost justified. For a description of the work customarily required to be performed to give this opinion, see *Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock*, 63 Bus. Law. 921 (2008).

Opinion recipients sometimes ask an opinion giver to state that, to the opinion giver's knowledge, the Company has no outstanding options, warrants or other rights to acquire Company stock other than as disclosed in the Transaction Documents. Many law firms are unwilling to give this opinion because it constitutes negative assurance on a factual matter they rarely are in a position to confirm. When, however, the opinion is given, the opinion letter should describe what the opinion preparers have done to support it.

[11] Although understood as a matter of customary practice to be covered by the "duly authorized" opinion, some opinion recipients ask opinion givers to state expressly that the rights, powers, and preferences of the Preferred Shares set forth in the certificate of incorporation do not violate the DGCL or the Company's certificate of incorporation. Note that the "duly authorized" opinion, whether or not it includes that additional statement, is not an opinion on the enforceability of the terms of the Preferred Shares. See *Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock*, 63 Bus. Law. 921 (2008).

[12] Because shares may be issued in the future under antidilution clauses or otherwise, as a matter of customary practice this opinion is understood to mean that sufficient authorized shares are available on the date of the opinion letter, not that sufficient authorized shares necessarily will be available on the conversion date. To make the limited nature of the opinion clear, some opinion preparers include an express assumption regarding the availability of sufficient authorized shares in the future.

Opinion recipients sometimes ask for an opinion that a specified number of shares (at least sufficient to cover issuance of the Conversion Shares) has been reserved for issuance. Many firms will not give this opinion because the concept of reservation, at least in Delaware and California, has no statutory meaning and the issue of the number of shares the Company has committed to issue is essentially factual (see note 9). Some firms will, however, give what is often an acceptable alternative, namely, an opinion that the board of directors has duly adopted a resolution reserving a specified number of shares for issuance on conversion of the Preferred Shares and that the resolution remains in full force and effect.

[13] Even though a valid issuance opinion could not be given on shares issued in violation of preemptive rights granted by statute or the Company's certificate of incorporation or bylaws, opinion recipients sometimes request an opinion that expressly addresses the absence of those rights. Such an opinion does not cover contractual rights (which may be covered by the no breach or default opinion in numbered opinion 4(iii) above).

commission or other remuneration is paid or given directly or indirectly for soliciting the conversion),[14] require registration under the Securities Act.[15, 16]

Except as disclosed in Schedule __ to the Purchase Agreement, we are not representing the Company in any pending litigation in which it is a named defendant that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Transaction Documents.[17]

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[14] Ordinarily, no registration opinions covering the future issuance of the Conversion Shares are based on an assumption that the conditions for availability of the exemption provided by Section 3(a)(9) from the registration requirements of the Securities Act of 1933 will be satisfied at the time of conversion. In the factual situation covered by this form, the only condition that needs to be assumed is that no commission or other remuneration will have been paid when the shares are converted. As in this form, some opinion givers state this assumption expressly. Other opinion givers do not for various reasons, including their belief that satisfaction of the matters assumed is so well understood that it does not have to be stated. No registration opinions are discussed in Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, *No Registration Opinions*, 63 Bus. Law. 187 (2007).

[15] As provided in this form, the no registration opinion is usually given in reliance on appropriate representations and warranties set forth in the Purchase Agreement (or information obtained in other ways, such as back-up certificates from the Company) relating to the absence of "general solicitation" and "general advertising" and prior sales of similar securities that could be integrated with the offering covered by the opinion. (If a placement agent is involved, the opinion also is usually based on representations and warranties of, or a certificate from, the placement agent.) Some opinion givers expressly exclude coverage of the no "general solicitation" and "general advertising" requirement from the opinion (that requirement is contained in Rule 502(c) of Regulation D and is understood to be a condition of compliance with the exemption provided by Section 4(2) of the Securities Act). See Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, *No Registration Opinions*, 63 Bus. Law. 187 (2007).

[16] When warrants, options or other rights to acquire Company stock are exercisable upon the payment of cash, the no registration opinion can raise difficult issues because the exemption under Section 3(a)(9) of the Securities Act would not be available (other than possibly if the warrants, options or other rights are exercised on a net exercise basis) and the availability of another exemption, such as under Section 4(2) of the Securities Act, would depend on the facts at the time of exercise. Accordingly, many firms will not give a no registration opinion on the issuance of shares upon the future exercise of warrants, options or other rights. Some firms, however, will give the opinion based on an express assumption that the warrants, options or other rights were exercised and the underlying shares issued at the closing of the sale of the Preferred Shares.

[17] This version of the "no-litigation" confirmation is narrower than the version that historically has been given, which covered litigation against the company generally. Because of its factual nature and in light of recent cases brought against law firms by recipients of no-litigation confirmations, many law firms no longer are willing to give the broader no-litigation confirmation, and some firms are unwilling to give any confirmation relating to litigation.

Although this form obviates the need for the phrase "to our knowledge" or a variant of it, other forms include that phrase. When they do, a definition of "knowledge" normally should be included to avoid misunderstanding as to the meaning of the term. An example of a definition that is derived from the ABA Legal Opinion Principles (see note 5) (and that would apply if no definition were included) is:

When the phrase "to our knowledge" or an equivalent phrase is used in this opinion, its purpose is to limit the statements it qualifies to the actual knowledge of the lawyers in this firm responsible for preparing this opinion letter after such inquiry as they deemed appropriate.

Some opinions preparers include in the definition in place of "this opinion letter" the phrase "the particular opinion or confirmation containing that reference." Also, some opinion preparers refer to "conscious awareness" instead of "actual knowledge."

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In preparing the confirmation, the opinion preparers normally would conduct an inquiry of those lawyers in their firm who the opinion preparers believe are reasonably likely to have information not otherwise known to them that is called for by the confirmation. As a matter of customary practice, the confirmation is understood not to cover information known to other lawyers in the firm but not known to the opinion preparers after such inquiry. Depending on the circumstances and the wording of the confirmation, the opinion preparers also might make inquiry of appropriate officials of the Company. In preparing a no litigation confirmation, the opinion preparers are not required as a matter of customary diligence to check court or other public records. Although not necessary, some opinion preparers choose to make this clear, for example, by stating expressly that they did not examine court or other public records.

If the opinion preparers are aware that, unknown to the opinion recipient, a material legal proceeding is being handled by another firm, they should consider whether providing a confirmation (however worded) regarding litigation without noting the existence of that legal proceeding would be misleading to the opinion recipient.