**AGREEMENT AND PLAN OF MERGER AND REORGANIZATION by and among FACEBOOK, INC., RHODIUM ACQUISITION SUB II, INC., RHODIUM MERGER SUB, INC., WHATSAPP INC., and FORTIS ADVISORS LLC., as the Stockholders’ Agent, dated as of February 19, 2014.**

Full text of the agreement is available at: <https://www.sec.gov/Archives/edgar/data/1326801/000132680114000023/fb-3312014xex21.htm>

**ARTICLE 8**      
**ESCROW FUND AND INDEMNIFICATION**

8.1    Escrow Fund.

(a)    At the First Effective Time, Acquirer shall withhold the Cash Escrow Amount and the Stock Escrow Amount from the Merger Consideration and shall deposit the Cash Escrow Amount and the Stock Escrow Amount with U.S. Bank, N.A. (or another institution selected by Acquirer and reasonably satisfactory to the Company) as escrow agent (the “***Escrow Agent***”) (the aggregate amount of cash and shares of Parent Common Stock so held in escrow from time to time, together with any interest and other income earned on such cash and any non-taxable stock dividends declared and paid in respect of such shares, the “***Escrow Fund***”), which Escrow Fund shall be governed by this Agreement and the Escrow Agreement. The Escrow Fund shall constitute security for the benefit of Acquirer (on behalf of itself or any other Indemnified Person) with respect to any Indemnifiable Damages pursuant to the indemnification, compensation and reimbursement obligations of the Converting Holders under this Article 8. Subject to any early payouts in accordance with the terms of this Agreement and the Escrow Agreement, the Escrow Agent shall hold the Escrow Fund until 11:59 p.m. Pacific time on the first anniversary of the Closing Date (the “***Escrow Release Date***”). Except to the extent there is a cancellation of shares of Parent Common Stock held in the Escrow Fund in connection with Indemnifiable Damages, shares of Parent Common Stock held in the Escrow Fund shall be treated by Acquirer as issued and outstanding stock of Parent, and the Company Stockholders shall be entitled to exercise voting rights and to receive dividends with respect to such shares (other than non-taxable stock dividends, which shall be withheld by Parent and included as part of the Escrow Fund). The Converting Holders shall not receive interest or other earnings on the shares of Parent Common Stock (other than as set forth in the immediately preceding sentence) in the Escrow Fund. Parent or Acquirer shall be treated as the owner of the Cash Escrow Amount for Tax purposes and shall report all income earned by the Cash Escrow Amount while such amount remains in the Escrow Fund. Neither the Escrow Fund (including any portion thereof) nor any beneficial interest therein may be pledged, subjected to any Encumbrance, sold, assigned or transferred by any Converting Holder or be taken or reached by any legal or equitable process in satisfaction of any debt or other Liability of any Converting Holder, in each case prior to the distribution of the Escrow Fund to any Converting Holder in accordance with Section 8.1(b) or Section 8.1(c), except that each Converting Holder shall be entitled to assign such Converting Holder’s rights to any amounts or shares of Parent Common Stock to be released from the Escrow Fund by will, by the laws of intestacy or by other operation of law.

(b)    Within five Business Days following the Escrow Release Date, Acquirer and the Stockholders’ Agent shall, subject to Section 8.1(d) and the terms of the Re-Vesting Agreements, deliver joint written instructions to the Escrow Agent instructing the Escrow Agent to:

(i)    deliver to the Paying Agent for further distribution to each applicable Converting Holder, with respect to each share of Outstanding Company Capital Stock (other than Disregarded Shares) held by such Converting Holder, an amount equal to (A) the amount by which the cash amount held in the Escrow Fund exceeds the Cash Percentage of the amount that is determined, in the reasonable judgment of Acquirer, to be necessary to satisfy all unsatisfied or disputed claims for indemnification, compensation or reimbursement specified in any Claim Certificate delivered to the Stockholders’ Agent prior to the Escrow Release Date in accordance with this Article 8 (each an “***Unresolved Claim,***” and the amount Acquirer reasonably determines to be necessary to satisfy all Unresolved Claims, the “***Retained Escrow Amount***”), multiplied by (B) the Specified Fraction with respect to such share of Outstanding Company Capital Stock; and

(ii)    deliver to the Transfer Agent, for distribution in book entry form to each applicable Converting Holder, with respect to each share of Outstanding Company Capital Stock (other than Disregarded Shares) held by such Converting Holder, the fraction of a share of Parent Common Stock equal to (A) the number of shares of Parent Common Stock by which (1) the number of shares of Parent Common Stock remaining in the Escrow Fund exceeds (2) the number of shares of Parent Common Stock having a value equal to the Stock Percentage of the Retained Escrow Amount, multiplied by (B) the Specified Fraction with respect to such share of Outstanding Company Capital Stock. The per share value of any shares of Parent Common Stock retained in the Escrow Fund to cover Unresolved Claims in accordance with this Section 8.1(b) or Section 8.1(c) shall be equal to the Specified Price.

(c)    Within five Business Days following the resolution or satisfaction of any Unresolved Claim (including the release from the Escrow Fund of any amount owed to any Indemnified Person in connection with the resolution of such Unresolved Claim), Acquirer and the Stockholders’ Agent shall, subject to Section 8.1(d) and the terms of the Re-Vesting Agreements, deliver joint written instructions to the Escrow Agent instructing the Escrow Agent to:

(i)    deliver to the Paying Agent for further distribution to each applicable Converting Holder, with respect to each share of Outstanding Company Capital Stock (other than Disregarded Shares) held by such Converting Holder, an amount equal to (A) the amount by which the cash amount held in the Escrow Fund exceeds the Cash Percentage of the amount (the “***Remaining Unresolved Claim Amount***”) that is determined, in the reasonable judgment of Acquirer, to be necessary to satisfy all remaining Unresolved Claims, multiplied by (B) the Specified Fraction with respect to such share of Outstanding Company Capital Stock; and

(ii)    deliver to the Transfer Agent, for distribution in book entry form to each applicable Converting Holder, with respect to each share of Outstanding Company Capital Stock (other than Disregarded Shares) held by such Converting Holder, the fraction of a share of Parent Common Stock equal to (A) the number of shares of Parent Common Stock by which (1) the number of shares of Parent Common Stock remaining in the Escrow Fund exceeds (2) the number of shares of Parent Common Shares having a value equal to the Stock Percentage of the Remaining Unresolved Claim Amount, multiplied by (B) the Specified Fraction with respect to such share of Outstanding Company Capital Stock.

(d)    The number of shares of Parent Common Stock to be released from the Escrow Fund for distribution to a Converting Holder shall be rounded down to the nearest whole share and computed after aggregating all shares of Parent Common Stock to be distributed to such Converting Holder. The amount of cash to be released from the Escrow Fund and distributed by the Payment Agent or Acquirer to a Converting Holder shall be rounded to the nearest cent after aggregating all cash amounts to be distributed to such Converting Holder by the Payment Agent or Acquirer, as applicable.

(e)    Shares of Parent Common Stock recovered from the Escrow Fund by Acquirer in satisfaction of indemnification claims shall be deemed to have a value equal to the Specified Price.

8.2    Indemnification.

(a)    Subject to the limitations set forth in this Article 8, from and after the Closing, the Converting Holders shall, severally (according to their respective Pro Rata Shares) but not jointly, indemnify and hold harmless Parent, Acquirer, Merger Sub, the Company, the First Step Surviving Corporation, the Final Surviving Corporation and their respective officers, directors, agents and employees, and each Person, if any, who controls or may control Parent within the meaning of the Securities Act (each of the foregoing being referred to individually as an “***Parent Indemnified Person***” and collectively as “***Parent Indemnified Persons***”) from and against, and shall compensate and reimburse each Indemnified Person for, any and all Indemnifiable Damages directly or indirectly, whether or not due to a Third-Party Claim, arising out of, resulting from or in connection with the following (the “***Parent Indemnifiable Matters***”):

(i)    any failure of any representation or warranty made by the Company herein or in the Company Disclosure Letter (including any exhibit or schedule of the Company Disclosure Letter it being understood that any statements in the Company Disclosure Letter to the effect that “Parent/Acquirer agrees the Company will not be in breach for failure to disclose” will be binding on the Parent Indemnified Persons) to be true and correct (A) as of the Agreement Date (except in the case of representations and warranties that by their terms speak only as of a specific date or dates, which representations and warranties shall be true and correct as of such date or dates) or (B) as of the Closing Date as though such representation or warranty were made as of the Closing Date (except in the case of representations and warranties that by their terms speak only as of a specific date or dates, which representations and warranties shall be true and correct as of such date or dates) (in the case of each of clauses “(A)” and “(B)”, without giving effect to (x) any update of or modification to the Company Disclosure Letter made or purported to have been made on or after the date of this Agreement or (y) any materiality, “Material Adverse Effect” or similar standards or qualifications limiting the scope of such representation or warranty);

(ii)    any failure of any certification, representation or warranty made by the Company in the Company Closing Certificate delivered to Parent or Acquirer to be true and correct as of the date such certificate is delivered to Parent or Acquirer;

(iii)    regardless of the disclosure of any matter set forth in the Company Disclosure Letter, any breach of, or default in connection with, any of the covenants, agreements or obligations made by the Company herein;

(iv)    regardless of the disclosure of any matter set forth in the Company Disclosure Letter, any inaccuracies in the Spreadsheet;

(v)    regardless of the disclosure of any matter set forth in the Company Disclosure Letter, any payments made with respect to Dissenting Shares to the extent that such payments, in the aggregate, exceed the value of the portion of the Merger Consideration that otherwise would have been payable or issuable (based on the Specified Price) pursuant to Section 1.3(a) upon the exchange of such Dissenting Shares, and any interest, costs, expenses and fees incurred by any Indemnified Person in connection with the exercise of any dissenters’ or appraisal rights; and

(vi)    regardless of the disclosure of any matter in the Company Disclosure Letter, any claims by (A) any then-current or former holder or alleged then-current or former holder of any Equity Interests of the Company (including any predecessors), arising out of, resulting from or in connection with such Person’s status or alleged status as a holder of Equity Interests of the Company (including any predecessors) at any time at or prior to the Closing, or (B) any Person to the effect that such Person is entitled to any Equity Interest or any payment in connection with the Transactions other than as specifically set forth on the Spreadsheet.

(b)    Subject to the limitations set forth in this Article 8, from and after the Closing, Parent shall indemnify and hold harmless the Converting Holders (and if applicable, their respective officers, directors, agents and employees, and each Person, if any, who controls or may control any Converting Holder within the meaning of the Securities Act) (each of the foregoing being referred to individually as a “***Holder Indemnified Person***” and collectively as “***Holder Indemnified Persons***”) from and against, and shall compensate and reimburse each Holder Indemnified Person for, any and all Indemnifiable Damages directly or indirectly, whether or not due to a Third-Party Claim, arising out of, resulting from or in connection with the following (the “***Holder Indemnifiable Matters***”):

(i)    any failure of any Parent Special Representations to be true and correct (A) as of the Agreement Date or (B) as of the Closing Date as though such representation or warranty were made as of the Closing Date (in the case of each of clauses “(A)” and “(B)”, without giving effect to any materiality, “Material Adverse Effect” or similar standards or qualifications limiting the scope of such representation or warranty); and

(ii)    any failure of any certification, representation or warranty made by Parent in the Parent and Acquirer Closing Certificate delivered to the Company that are within the scope of those covered in the Parent Special Representations to be true and correct as of the date such certificate is delivered to the Company.

(c)    An “***Indemnified Person***” means a Parent Indemnified Person or Holder Indemnified Person, as applicable. An “***Indemnifying Person***” means a Converting Holder or either Parent or Acquirer, as applicable.

(d)    Knowledge standards or qualifications, and qualifications or requirements that a matter be or not be “reasonably expected” or “reasonably likely” to occur in any representation, warranty, covenant, agreement or obligation shall only be taken into account in determining whether a breach of or default in connection with such representation, warranty, covenant, agreement or obligation (or failure of any representation or warranty to be true and correct) exists and shall not be taken into account in determining the amount of any Indemnifiable Damages with respect to such breach, default or failure to be true and correct.

8.3    Indemnifiable Damage Threshold; Other Limitations.

(a)    Notwithstanding anything to the contrary contained herein, no Parent Indemnified Person may make a claim against the Escrow Fund in respect of any claim for Indemnifiable Damages arising out of, resulting from or in connection with the matters listed in clauses “(i)” and “(ii)” of Section 8.2(a) (other than any failure of any of the Company Special Representations to be true and correct as aforesaid) unless and until a Claim Certificate (together with any other delivered Claim Certificates) describing Indemnifiable Damages in an aggregate amount greater than $10,000,000 (the “***Aggregate Deductible***”) has been delivered, in which case the Parent Indemnified Person may make claims for indemnification, compensation and reimbursement and may recover all Indemnifiable Damages in excess of the amount of the Aggregate Deductible (provided that no recovery may actually be made until claims for Indemnifiable Damages under clauses “(i)” and “(ii)” of Section 8.2(a) resolved in favor of Parent Indemnified Persons exceed the Aggregate Deductible). The Aggregate Deductible shall not apply to any other Indemnifiable Damages.

(b)    Subject to Section 8.3(c), if the First Merger is consummated, recovery from the Escrow Fund shall constitute the sole and exclusive remedy for the indemnity obligations of each Converting Holder under this Agreement for Indemnifiable Damages arising out, resulting from or in connection with of any of the matters listed in: (i) clause “(i)” or clause “(ii)” of Section 8.2(a) (except (A) in the case of intentional fraud by or on behalf of the Company under this Agreement and (B) any failure of any of the representations and warranties contained in Section 2.2 (Capital Structure) or Section 2.3(a) (Authority) or the representations and warranties of the Company contained in any Closing Certificate delivered to Parent or Acquirer that are within the scope of those covered in Section 2.2 or Section 2.3(a) (collectively, the “***Company Special Representations***”) to be true and correct as aforesaid), (ii) clause “(iii)” of Section 8.2(a) (other than with respect to any intentional breach or default), and (iii) clause “(vi)” of Section 8.2(a). In the case of claims for Indemnifiable Damages arising out of, resulting from or in connection with (i) intentional fraud by or on behalf of the Company under this Agreement, (ii) any failure of any of the Special Representations to be true and correct as aforesaid, (iii) any of the matters set forth in clause “(iii)” (solely with respect to any intentional breach or default), clause “(iv)” or clause “(v)” of Section 8.2(a) (collectively, “***Fundamental Matters***”), after Indemnified Persons have exhausted or made claims upon all amounts of cash or all shares of Parent Common Stock held in the Escrow Fund (after taking into account all other claims for indemnification, compensation or reimbursement from the Escrow Fund made by Indemnified Persons) (it being understood that recovery for all Company Indemnifiable Matters shall first be sought from the Escrow Fund), each Converting Holder shall have Liability for such Converting Holder’s Pro Rata Share of the amount of any Indemnifiable Damages resulting therefrom; provided that such liability shall be limited to an amount equal to such Converting Holder’s Pro Rata Share of the aggregate value of the Merger Consideration (inclusive of such Converting Holder’s Pro Rata Share of the aggregate value of the Escrow Fund) (it being understood that, for purposes of determining the aggregate value of the Stock Consideration, each share of Parent Common Stock shall be valued at the Specified Price); provided, further, that such limitation of liability shall not apply to a Converting Holder in the case of (x) intentional fraud by or on behalf of such Converting Holder or (y) intentional fraud by or on behalf of the Company in which such Converting Holder participated or had actual knowledge. In the case of claims for Indemnifiable Damages arising out of, resulting from or in connection with (i) intentional fraud by or on behalf of Parent, Acquirer or Merger Sub under this Agreement or (ii) any failure of the representations and warranties contained in Section 3.2(a) (Authority), Section 3.3 (Issuance of Shares) or Section 3.5 (No Prior Merger Sub Operations) or the representations and warranties of Parent, Acquirer or Merger Sub contained in the Parent and Acquirer Closing Certificate delivered to the Company that are within the scope of those covered in Section 3.2(a), Section 3.3 or Section 3.5 (collectively, the “***Parent Special Representations***”) to be true and correct as aforesaid), Parent shall have Liability for the amount of any Indemnifiable Damages resulting therefrom; provided that in the case of the immediately foregoing clause “(ii)” only, such liability shall be limited to an amount equal to the aggregate value of the Merger Consideration (it being understood that, for purposes of determining the aggregate value of the Stock Consideration, each share of Parent Common Stock shall be valued at the Specified Price).

(c)    The amounts that an Indemnified Person recovers from the Escrow Fund pursuant to Fundamental Matters shall not reduce the amount that an Indemnified Person may recover with respect to claims that are not Fundamental Matters. By way of illustration and not limitation, assuming there are no other claims for indemnification, in the event that Indemnifiable Damages resulting from a Fundamental Matter are first satisfied from the Escrow Fund and such recovery fully depletes the Escrow Fund, the maximum amount recoverable by an Indemnified Person pursuant to a subsequent claim that is not a Fundamental Matter shall continue to be $600,000,000 irrespective of the fact that the Escrow Fund was used to satisfy such Fundamental Matter, such that the amount recoverable for such two claims would be the same regardless of the chronological order in which they were made.

(d)    Notwithstanding anything to the contrary contained in this Agreement, (i) no Converting Holder will have any right of indemnification, contribution or right of advancement from Parent, the First Step Surviving Corporation, the Final Surviving Corporation or any other Indemnified Person with respect to any Indemnifiable Damages claimed by any Indemnified Person for which such Converting Holder is liable in its capacity as a Converting Holder and (ii) the rights and remedies of the Indemnified Persons after the First Effective Time shall not be limited by any waiver of any condition to the Closing related thereto. The Company and the Stockholders’ Agent (on behalf of the Converting Holders) hereby agree that: (A) the Indemnified Persons’ rights to indemnification, compensation and reimbursement contained in this Article 8 relating to the representations, warranties, covenants and obligations of the Company or the Stockholders’ Agent are part of the basis of the bargain contemplated by this Agreement; and (B) such representations, warranties, covenants and obligations, and the rights and remedies that may be exercised by the Indemnified Persons with respect thereto, shall not be waived, limited or otherwise affected by or as a result of (and the Indemnified Persons shall be deemed to have relied upon such representations, warranties, covenants or obligations notwithstanding) any knowledge on the part of any of the Indemnified Persons or any of their Representatives, regardless of whether obtained through any investigation by any Indemnified Persons or any Representative of any Indemnified Persons or through disclosure by the Company (other than such disclosures included in the applicable part of the Company Disclosure Letter relating to such representation, warranty or covenant) or any other Person, and regardless of whether such knowledge was obtained before or after the execution and delivery of this Agreement.

(e)    All Indemnifiable Damages shall be calculated net of the amount of any actual recoveries actually received by an Indemnified Person prior to the Escrow Release Date under any existing insurance policies and contractual indemnification or contribution provisions (in each case, calculated net of any actual collection costs and reserves, expenses, deductibles or premium adjustments or retrospectively rated premiums (as determined in good faith by an Indemnified Person) incurred or paid to procure such recoveries) in respect of any Indemnifiable Damages suffered, paid, sustained or incurred by any Indemnified Person; provided that no Indemnified Person shall have any obligation to seek to obtain or continue to pursue any such recoveries.

(f)    Without limiting in any way whatsoever any of Parent’s, Acquirer’s, Merger Sub’s or any other Person’s rights with respect to claims based upon intentional fraud, Parent and Acquirer acknowledges and agrees (on behalf of all Parent Indemnified Persons) that the representations and warranties of the Company set forth in Article 2, the Company Disclosure Letter, and any certificate, agreement, document, schedule or instrument delivered by or on behalf of the Company pursuant to this Agreement or any other Transaction Document are the only representations and warranties made by or on behalf of the Company in connection with the transactions contemplated by this Agreement.

(g)    Following the Closing, except in the event of intentional fraud (other than intentional fraud to the extent such intentional fraud is by or on behalf of the Company under this Agreement) (i) this Article 8 shall constitute the sole and exclusive remedy for recovery of monetary Indemnifiable Damages by the Parent Indemnified Persons and Holder Indemnified Persons for all Company Indemnifiable Matters and Parent Indemnifiable Matters, respectively, under this Agreement (which means, for example, that the survival periods and liability limits set forth in this Article 8 shall control notwithstanding any statutory or common law provisions or principles to the contrary), and (ii) all applicable statutes of limitations or other claims periods with respect to claims for Indemnifiable Damages shall be shortened to the applicable claims periods and survival periods set forth herein; provided, however, that for clarity, nothing in this Agreement shall limit the rights or remedies of Indemnified Person in connection with any claims seeking injunctive relief or specific performance.

8.4    Period for Claims. Except as otherwise set forth in this Section 8.4 and in the case of claims alleging intentional fraud by or on behalf of the Company under this Agreement, the period during which claims for Indemnifiable Damages may be made (the “***Claims Period***”) against the Escrow Fund for Indemnifiable Damages arising out of, resulting from or in connection with the matters listed in clauses “(i)” and “(ii)” and “(iii)” (as to non-intentional breaches or defaults) of Section 8.2(a) (other than with respect to any of the Special Representations) shall commence at the Closing and terminate at 11:59 p.m. Pacific time on the Escrow Release Date. The Claims Period for Indemnifiable Damages arising out of, resulting from or in connection with the other matters listed in Section 8.2(a), consisting of claims alleging (i) intentional fraud by or on behalf of the Company under this Agreement, and (ii) any failure of any of the Company Special Representations to be true and correct, shall commence at the Closing and terminate at 11:59 p.m. Pacific time on the date that is 30 days following the expiration of the applicable statute of limitations. The Claims Period for Indemnifiable Damages arising out of, resulting from or in connection with the matters listed in Section 8.2(b), consisting of claims alleging (i) intentional fraud by or on behalf of Parent, Acquirer or Merger Sub under this Agreement, and (ii) any failure of any of the Parent Special Representations to be true and correct, shall commence at the Closing and terminate at 11:59 p.m. Pacific time on the date that is 30 days following the expiration of the applicable statute of limitations. Notwithstanding anything to the contrary contained herein, such portion of the Escrow Fund on the Escrow Release Date as in the reasonable judgment of Acquirer may be necessary to satisfy any Unresolved Claims shall remain in the Escrow Fund until such claims for Indemnifiable Damages have been resolved or satisfied in accordance with Section 8.1(b). The availability of the Escrow Fund to indemnify, compensate or reimburse the Indemnified Persons will be determined without regard to any right to indemnification that any Converting Holder may have in his or her capacity as an officer, director, employee or agent of the Company and no such Converting Holder will be entitled to any indemnification from the Company, the First Step Surviving Corporation or the Final Surviving Corporation for amounts paid for indemnification, compensation or reimbursement under this Article 8 in such Person’s capacity as a Converting Holder.

8.5    Claims.

(a)    From time to time during the Claims Period, Acquirer or the Stockholders’ Agent, as applicable, may deliver to the Stockholders’ Agent or Acquirer, as applicable, one or more certificates signed by any officer of Acquirer or by the Stockholders’ Agent (each, a “***Claim Certificate***”):

(i)    stating that an Indemnified Person has incurred, paid, reserved or accrued, or reasonably believes that it could reasonably be expected to incur, pay, reserve or accrue, Indemnifiable Damages (or that with respect to any Tax matters, that any Tax Authority reasonably may raise such matter in audit of such Indemnified Person or its Affiliates, that could give rise to Indemnifiable Damages);

(ii)    stating the amount of such Indemnifiable Damages (which, in the case of Indemnifiable Damages not yet incurred, paid, reserved or accrued, may be the maximum amount reasonably believed by Acquirer or the Stockholders’ Agent, as applicable, could reasonably be expected to be incurred, paid, reserved, accrued or demanded by a third party) (the amount of such Indemnifiable Damages, which may be adjusted by Acquirer or the Stockholders’ Agent, as applicable, from time to time following investigation into the matters therein by written notice to the Stockholders’ Agent or Acquirer, as applicable, the “***Claimed Amount***”); and

(iii)    specifying in reasonable detail (based upon the information then possessed by Acquirer or the Stockholders’ Agent, as applicable,) the individual items of such Indemnifiable Damages included in the amount so stated and the nature of the claim to which such Indemnifiable Damages are related.

(b)    No delay in providing such Claim Certificate within the applicable Claims Period shall affect an Indemnified Person’s rights hereunder (except to the extent that such failure materially prejudices the Indemnifying Person in terms of the amount of Indemnifiable Damages such Indemnifying Person is liable to indemnify the Indemnified Person for).

8.6    Resolution of Objections to Claims.

(a)    If the Stockholders’ Agent or Acquirer, as applicable, does not contest, by written notice to Acquirer or the Stockholders’ Agent, as applicable, any claim or claims by Acquirer or the Stockholders’ Agent, as applicable, made in any Claim Certificate within the 30-day period following receipt of the Claim Certificate, then: (X) in the case of a claim by Acquirer, (i) Acquirer and the Stockholders’ Agent shall, within 10 days following the end of such period, deliver joint written instructions to the Escrow Agent instructing the Escrow Agent to (A) release from the Escrow Fund to Acquirer an amount in cash equal to the Cash Percentage of the Claimed Amount with respect to such Claim Certificate, and (B) deliver to the Transfer Agent for cancellation a number of shares of Parent Common Stock from the Escrow Fund having a total value equal to the Stock Percentage of such Claimed Amount (rounded to the nearest whole share); and (ii) if the cash and shares held in the Escrow Fund are insufficient to cover the full amount of such Indemnifiable Damages, then, subject to the limitations contained in Section 8.3, each Converting Holder shall pay such Converting Holder’s Pro Rata Share of such shortfall to the applicable Indemnified Person; and (Y) in the case of a claim by the Stockholders’ Agent, Parent or Acquirer shall pay the Claimed Amount to the Holder Indemnified Persons.The per share value of any shares of Parent Common Stock cancelled to satisfy any claims in a Claim Certificate under this Article 8 shall be equal to the Specified Price.

(b)    If the Stockholders’ Agent or Acquirer, as applicable, objects in writing to any claim or claims by Acquirer or the Stockholders’ Agent, as applicable, made in any Claim Certificate within the 30-day period set forth in Section 8.6(a), Acquirer and the Stockholders’ Agent shall attempt in good faith for 60 days after Acquirer’s or the Stockholders’ Agents’, as applicable, receipt of such written objection to resolve such objection. If Acquirer and the Stockholders’ Agent shall so agree, a memorandum setting forth such agreement shall be prepared and signed by both Acquirer and the Company (the amount determined to be owed to the Indemnified Persons and set forth in such memorandum, the “***Stipulated Amount***”) and: (X) in the case of a claim by Acquirer, (i) Acquirer and the Stockholders’ Agent shall deliver joint written instructions to the Escrow Agent instructing the Escrow Agent to: (A) release from the Escrow Fund to Acquirer an amount in cash equal to the Cash Percentage of the Stipulated Amount, and (B) deliver to the Transfer Agent for cancellation a number of shares of Parent Common Stock from the Escrow Fund having a total value equal to the Stock Percentage of such Stipulated Amount (rounded to the nearest whole share), and (ii) if the cash and shares held in the Escrow Fund are insufficient to cover the full Stipulated Amount, then, subject to the limitations contained in Section 8.3, each Converting Holder shall pay such Converting Holder’s Pro Rata Share of such shortfall to the applicable Indemnified Person; and (Y) in the case of a claim by the Stockholders’ Agent, Parent or Acquirer shall pay the Stipulated Amount to the Holder Indemnified Persons.

(c)    If no such agreement can be reached during the 60-day period for good faith negotiation set forth in Section 8.6(a), but in any event upon the expiration of such 60-day period, either Acquirer or the Stockholders’ Agent may bring an arbitration in accordance with the terms of Section 9.11 to resolve the matter. The decision of the arbitrator as to the validity and amount of any claim in such Claim Certificate shall be non-appealable, binding and conclusive upon the parties hereto and the Converting Holders (the amount determined by the arbitrator to be owed to the Indemnified Persons, the “***Award Amount***”), and: (X) in the case of a claim by Acquirer, (i) Acquirer and the Stockholders’ Agent shall, within three Business Days following the date of such decision, deliver joint written instructions to the Escrow Agent instructing the Escrow Agent to: (A) release from the Escrow Fund to Acquirer an amount in cash equal to the Cash Percentage of the Award Amount, and (B) deliver to the Transfer Agent for cancellation a number of shares of Parent Common Stock from the Escrow Fund having a total value equal to the Stock Percentage of such Award Amount (rounded to the nearest whole share), and (ii) if the cash and shares held in the Escrow Fund are insufficient to cover the full Award Amount, then, subject to the limitations contained in Section 8.3, each Converting Holder shall pay such Converting Holder’s Pro Rata Share of such shortfall to the applicable Indemnified Person; and (Y) in the case of a claim by the Stockholders’ Agent, Parent or Acquirer shall pay the Award Amount to the Holder Indemnified Persons.

(d)    Judgment upon any determination of an arbitrator may be entered in any court having jurisdiction. For purposes of this Section 8.6(d), in any suit hereunder in which any claim or the amount thereof stated in the Claim Certificate is at issue, Acquirer shall be deemed to be the prevailing party unless the arbitrator determines in favor of the Stockholders’ Agent (on behalf of the Converting Holders) with respect to more than one-half of the amount in dispute, in which case the Converting Holders shall be deemed to be the prevailing party. The non-prevailing party (with respect to the Stockholders’ Agent, the Stockholders’ Agent on behalf of the Converting Holders) to an arbitration shall pay its own expenses and the expenses and the fees and expenses of the prevailing party, including attorneys’ fees and costs, reasonably incurred in connection with such suit.

8.7    Stockholders’ Agent.

(a)    At the Closing, Fortis Advisors LLC, a Delaware limited liability company, shall be constituted and appointed as the Stockholders’ Agent. The Stockholders’ Agent shall be the agent and true and lawful attorney-in-fact for and on behalf of the Converting Holders to: (i) execute, as Stockholders’ Agent, this Agreement and any agreement or instrument entered into or delivered in connection with the Transactions, (ii) give and receive notices, instructions and communications permitted or required under this Agreement, or any other agreement, document or instrument entered into or executed in connection herewith, for and on behalf of any Converting Holder, to or from Acquirer (on behalf of itself or any other Indemnified Person) relating to this Agreement or any of the Transactions and any other matters contemplated by this Agreement or by such other agreement, document or instrument (except to the extent that this Agreement expressly contemplates that any such notice or communication shall be given or received by each Converting Holder individually), (iii) review, negotiate and agree to and authorize Acquirer to reclaim an amount of cash or shares of Parent Common Stock in the Escrow Fund in satisfaction of claims asserted by Acquirer (on behalf of itself or any other Indemnified Person, including by not objecting to such claims) pursuant to this Article 8, (iv) object to such claims pursuant to Section 8.6, (v) consent or agree to, negotiate, enter into, or, if applicable, contest, prosecute or defend, settlements and compromises of, and demand arbitration and comply with Orders of courts and awards of arbitrators with respect to, such claims, resolve any such claims, take any actions in connection with the resolution of any dispute relating hereto or to the Transactions by arbitration, settlement or otherwise, and take or forego any or all actions permitted or required of any Converting Holder or necessary in the judgment of the Stockholders’ Agent for the accomplishment of the foregoing and all of the other terms, conditions and limitations of this Agreement, (vi) consult with legal counsel, independent public accountants and other experts selected by it, solely at the cost and expense of the Converting Holders; (vii) consent or agree to any amendment to this Agreement or to waive any terms and conditions of this Agreement providing rights or benefits to the Converting Holders (other than with respect to the payment and issuance of the Merger Consideration less the Cash Escrow Amount and the Stock Escrow Amount) in accordance with the terms hereof and in the manner provided herein and (viii) take all actions necessary or appropriate in the judgment of the Stockholders’ Agent for the accomplishment of the foregoing, in each case without having to seek or obtain the consent of any Person under any circumstance. Parent, Acquirer, Merger Sub and their respective Affiliates (including after the First Effective Time, the First Step Surviving Corporation, and after the Second Effective Time, the Final Surviving Corporation) shall be entitled to rely on the appointment of Fortis Advisors LLC, a Delaware limited liability company, as the Stockholders’ Agent and treat such Stockholders’ Agent as the duly appointed attorney-in-fact of each Converting Holder and has having the duties, power and authority provided for in this Section 8.7. The Converting Holders shall be bound by all actions taken and documents executed by the Stockholders’ Agent in connection with this Article 8, and Acquirer and other Indemnified Persons shall be entitled to rely exclusively on any action or decision of the Stockholders’ Agent. The Person serving as the Stockholders’ Agent may be replaced from time to time by the holders of a majority in interest of the aggregate value of the cash and shares of Parent Common Stock then held in the Escrow Fund (with each share of Parent Common Stock being valued for such purposes at the Specified Price) upon not less than 30 days’ prior written notice to Acquirer. No bond shall be required of the Stockholders’ Agent. Certain Converting Holders may enter into a letter agreement with the Stockholders’ Agent to provide direction to the Stockholders’ Agent in connection with the performance of its services under this Agreement (such Converting Holders, including their individual representatives, hereinafter referred to as the “***Advisory Group***”).

(b)    The Stockholders’ Agent and his agents and representatives or any member of the Advisory Group (collectively, the “***Stockholders’ Agent Group***”) shall not be liable to any Converting Holder for any act done or omitted hereunder while acting in good faith (and any act done or omitted pursuant to the advice of counsel shall be conclusive evidence of such good faith) and without gross negligence or willful misconduct. The Converting Holders shall severally but not jointly indemnify the Stockholders’ Agent and its members, managers, directors, officers, agents and employees or any member of the Advisory Group and hold them harmless from and against any and all losses, claims, damages, liabilities, fees, costs, expenses (including all reasonable out of pocket costs and expenses and legal fees and disbursements and costs and including costs incurred in connection with seeking recovery from insurers), judgments, fines or amounts paid in settlement (collectively, “***Stockholders’ Agent Expenses***”) incurred without gross negligence, willful misconduct or bad faith on the part of the Stockholders’ Agent Group and arising out of, resulting from or in connection with the acceptance or administration of its duties hereunder. If not paid directly to the Stockholders’ Agent by the Converting Holders, such Stockholders’ Agent Expenses may be recovered by the Stockholders’ Agent first, from the Expense Fund, second from the portion of the Escrow Fund otherwise distributable to the Converting Holders (and not distributed or distributable to an Indemnified Person or subject to a pending indemnification claim of an Indemnified Person) after the Escrow Release Date pursuant to the terms hereof, at the time of distribution, and third, directly from the Converting Holders according to their respective Pro Rata Shares. The Converting Holders acknowledge that no provision of this Agreement, the Escrow Agreement nor any of the transactions contemplated hereby shall require the Stockholders’ Agent to expend or risk its own funds or otherwise incur any financial liability in the exercise or performance of any of its powers, rights, duties or privileges under this Agreement, the Escrow Agreement or any of the transactions contemplated hereby. All of the immunities and rights to indemnification granted to the Stockholders’ Agent Group under this Agreement shall survive the resignation or removal of Stockholders’ Agent or any member of the Advisory Group, the Closing and/or any termination of this Agreement and the Escrow Agreement. The powers, immunities and rights to indemnification granted to the Stockholders’ Agent Group hereunder: (i) are is coupled with an interest and shall be irrevocable and survive the death, incompetence, bankruptcy or liquidation of the respective Converting Holders and shall be binding on any successor thereto and (ii) shall survive the delivery of an assignment by any Converting Holders of the whole or any fraction of his, her or its interest in the Escrow Fund.

(c)    Any notice or communication given or received by, and any decision, action, failure to act within a designated period of time, agreement, consent, settlement, resolution or instruction of, the Stockholders’ Agent that is within the scope of the Stockholders’ Agent’s authority under Section 8.7(a) shall constitute a notice or communication to or by, or a decision, action, failure to act within a designated period of time, agreement, consent, settlement, resolution or instruction of all the Converting Holders and shall be final, binding and conclusive upon each such Converting Holder; and each Indemnified Person shall be entitled to rely exclusively upon any such notice, communication, decision, action, failure to act within a designated period of time, agreement, consent, settlement, resolution or instruction as being a notice or communication to or by, or a decision, action, failure to act within a designated period of time, agreement, consent, settlement, resolution or instruction of, each and every such Converting Holder. Parent, Acquirer, Merger Sub, the First Step Surviving Corporation, the Final Surviving Corporation and the Indemnified Persons are hereby relieved from any Liability to any Person for any acts done by them in accordance with such notice, communication, decision, action, failure to act within a designated period of time, agreement, consent, settlement, resolution or instruction of the Stockholders’ Agent.

(d)    Subject to the terms and conditions of this Agreement, upon the Closing, the Company shall wire to the Stockholders’ Agent the Expense Fund pursuant to wire instructions provided to the Company, which shall be held by the Stockholders’ Agent as agent and for the benefit of the Converting Holders in a segregated client account and shall be used for the purposes of paying directly, or reimbursing the Stockholders’ Agent for, any expenses incurred pursuant to this Agreement, the Escrow Agreement or any Stockholders’ Agent engagement agreement. The Stockholders’ Agent will hold these funds separate from its corporate funds. The Converting Holders shall not receive interest or other earnings on amounts in the Expense Fund and the Converting Holders irrevocably transfer and assign to the Stockholders’ Agent any ownership right that the Converting Holders may have in any interest that may accrue on amounts in the Expense Fund. The Converting Holders acknowledge that the Stockholders’ Agent is not providing any investment supervision, recommendations or advice. The Stockholders’ Agent shall have no responsibility or liability for any loss of principal of the Expense Fund other than as a result of its gross negligence or willful misconduct. As soon as practicable following the later of (i) the final release of the Escrow Fund or (ii) the final resolution of any claims, the Stockholders’ Agent shall distribute the remaining portion of the Expense Fund (if any) to the Escrow Agent for further distribution to the Converting Holders in accordance with his, her or its Pro Rata Share. The Stockholders’ Agent is not acting as a withholding agent or in any similar capacity in connection with the Expense Fund, and has no tax reporting or income distribution obligations hereunder.

8.8    Third-Party Claims In the event Acquirer becomes aware of a claim by a third party that Acquirer in good faith believes may result in Indemnifiable Damages (a “***Third-Party Claim***”), Acquirer shall have the right in its sole discretion to conduct the defense of and to settle or resolve any such Third-Party Claim (and, for the avoidance of doubt, the costs and expenses incurred by Acquirer in connection with conducting such defense, settlement or resolution (including reasonable attorneys’ fees, other professionals’ and experts’ fees and court or arbitration costs) shall be included in the Indemnifiable Damages for which Acquirer may seek indemnification pursuant to a claim made hereunder, if any (provided that for clarity such costs and expenses shall constitute Indemnifiable Damages if and solely to the extent that Acquirer is entitled to indemnification for the matter underlying such Third-Party Claim). The Stockholders’ Agent shall have the right to receive copies of all pleadings, notices and communications with respect to such Third-Party Claim to the extent that receipt of such documents does not affect any privilege relating to any Indemnified Person, subject to execution by the Stockholders’ Agent of Acquirer’s (and, if required, such third party’s) standard non-disclosure agreement to the extent that such materials contain confidential or propriety information. However, Acquirer shall have the right in its sole discretion to determine and conduct the defense of any Third-Party Claim and the settlement, adjustment or compromise of such Third-Party Claim. Unless otherwise consented to in writing in advance by Acquirer in its sole discretion, the Stockholders’ Agent and its Affiliates may not participate in any Third-Party Claim or any action related to such Third-Party Claim (including any discussions or negotiations in connection with the settlement, adjustment or compromise thereof). Except with the consent of the Stockholders’ Agent, which consent shall be deemed to have been given unless the Stockholders’ Agent shall have objected within 30 days after a written request for such consent by Acquirer, no settlement or resolution by Acquirer of any such Third-Party Claim shall be determinative of the existence of or amount of Indemnifiable Damages relating to such matter. In the event that the Stockholders’ Agent has consented to any such settlement or resolution, neither the Stockholders’ Agent nor any Converting Holder shall have any power or authority to object under Section 8.6 or any other provision of this Article 8 to the amount of any claim by or on behalf of any Indemnified Person against the Escrow Fund for indemnity with respect to such settlement or resolution. Acquirer shall give the Stockholders’ Agent prompt notice of the commencement of any legal proceeding against Acquirer, the First Surviving Corporation or the Final Surviving Corporation in connection with any Third-Party Claim; provided, that any failure on the part of Acquirer to so notify the Stockholders’ Agent shall not limit any of the obligations of any Converting Holder under the Article 8 (except to the extent that such failure materially prejudices the Converting Holder in terms of the amount of Indemnifiable Damages such holder is liable to indemnify the Indemnified Person for).

8.9    Treatment of Indemnification Payments. Acquirer, the Stockholders’ Agent and the Converting Holders agree to treat (and cause their respective Affiliates to treat) any payment received by the Indemnified Persons pursuant to this Article 8 as adjustments to the Merger Consideration for all Tax purposes, to the maximum extent permitted by Applicable Law.