

This document does not constitute legal advice and is not meant to serve as a recommended form suitable for each and every early stage capital investment by institutional investors in a Swiss early stage company. It is intended for use as a starting point for drafting and negotiation only. All parties involved should carefully consider departing from its terms where necessary to reflect the business terms underlying the early stage capital investment and should always satisfy themselves with their advisors and counsel of the commercial and legal implications of its use.

INVESTMENT AGREEMENT

dated as of *[date]*

relating to

[the COMPANY]

made by and among

[INVESTORS]

and

[FOUNDERS]

and

[OTHER SHAREHOLDERS]

and

[the COMPANY]

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STATEMENT

Purpose

The purpose of this model documentation for sizeable venture capital investment rounds with institutional investors (**Model Documentation**) is to facilitate and increase the efficiency of both negotiations for as well as the documentation of such investments in Switzerland (for small start-up investments by business angels and similar start-up investors, see SECA's model documentation "light" at www.seca.ch/templates/templates/vc-model-documentation.aspx). The Model Documentation is subject to Swiss law and takes into account international including Anglo-American documentation standards and concepts.

Documents

The Model Documentation comprises the following documents:

- Term Sheet
- Investment Agreement
- Shareholders Agreement

and certain important ancillary documents, such as Articles of Incorporation (*Statuten; statuts*), Board Regulations (*Organisationsreglement; règlement d'organisation*) and Cap Table.

Working Group

In order to incorporate the collective experience of Swiss private equity practice and ensure broad acceptance in the industry the SECA Legal & Tax Chapter invited a standing working group (**Working Group**) of practitioners from some of the major Swiss law firms active in the field to develop a commonly acceptable set of Model Documentation. The Working Group consists of:

- **Martin Frey**, Baker & McKenzie;
- **Dieter Gericke**, Homburger AG;
- **Hannes Glaus**, Bratschi AG;
- **Beat Kühni**, Lenz & Staehelin;
- **Oliver Triebold**, Schellenberg Wittmer AG;
- **Michael Trippel**, Bär & Karrer AG;
- **Ulysses von Salis**, Niederer Kraft Frey AG; and
- **Christian Wenger**, Wenger & Vieli AG.

With respect to one of the focus points of the revisions leading up to the current 3rd edition of the Model Documentation – *i.e.*, the alignment of the scope and content of the representations and warranties under the Investment Agreement to current market trends for transactions of this type – the Working Group was assisted by a group of talented younger lawyers (**Youngster Group**) consisting of:

- **Claudio Bazzi**, Bratschi AG;
- **Alexander Blaeser**, Baker & McKenzie;
- **Silvio Grunder**, Bär & Karrer AG;
- **Marcel Jacob**, Schellenberg Wittmer AG;
- **Adrian Koller**, Niederer Kraft Frey AG;
- **Margrit Marti**, Homburger AG;
- **Fabiano Menghini**, Lenz & Staehelin; and
- **Marc Walter**, Wenger & Vieli AG.

SECA expresses its thanks to its Legal & Tax Chapter, the Working Group and the Youngster Group for all their contributions and efforts to establish the Model Documentation on a *pro bono* basis for the benefit of the Swiss venture capital and private equity market as a whole.

Scope

The Working Group first had to agree on a number of assumptions. The Model Documentation has been developed particularly with a view for it to be suitable for national and international, including Anglo-American professional / institutional investors. Further, it assumes that

- the investment is made as an early stage investment (typically CHF 5 – 20 million),
- the circle of involved parties consists of founders, (passive or active) shareholders and more than one active (financial) investors, and
- the early stage company is incorporated in Switzerland and organized in the form of a stock corporation (*Aktiengesellschaft, société anonyme*).
- Further assumptions and qualifications are stated in the footnotes.

In addition, important commercial terms (such as representations and warranties in the Investment Agreement, control-related veto rights on shareholder and board level and anti-dilution, registration and non-competition related protections in the Shareholders Agreement) have been included in the Model Documentation as an example only and/or have been deliberately left blank.

Caution

It is upon each party to ensure if and to what extent the Model Documentation is suitable to the transaction at hand. Each transaction has its own particularities and requires a deliberate and careful balance of interests. And for many of the legal issues addressed by the Model Documentation, there is more than one valid answer. Accordingly, consult your legal, tax and other advisors to ensure that the Model Documentation fits, and is appropriately adapted to, your specific purpose and reconfirm whether and to what extent the rights and obligations contemplated in the Model Documentation are valid and enforceable. Neither SECA nor any member of its Legal & Tax Chapter or the Working Group gives any opinion or assurances as to the suitability, adequacy, validity and/or enforceability of the Model Documentation and its provisions. In using or working with the Model Documentation, each user will be deemed to have waived, to the maximum extent legally permissible, any right or claim against, and to have accepted the exclusion of any responsibility or liability of, SECA, any member of its Legal & Tax Chapter and the Working Group.

We intend to develop the Model Documentation further over time based on “real life” experiences with it but also on your comments and proposed improvements – which you are invited and encouraged to submit to us (info@seca.ch), any member of the Legal & Tax Chapter or the Working Group.

Third Edition

The 3rd edition of the Model Documentation is in the new corporate logo of SECA and incorporates a number of changes to reflect some legislative changes, some court precedents and day-to-day real life experiences with the Model Documentation. It now also includes a form cap table.

Zurich, September 2018

INVESTMENT AGREEMENT

dated as of [date]

and entered into by and among

1. Investors

1.1 [name Investor 1], [address] ("Investor 1")

1.2 [name Investor n], [address] ("Investor n")

(Investor 1 and Investor n, collectively "Investors"
and individually an "Investor")

2. Founders

2.1 [name Founder 1], [address] ("Founder 1")

2.2 [name Founder n], [address] ("Founder n")

(Founder 1 and Founder n, collectively "Founders"
and individually a "Founder")

3. Other Shareholders

3.1 [name Other Shareholder 1], [address] ("Other Shareholder 1")

3.2 [name Other Shareholder n], [address] ("Other Shareholder n")

(Other Shareholder 1 and Other Shareholder n, collectively "Other Shareholders"
and individually an "Other Shareholder")

(Founders and Other Shareholders collectively "Existing Shareholders"
and individually an "Existing Shareholder")

and

4. Company

[name Company], [address] ("Company")

(Company, Investors and Existing Shareholders, collectively "Parties"
and individually a "Party")

Table of Contents

- 1. Definitions 4
- 2. Current Equity Structure of the Company 4
- 3. Increase of Share Capital 4
- 3.1 Capital Increase / Extraordinary General Meeting of Shareholders 5
- 3.2 Constitutional Meeting of Newly Elected Board 6
- 4. Subscription of Preferred Shares 6
- 4.1 Undertaking to Subscribe 6
- 4.2 Cash Contribution 7
- 5. Ownership Structure after the Capital Increase 7
- 6. Conduct of Business until Closing 7
- 7. Closing 8
- 7.1 Place and Date of Closing 8
- 7.2 Conditions Precedent to Closing 8
- 7.3 Closing Actions and Deliveries 8
- 7.4 Application to Commercial Register 10
- 7.5 Issuance of New Shares and Registration in Share Register 10
- 8. [Termination and Rescission] 10
- 9. Representations and Warranties 11
- 9.1 Representations and Warranties [of the Existing Shareholders] 11
- 9.2 Representations and Warranties of Investors 12
- 9.3 Exclusive Representations and Warranties 12
- 10. Remedies 13
- 10.1 Time Limitations 13
- 10.2 [Limitations on Liability] 15
- 10.3 Remedies of Existing Shareholders and the Company 16
- 10.4 Remedies Exclusive 16
- 11. Miscellaneous 17
- 11.1 Nature of Parties' Rights and Obligations 17
- 11.2 Confidentiality 17
- 11.3 Successors and Assigns 18
- 11.4 Costs and Expenses, Taxes 18
- 11.5 Notices 19
- 11.6 Entire Agreement 19
- 11.7 Severability 20
- 11.8 Survival 20
- 11.9 Amendments 20
- 11.10 Waiver of Rights 20
- 12. Governing Law and [Arbitration]/[Jurisdiction] 20
- 12.1 Governing Law 20
- 12.2 [Arbitration]/[Jurisdiction] 20
- 1. Definitions 4
- 2. Current Equity Structure of the Company 4
- 3. Increase of Share Capital 4
- 3.1 Capital Increase / Extraordinary General Meeting of Shareholders 5
- 3.2 Constitutional Meeting of Newly Elected Board 6

4.	Subscription of Preferred Shares.....	6
4.1	Undertaking to Subscribe	6
4.2	Cash Contribution	7
5.	Ownership Structure after the Capital Increase.....	7
6.	Conduct of Business until Closing	7
7.	Closing.....	8
7.1	Place and Date of Closing	8
7.2	Conditions Precedent to Closing	8
7.3	Closing Actions and Deliveries	8
7.4	Application to Commercial Register.....	10
7.5	Issuance of New Shares and Registration in Share Register	10
8.	[Termination and Rescission]	10
9.	Representations and Warranties	11
9.1	Representations and Warranties [of the Existing Shareholders].....	11
9.2	Representations and Warranties of Investors	12
9.3	Exclusive Representations and Warranties.....	12
10.	Remedies.....	13
10.1	Time Limitations.....	13
10.2	[Limitations on Liability].....	15
10.3	Remedies of Existing Shareholders and the Company.....	16
10.4	Remedies Exclusive.....	16
11.	Miscellaneous	17
11.1	Nature of Parties' Rights and Obligations.....	17
11.2	Confidentiality	17
11.3	Successors and Assigns.....	18
11.4	Costs and Expenses, Taxes	18
11.5	Notices	19
11.6	Entire Agreement.....	19
11.7	Severability	20
11.8	Survival	20
11.9	Amendments.....	20
11.10	Waiver of Rights.....	20
12.	Governing Law and [Arbitration]/[Jurisdiction]	20
12.1	Governing Law	20
12.2	[Arbitration]/[Jurisdiction]	20

Preamble

- A. The Company is organized in the form of a Swiss stock corporation (*Aktiengesellschaft; société anonyme*) registered with the commercial register of the Canton of [seat of Company] under the number [commercial register number] having its registered office at [address], Switzerland.
- B. The Company's core business consists of [description of core business] ("**Business**").¹
- C. The Company intends to increase its share capital in an early stage financing round ("**Financing Round**") by way of issuance of [number] Preferred Shares in the Company with a nominal value of CHF [amount] per Preferred Share, each to be fully paid-in in cash, thereby increasing the issued share capital of the Company by a nominal amount of CHF [amount] from CHF [amount] to CHF [amount], ("**Capital Increase**").
- D. The Parties intend to enter, inter alia, into a certain shareholders agreement substantially in the form attached hereto as **Annex D ("Shareholders Agreement")** on or immediately prior to the Closing Date.
- E. The Parties wish to determine in this Agreement their respective rights and obligations in relation to the Investors' investment in the Company and the subscription and issuance of new Preferred Shares in the Company.

Based on the foregoing, the Parties agree as follows:

1. DEFINITIONS

For purposes of this Agreement, capitalized terms shall have the meanings set forth in **Annex 1**.

2. CURRENT EQUITY STRUCTURE OF THE COMPANY

As at the date of this Agreement, the Company has an issued statutory share capital in the nominal amount of CHF [amount], divided into [number] common shares (*Stammaktien; actions ordinaires*) with a nominal value of CHF [amount] per share, each fully paid-in ("**Existing Shares**"). The Company has [no]/[number of] treasury shares.

3. INCREASE OF SHARE CAPITAL

In order to give effect to the Capital Increase and on the terms and subject to the conditions of this Agreement:

- (a) the Investors will provide for cash equity funding to the Company in the amount of CHF [amount] at a pre-money valuation of the Company (fully diluted) of CHF [amount] in

¹ **[Note:** The Model Documentation presumes that the Company's core business needs no adjustments or modifications prior to completion of the Capital Increase. If the Investors request that the core business of the Company be modified or complemented as a condition precedent (CP) to Closing, the wording of this introductory paragraph B (and/or the definition of the term "Business", which latter definition is being used for specific other purposes) should be modified accordingly (together with consequential adjustments, as appropriate, throughout the Model Documentation).]

[one share capital increase]² for purposes of enabling the Company to [expand its business in accordance with the Business Plan]; and

- (b) each of the Existing Shareholders and the Company hereby undertakes to the Investors to generally use their powers and take all actions and execute all documents required to effect the transactions contemplated under this Agreement and to consummate the Capital Increase in accordance with the terms and conditions hereof.

3.1 Capital Increase / Extraordinary General Meeting of Shareholders

3.1.1 Undertakings of Existing Shareholders

Each of the Existing Shareholders and (regarding sub-paragraph (a) below) the Company hereby undertakes to the Investors to:

- (a) procure that an extraordinary general meeting of shareholders of the Company ("**Extraordinary General Meeting**") is convened in a timely manner and takes place on the Closing Date;
- (b) approve, or procure that the Proxy Holder approves, the resolutions to be taken by the Extraordinary General Meeting in accordance with Section 3.1.3; and
- (c) [*specify additional actions/resolutions as appropriate*].

3.1.2 Waiver of Preferential Subscription Rights

Each of the Existing Shareholders hereby unconditionally and irrevocably waives all of its preferential subscription rights (*Bezugsrechte; droits de souscription préférentiels*) in connection with the Capital Increase and hereby agrees that the Company allocates the appropriate number of Preferred Shares in the Capital Increase exclusively to the Investors in accordance with this Agreement and the cap table set forth in **Annex 5**.

3.1.3 Resolutions to be passed by the Extraordinary General Meeting

The following resolutions shall be passed at the Extraordinary General Meeting on the Closing Date:

- (a) to replace the Existing Articles by, and adopt, the Articles substantially in the form attached hereto as **Annex 3.1.3**;
- (b) to increase the nominal statutory share capital of the Company by the aggregate amount of CHF [*amount*] from CHF [*amount*] to CHF [*amount*] through the issuance of [*number*] new Preferred Shares, each at the issue price of CHF [*amount*] ("**Issue Price**"), which constitutes a premium (*Agio; agio*) for each Preferred Share of CHF [*amount*], to the Investors in accordance with, and at the Subscription Amounts set forth in, Section 4;

² [**Note:** Investors may request that the Capital Increase be split up into two or more tranches, the subscription of which is subject to the Company reaching certain specified milestones. If so, the wording of this Section would have to be amended (together with consequential adjustments, as appropriate, throughout the Model Documentation).]

- (c) [to create conditional share capital in the amount of CHF [amount],];
- (d) to elect the following persons as New Director[s]:
 - [name], nominated by [Investor 1];
 - [name], nominated by [Investor n]; and
 - [name], nominated by [the Founders];
- (e) [to elect [name] as the new Company auditors]; and
- (f) [additional actions/resolutions as appropriate].

3.2 Constitutional Meeting of Newly Elected Board

Each Party hereto undertakes to procure that each Director nominated by it will convene for the constitutional meeting of the newly composed Board to be held on the Closing Date immediately following the Extraordinary General Meeting and will approve the following resolutions:

- (a) to elect [name] as Chairman (*Verwaltungsratspräsident; président du conseil d'administration*);
- (b) to grant [each New Director] collective signing power by two (*Kollektivunterschrift zu Zweien; signature collective à deux*); and
- (c) to replace the Existing Board Regulations by, and adopt, the Board Regulations, substantially in the form attached hereto as **Annex 3.2(c)**.

4. SUBSCRIPTION OF PREFERRED SHARES

4.1 Undertaking to Subscribe

Subject to the terms and conditions of this Agreement (including, without limitation, Section 7.2), each Investor undertakes to subscribe for Preferred Shares as follows:

- (a) Investor 1 shall subscribe for [number] Preferred Shares, each at the Issue Price, for an aggregate subscription amount of CHF [amount] ("**Investor 1 Subscription Amount**"); and
- (b) Investor n shall subscribe for [number] Preferred Shares, each at the Issue Price, for an aggregate subscription amount of CHF [amount] ("**Investor n Subscription Amount**").

For this purpose, each Investor hereby undertakes, subject to the conditions precedent set forth in Section 7.2 being satisfied or waived by each of the Investors, to execute and deliver to the Company its Subscription Form on or prior to the Closing Date.

4.2 Cash Contribution

No later than 5 Business Days before the Closing Date, each Investor shall pay its Subscription Amount [from a Swiss bank]³ to the following blocked capital account of the Company (*Kapitalinzahlungssperrkonto; compte de capital bloqué*):

Bank:	[name], [place]
In favour of:	[Company name]
Account No:	[number]
IBAN No:	[number]
Clearing No:	[number]
Reference:	Share Capital Increase of [Company name]

5. OWNERSHIP STRUCTURE AFTER THE CAPITAL INCREASE

After completion of the Capital Increase, the ownership structure of the Company shall be as specified in the cap table set forth in **Annex 5**.

6. CONDUCT OF BUSINESS UNTIL CLOSING

The Company shall, and each of the Existing Shareholders hereby undertakes to procure that the Company will, until Full Consummation of the Capital Increase, operate its [B/b]business in the ordinary course in accordance with past practice, except as explicitly provided by this Agreement or with the prior written consent of [each Investor] (such consent not to be unreasonably withheld or delayed).

[In particular, the Company hereby covenants to each of the Investors not to, and each of the Existing Shareholders hereby undertakes to the Investors to procure that the Company will not:⁴

(a) [specify as appropriate]⁵

³ **[Note:** AML/KYC compliance by the Swiss bank with which the blocked capital account of the Company is held may delay the Closing Date unless such compliance will be duly completed in advance.]

⁴ **[Note:** Appropriate limitations and restrictions between signing and Closing should aim to avoid that material actions (or omissions) occur that alter or adversely affect the Company or its capital structure, assets or business operations in any material way. Absent particular CPs to Closing that need more time to be fulfilled, it is anticipated that there will usually be only a few business days between signing and Closing so that any reasonably agreed limitations and restrictions on the Company during the relatively short period of time between signing and Closing should usually not unduly restrict the Company's ability to operate as a going-concern and in the further pursuit of its ordinary course of business.]

⁵ **[Note:** The list of qualified actions (or omissions) in respect of the Company's capital structure, assets or business operation between signing and Closing that require the prior written consent of the Investors should be determined and drafted giving due regard to the specifics of any given case, but usually will include: (1) changes to its issued and outstanding share capital, (2) material investments or divestments outside the ordinary course of business, (3) no mergers, de-mergers, share splits, or other corporate re-organisation or restructuring, (4) the incurrence of financial indebtedness, (5) the execution, amendment or termination of any material agreements or agreements outside the ordinary course of business, (6) the hiring or dismissal of Management/Key Employees/employees or the amendment of any employment related terms (except if and to the extent contemplated by the Investment Agreement), (7) maintenance (or purchase) of appropriate insurance coverage, (8) IP rights matters, (9) authorizations and permits, (10) compliance & regulatory matters, (11) social security & pension fund matters, (12) tax matters, (13) litigation, arbitration & other administrative proceedings, etc.]

in each case of paragraphs (a) to ([specify]) above, except with the prior written consent of [each Investor] (such consent not to be unreasonably withheld or delayed).]

7. CLOSING

7.1 Place and Date of Closing

The Closing shall take place on [date]⁶ at the offices of [insert name of law firm / notary], or such other date or place as the Parties mutually agree ("**Closing Date**").

7.2 Conditions Precedent to Closing

The Closing shall be subject to the prior fulfilment (or waiver by each Investor) of each of the following conditions precedent:⁷

- (a) [the absence of any breach by any Party (other than the relevant Investor) of any material provision of this Agreement, including, but not limited to, the payment obligations set out in Section 4.2 and the representations and warranties given by any other Party under Section 9;]
- (b) [the absence of a Material Adverse Change with respect to the Company;]
- (c) [the compliance by all Existing Shareholders and the Company with Section 6;] and
- (d) [specify additional CPs as appropriate].

7.3 Closing Actions and Deliveries

At Closing, the relevant Party shall procure that (i) the following documents shall be delivered, in each case duly executed and in form and substance satisfactory to the Company and each of the Investors, and (ii) the following actions shall be performed:⁸

- (a) each Party shall duly execute (or deliver a duly executed) Shareholders Agreement substantially in the form attached hereto as **Annex D**;
- (b) [the Company shall deliver duly executed employment agreements with [all members of the Management]/[Key Employees] substantially in the form attached hereto as **Annex 7.3(b)**];

⁶ *[Note: It is presumed that the Closing Date to be specified in this Section will usually be only a few business days after the signing of the Investment Agreement has occurred, except where the fulfilment of particular CPs to Closing needs more time.]*

⁷ *[Note: The list of CPs to Closing as reflected in Section 7.2 is merely indicative and is to be determined and drafted giving due regard to the specifics of any given case.]*

⁸ *[Note: The list of closing actions and deliveries reflected in Section 7.3 is merely indicative and is to be determined and drafted giving due regard to the specifics of any given case (including as to whether originals or fax copies of such documents shall be delivered).]*

- (c) [the Company shall deliver the resignation letter[s] from each resigning existing Director;]⁹
- (d) each relevant Party shall deliver the acceptance declarations of the New Directors (*Wahlannahmeerklärungen; déclaration d'acceptation*) nominated by it, together with duly legalized specimen signature sheets (*Unterschriftenmuster; specimen de signature*);
- (e) [the Company shall deliver the acceptance declarations of [name] as the new Company auditors, if any;]
- (f) each Existing Shareholder shall deliver its proxy for the Extraordinary General Meeting authorizing the Proxy Holder to vote on and approve all resolutions set forth in Section 3.1;
- (g) the Company shall deliver confirmation from [specify name of Company's bank] evidencing that all Subscription Amounts have been paid in cash and fully credited to the Company's blocked account specified in Section 4.2;
- (h) each Investor shall deliver a duly signed original of its Subscription Form in accordance with Section 4.1;
- (i) upon delivery of the foregoing documents, the Extraordinary General Meeting shall be held in the presence of a notary approving: (1) the increase of the share capital [(including waivers of preferential subscription rights)]¹⁰, (2) the creation of Preferred Shares as set forth herein, [(3) the creation of conditional share capital in the amount of CHF [amount].], (4) the adoption of the Articles, and (5) the election of the New Directors [and [name] as the new Company auditors];
- (j) the Board shall take the circular resolution regarding (1) the constitution of the newly composed Board, (2) the election of the Chairman, and (3) the granting of collective signing power by two (*Konstituierungsbeschluss; résolution de constitution*), all in accordance with this Agreement;
- (k) [the Company shall deliver the auditors' report (*Prüfungsbestätigung; confirmation des réviseurs*) confirming the completeness and accuracy of the Board's capital increase report;]¹¹
- (l) the Board shall issue the report of the Board regarding the capital increase (*Kapitalerhöhungsbericht; rapport d'augmentation*) and take the resolutions on the ascertainment and the execution of the Capital Increase (*Feststellungsbeschluss; constatations relatives à l'augmentation du capital*) in the presence of a notary;

⁹ **[Note:** Resignation letters may be necessary in case the Parties have agreed that specified incumbent Directors must resign to facilitate the agreed upon new Board composition as of the Closing Date.]

¹⁰ **[Note:** An auditors' report will be required in the context of the capital increase if statutory pre-emption rights (*Bezugsrechte; droits de souscriptions préférentiels*) of shareholders are excluded. As the Existing Shareholders waive their statutory pre-emption rights in Section 3.1.2 it is not necessary to exclude the statutory pre-emption rights.]

¹¹ **[Note:** An auditors' report will not be required in the context of a regular capital increase in cash unless statutory pre-emption rights (*Bezugsrechte; droits de souscriptions préférentiels*) of shareholders are excluded.]

- (m) the Board shall deliver a duly signed Application to the Register of Commerce of the Canton of [canton] regarding (1) the increase of the share capital to reflect the Capital Increase, (2) the creation of Preferred Shares (*Vorzugsaktien; actions privilégiées*) as a new class of shares, [(3) the creation of conditional share capital in the amount of CHF [amount].] (4) the adoption of the Articles, and (5) the election of the New Directors [and [name] as the new Company auditors] ("**Application**");
- (n) the Board shall take the circular resolutions evidencing the Board resolution (1) the adoption of the Board Regulations, and (2) the registration of the Investors as owners with voting rights of the relevant number of Preferred Shares subscribed by the respective Investors in the Company's share register upon Full Consummation;
- (o) each Investor shall delivery its notification letter to the Company stating the full name(s) and address(es) of the ultimate beneficial owner(s) within the meaning of Art. 697j CO; and
- (p) [specify additional deliveries/actions as appropriate].¹²

In addition to the above, the Company and each of the Existing Shareholders undertakes to each Investor to execute or perform such other documents, instruments, certificates or acts as may be reasonably requested by each Investor and/or the Company in order to complete, perfect and consummate the transactions contemplated by this Agreement, including, but not limited to, the increase of the share capital of the Company and the issuance of the respective number of Preferred Shares to the Investors as set forth in this Agreement.

7.4 Application to Commercial Register

The Company shall file the Application with the Register of Commerce of the Canton of [canton] immediately after performance of the actions and delivery of the documents specified in Section 7.3.

7.5 Issuance of New Shares and Registration in Share Register

The Company shall deliver to the each Investor [and Existing Shareholder] a copy of the updated share register of the Company evidencing each Investor and Existing Shareholder as legal [and beneficial] owner of the appropriate number of Preferred Shares or Existing Shares immediately upon receipt of the certified extract and/or express confirmation of the Register of Commerce of the Canton of [canton] evidencing the registration of the Capital Increase, the adoption of the Articles, the election of the New Directors and their respective signing powers.

8. [TERMINATION AND RESCISSION]¹³

[In case of no Full Consummation of the Capital Increase until the earlier to occur of: [30] Business Days after the Closing or [specific date], then each Investor who did not cause such delay

¹² [Note: Potential capital contribution reserves created need to be accounted for on a separate account in the Company's accounting, to be separately disclosed in its financial statements and to be declared for Swiss withholding tax purposes (form 170).]

¹³ [Note: Compulsory Swiss corporate laws limit Anglo-Saxon style termination/redemption rights in the context of a contemplated capital increase in case such capital increase is not (or not fully) consummated by a specified long-stop date. The termination rights set forth in this Section thus allow compliant Investors to terminate the Investment Agreement (and related agreements) only up to the time when the Board of the Company has stated in the public deed referred to in Section 7.3(d) that the relevant new shares (Preferred

by a breach of any of its material obligations under this Agreement]/[the Investors representing the majority of the Subscription Amounts of Investors who did not cause such delay by a breach of any of their material obligations under this Agreement, acting jointly], shall have the right (but not the obligation) to terminate and rescind this Agreement, the Shareholders Agreement and any documents, instruments or deeds executed by any of the Investors (including, but not limited to, the Subscription Forms) with immediate effect by written notice to all other Parties.

In case notice of termination and rescission is made in accordance with the preceding paragraph:

- (a) each of the Parties acknowledges and agrees that this Agreement (subject to Section 11.8), the Shareholders Agreement (subject to Section 11.8 and any documents, instruments or deeds executed by any of the Investors (including, but not limited to, the Subscription Forms) shall be deemed terminated and shall be without any further effect;
- (b) each of the Existing Shareholders and the Company hereby undertakes to the Investors to procure that the application to the Register of Commerce of the Capital Increase (if already filed) shall be withdrawn and that the respective Subscription Amounts paid by the Investors for new Preferred Shares hereunder shall be immediately repaid to each of the Investors in cash out of the blocked bank account of the Company.

Notwithstanding anything contained herein to the contrary, it is acknowledged and agreed that the right of termination and rescission pursuant to this Section 8 shall be without prejudice to any other rights or remedies that the respective Investor(s) may have under this Agreement, in particular due to its violation, under the Shareholders Agreement or under applicable laws.]

9. REPRESENTATIONS AND WARRANTIES

9.1 Representations and Warranties [of the Existing Shareholders]¹⁴

Subject to the limitations set forth in this Section 9 (including **Annex 9.1**) and Section 10, [each of the Existing Shareholders] hereby represents and warrants to each of the Investors that the

Shares) have been duly subscribed and paid for (Feststellungsbeschluss; constatations relatives à l'augmentation du capital).

*After that point in time, a "termination" or "rescission" of the contemplated capital increase may no longer be permissible under compulsory Swiss corporate laws, so that the sole remaining legal remedy that would achieve a similar economic result to a "termination" or "rescission" would be a formal capital reduction. Such formal capital reduction and economically similar alternative remedies (such as restitution obligations of the Existing Shareholders towards the Investors) are **not** reflected in the Model Documentation.*

However, in practice and absent particular circumstances in any given case, certainty of the full and successful consummation of the capital increase in accordance with the terms of the Investment Agreement should rarely be an issue (assuming all CPs to Closing are being fulfilled or waived), as the Parties usually will take comfort from appropriate preparations undertaken by and among their counsels (including the agreed-upon sequence of events and mechanics of the pre-closing and Closing and the pre-clearance of all relevant corporate legal documents with the relevant register of commerce).]

¹⁴ **[Note:** Depending on what involvement and/or knowledge "passive" and/or "active" Existing Shareholders may have in respect of the Company and its business operations, it may be appropriate to divide the agreed reps & warranties into two categories so that some reps & warranties are given by all Existing Shareholders whereas others are given solely by all or selected "active" Existing Shareholders (such as Founders or members of the Management or Key Employees).

In practice, Investors sometimes request that the Company also makes all or selected reps & warranties. Besides the limited economic upside any reps & warranties from the Company could offer to Investors

representations and warranties set forth in **Annex 9.1**¹⁵ are true and accurate, both as of the date of this Agreement and the Closing Date, except for those representations and warranties which are explicitly made as of a specific date.

9.2 Representations and Warranties of Investors

Subject to the limitations set forth in this Section 9 (including **Annex 9.2** and Section 10, each of the Investors hereby represents and warrants to the Existing Shareholders and the Company that the representations and warranties set forth in **Annex 9.2**¹⁶ are true and accurate, both as of the date of this Agreement and the Closing Date, except for those representations and warranties which are explicitly made as of a specific date.

9.3 Exclusive Representations and Warranties

The Parties acknowledge that none of the Parties has made, and none of the Parties has relied upon, any representation or warranty, express or implied, pertaining to the subject matter of this Agreement other than as expressly provided in this Agreement. In particular, and without limiting the generality of the foregoing, each Investor acknowledges that no Existing Shareholder is making any representations as to budgets, business plans, forward-looking statements, the future development or success of the Company and its business or other projections of a financial, technical or business nature relating to the business of the Company.

Without prejudice to the foregoing, [each of the Existing Shareholders] hereby acknowledges that each Investor has entered into this Agreement and will pay the Subscription Amount in reliance on each of the representations and warranties set forth in this Section 9 (including **Annex 9.1**).

generally (indeed, in case of a misrepresentation or breach of warranty by the Company, each Investor would in effect, and pro rata to its participation in the Company, find itself indirectly "paying" any damages expressed in the agreement to be payable by the Company), reps & warranties given by a privately held company for the benefit of its future shareholders in the context of a share issuance (other than reps & warranties in respect of the company's corporate existence, authority, capacity and title in newly issued shares) may be in breach of compulsory Swiss corporate laws pursuant to some views expressed in Swiss legal doctrine. The Model Documentation is therefore drafted under the assumption that the Company will not be required to give any reps & warranties.]

¹⁵ *[Note: The scope and wording of reps & warranties should be determined giving due regard to the specifics of the relevant Company and its specific business, financial, technical, legal and tax risks. Usually, negotiations focus heavily on the specific scope/wording of any given rep or warranty, relevant materiality thresholds (if any) and "outside the ordinary course of business" and/or "actual" vs. "best knowledge" qualifiers.]*

¹⁶ *[Note: Investors may not be willing, or depending on their investment policies and guidelines not be in a position, to make any representations and warranties other than in respect of their existence, capacity and authority, sufficiency of funds, no conflict and binding nature of their obligations.]*

10. REMEDIES

10.1 Time Limitations

10.1.1 Notice of Breach (*Rügefrist; avis de violation*)

An Investor shall deliver to the Company (which shall receive such notice for on behalf of and promptly forward such notice to the Existing Shareholders) a notice in writing describing the underlying facts of a claim for misrepresentation or breach of warranty in reasonable detail to the extent then known within [60] calendar days after that Investor has obtained reasonable knowledge of the circumstances which are likely to give rise to a claim for misrepresentation or breach of warranty under this Agreement.

Failure to provide notice of claim consistent with this Section 10.1.1 shall not relieve an Existing Shareholder of any liability it may have under Section 9.1; *provided*, however, that an Existing Shareholder shall not be liable for any damage, loss, expense, or cost to the extent the same is attributable to, or caused or aggravated by, or could not be remedied due to, that Investor's failure to timely provide notice in accordance with this Section 10.1.1. The Parties explicitly waive the application of Articles 201 and 210 CO.

10.1.2 Time Limitations on Claims

The representations and warranties given by [the Existing Shareholders] as set forth in Section 9.1 and **Annex 9.1** shall expire, and any claim of an Investor for misrepresentation or breach of warranty shall be time barred, forfeited and precluded from being made (*Verjährung; prescription*):¹⁷

- (a) with respect to representations and warranties made in **Annex 9.1** paragraph[s] [*specify relevant paragraphs re legal existence, issue, no encumbrance and title of shares*], as of the [tenth] anniversary of the Closing Date;
- (b) with respect to the representations and warranties made in **Annex 9.1** paragraph[s] [*specify relevant paragraphs re taxes (if any)*], as of the earlier of: (1) six months after the later of (i) the fifth anniversary of the Closing Date or (ii) the date on which the relevant [Taxes] have been finally assessed (*veranlagt; imposé*) and such assessment has become legally binding (*rechtskräftig; exécutoire*), or (2) the date on which the statute of limitations for the relevant [Taxes] has expired;
- (c) with respect to representations and warranties made in **Annex 9.1** paragraph[s] [*specify relevant paragraphs re social security and pensions (if any)*], as of the [fifth] anniversary of the Closing Date; and
- (d) with respect to all other representations and warranties made in **Annex 9.1**, as of the expiry of a period of [18] months from the Closing Date.

It is understood and agreed that any notice of claim for misrepresentation or breach of warranty shall be delivered to the Company (which shall receive such notice for and on behalf of, and

¹⁷ **[Note: The proposed time limitations for representations & warranties as proposed in this Section are merely indicative and should be determined and negotiated giving due regard to the specifics of any given case.]**

promptly forward such notice to, the Existing Shareholders) on or by the applicable date set forth in the preceding paragraphs, in which case the resolution of such claim may be effected after such date; *provided*, however, that notwithstanding the foregoing, the Investor's claim shall be time-barred, forfeited and precluded from being made (*verjährt; prescrit*) unless the relevant Investor initiates proceedings on the claim against [the Existing Shareholders] in accordance with Section 12 within [one year] from the date of that Investor's notice of claim to the Company.

10.1.3 Remedies for the Investors¹⁸

With respect to a misrepresentation or a breach of warranty notified by an Investor to the Company in accordance with Section 10.1, [the Existing Shareholders] shall have the right, within [30] calendar days after receipt of such notice of breach from the Company, to put the Company or, with the prior written consent of [all] Investors (such consent not to be unreasonably withheld in case the damage, loss, expense, or cost was incurred by that Investor and not by the Company), that Investor, at [the Existing Shareholders'] own expense, in the position it would have been in had no such misrepresentation or breach of warranty occurred.

If and to the extent the remedy set forth in the preceding paragraph cannot be effected or is not effected within such period of time, then that Investor, subject to the exclusions and limitations set forth in this Agreement, shall have the right to claim that [the Existing Shareholders] pay, and [each Existing Shareholder] shall be[, subject to Section 10.2, jointly and severally]¹⁹ liable to that Investor to pay, damages to the Company (or, if the damage, loss, expense, or cost is incurred by that Investor and that Investor so elects, to that Investor) in the amount which is necessary to put the Company (or, subject to the foregoing requirements, that Investor) in the position it would have been in had no such misrepresentation or breach of warranty occurred. Such damages shall include all duly documented external costs and reasonable expenses of the Company (or, subject to the foregoing requirements, that Investor) including reasonable attorneys' fees[, but shall exclude lost profits].²⁰

¹⁸ *[Note: In case the Parties agreed to differentiate the scope of the reps & warranties to be given by Existing Shareholders depending on whether an Existing Shareholder qualifies as "active" (and, thus, knowledgeable) or "passive" (see Footnote 14), the remedies for the Investors (and the limitations of liability of the Existing Shareholders pursuant to Section 10.2) would have to reflect such differentiation, and the wording of this Section (and Section 10.2) would have to be amended accordingly (together with consequential adjustments, as appropriate, throughout the Model Documentation).*

Similarly, if the Parties wished to enlarge available remedies for the Investors (e.g. to include call rights of the Investors in respect of Existing Shares held by all or selected Existing Shareholders to account for the fact that such Existing Shareholders may not otherwise be in the financial position to satisfy their liability under Sections 9.1 and 10 towards the Investors in case of a misrepresentation or breach of warranty), the wording of this Section (and Section 10.2) would have to be amended accordingly (together with consequential adjustments, as appropriate, throughout the Model Documentation).]

¹⁹ *[Note: Whether or not the concept of joint and several liability of and among the Existing Shareholders is appropriate, should be carefully considered and negotiated giving due regard to the specifics of any given case (including whether the scope of reps & warranties to be given by Existing Shareholders is meant to be differentiated depending on whether an Existing Shareholder qualifies as "active" or "passive"; see Footnote 14).]*

²⁰ *[Note: As an alternative, the Parties may include a right to demand delivery of, or a right to deliver shares, instead of a cash payment as compensation for the damage.]*

10.2 [Limitations on Liability]

10.2.1 [Liability Cap]²¹

[Notwithstanding anything contained in this Agreement to the contrary, it is acknowledged and agreed that the liability of [the Existing Shareholders] towards each Investor for misrepresentations or breaches of warranties under this Agreement shall not exceed, in the aggregate, an amount equal to the sum of: (i) [percentage] percent of that Investor's Subscription Amount, and (ii) reasonable costs and fees incurred by an Investor in connection with the examination of a possible misrepresentation or breach of warranty and any proceedings brought against [the Existing Shareholders] in connection with any misrepresentation or breach of warranty.]

10.2.2 [Disclosed Matters]²²

[The liability of the [Existing Shareholders] towards each Investor for misrepresentations or breaches of warranties under this Agreement shall be excluded if and to the extent that any matter, fact or circumstance that would otherwise give rise to a misrepresentation or breach of warranty [(i)] has been specifically disclosed in **Annex 9.1**, in each case by specific reference to the relevant Section of **Annex 9.1** to which such fact, matter, circumstance or disclosure relates [or (ii) has been Fairly Disclosed in the Disclosure Letter attached hereto as **Annex 10.2.2** (collectively, the "**Disclosed Matters**").]

[Subject only to Disclosed Matters, no fact, matter or circumstance, and no disclosures made (including, without limitation, during due diligence and/or during the negotiations of the definitive agreements), shall operate, or be deemed to operate, as an exclusion, reduction or limitation of any liability of the [Existing Shareholders] towards each Investor for misrepresentations or breaches of warranties under this Agreement and no other information of which an Investor has or is deemed to have knowledge shall in any way limit claims of an Investor under this Agreement. The Parties explicitly exclude and waive to the fullest extent legally permissible Article 200 CO, if and to the extent applicable.]

²¹ **[Note:** The wording of this Section 10.2 is merely indicative of limitations of liability for misrepresentations or breaches of warranties that may be appropriate in particular circumstances and does **not** reflect potential additional limitations of the liability of Existing Shareholders, such as:

- differentiated liability caps depending on which specific rep or warranty has been breached;
- differentiated individual liability caps for each or selected Existing Shareholder; and
- minimum amounts that damage claims of an Investor would have to exceed in the aggregate (so-called "thresholds" or "deductibles") and/or individually ("de-minimis" threshold for bringing a claim and/or counting it toward the aggregate amount of all claims) to trigger the liability of Existing Shareholders under the Investment Agreement.

In any case, any limitation of liability (including the potential additional limitations referred to in foregoing bullet points) should be carefully considered, negotiated and drafted giving due regard to the specifics of any given case.]

²² **[Note:** Consistent with market developments, the 3rd edition of the Model Documentation now reflects a fair disclosure concept (for information fairly disclosed to the Investors in a Disclosure Letter) which is combined with a specific disclosure concept (for specific qualifications of the representations and warranties contained in Annex 9.1). In any case, a suitable disclosure and limitation of liability concept should be carefully considered, negotiated and drafted giving due regard to the specifics of any given case.]

10.2.3 [Other Limitations]

[[The Existing Shareholders'] liability for misrepresentation or breach of warranty under this Agreement shall be excluded or reduced, as the case may be, if and to the extent that:

- (a) the relevant Investor has failed to use commercially reasonable best efforts to mitigate its loss or damage in respect thereof;
- (b) the relevant Investor or the Company have actually recovered [or, using commercially reasonable best efforts, could recover or could have recovered, as the case may be,] from any third person, including but not limited to an insurer, any sum in respect of any matter to which a claim made relates, after deduction of all duly documented costs and expenses incurred in making such recovery;
- (c) a specific provision, reserve or valuation allowance has been or is made or included in the [audited] financial statements of the Company as of [date before the signing date] with respect to the facts, matters or circumstances resulting in a misrepresentation or breach of warranty;
- (d) such liability is attributable to any act, omission, transaction or arrangement of the Investors after the signing of this Agreement;
- (e) any tax payable by the Company is reduced as a result of a matter giving rise to a claim for misrepresentation or breach of warranty;
- (f) such claim arises or is increased as a result of any legislation, regulation, rule of law or practice not in force at the date hereof, or as a result of the withdrawal after Closing of any authorization, license or permit previously made by any relevant authority, or as a result of any change made or introduced on or after the date hereof in any legislation, regulation, rule of law or practice of any relevant authority, whether or not such change or withdrawal purports to be effective retrospectively in whole or part.]

10.3 Remedies of Existing Shareholders and the Company

The provisions of Sections 10.1 and 10.2 shall apply by analogy to any claim by an Existing Shareholder or the Company that an Investor is liable for any misrepresentation or breach of warranty under Section 9.2 and **Annex 9.2**.

10.4 Remedies Exclusive

The remedies in this Section 10 for any misrepresentation or breach of warranty under this Agreement shall be *in lieu* of, and not in addition to, the remedies provided for under statutory law. All other remedies including, without limitation, the right to rescind this Agreement shall, subject to the right of termination and rescission in accordance with Section 8, not apply and are expressly excluded and waived.

11. MISCELLANEOUS

11.1 Nature of Parties' Rights and Obligations

Except as specifically provided otherwise in this Agreement, the rights and obligations of the Parties hereunder shall be several (and not joint). Each of the Investors may exercise and enforce its rights hereunder individually in accordance with this Agreement, and the non-performance by the Company or another Party ("**Defaulting Party**") shall neither relieve the Company nor any other Party from performing its obligations under this Agreement, nor shall the Company (*provided* it is not the Defaulting Party) or any other Party be liable for the non-performance by the Defaulting Party.

The obligations of the Parties hereunder are contractual in nature and the Parties agree that they do not form, and this Agreement shall not be deemed to constitute, a simple partnership (*einfache Gesellschaft; société simple*) pursuant to Art. 530 *et seq.* CO.

11.2 Confidentiality

The existence as well as the terms and conditions of this Agreement, and any information exchanged among the Parties (including their respective representatives or advisors) during the due diligence and the negotiation of the definitive agreements for the Financing Round and/or pertaining to the business and the operation of the Company (all such information collectively "**Confidential Information**"), shall be kept strictly confidential by each Party. The Parties shall neither use in any form nor disclose to any third party any Confidential Information unless explicitly authorized by this Agreement. The Parties shall ensure that their employees, directors and any other representatives as well as the advisors of each Party to whom any such Confidential Information is entrusted comply with these restrictions.

Without limiting the generality of the foregoing, the term Confidential Information shall include in particular:

- (a) [any information regarding this Agreement, the investments made or to be made by each Investor in the Company and the commercial terms and conditions of the investments; and
- (b) any trade secrets, financial or confidential information of the Company or any of the Investors.]

The term Confidential Information shall not include any information: (i) which as of the time of its disclosure by a Party was already lawfully in the possession of the receiving Party as evidenced by written records, or (ii) which at the time of the disclosure was in the public domain, or (iii) the disclosure of which was previously explicitly authorized by the respective Party.

The non-disclosure obligation shall not apply to any disclosure of Confidential Information required by law or regulations. In the event a disclosure of Confidential Information is required by law or regulations (including, without limitation, for tax, audit or regulatory purposes), the disclosing Party shall use all reasonable efforts to arrange for the confidential treatment of the materials and information so disclosed.

Each Party may use any Confidential Information in accordance with this Agreement. But, subject to the terms hereof and the terms of the Shareholders Agreement, each Party acknowledges

and agrees that any Confidential Information made available to it (including to any representative or advisor of such Party) by the Company or any other Party (including their representatives or advisors) hereunder shall not be used by such Party other than (i) as permitted under this Agreement and the Shareholders Agreement, (ii) for the benefit of the Company, or (iii) for the respective Party's assessment of the Company, and shall not be exploited by or for the benefit of such Party or any of its Affiliates or third party.

Finally, it is acknowledged and agreed that each of the Investors will report regularly to its investors and/or any of its Affiliates on all information pertaining to the Company and the equity investment made or to be made in the Company in accordance with its reporting obligations under its fund investment documents or to the extent required for legal, tax, audit or regulatory purposes.

[Within 60 calendar days of the Closing, the Company may issue an announcement (in a form approved in advance in writing by the Board and each Investor) confirming the investment by each Investor in the Company under this Agreement; *provided*, however, that such announcement shall neither disclose the specific terms on which the Investors have invested in the Company nor the amounts invested without the prior written approval of each Investor.

No other announcement or press releases regarding the matters contemplated by this Agreement shall be made by the Company without the prior written consent of the Board and each Investor (such consent of the Investors to be given entirely at their discretion).]

Nothing herein shall restrict the Company from granting third parties customary due diligence access for purposes of financial, commercial, strategic or similar transactions based on appropriate non-disclosure and non-use agreements.

11.3 Successors and Assigns²³

This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective permitted successors and assigns; *provided*, however, that neither the Company nor another Party hereto [(other than an Investor)] shall be entitled to assign or transfer any of the rights or obligations hereunder to any other party except with the prior written consent of each [Party]/[Investor].

11.4 Costs and Expenses, Taxes

Subject to the immediately following paragraph, it is agreed that each Party shall bear its own costs and expenses arising out of or incurred, and any taxes imposed on it, in connection with this Agreement and all transactions contemplated hereby.

The Company shall bear all Swiss issuance and stamp taxes arising out of the Financing Round [and shall reimburse the Investors for all [reasonable] legal fees and [reasonable] expenses incurred by the Investors and their advisors in connection with the transactions contemplated by this Agreement [up to an amount not exceeding CHF [amount]].²⁴ Such reimbursement shall

²³ *[Note: Depending on the investment/fund structure of an Investor, this Section may have to be amended (together with consequential changes throughout the Model Documentation) to appropriately capture the investment fund structure managed by such Investor.]*

²⁴ *[Note: Each person using the Model Documentation should satisfy itself of the potential tax consequences resulting from such cost allocation to the Company.]*

be paid to the Investors within ten Business Days after the Full Consummation of the Capital Increase.

11.5 Notices

All notices and other communications made or to be made under this Agreement shall be given in writing by [email,]fax or courier to the following addresses:

If to Investor 1: [contact details]

If to Investor n: [contact details]

If to Founder 1: [contact details]

If to Founder n: [contact details]

If to Other Shareholder 1: [contact details]

If to Other Shareholder n: [contact details]

If to the Company: Attn. Chairman of the Board
[contact details]

[Alternative for notices to a larger number of Common Shareholders:

If to Common Shareholders: To [the Company], Attn. [CEO / Chairman]
[contact details],

who shall forward the notices and communications received without delay to each of the Common Shareholders]

In case of the delivery of a notice to the Company on behalf of an Existing Shareholder in accordance with this Agreement, receipt by the Company of the notice shall be relevant for the compliance with the applicable deadlines. Each Existing Shareholder hereby appoints the Company as receiver of such notices on behalf of it. The Company shall send copies of such notices to the Existing Shareholders timely upon receipt.

Each Party may change or amend the addresses given above or designate additional addresses for the purposes of this Section 11.5 by giving the other Parties written notice of the new address in the manner set forth in this Section 11.5.

11.6 Entire Agreement

With the exception of the Shareholders Agreement [and the non-disclosure agreement dated [date]], this Agreement including its Annexes constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes any agreement or understanding that may have been concluded with respect to the subject matter hereof between any of the

Parties prior to the date of this Agreement[, except for the confidentiality agreement dated [date], which shall continue to apply to the extent that its provisions are more restrictive than those set out in Section 11.2].

[The Parties confirm that in addition to this Agreement, there are no side agreements relating to the subject matter hereof between any of them [that have not been disclosed to the other Parties and the terms of which may affect any of the rights granted to any of the Parties hereunder].]

11.7 Severability

If at any time any provision of this Agreement or any part thereof is or becomes invalid or unenforceable, then neither the validity nor the enforceability of the remaining provisions or the remaining part of the provision shall in any way be affected or impaired thereby. The Parties agree to replace the invalid or unenforceable provision or part thereof by a valid or enforceable provision which shall best reflect the Parties' original intention and shall to the extent possible achieve the same economic result.

11.8 Survival

Notwithstanding any termination and rescission of this Agreement (and the Shareholders Agreement and any documents, instruments or deeds executed by any of the Investors including, but not limited to, the Subscription Forms) pursuant to Section 8, it is acknowledged and agreed that Sections [8, 11 and 12] shall survive any such termination and rescission and continue to be effective as if no such termination and rescission had occurred.

11.9 Amendments

This Agreement (including this Section 11.9) may be amended only in writing by an instrument signed by all Parties.

11.10 Waiver of Rights

No waiver by a Party of a failure of any other Party to perform any provision of this Agreement shall operate or be construed as a waiver in respect of any other or further failure whether of a similar or different character.

12. GOVERNING LAW AND [ARBITRATION]/[JURISDICTION]

12.1 Governing Law

This Agreement shall in all respects be governed by and construed in accordance with Swiss law.

12.2 [Arbitration]/[Jurisdiction]

[Any dispute, controversy or claim arising out of or in connection with this Agreement, including its conclusion, validity, binding effect, amendment, breach, termination or rescission, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution in force on the date when the Notice of Arbitration is submitted in accordance with such Rules. The number of arbitrators shall be [one / three]. The

seat of the arbitration shall be [Zurich]/[Geneva] and the arbitral proceedings shall be conducted in [English]; *provided* that evidence may be submitted to the arbitral tribunal in [German]/[French]/[Italian] without translation into English.]

[All disputes arising out of or in connection with this Agreement, including disputes regarding its conclusion, validity, binding effect, amendment, breach, termination or rescission, shall be subject to the exclusive jurisdiction of the [ordinary]/[commercial] court[s] of the Canton of [canton of domicile of the Company], the venue being [city].]²⁵

* * * * *

[Signature page to follow]

²⁵

[Note: Alternative to arbitration.]

IN WITNESS WHEREOF, the Parties have signed this Agreement as of the date first written above

[Investor 1]

By: _____
Names: _____
Titles: _____

[Investor n]

By: _____
Names: _____
Titles: _____

[Founder 1]

By: _____
Names: _____
Titles: _____

[Founder n]

By: _____
Names: _____
Titles: _____

[Other Shareholder 1]

By: _____
Names: _____
Titles: _____

[Other Shareholder n]

By: _____
Names: _____
Titles: _____

[Company]

By: _____
Names: _____
Titles: _____

List of Annexes

Annex D:	Shareholders Agreement
Annex 1:	Defined Terms
Annex 3.1.3:	Articles
Annex 3.2(c):	Board Regulations
Annex 5:	Cap Table
[Annex 7.3(b):	Form of Employment Agreements]
Annex 9.1:	Representations and Warranties of Existing Shareholders
Annex 9.2:	Representations and Warranties of Investors
[Annex 10.2.2	Disclosure Letter]

Shareholders Agreement

Attached.

Defined Terms

"**Accounting Rules**" shall mean the accounting rules and principles consistently applied in the past by the Company in accordance with [the International Financial Reporting Standards (IFRS)]/[US GAAP]/[Swiss GAAP FER]/[the CO].

"**Affiliate**" shall mean any person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the person or entity specified and includes funds, investment vehicles or other entities formed or incorporated in any jurisdiction which are managed by any of the Investors.

"**Agreement**" shall mean this investment agreement dated as of *[date]* including the Preamble and its Annexes, as amended from time to time in accordance with its terms.

"**Annex**" shall mean any annex to this Agreement.

"**Application**" shall have the meaning set forth in Section 7.3(m).

"**Articles**" shall mean the articles of incorporation (*Statuten; statuts*) of the Company substantially in the form attached to this Agreement as **Annex 3.1.3**] and as amended from time to time in accordance with [this Agreement and] the Shareholders Agreement.

"**Assets**" shall mean all assets other than Intellectual Property.

"**Authority**" shall mean any court, arbitral tribunal, or governmental, administrative or regulatory authority or agency.

"**Authorizations**" shall mean all official authorizations, orders, permissions, product registrations, certifications, certificates, approvals, notices or consents (including all written amendments, supplements or replacements).

"**Benefit Plan**" shall mean all mandatory or voluntary social security, benefit, pension or welfare plan, arrangement scheme or fund relating to the Company and current or former employees of the Company.

"**Best Knowledge**" shall mean (i) the [actual] knowledge of the person(s) to which it relates and (ii) the knowledge that [the Company, its Directors and its senior management]/[specify names] would be expected to have[, in each case] acting diligently and upon reasonable investigation and/or upon consultation with its and their external advisors (attorney, accountant, etc.).

"**Board**" shall mean the board of directors of the Company, as appointed from time to time in accordance with the terms of this Agreement and the Shareholders Agreement.

"**Board Regulations**" shall mean the organizational regulations (*Organisationsreglement; règlement d'organisation*) of the Board substantially in the form attached to this Agreement as **Annex 3.2(c)** and as amended from time to time in accordance with [this Agreement and] the Shareholders Agreement.

"**Business**" shall have the meaning set forth in Preamble B.

"**Business Day**" shall mean any day other than Saturday or Sunday on which banks are open for business in *[city/canton]*.

"**Business IP**" shall mean all Intellectual Property which is being used, and/or is required, in order to conduct the business operations of the Company in any jurisdiction relevant for the business operations of the Company.

["**Business Plan**" shall mean the business plan from time to time adopted by the Board, setting out *[specify]*.]

"**Capital Increase**" shall have the meaning set forth in Preamble C.

"**CEO**" shall mean the Chief Executive Officer of the Company appointed from time to time in accordance with this Agreement and the Board Regulations.

"**Chairman**" shall mean the chairman of the Board (*Verwaltungsratspräsident; président du conseil d'administration*).

"**Claim**" shall mean any claim, legal action, proceeding, suit, litigation, prosecution, investigation, enquiry or arbitration, whether actual or threatened, whether as claimant, defendant or other party, whether domestic or foreign, whether civil, criminal or administrative.

"**Closing**" shall mean the closing of the Capital Increase as set forth in Section **Fehler! Verweisquelle konnte nicht gefunden werden.**

"**Closing Date**" shall have the meaning set forth in Section 7.1.

"**CO**" shall mean the Swiss Code of Obligations as of March 30, 1911, as amended from time to time.

"**Company**" shall mean *[specify]*.

"**Confidential Information**" shall have the meaning set forth in Section 11.2.

["**Current Business Plan**" shall mean the business plan of the Company attached hereto as **Schedule 5 to Annex 9.1.**]

"**Defaulting Party**" shall have the meaning set forth in Section 11.1.

"**Director**" shall mean a member of the Board appointed from time to time in accordance with the terms of this Agreement.

"**Disclosed Matters**" shall have the meaning set forth in Section 10.2.2.

["**Disclosure Letter**" shall mean the disclosure letter dated *[date]* attached hereto as **Annex 10.2.2.**]

"**Encumbrance**" shall mean any claim, charge, pledge, mortgage, security, lien, option, equity, power of sale, hypothecation, usufruct, retention of title, right of pre-emption, right of first refusal or other third party rights or security interest of any kind or an agreement to create any of the foregoing, irrespective of whether such Encumbrance arises under any agreement, covenant, other instrument, the mere operation of statutory or other laws or by means of a judgment, order or decree of any court, judicial or administrative authority, and shall also mean any approval or consent required from a third person to the exercise or full vesting of a right or title.

"**Environmental Law**" shall mean any national, supranational or local laws, legislation or orders in Switzerland or in any country where the Company has any business interests and that are applicable to the

Business and which concern or relate to compensation in respect to damage to the environment (including, without limitation, laws relating to hygiene, emissions, discharges or threatened releases of Hazardous Substances into the environment, or to the production, processing, distribution, management, use, treatment, storage, burial, disposal, transport or handling of Hazardous Substances).

"Environmental Permit" shall mean any Authorization which is necessary under Environmental Law for the operation of the Business at the date of this Agreement.

"Existing Articles" shall mean the existing articles of incorporation (*Statuten; statuts*) of the Company as in effect and in force as per the date of this Agreement.

"Existing Board Regulations" shall mean the existing organizational regulations (*Organisationsreglement; règlement d'organisation*) of the Board as in effect and in force as per the date of this Agreement.

"Existing Shareholder(s)" shall have the meaning set forth on the front Page of this Agreement.

"Existing Shares" shall have the meaning set forth in Section 2.

"Extraordinary General Meeting" shall have the meaning set forth in Section 3.1.1.

"Fairly Disclosed" shall mean the fair and non-misleading disclosure of a matter, fact or circumstance to the Investors in the Disclosure Letter in a manner which allowed each Investor to identify and assess the impact of such fact, matter or circumstance on the relevant representation and warranty of the [Existing Shareholders] in **Annex 9.1** to which such matter, fact or circumstance relates and on the business operations, prospects or valuation of the Company by reading and taking *prima facie* knowledge of such fact, manner or circumstance as described in the Disclosure Letter on a stand-alone basis and without need for any other or further explanation or information from an [Existing Shareholder] or the Company.

"Financial Statements" shall have the meaning set forth in Section 3 of **Annex 9.1**.

"Financing Round" shall have the meaning set forth in Preamble C.

"Founder(s)" shall have the meaning set forth on the front Page of this Agreement.

"Full Consummation" shall mean that the Preferred Shares issued in connection with the Capital Increase have been registered in the commercial register in accordance with Section 7.4.

"Hazardous Substances" shall mean any wastes, pollutants, contaminants or other substances (including, without limitation, electromagnetic fields, radioactive substances, liquids, solids, gases, noise, heat and vibration) which are materially harmful to human health or other life or the environment by virtue of their toxic, explosive, radioactive, corrosive, noisy, caustic or noxious properties.

"Intellectual Property" shall mean any trademarks, service marks, trade names, domain names, logos, patents, inventions, trade secrets and other rights in know-how, design rights, utility models, copyrights, software, rights in databases and all other similar proprietary rights anywhere in the world, including, where such rights are obtained or enhanced by registration, any registration of such rights and applications and rights to apply for such registrations.

"Investor(s)" shall have the meaning set forth on the front Page of this Agreement.

"Investor 1 Subscription Amount" shall have the meaning set forth in Section 4.1.

"Investor n Subscription Amount" shall have the meaning set forth in Section 4.1.

"Issue Price" shall have the meaning set forth in Section 3.1.3(b).

"Key Employee" shall mean each member of the Management and [*specify additional key employees, as appropriate*].]

"Management" shall mean the [CEO, CFO, CIO] and [*specify additional key members of management, as appropriate*] of the Company.

"Material Adverse Change" shall mean any adverse change relating to the structure, business, financial condition, prospects, assets and liabilities, or results of operations of or other material adverse effect on the Company that would cause, or is likely to cause, a reasonable investor to abstain from entering into and/or consummating the transactions contemplated under this Agreement.²⁶

"Material Agreements" shall mean all contracts, agreements, arrangements or obligations to which the Company is a party and which are of material importance to the Business, including, without limitation, any contracts, agreements, arrangements or obligations²⁷

- (a) with the top [ten] [customers/distributors/resellers] of the Company as determined based on annual net revenue for the business year ended on the [*date of last Financial Statement*];
- (b) with the top [ten] [suppliers/service providers/consultants] of the Company as determined based on annual net expenditures for the business year ended on the [*date of last Financial Statement*];
- (c) providing for the (contingent or non-contingent) payment by the Company in one or several installments of an amount in excess of CHF [*amount*] or the equivalent thereof;
- (d) [that regulate ownership or use of Business IP by the Company or that impose a non-competition or non-solicitation obligation on the Company;]
- (e) [with respect to any joint venture, consortium, partnership or other unincorporated association the Company is a party to or a member of (other than a recognized non-profit trade association), [*provided* that such entail any [material] (contingent or non-contingent) liabilities or obligations to make [material] contributions in kind or in cash]]; or
- (f) [regarding the financing of the Company or the provision of collateral by the Company for its own obligations, for the obligations of any Affiliate or the obligations of third parties, including any guarantees provided by the Company.]

"New Director" shall mean each of the persons, who are elected as new members of the Board upon nomination in accordance with Section 3.1.3(d) and Section 7.3(d).

"Other Shareholder(s)" shall have the meaning set forth on the front Page of this Agreement.

"Page" shall mean a page of this Agreement.

"Party" and "Parties" shall have the meaning set forth on the front Page of this Agreement.

²⁶ [*Note: As an alternative to this generic standard, the Parties may wish to specify materiality thresholds as from which a change shall be considered a Material Adverse Change.*]

²⁷ [*Note: Generic standard list, which needs to be tailored to the transaction.*]

"**Preamble**" shall mean a preamble of this Agreement.

"**Preferred Shares**" shall mean preferred shares (*Vorzugsaktien; actions privilégiées*) with a nominal value of CHF [amount] per preferred share, each to be fully paid in in cash pursuant to the terms of this Agreement and having the preferences set forth in the Articles and the Shareholders Agreement.

"**Premises**" shall mean any premises required by the Company to conduct its Business.

"**Proxy Holder**" shall mean the proxy holder whose name is entered in the proxy as the person who is appointed to represent and act for the issuer of the proxy.

["**Schedule**" shall mean any schedule to **Annex 9.1.**]

"**Section**" shall mean a section of this Agreement.

"**Shareholders Agreement**" shall have the meaning set forth in Preamble D.

"**Subscription Amount**" shall mean the total of the subscription amounts payable by the respective Investor for all of its Preferred Shares in accordance with Section 4.1(a) to [4.1(b)].

"**Subscription Form**" shall mean the subscription forms to be executed by the Investors in accordance with the terms of this Agreement in form and substance satisfactory to the Company and as required by Swiss corporate law.

"**Taxes**" shall mean all actual or contingent direct or indirect tax, customs, social security or pension liabilities, duties, charges, levies, assessments, contributions or the like in any jurisdiction, including any interest, costs, expenses or penalties related thereto and regardless whether payable to an Authority, a Benefit Plan or any other person; including, without limitation, income taxes (personal and corporate), capital taxes, stamp duties, withholding taxes, value added taxes, taxes related to real estate or other property, payroll taxes, social security contributions, pension plan contributions, contributions for unemployment, accident, sickness and similar mandatory or voluntary insurances. **Taxation** shall be understood accordingly.

"**Tax Authority**" shall mean any Authority whatsoever competent to impose, collect or assess any Taxes, whether in Switzerland or elsewhere.

"**Tax Returns**" shall have the meaning set forth in Section 7 of **Annex 9.1.**

Articles

Attached.

Board Regulations

Attached.

Cap Table

Attached.

[Form of Employment Agreements]

[Attached.]

Representations and Warranties [of Existing Shareholders]²⁸

1. Capacity and Title of Existing Shareholders

1.1 Authority and Ownership

Each Existing Shareholder has the unrestricted right and authority, including, but not limited to, required corporate approval(s), to enter into this Agreement and to perform all obligations under or in connection with this Agreement. This Agreement constitutes a valid, legal and binding obligation of the Existing Shareholders, enforceable against the Existing Shareholders in accordance with its terms. The Existing Shareholders are neither over-indebted (*überschuldet; surendetté*), nor insolvent (*insolvent; insolvable*) nor unable to pay their debts as they fall due (*illiquid; non liquide*). The Existing Shareholders are the sole legal [and beneficial] owners of the Existing Shares, free and clear of any Encumbrance.

1.2 Execution and Performance, No Consents

The execution and performance of this Agreement by the Existing Shareholders (*i*) will not result in a breach of, or default under any term or provision of [the constitutional documents,] applicable law, any agreement, license, Authorization or other instrument or of any order, judgment or decree of any Authority to which any of the Existing Shareholders is a party or by which any of the Existing Shareholders is bound, and (*ii*) does not require any notice, consent, waiver or approval by any Authority or any other person. There are no proceedings or investigations whatsoever pending or threatened in writing against any of the Existing Shareholders that could compromise the transactions contemplated by this Agreement.

2. Status of the Company

2.1 Incorporation, Share Capital and Authority

The Company is a corporation duly incorporated and validly existing under the laws of Switzerland. The Company has a share capital of CHF [*amount*], divided into [*number*] fully paid up registered shares with a nominal value of CHF [*amount*] each. The Existing Shares have been validly issued, are fully paid up and constitute the entire issued share capital of the Company. [No share certificates have been issued by the Company since its incorporation.] [In particular, in the context of the incorporation of the Company and/or subsequent capital increases, there have not been any undisclosed (intended) acquisitions of assets (*beabsichtigte Sachübernahmen; reprises de biens (envisagées)*)] [Other than the share or other incentive scheme disclosed in **Schedule 11(e)** to this **Annex 9.1, n**]/[N]o options, warrants, calls, rights, contracts, commitments or derivative instruments are outstanding that could require the Company to sell, transfer or issue any shares or other securities of the Company. The Preferred Shares, if issued in accordance with this Agreement, will be validly issued and fully paid-up. The Company has full corporate power and authority to own its property and assets and to carry on its Business.

²⁸ [**Note:** As a general matter, representations & warranties are only given for the Company (as defined) and not for any group companies. Consider adding representations & warranties for group companies, if applicable.]

2.2 No Dissolution, Bankruptcy or Insolvency

No measures have been taken for the dissolution and liquidation or declaration of bankruptcy of the Company and no events have occurred which would justify any such measures to be taken, in particular (i) no order has been made, petition presented, resolution passed or meeting convened for the winding up, dissolution or liquidation of the Company and there are no proceedings under applicable insolvency, bankruptcy, composition, moratorium, reorganization, or similar laws and no events have occurred which would require the initiation of any such proceedings; and (ii) no receiver, liquidator, administrator, commissioner or similar official has been appointed in respect of the Company and no step has been taken for or with a view to the appointment of such a person. The Company is neither over-indebted (*überschuldet; surendettée*), nor insolvent (*insolvent; insolvable*) nor unable to pay its debts as they fall due (*illiquid; non liquide*).

2.3 Corporate Books and Registers

The corporate books, registers, accounts, ledgers, records and supporting documents of the Company are up to date [in all material respects] and contain complete and accurate records of all matters since its incorporation, which were required to be dealt with in such documents.

2.4 Execution and Performance, No Consents

The execution and performance of this Agreement by the Company (i) will not result in a breach of, or default under any term or provision of the constitutional documents, any applicable law, any agreement, license, Authorization or other instrument or of any order, judgement or decree of any Authority to which the Company is a party or by which the Company is bound, and (ii) does not require any notice, consent, waiver or approval by any Authority or any other person.

3. Financial Statements

The [un]audited statutory financial statements of the Company for the last [three] completed business year[s] and [the unaudited interim financial statements of the Company as of [date]], each as attached in **Schedule 3** to this **Annex 9.1** (collectively, "**Financial Statements**") were prepared in accordance with the Accounting Rules. The Financial Statements (i) are correct and complete and give an accurate view of the financial position of the Company [in all respects]/[in accordance with the Accounting Rules] at the respective accounts date and the results of the operations [and cash flows] of the Company for the financial periods then ending, and (ii) completely and correctly reflect all of the Company's assets and liabilities [in all respects]/[in accordance with the Accounting Rules] at the respective accounts date. There are no (contingent) liabilities of the Company which would have to be reflected in its financial statements pursuant to the Accounting Rules, other than those stated in the Financial Statements.

4. Assets (other than Intellectual Property)

The Company has good and valid title to, or with respect to Assets held under a lease, rental or other leasing agreement, the valid right to use all Assets that are material for the Business, free and clear from any assignment or Encumbrance. The Company is under no obligation to sell any Assets other than in the normal course of business. The Assets comprise all the material assets necessary for the carrying on of the Business. All existing use of the Premises with respect to the Business is permitted under all relevant planning and other legislation and[, to the Existing Shareholders' Best Knowledge,] there are no restrictions to the continued use of the Premises, and no restrictions regarding the use of the Premises have been threatened in writing which would prevent the carrying on of the Business in any respect. All Assets of the Company which are [owned or used by the Company in connection with]/[material for] the Business are in

good operating condition and working order, taking into account ordinary wear and tear, and have been regularly and properly maintained.

5. **[Current Business Plan]**

[The Current Business Plan as attached hereto as **Schedule 5** to this **Annex 9.1** is up-to-date and has been prepared by the Company's management with the care of a duly acting business person. All statements of opinion, forecasts, projections and budgets contained in the Current Business Plan have been properly prepared based on assumptions which are fair and reasonable in the circumstances. No material facts have been omitted from the Current Business Plan which would render the information contained in it misleading. The Current Business Plan contains all information necessary to enable the Investors to make an informed assessment of the assets, liabilities, financial position, profits, losses and prospects of the Company. There are no essential facts and/or circumstances upon which the assumptions in the Current Business Plan are based that are not or no longer existing.]

6. **Ordinary Course of Business, No Material Adverse Change**

Since *[date of last Financial Statement]*,

- (a) the Company has been carrying out its business in the ordinary course and consistent with past practice;
- (b) neither the Existing Shareholders with respect to the Company nor the Company have taken or implemented any of the decisions or actions listed in **Annex [6]** to the Shareholders Agreement; and
- (c) no Material Adverse Change has occurred.

7. **Taxes, Social Security and Pension**

- (a) All notices, reports, accounts, computations, statements, assessments, registrations and any other necessary information which the Company was legally obliged to submit to any Tax Authority or Benefit Plan for the purposes of Taxation ("**Tax Returns**") have been submitted by the Company within applicable time limits and were accurate and complete [in all material respects].
- (b) As of *[date of last Financial Statements]*, all Taxes for which the Company has been liable or is liable to account for (whether of Switzerland or elsewhere), have been duly and timely withheld, deducted and paid (where applicable) or, if not due as of such date, were fully provided for in the Financial Statements. Since *[date of last Financial Statements]*, all Taxes which have become due (whether of Switzerland or elsewhere) have been duly and timely withheld, deducted and/or paid (as applicable). The signing of this Agreement and the consummation of the transactions contemplated herein do not result in any Taxes levied from the Company, except for the Taxes incurred by and to be borne by the Company under Section 11.4 of this Agreement.
- (c) No claim, action or proceeding regarding Taxes is pending or threatened by any Tax Authority. No Tax Return is currently under audit by any Tax Authority and no communication of any such audit has been received. The Company is not party to any agreement or any other legal form for the extension of time for the assessment of payment of Taxes. The Company does not have any outstanding obligations under any agreements entered into with any Tax Authority. The Company is not subject to any blocking periods.

All claims and elections which have been made by the Company in relation to Tax are valid and have been made within the statutory time limits, and none of these claims or elections are in dispute in any respect.

- (d) The Company has not entered into any transaction that, for Tax purposes, qualifies as a hidden dividend distribution (*verdeckte Gewinnausschüttung*), and the Company has [always] conducted its Business in compliance with the arm's-length principle.
- (e) The Company complies, and has always fully complied, with the terms and conditions of any tax ruling obtained.
- (f) The Company has not received any payment or credit of Taxes to which it was not entitled nor received any Tax assessment in which its Tax liability was understated. The Company is not liable to pay, reimburse or indemnify any person (including a Tax Authority or body) in respect of a Tax liability of any other Person.
- (g) The Company has complied with all laws applicable to and governing documents of any Benefit Plan. On the basis of and compared to the funding requirements of applicable law, none of the Benefit Plans has an accumulated funding deficiency (*Unterdeckung*) and none of the Benefit Plans has any claim against the Company [other than those provided for in the Financial Statements].

8. Authorizations

All necessary Authorizations[, including Environmental Permits,] for the operation of the Business as well as for carrying on the business as conducted in the past and as now carried on have been obtained, are in full force and effect and have been and are being complied with [in all [material] respects]. No investigation, inquiry or proceeding with respect to the Business (as well as the business as conducted by the Company today and in the past) is pending or has been threatened in writing which is likely to result in the suspension, cancellation, modification or revocation of any of such Authorizations.

9. Compliance

The Company carried on and is carrying on its business in accordance with all applicable laws (including, in particular, antitrust and competition laws, data protection laws and Environmental Laws), regulations, ordinances, collective labor agreements and constitutional documents. No investigation or enquiry is pending or threatened in writing and no order, decree, decision or judgement has been issued by any Authority or self-regulatory body regarding any matter against the Company or any person for whose acts or omissions the Company may be liable in connection with the breach or alleged breach of any laws or regulations. The Company is under no obligation to remedy any unlawful situation in respect of any of its assets or activities.

10. Agreements

10.1 With Respect to All Agreements

The Company is not party to or bound by any contract, agreement, arrangement or obligation, which

- (a) has not been entered into at arm's length terms;
- (b) has not been entered into in the ordinary course of the Company's business;

- (c) has been entered into with (i) any Existing Shareholder, (ii) any person related to or connected with an Existing Shareholder or (iii) any Affiliate, except for the [employment] agreements listed in **Schedule 10.1(c)** to this **Annex 9.1**; or
- (d) restricts the Company in its freedom to carry on [or, to Existing Shareholder(s)' Best Knowledge, its ability to expand] its Business in any material respects.

10.2 With Respect to Material Agreements

- (a) Each of the Material Agreements is listed in **Schedule 10.2(a)** to this **Annex 9.1**, has been disclosed to the Investors in full, is valid and in full force and effect, and the Company has not taken any steps with the effect to amend or terminate any of the Material Agreements.
- (b) No counterparty to any Material Agreement has the right to terminate the relevant Material Agreement or alter its obligations in any material respect as a result of the transactions contemplated by this Agreement.
- (c) The Company is acting in compliance with and not in default under or in breach of any Material Agreement.
- (d) The Company has not received from any party to any Material Agreement a written notice to the effect of (i) terminating, suspending or materially reducing or threatening to terminate, suspend or materially reduce, the relevant Material Agreement and/or its business with the Company or (ii) making a complaint regarding the performance of the Company under the relevant Material Agreement.

11. Employees

- (a) **Schedule 11(a)** to this **Annex 9.1** contains a true, accurate and up-to-date list of all employees of the Company²⁹ indicating name, date of birth, date of entry, position, signature authority, termination period, work permit (if needed), accumulated overtime, outstanding holidays and total compensation payable (whether in kind or in cash), including current base salary, bonus, incentives, severance payments, rights to pension promises and other material benefits, as at the date of this Agreement.
- (b) All employment agreements between the Company and its employees are in writing, contain all terms and conditions applicable to the respective employment relationship and contain only customary terms and conditions. The Company does not retain, and has not retained in the past, any consultants or freelancers that could be requalified as employees under applicable laws.
- (c) The Company and each of its employees complied with all obligations imposed by all relevant laws, ordinances and collective labor agreements. All employees of the Company have the necessary working permits or are Swiss citizens.
- (d) As at the date of this Agreement, no material salary increases have been resolved but not yet implemented. Any claims of current or former employees of the Company, including any claims for compensation, bonus, overtime and holidays, are fully provided

²⁹

[Note: Scope of data that may lawfully be disclosed in such list, i.e. whether it needs to be limited to certain employees and/or certain data, to be analyzed on a case by case basis, taking into consideration in particular any data protection regime applicable to the transaction.]

for in the Financial Statement as per the respective accounts date. Since such accounts date, overtime claims and outstanding holiday entitlements accrued only in the ordinary course of business.

- (e) The Company does not have in existence any share or other incentive scheme, whether settled in cash or in (phantom) securities of any kind and the Company has no obligation[, other than those disclosed in **Schedule 11(e)** to this **Annex 9.1**,] to pay any bonus or similar payments to any present or former employee or consultant. The Company has no obligation to make any severance, change-of-control or transaction bonus payment, or any payment of compensation for loss of office, employment or redundancy to any present or former employee, consultant or director as a consequence of the transactions contemplated by this Agreement.
- (f) None of the key employees of the Company listed in **Schedule 11(f)** to this **Annex 9.1** has at the date of this Agreement given, or has been given, notice of termination of her/his employment or has indicated an intention to terminate her/his employment.

12. Intellectual Property

- (a) All Business IP [is listed in **Schedule 12(a)** to this **Annex 9.1** and] is (or, where appropriate in the case of pending applications, will be):
 - (aa) legally and beneficially owned by the Company or lawfully used in accordance with a license agreement (which is in full force and effect without default or breach by any party thereto);
 - (bb) valid and[, to Existing Shareholder(s)' Best Knowledge,] not being infringed or challenged or opposed by any person and there is no reason to anticipate such infringement, challenge or opposition;
 - (cc) not subject to any Encumbrance or any license in favor of another person;
 - (dd) in the case of rights in such Business IP which is registered or the subject of applications for registration, validly registered or applied for in the name of the Company, has been properly used to maintain its validity, and all registration or renewal fees which are due have been paid and all steps which are required for their registration, maintenance and protection have been taken; and
 - (ee) in the case of Business IP related to software developed for use with the Company's products, legally and beneficially exclusively owned by the Company and the Company has the right to sell or distribute such software without restriction.
- (b) [To the Best Knowledge of the Existing Shareholder(s), t]/[T]he Business does not infringe, and has not in the past infringed, any Intellectual Property of any third party (or would not do so if the same was valid).
- (c) The Company has taken all best practice precautions and measures to protect and maintain the confidentiality of its trade secrets and know-how.

13. [Real Property]

[The Company does not own any real property. The Company has good and valid title as lessee to all real property used for the operation of its business and such real property is accurately

and comprehensively listed in **Schedule 13** to this **Annex 9.1**. The Company has made no changes to leased real property which will require material payments by the Company at termination of the lease to restore the leased real property to their original conditions.]

14. Insurance

The Company has, and has had since its inception, adequate insurance coverage relating to its Business which is customary in the Company's industry for a company of its size. All insurance policies of the Company are in full force and effect and there have been no material acts or circumstances which make any of these policies voidable. All premiums have been paid when due by the Company. The Company has complied with the terms and conditions of such insurance policies; in particular, there has been no breach of any of the insurance policies that would entitle insurers to decline to pay all or any part of any claim made under such policies. There are no pending claims under such insurance policies. The Company has not received any notice from any insurer to the effect that the insurance premiums will be substantially increased, or that an existing insurance policy will be terminated or not renewed. No product liability, professional liability or similar claim has been made against the Company since its incorporation.

15. Litigation / Proceedings

There are no outstanding or unsatisfied judgments, orders, decrees, arbitral awards or other decisions, and there are no Claims pending or threatened in writing, against the Company (or any person for whose acts or defaults the Company may be liable) by or before any Authority. To Best Knowledge of the Company and the Existing Shareholders, no facts or circumstances exist which are reasonably likely to give rise to a Claim.

16. [Environment]

[The Company has not caused pollution of the environment so as to give rise to a duty of environmental remediation or to liability for compensation or otherwise. All assets used by the Company comply and have in the past complied with all applicable Environmental Laws.]

17. No Finder's Fees

No person is entitled to receive from the Company any option, broker's, finder's or transaction fee, commission or other form of remuneration in connection with this Agreement and the transactions contemplated thereby.

18. Disclosure

[To Best Knowledge of the Existing Shareholders, a]/[A]ll material information relating to the Company and its business have been disclosed to the Investors and such information is true, correct and complete.

Representations and Warranties of Investors

1. Capacity of Investors

1.1 Authority

Each of the Investors has the unrestricted right and authority to enter into this Agreement and to perform all undertakings under or in connection with this Agreement. This Agreement constitutes valid, legal and binding obligations of the Investors, enforceable against the Investors in accordance with its terms. Neither of the Investors is over-indebted (*überschuldet; surendetté*), insolvent (*insolvent; insolvable*) or unable to pay its debts as they fall due (*illiquid; non liquide*) and there are no circumstances that indicate any over-indebtedness or insolvency or illiquidity of the Investors in the foreseeable future.

1.2 Execution and Performance

The execution and the performance of this Agreement by the Investors have been authorized by all necessary corporate action of each of the Investors and it will not:

- (a) result in a breach of any provision of the constitutional documents, such as the articles of incorporation or board regulations, of any of the Investors; or
- (b) result in a breach, or default under, any term or provision of any agreement, license or other instrument or of any order, judgment or decree of any court, governmental agency or regulatory body to which any of the Investors is a party or by which any of the Investors is bound.

1.3 No Consents Required

None of the Investors requires any notice, consent, waiver, approval or clearance by any governmental agency or regulatory body of any nature other than mentioned in this Agreement to enter into this Agreement and to consummate the transactions contemplated by this Agreement. There are no proceedings or investigations whatsoever pending or threatened in writing against any of the Investors that could compromise the consummation of the transactions contemplated by this Agreement.

[Annex 10.2.2]

[Disclosure Letter]

[Attached.]