

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

FORM 10-K  
ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2018

Commission file number 000-53851

**Mobivity Holdings Corp.**  
(Exact Name of Registrant as Specified in Its Charter)

Nevada  
(State or Other Jurisdiction of  
Incorporation or Organization)

26-3439095  
(I.R.S. Employer  
Identification No.)

55 North Arizona Place, #310  
Chandler, Arizona 85225  
(Address of Principal Executive Offices and Zip Code)

(877) 282-7660  
(Telephone Number)

Securities registered pursuant to Section 12 (b) of the Act:  
None

Securities registered pursuant to section 12 (g) of the Act:  
Common Stock, \$.001 par value

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.  
Yes  No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act.  
Yes  No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes  No

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes  No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company" and "emerging growth company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer	<input type="checkbox"/>	Accelerated filer	<input type="checkbox"/>
Non-accelerated filer	<input type="checkbox"/>	Smaller reporting company	<input checked="" type="checkbox"/>
		Emerging growth company	<input type="checkbox"/>

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

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act).  
Yes  No

The aggregate market value of the voting and non-voting common equity held by non-affiliates as of June 30, 2018 was \$33,416,152.

As of March 15, 2019, the registrant had 45,998,053 shares of common stock issued and outstanding.

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MOBIVITY HOLDINGS CORP.  
ANNUAL REPORT ON FORM 10-K  
FISCAL YEAR ENDED DECEMBER 31, 2018  
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## FORWARD-LOOKING STATEMENTS

*This Annual Report on Form 10-K, or Form 10-K, contains “forward-looking statements” that involve risks and uncertainties, as well as assumptions that, if they never materialize or prove incorrect, could cause our results to differ materially and adversely from those expressed or implied by such forward-looking statements. The forward-looking statements are contained principally in Item 1—“Business,” Item 1.A—“Risk Factors” and Item 7—“Management’s Discussion and Analysis of Financial Condition and Results of Operations” but appear throughout the Form 10-K. Examples of forward-looking statements include, but are not limited to our expectations, beliefs or intentions regarding our potential product offerings, business, financial condition, results of operations, strategies or prospects and other matters that do not relate strictly to historical facts or statements of assumptions underlying any of the foregoing. These statements are often identified by the use of words such as “anticipate,” “believe,” “continue,” “could,” “estimate,” “expect,” “intend,” “may,” “ongoing,” “opportunity,” “plan,” “potential,” “predicts,” “seek,” “should,” “will,” or “would,” and similar expressions and variations or negatives of these words. These forward-looking statements are based on the expectations, estimates, projections, beliefs and assumptions of our management based on information currently available to management, all of which are subject to change. Such forward-looking statements are subject to risks, uncertainties and other factors that are difficult to predict and could cause our actual results and the timing of certain events to differ materially and adversely from future results expressed or implied by such forward-looking statements. Factors that could cause or contribute to such differences include, but are not limited to, those identified below in Item 1.A—“Risk Factors”. Furthermore, such forward-looking statements speak only as of the date of this Form 10-K. We undertake no obligation to update or revise publicly any forward-looking statements to reflect events or circumstances after the date of such statements for any reason, except as otherwise required by law.*

### Part I

#### Item 1. Business

##### General Information

Mobivity Holdings Corp. (the “Company” or “we”) is in the business of developing and operating proprietary platforms over which brands and enterprises can conduct national and localized, data-driven marketing campaigns. Our proprietary platforms, consisting of software available to phones, tablets, PCs, and Point-of-Sale (“POS”) systems, allow resellers, brands and enterprises to market their products and services to consumers through text messages sent directly to the consumers via mobile phones, mobile smartphone applications, and dynamically printed receipt content. We generate revenue by charging the resellers, brands and enterprises a per-message transactional fee, through fixed or variable software licensing fees, or via advertising fees. We help personal care, restaurant and retail brands realize their strategy of growing their business by increasing customer frequency, engagement and spend. Mobivity’s analytics services and products provide solutions that allow brands to take validated marketing actions across all channels, based on real customer behavior to create personalized, relevant, localized and targeted campaigns. With national clients such as Subway, Sonic, Chick-fil-A, and Baskin-Robbins, Mobivity’s goal is to unlock the power of internal and external customer data to create a system that provides data driven insight to continually adapt and enhance communications with customers.

According to the U.S. Census Bureau, only 7% of commerce in the US occurs online which means 93% is still happening in the physical world. We believe that brands, and in particular restaurant and retail brands, need a better way to tie marketing activities to customer purchases, and then use the information to build a more relevant, personal experience for each customer, at a local and national level. Mobivity is giving brands the ability to connect (and measure) marketing communications in the physical world by unlocking POS and mobile data and marrying it with other traditional tactics to create a closed loop: in some cases, increasing response rates from 0.05% to 5% (or greater); improving online advertising conversion by 10X; and increasing revenue per ad by more than 2.5X.

Mobivity’s solution addresses the offline marketing problem and makes personalized marketing automation possible for offline commerce. Digital marketing is highly dynamic and personally targeted. According to studies published by McKinsey & Company, Point Drive, and the National Advertising Institute, targeted advertising generates conversion rates more than eleven times higher than non-targeted advertising, more than double the revenue per advertisement, and is 250% more efficient than non-targeted advertising. Combined with purchase data and analytics gathered by Mobivity’s products and platforms, Mobivity customers are able to quickly transform traditionally low marketing campaign response rates to exponentially higher response rates.

**Recurrency**

Mobivity's Recurrency platform (formerly "SmartSuite") unlocks valuable POS and mobile data to help transform customer transactions into actionable and attributable marketing insights. Our technology provides transactional data, in real-time, that uncovers market-basket information and attributes both online and traditional promotions. Recurrency is comprised of Recapture, Recognition, Receipt, Reach, Reup, and Belly Loyalty.

**Recapture**

Mobivity's Recurrency begins with Recapture, which can capture, normalize, integrate, and store transaction data for almost any POS system. This provides a clean useful dataset upon which to predict and influence your customers' buying behavior and deliver basket-level insights to your business.

**Recognition**

Mobivity's Recognition is comprised of various reporting and analytics tools to uncover patterns in the buying behaviors of consumers and leverages that data to suggest pricing optimizations, and guide marketing campaigns.

**Receipt**

Mobivity's Receipt unlocks the power of transactional data to create relevant and timely customer messages. Both clients and agencies are using Receipt to drive better results and make decisions around offers, promotions, and customer engagement through the medium of the printed receipt. Our Receipt solution enables our customers with the ability to control the content on receipts printed from their point of sale, or POS system. Receipt is a software application that is installed on the POS, or directly onto receipt printer platforms, such as Epson's OmniLink product, which dynamically controls what is printed on receipts such as coupons, announcements, or other calls-to-action, such as invitations to participate in a survey. Receipt includes a Web-based interface where users can design receipt content and implement business rules to dictate what receipt content is printed in particular situations. All receipt content is also transmitted to Receipt's server back-end for storage and analysis via Recognition.

**Reach**

Mobivity's Reach transforms standard short message service ("SMS") and multimedia messaging service ("MMS") messaging into a data-driven marketing medium. Mobivity's Reach tracks and measures offer effectiveness at a more granular level than anything available in the industry, allowing clients to create smarter offers and drive higher redemption rates. Our proprietary platform connects to all wireless carriers so that any consumer, on any wireless service (for example, Verizon), can join our customer's SMS/MMS mobile marketing campaign. Once the consumer has subscribed to our customer's SMS/MMS mobile marketing campaign, our Web-based software solution serves as a tool by which our customers can initiate messages and other communications back to their subscribed consumers, as well as configure and administer their mobile marketing campaigns.

**Reup**

Mobivity's Reup aids marketing to align focusing its attention on engaging the customer and trying to change their buying behavior. Reup allows clients to begin including, and rewarding, employee behavior as a key method to effect customer behavior and drive more revenue. By focusing on small changes - upsizing drinks, adding desserts, and promoting limited time offers - employees can have a dramatic impact on sales.

**Belly Loyalty**

Mobivity's Belly Loyalty program focuses on a customer engagement with a customer-facing digital rewards platform via an app and digital pad. As a result of the Belly acquisition, Mobivity now has: a highly rated app ("Belly - Rewards Everyday") on IOS and Android that leverages geolocation; an email messaging system that connects our clients to our customers; a loyalty program that rewards customer frequency.

**Company Strategy**

Our objective is to build an industry-leading Software-as-a-Service (SaaS) product that connects consumers to merchants and brands. The key elements to our strategy are:

· *Exploit the competitive advantages and operating leverage of our technology platform.* The core of our business is our proprietary Recapture POS technology. Several years of development went into designing Recapture such that the process of intercepting POS data and performing actions, such as controlling the receipt printer with receipt is scalable, portable to a wide variety of POS platforms, and does not impact performance factors including the print speed of a typical receipt printer. Furthermore, we believe the transmission of POS data to Mobivity's cloud-based data stores presents a very competitive and innovative method of enabling POS data access. Additionally, we believe that our Reach platform is more advanced than technologies offered by our competitors and provides us with a significant competitive advantage. With more than ten years of development, we believe that our platform operates SMS/MMS text messaging transactions at a "least cost" relative to competitors while also being capable of supporting SMS/MMS text messaging transactional volume necessary to support our

goal of several thousand end users. Leveraging our Recognition platform with Reach allows for full attribution of SMS/MMS offers, which we believe is a unique combination of both SMS/MMS text messaging and POS data.

- *Evolve our sales and customer support infrastructure to uniquely serve very large customer implementations such as franchise-based brands who operate a large number of locations.* Over the past few years we have focused our efforts on the development of our technology and solutions with the goal of selling and supporting small and medium-sized businesses. Going forward, we intend to increase significantly our investments in sales and customer support resources tailored to selling to customers that operate franchise brands. Today we support more than 30,000 merchant locations globally.
- *Acquire complementary businesses and technologies.* We will continue to search and identify unique opportunities which we believe will enhance our product features and functionality, revenue goals, and technology. We intend to target companies with some or all of the following characteristics: (1) an established revenue base; (2) strong pipeline and growth prospects; (3) break-even or positive cash flow; (4) opportunities for substantial expense reductions through integration into our platform; (5) strong sales teams; and (6) technology and services that further build out and differentiate our platform. Our acquisitions have historically been consummated through the issuance of a combination of our common stock and cash.
- *Build our intellectual property portfolio.* We currently have seven issued patents that we believe have significant potential application in the technology industry. We plan to continue our investment in building a strong intellectual property portfolio.

While these are the key elements of our current strategy, there can be no guarantees that our strategy will not change or that our strategy will be successful.

#### **Recent Developments**

We have entered into the following material transactions since January 1, 2017.

##### *2017 Customer Contract Renewal and Expansion*

On June 30, 2017 we renewed and expanded our partnership with one of our largest customers to foster additional customer engagement and long-term growth through utilization of Mobivity's Reach solution. With personalized customer communications via text/social messaging (Reach), and optimized business performance (Recognition), we have crafted a complete and self-optimizing solution for increasing customer acquisition, frequency and spend.

The renewed and expanded partnership utilizes the Mobivity platform for all of our customer's locations for a term of five years, and includes a co-marketing commitment from both companies to ensure the continued growth in consumer subscribers to the program. The five-year term includes a six figure monthly minimum commitment that is prepaid to Mobivity on an annual basis.

##### *2018 Warrant Exercise*

Between January 19, 2018 and March 31, 2018, we conducted an offer to the holders of our outstanding common stock purchase warrants pursuant to which our warrant holders will be permitted to exercise their warrants at a reduced exercise price for a period expiring on March 31, 2018. At the commencement of the warrant offer, there were warrants outstanding that entitled their holders to purchase 5,134,349 shares of our common stock at exercise prices of \$1.00 and \$1.20 per share. Pursuant to the offer, warrant holders exercised warrants to purchase 1,898,015 shares of our common stock, resulting in additional capital of \$1,898,015. We undertook this limited-time warrant exercise price reduction in order to raise additional capital without incurring further potential dilution to our stockholders. In addition, through the warrant holders' acceptance of our offer, we could significantly reduce the number of outstanding warrants and thereby simplify our capital structure. The warrant offer was conducted by our management and there were no commissions paid by us in connection with the solicitation.

##### *Unsecured Promissory Note Investments in 2018*

During February 2018, we conducted a private placement of Unsecured Promissory Notes (individually, a "Note" and collectively, the "Notes") in the aggregate principal amount of \$1,080,000 to certain investors, officers and directors of the Company. Each Note bears interest on the unpaid balance at the rate of fifteen percent (15%) per annum and the principal and accrued interest is due and payable no later than December 1, 2018. We may prepay any of the Notes without notice, subject to a two percent (2%) pre-payment penalty. The Note offer was conducted by our management and there were no commissions paid by us in connection with the solicitation.

##### *June 2018 Private Placement*

In June and July 2018, we conducted a private placement of our common shares at an offering price of \$1.00 per shares. We had sold a total of 6,822,583 shares of our common stock for gross proceeds of \$6,822,583 including \$5,775,000 of cash and the cancellation of \$1,000,000 of principal \$47,583 of accrued interest under our February 2018 private placement Notes.

*November 2018 Acquisition of Certain Belly, Inc Assets*

On November 14, 2018, we entered into an Asset Purchase Agreement with Belly, Inc., a Delaware corporation, pursuant to which we purchased from Belly, certain operating assets relating to Belly's proprietary digital customer loyalty platform, including client contracts, accounts receivable and intellectual property, in exchange for our payment of \$3,000,000, subject to working capital adjustments. Belly was founded in 2001 and was originally funded by Andreessen Horowitz, Lightbank, NEA, DAG Ventures, Cisco and 7-Ventures, LLC (a subsidiary of 7-Eleven, Inc). Belly is a platform-first technology company enabling businesses of all sizes to create digital connections that result in personal relationships with their customers. Belly's platform has been deployed to more than 5,000 merchant locations and 7 million consumers. Our acquisition of the Belly assets is expected to be accretive to our top and bottom line revenue figures. The Asset Purchase Agreement contains customary representations, warranties and indemnities on the part of Belly. The closing of the acquisition took place on November 14, 2018, subject to usual and customary closing conditions. We financed the acquisition through our cash on hand.

In connection with our acquisition of the Belly assets, on November 14, 2018, we entered into a Loan and Security Agreement with Wintrust Bank. The Loan and Security Agreement provides for a single-term loan to us in the original principal amount of \$1,000,000. Interest accrues on the unpaid principal amount at the rate of prime plus 1.5%. The loan is a three-year loan and is interest-only payable for the first six months of the loan. Commencing on May 1, 2019, we will commence monthly payments of principal in the amount of \$33,333.33 in addition to the monthly payment of accrued interest. The loan is secured by all of our assets other than our intellectual property. We used the proceeds of the loan to re-finance a loan in the principal amount of \$1,000,000 we assumed as part of the acquisition of the Belly assets.

**Industry Background**

Traditionally only sophisticated e-commerce brands, such as Amazon, were capable of personalizing and targeting their marketing to consumers as they navigated online shopping experiences that tracked their every move, all the way to check out. But despite the scale and success of e-commerce, it still accounts for just around 10% of commerce conducted in the U.S. The other 90% of "offline" merchants struggle to leverage data to combine with digital marketing channels and replicate the same personalized marketing tactics employed by successful e-commerce operators. Particularly, merchants are challenged with connecting purchase data collected by traditional point-of-sale terminals and mapping those transactions back to consumers to ensure that follow on marketing messages are personalized to the consumers purchase history.

Offline marketers will increasingly invest in technologies that leverage data to power personalized, digital consumer experiences and mimic how e-commerce marketers operate. This is a trend that has growing support from various industry analysts as well. McKinsey recently reported that "data activated marketing" can boost sales 15%-20% and significantly improve the ROI on marketing spend across marketing channels. While the upside of data driven marketing may seem obvious, marketers are also converging their digital and offline worldviews when it comes to thinking about how they allocate their marketing budgets. Gartner's 2015-2016 Chief Marketing Officer (CMO) Spend Survey reported that 98 percent of CMOs no longer make a clear distinction between marketing online and offline and say the disciplines are merging. We believe that these trends reveal a material insight into how the market is converging towards our value proposition and will further propel our growth; as the market increasingly convinces itself of the upside of targeting its marketing based off of consumer data, as suggested by the McKinsey study, and the Gartner study suggests that offline and digital marketing disciplines are merging, then our unique approach to merging offline point-of-sale data with digital channels.

Data driven marketing will also leverage the rapidly emerging field of "cognitive computing," where computers are becoming intelligent – often referred to as "artificial intelligence". Google CEO, Sundar Pichai, has described how Google is shifting from a mobile first world, to an AI first world; and actions speak louder than words - Google has acquired more artificial intelligence startups than Facebook and Microsoft combined. A recent forecast by Tractica (a market intelligence firm that focuses on human interaction with technology) suggests that annual worldwide AI revenue will grow at a combined annual growth rate of more than 49% to \$36.8 billion by 2025. One of the key drivers to progress in this field is called "machine learning," which aims to give computers the ability to learn without being explicitly programmed. This could open up entirely new possibilities where marketing becomes not just automated, but autonomous and entirely free of human intervention. Machine learning is powered by collecting massive amounts of data that can "train" machines to think on their own; an article in Fortune last year went as far as calling "data the new oil". Jim Hare, research vice president at Gartner, proclaimed "As AI accelerates up the Hype Cycle, many software providers are looking to stake their claim in the biggest gold rush in recent years."

## The Mobivity Solution

Our Recurrency platform is designed to leverage point-of-sale data, along with cognitive computing, to increase visits, spend, and loyalty from consumers. We do this by **capturing** transaction detail, **analyzing** the data, and **motivating** customers and employees to take actions that improve business performance.

- *Capture:* Recall that more than 90% of our economy still functions “offline”. Our Recapture solution plays an integral part in bringing brick and mortar businesses into the digital future by creating an extensible point of access to their POS data. Recapture is a lightweight software client that can be installed in just about any POS system and immediately enables applications to operate off of real-time POS data. While our Reach and Receipt products utilize the data feed from Recapture, third party applications and other analytics tools can also leverage Recapture to expand their capabilities.
- *Analyze:* Often times marketers spend a large portion of their budget on marketing programs with little to no visibility into attributable sales. A 2016 IAB/Winterberry study reported cross-channel measurement and attribution would be the No. 1 tactic occupying respondents’ time last year, a whopping 63 percent year-over-year increase from the previous year. This is because understanding consumers’ offline behavior is mission-critical for brands and agencies looking to bridge the gap between the online and offline worlds. Our Recognition solution allows for easy access to POS data enabling full attribution of our Reach or Receipt campaigns, along with potentially linking offline POS data to other forms of digital marketing such as social or search advertising.
- *Motivating Consumers.* We motivate consumers and employees to improve business performance through our Receipt, Reach, and Reup applications that are powered by the POS data captured by Recapture, and analyzed by Recognition. This is where our ability to engage consumers through their mobile phone and track their behavior to any of these offline cash registers, combines with machine learning and artificial intelligence techniques to dial-in targeted marketing engagements that cause consumers to spend more. Our Reach solution has engaged more than nine million consumers across more than 30,000 retail locations while examining billions of purchase transactions. In one study, we worked with the analytics and data team of one of our largest clients where we studied the behavior of consumers both before and after their enrollment in a Reach marketing program. Together, we took a universe of hundreds of thousands of consumers and examined their purchases for a period of time before they joined the Reach program. We then tracked their purchases after they joined the program and learned that these consumers increased their overall spend by forty five percent. Restaurant’s fight tooth and nail for every 1% increase in spend, so this was an amazing result. Another brand challenged us to increase their customer frequency which had historically been an average of just one visit every 60 days. By leveraging our Receipt platform we were able to create a targeted offer program that printed coupons on consumers’ receipts. In some cases, consumers returned in eight days – far better than the historical average of 60 days. Within 90 days since launching the program, consumers are returning within days (instead of months) and the program is on pace to generate a ROI of more than 400%.

In the future, we intend to develop additional platform features with the goal of driving additional value by helping brick and mortar brands leverage POS data to drive business growth.

## Marketing and Sales

We market and sell the services offered over our proprietary platform directly through our own sales force, via resellers, and in some cases through agents.

- *Direct Sales.* Our direct sales force is predominantly comprised of a small team of representatives employed by us to promote and sell our services in various geographical areas.
- *Resellers.* We sell our services via wholesale pricing of licensing and transactional fees to various resellers who market and sell the Mobivity services under their own brand.
- *Agents.* We also engage independent agents to market and sell our services under the Mobivity brand in return for payment of a commission or revenue share for customers they introduce to us.
- In addition to our direct and indirect sales channels, we also market our services online through our Website, Facebook, Twitter, LinkedIn, and other online channels. We also participate in various trade and industry events to build awareness and promote exposure to our services and brand.

Our services are predominantly marketed and sold in the form of a recurring software licensing fee that is determined by desired features and the number of physical locations our customers would like to deploy the services in. For example, a customer who exclusively utilizes our Reach feature for one location will pay a much lower recurring licensing fee than a marketer who desires our full breadth of product features and needs to drive localized marketing campaigns across 50 locations in various cities or locales.

In addition to license fees, we also arrange for a transaction fee in special cases where our customers require greater bandwidth or throughput to process large volumes of Reach-powered mobile messaging transactions. For example, a customer may want to utilize our services for a major sporting event when there may be tens of thousands of fans who are expecting a "score alert" sent to their mobile phone via a SMS/MMS text message. In this case, the required resources to facilitate a large number of SMS/MMS messages in a short period of time is much higher and therefore we may charge an additional per-SMS/MMS text message fee to our customer.

#### **Research and Development**

We have developed an internal and external software development team with many years of experience in the mobile advertising and marketing industries. Our research and development activities are focused on enhancements to our platform, including extending our technology into payment processing, location-based services, application analytics, and other technical opportunities in the evolving mobile industry.

Our total engineering, research and development expenditures in 2018 and 2017 were \$4,022,159 and \$4,201,647, respectively.

#### **Competition**

Combining POS data, cognitive computing, and various marketing applications is relatively new. The majority of our competitors are start-ups or early stage growth companies helping to pioneer the technology necessary to extract POS data and integrate that data with technology channels such as mobile messaging, e-mail, social media, and others. Competitors in this arena include Fishbowl Marketing, Bridg, Sparkfly, and PosIQ.

We also believe that POS manufacturers could also pose a competitive threat by vertically integrating similar features and capabilities into their core products. Leading vendors in the POS space include Oracle/Micros, NCR, IBM, Square, First Data/Clover, and others.

We believe that the key competitive factors that differentiate us from our competitors include:

- *Intellectual Property.* We currently own seven patents that cover various approaches to facilitating SMS/MMS text messaging solutions and manipulating receipt content.
- *Competitive pricing.* We are unaware of any solution in the market that offers the ability to aggregate and analyze POS data (Recognition), activate mobile messaging campaigns (Reach), convert print receipts into targeted marketing transactions (Receipt), and shape employee performance in real-time (Reup) all from a single platform (Recurrency). Our platform approach will allow for bundled pricing strategies, or a la carte tactics, that could create unfair pricing advantages.
- *Scalability.* We believe that our platform is more scalable than most if not all of our competitors. We have scaled from around 1,000 POS integrations to more than 20,000 in just three years. Aside from the POS manufacturers themselves, we are unaware of any other solutions provider who is currently integrated with as many POS devices as we are.

#### **Seasonality**

Our business, as is typical of companies in our industry, is highly seasonal. This is primarily due to traditional marketing and advertising spending being heaviest during the holiday season while brands, advertising agencies, mobile operators and media companies often close out annual budgets towards the end of the calendar year. Seasonal trends have historically contributed to, and we anticipate, will continue to contribute to fluctuations in our quarterly results, including fluctuations in sequential revenue growth rates.

#### **Intellectual Property**

We regard the protection of our developed technologies and intellectual property rights as an important element of our business operations and crucial to our success. We rely primarily on a combination of patent laws, trademark laws, copyright laws, trade secrets, confidentiality procedures and contractual provisions to protect our proprietary technology. We require our employees, consultants and advisors to enter into confidentiality agreements. These agreements provide that all confidential information developed or made known to the individual during the course of the individual's relationship with us is to be kept confidential and not disclosed to third parties except under specific circumstances. In the case of our employees, the agreements provide that all of the technology which is conceived by the individual during the course of employment is our exclusive property. The development of our technology and many of our processes are dependent upon the knowledge, experience and skills of key scientific and technical personnel.



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As of the date of this report we own seven patents. U.S. Patent numbers 7,991,388 B1 and 8,244,216 B1 were issued on August 2, 2011 and August 14, 2012, respectively. These patents cover a geo-bio-metric personal identification number, a service that authenticates a user from a feature phone or smart phone using a number of mobile attainable attributes: geolocation, facial image, accelerometer (which measures the physical orientation or movement of the device itself), and text messaging. The purpose of the geo-bio-metric PIN service is to authenticate a user while verifying the following: the user is currently using his or her other phone; the user is at the location that their phone is at; the user is not at another location and using their phone through a proxy; and an impostor is not using the phone.

In March 2011, we acquired US Patent number 6,788,769 B1 which covers a method and system for using telephone numbers as a key to address email and online content without the use of a look-up database. Using this system, a phone number is used to access a website or an email address in exactly the same way it is used to dial a telephone.

U.S. Patent numbers 8,463,306 and 8,818,434 were issued on June 11, 2013 and August 26, 2014, respectively. U.S. Patent 9,307,430 was issued on April 5, 2016. These patents cover a method and system for testing a SMS/MMS text messaging network. The method and system allows for real-time testing of the initiation and completion of SMS/MMS text messages and any delivery delays across the major American mobile phone carriers, and accurately measures the progress on SMS/MMS broadcasts and records when a broadcast has been completed.

U.S. Patent number 3,836,444 was granted on September 29, 2016. U.S. Patent 9,727,853 was issued on August 8, 2017. These patents cover a system to generate value added messages on receipts printed by point-of-sale (POS) systems based on various rules determined by information conveyed on the purchase receipt such as location, time of day, or other purchase data. The patent application claims priority to a patent application filed in 2006.

Our issued and any future patents that we may issue may not survive a legal challenge to their scope, validity or enforceability, or provide significant protection for us. The failure of our patents, or the failure of our copyright and trade secret laws to adequately protect our technology, might make it easier for our competitors to offer similar products or technologies. In addition, patents may not issue from any of our current or any future applications.

### **Government Regulation**

The growth and development of the mobile messaging market and the market for electronic storage of personal information has resulted in a variety of stringent consumer protection laws, many of which impose significant burdens on companies that store personal information. Depending on the products and services that they offer, mobile data service providers may be subject to regulations and laws applicable to providers of mobile, Internet and VOIP services, including domestic and international laws and regulations relating to user privacy and data protection, defamation, pricing, advertising, taxation, gambling, sweepstakes, promotions, billing, real estate, consumer protection, accessibility, content regulation, quality of services, telecommunications, mobile, television and intellectual property ownership and infringement. We expect that the regulation of our industry generally will continue to increase and that we will be required to devote increasing amounts of legal and other resources to address this regulation. In addition, the application of existing domestic and international laws and regulations relating to issues such as user privacy and data protection, marketing, advertising, consumer protection and mobile disclosures in many instances is unclear or unsettled.

In addition to its regulation of wireless telecommunications providers generally, the U.S. Federal Communications Commission, or FCC, has examined, or is currently examining, how and when consumers enroll in mobile services, what types of disclosures consumers receive, what services consumers are purchasing and how much consumers are charged. In addition, the Federal Trade Commission, or FTC, has been asked to regulate how mobile marketers can use consumers' personal information. Consumer advocates claim that many consumers do not know when their information is being collected from cell phones and how such information is retained, used and shared with other companies. Consumer groups have asked the FTC to identify practices that may compromise privacy and consumer welfare; examine opt-in procedures to ensure consumers are aware of what data is at issue and how it will be used; investigate marketing tactics that target children; and create policies to halt abusive practices. The FTC has expressed interest, in particular, in the mobile environment and services that collect sensitive data, such as location-based information.

The principal laws and regulations that pertain to us and our customers in connection with their utilization of our platform, include:

- *Deceptive Trade Practice Law in the U.S.* The FTC and state attorneys general are given broad powers by legislatures to curb unfair and deceptive trade practices. These laws and regulations apply to mobile marketing campaigns and behavioral advertising. The general guideline is that all material terms and conditions of the offer must be "clearly and conspicuously" disclosed to the consumer prior to the buying decision. The balancing of the desire to capture a potential customer's attention, while providing adequate disclosure, can be challenging in the mobile context due to the lack of screen space available to provide required disclosures.

- *Behavioral Advertising.* Behavioral advertising is a technique used by online publishers and advertisers to increase the effectiveness of their campaigns. Behavioral advertising uses information collected from an individual's web-browsing behavior, such as the pages they have visited or the searches they have made, to select which advertisements to display to that individual. This data can be valuable for online marketers looking to personalize advertising initiatives or to provide geo-tags through mobile devices. Many businesses adhere to industry self-governing principles, including an opt-out regime whereby information may be collected until an individual indicates that he or she no longer agrees to have this information collected. The FTC and EU member states are considering regulations in this area, which may include implementation of a more rigorous opt-in regime. An opt-in policy would prohibit businesses from collecting and using information from individuals who have not voluntarily consented. Among other things, the implementation of an opt-in regime could require substantial technical support and negatively impact the market for our mobile advertising products and services. A few states have also introduced bills in recent years that would restrict behavioral advertising within the state. These bills would likely have the practical effect of regulating behavioral advertising nationwide because of the difficulties behind implementing state-specific policies or identifying the location of a particular consumer. There have also been a large number of class action suits filed against companies engaged in behavioral advertising.
- *Behavioral Advertising-Privacy Regulation.* Our business is affected by U.S. federal and state, as well as EU member state and foreign country, laws and regulations governing the collection, use, retention, sharing and security of data that we receive from and about our users. In recent years, regulation has focused on the collection, use, disclosure and security of information that may be used to identify or that actually identifies an individual, such as an Internet Protocol address or a name. Although the mobile and Internet advertising privacy practices are currently largely self-regulated in the U.S., the FTC has conducted numerous discussions on this subject and suggested that more rigorous privacy regulation is appropriate, including regulation of non-personally identifiable information which could, with other information, be used to identify an individual. Within the EU, member state data protection authorities typically regard IP addresses as personal information, and legislation adopted recently in the EU requires consent for the placement of a cookie on a user device. In addition, EU data protection authorities are following with interest the FTC's discussions regarding behavioral advertising and may follow suit by imposing additional privacy requirements for mobile advertising practices.
- *Marketing-Privacy Regulation.* In addition, there are U.S. federal and state laws and EU member state and other country laws that govern SMS/MMS and telecommunications-based marketing, generally requiring senders to transmit messages (including those sent to mobile devices) only to recipients who have specifically consented to receiving such messages. U.S. federal, EU member state and other country laws also govern e-mail marketing, generally imposing an opt-out requirement for emails sent within an existing business relationship.
- *SMS/MMS and Location-Based Marketing Best Practices and Guidelines.* We voluntarily comply with the guidelines of the Mobile Marketing Association, or MMA, a global association of 700 agencies, advertisers, mobile device manufacturers, wireless operators and service providers and others interested in the potential of marketing via the mobile channel. The MMA has published a code of conduct and best practices guidelines for use by those involved in mobile messaging activities. The guidelines were developed by a collaboration of the major carriers and they require adherence to them as a condition of service. We voluntarily comply with the MMA code of conduct, which generally require notice and user consent for delivery of location-based services. In addition, the Cellular Telephone Industry Association, or CTIA, has developed Best Practices and Guidelines to promote and protect user privacy regarding location-based services.
- *TCPA.* The United States Telephone Consumer Protection Act, or TCPA, prohibits unsolicited voice and text calls to cell phones through the use of an automatic telephone-dialing system (ATDS) unless the recipient has given prior consent. The statute also prohibits companies from initiating telephone solicitations to individuals on the national Do-Not-Call list, and restricts the hours when such messages may be sent. Violations of the TCPA can result in statutory damages of \$500 per violation (i.e., for each individual text message). U.S. state laws impose additional regulations on voice and text calls. We believe that our platform does not employ an ATDS within the meaning of the TCPA based on case law construing that term.
- *CAN-SPAM.* The U.S. Controlling the Assault of Non-Solicited Pornography and Marketing Act, or CAN SPAM Act, prohibits all commercial e-mail messages, as defined in the law, to mobile phones unless the device owner has given "express prior authorization." Recipients of such messages must also be allowed to opt-out of receiving future messages the same way they opted-in. Senders have ten business days to honor opt-out requests. The FCC has compiled a list of domain names used by wireless service providers to which marketers may not send commercial e-mail messages. Senders have 30 days from the date the domain name is posted on the FCC site to stop sending unauthorized commercial e-mail to addresses containing the domain name. Violators are subject to fines of up to \$6.0 million and up to one year in jail for some spamming activities. Carriers, the FTC, the FCC, and State Attorneys General may bring lawsuits to enforce alleged violations of the Act.
- *Communications Privacy Acts.* Foreign and U.S. federal and state laws impose liability for intercepting communications while in transit or accessing the contents of communications while in storage. EU member state laws also require consent for

our receiving this information, and if our carrier customers fail to obtain such consent we could be subjected to civil or even criminal penalties.

*Security Breach Notification Requirements.* EU member state laws require notice to the member state data protection authority of a data security breach involving personal data if the breach poses a risk to individuals. In addition, Germany enacted a broad requirement to notify individuals in the event of a data security breach that is likely to be followed by notification requirements to data subjects in other EU member states. In the U.S., various states have enacted data breach notification laws, which require notification of individuals and sometimes state regulatory bodies in the event of breaches involving certain defined categories of personal information. Japan and Uruguay have also enacted security breach notice requirements. This new trend suggests that breach notice statutes may be enacted in other jurisdictions, including by the U.S. at the federal level, as well.

*Children.* The Children's Online Privacy Protection Act prohibit the knowing collection of personal information from children under the age of 13 without verifiable parental consent, and strictly regulate the transmission of requests for personal information to such children. Other countries do not recognize the ability of children to consent to the collection of personal information. In addition, it is likely that behavioral advertising regulations will impose special restrictions on use of information collected from minors for this purpose.

## Employees

As of April 10, 2019, we had 58 employees, consisting of 37 full-time and two part-time in research and development, 13 full-time in sales and marketing, and seven full-time in general and administrative.

## Item 1A. Risk Factors.

### Risks Relating to Our Business

***We may need additional financing to execute our business plan and fund operations, which additional financing may not be available on reasonable terms or at all.*** As of December 31, 2018, we had a working capital deficit of \$(3,580,179). While we believe that our working capital on hand, along with our expected cash flow from operations, will be sufficient to fund our 12-month plan of operations, there can be no assurance that we will not require significant additional capital within 12 months. Also, we expect that we may require additional capital beyond the next 12 months unless we are able to achieve and maintain a profitable operation. In the event we require additional capital we will endeavor to raise additional funds through various financing sources, including the sale of our equity and debt securities and the procurement of commercial debt financing. However, there can be no guarantees that such funds will be available on commercially reasonable terms, if at all. If such financing is not available on satisfactory terms, we may be unable to expand or continue our business as desired and operating results may be adversely affected. Any debt financing will increase expenses and must be repaid regardless of operating results and may involve restrictions limiting our operating flexibility. If we issue equity securities to raise additional funds, the percentage ownership of our existing stockholders will be reduced, and our stockholders may experience additional dilution in net book value per share.

Our ability to obtain needed financing may be impaired by such factors as the capital markets, both generally and specifically in our industry, and the fact that we are not yet profitable, which could impact the availability or cost of future financings. If the amount of capital we are able to raise from financing activities, together with our revenues from operations, is not sufficient to satisfy our capital needs, we may be required to reduce or even cease operations.

***Our sales efforts to large enterprises require significant time and effort and could hinder our ability to expand our customer base and increase revenue.*** Attracting new customers to our large enterprise division requires substantial time and expense, especially in an industry that is so heavily dependent on personal relationships with executives. We cannot assure that we will be successful in establishing new relationships or maintaining or advancing our current relationships. For example, it may be difficult to identify, engage and market to customers who do not currently perform mobile marketing or advertising or are unfamiliar with our current services or platform. Further, many of our customers typically require input from one or more internal levels of approval. As a result, during our sales effort, we must identify multiple people involved in the purchasing decision and devote a sufficient amount of time to presenting our products and services to those individuals. The complexity of our services often requires us to spend substantial time and effort assisting potential customers in evaluating our products and services including providing demonstrations and benchmarking against other available technologies. We expect that our sales process will become less burdensome as our products and services become more widely known and used. However, if this change does not occur, we will not be able to expand our sales effort as quickly as anticipated and our sales will be adversely affected.

***We may not be able to enhance our platform to keep pace with technological and market developments, or to remain competitive against potential new entrants in our markets.*** The market for mobile marketing and advertising services is emerging and is characterized by rapid technological change, evolving industry standards, frequent new product introductions and short product life

cycles. Our current platform and services may not in the future be acceptable to marketers and advertisers. To keep pace with technological developments, satisfy increasing customer requirements and achieve acceptance of our marketing and advertising campaigns, we will need to enhance our current mobile marketing solutions and continue to develop and introduce on a timely basis new, innovative mobile marketing services offering compatibility, enhanced features and functionality on a timely basis at competitive prices. Our inability, for technological or other reasons, to enhance, develop, introduce and deliver compelling mobile marketing services in a timely manner, or at all, in response to changing market conditions, technologies or customer expectations could have a material adverse effect on our operating results or could result in our mobile marketing services platform becoming obsolete. Our ability to compete successfully will depend in large measure on our ability to maintain a technically skilled development and engineering staff and to adapt to technological changes and advances in the industry, including providing for the continued compatibility of our mobile marketing services platform with evolving industry standards and protocols. In addition, as we believe the mobile marketing market is likely to grow substantially, other companies which are larger and have significantly more capital to invest than us may emerge as competitors. For example, in May 2010, Google, Inc. acquired Admob, Inc. Similarly, in January 2010, Apple, Inc. acquired Quattro Wireless, Inc. New entrants could seek to gain market share by introducing new technology or reducing pricing. This may make it more difficult for us to sell our products and services, and could result in increased pricing pressure, reduced profit margins, increased sales and marketing expenses or the loss of market share or expected market share, any of which may significantly harm our business, operating results and financial condition.

***Our services are provided on mobile communications networks that are owned and operated by third parties who we do not control and the failure of any of these networks would adversely affect our ability to deliver our services to our customers.*** Our mobile marketing and advertising platform is dependent on the reliability of mobile operators who maintain sophisticated and complex mobile networks. Such mobile networks have historically, and particularly in recent years, been subject to both rapid growth and technological change. If the network of a mobile operator with which we are integrated should fail, including because of new technology incompatibility, the degradation of network performance under the strain of too many mobile consumers using it, or a general failure from natural disaster or political or regulatory shut-down, we will not be able provide our services to our customers through such mobile network. This in turn, would impair our reputation and business, potentially resulting in a material, adverse effect on our financial results.

***If our platform does not scale as anticipated, our business will be harmed.*** We must be able to continue to scale to support potential ongoing substantial increases in the number of users in our actual commercial environment and maintain a stable service infrastructure and reliable service delivery for our mobile marketing and advertising campaigns. In addition, we must continue to expand our service infrastructure to handle growth in customers and usage. If our mobile marketing services platform does not efficiently and effectively scale to support and manage a substantial increase in the number of users while maintaining a high level of performance, the quality of our services could decline and our business will be seriously harmed. In addition, if we are unable to secure data center space with appropriate power, cooling and bandwidth capacity, we may not be able to efficiently and effectively scale our business to manage the addition of new customers and overall mobile marketing campaigns.

***The success of our business depends, in part, on wireless carriers continuing to accept our customers' messages for delivery to their subscriber base.*** We depend on wireless carriers to deliver our customers' messages to their subscriber base. Wireless carriers often impose standards of conduct or practice that significantly exceed current legal requirements and potentially classify our messages as "spam," even where we do not agree with that conclusion. In addition, the wireless carriers use technical and other measures to attempt to block non-compliant senders from transmitting messages to their customers; for example, wireless carriers block short codes or Internet Protocol addresses associated with those senders. There can be no guarantee that we, or short codes registered to us, will not be blocked or blacklisted or that we will be able to successfully remove ourselves from those lists. Although our services typically require customers to opt-in to a campaign, minimizing the risk that our customers' messages will be characterized as spam, blocking of this type could interfere with our ability to market products and services of our customers and communicate with end users and could undermine the effectiveness of our customers' marketing campaigns. To date we have not experienced any material blocking of our messages by wireless carriers, but any such blocking could have an adverse effect on our business and results of operations.

***We depend on third party providers for a reliable Internet infrastructure and the failure of these third parties, or the Internet in general, for any reason would significantly impair our ability to conduct our business.*** We outsource all of our data center facility management to third parties who host the actual servers and provide power and security in multiple data centers in each geographic location. These third-party facilities require uninterrupted access to the Internet. If the operation of our servers is interrupted for any reason, including natural disaster, financial insolvency of a third-party provider, or malicious electronic intrusion into the data center, our business would be significantly damaged. As has occurred with many Internet-based businesses, on occasion in the past, we have been subject to "denial-of-service" attacks in which unknown individuals bombarded our computer servers with requests for data, thereby degrading the servers' performance. While we have historically been successful in relatively quickly identifying and neutralizing these attacks, we cannot be certain that we will be able to do so in the future. If either a third-party facility failed, or our ability to access the Internet was interfered with because of the failure of Internet equipment in general or we become subject to malicious attacks of computer intruders, our business and operating results will be materially adversely affected.

**Failure to adequately manage our growth may seriously harm our business.** We operate in an emerging technology market and have experienced, and may continue to experience, significant growth in our business. If we do not effectively manage our growth, the quality of our products and services may suffer, which could negatively affect our brand and operating results. Our growth has placed, and is expected to continue to place, a significant strain on our managerial, administrative, operational and financial resources and our infrastructure. Our future success will depend, in part, upon the ability of our senior management to manage growth effectively. This will require us to, among other things:

- implement additional management information systems;
- develop additional levels of management within our company;
- locate additional office space in various countries; and
- maintain close coordination among our engineering, operations, legal, finance, sales and marketing and customer service and support organizations.

Moreover, as our sales increase, we may be required to concurrently deploy our services infrastructure at multiple additional locations or provide increased levels of customization. As a result, we may lack the resources to deploy our mobile marketing services on a timely and cost-effective basis. Failure to accomplish any of these requirements would seriously harm our ability to deliver our mobile marketing services platform in a timely fashion, fulfill existing customer commitments or attract and retain new customers.

**The gathering, transmission, storage and sharing or use of personal information could give rise to liabilities or additional costs of operation as a result of governmental regulation, legal requirements, civil actions or differing views of personal privacy rights.** We transmit and store a large volume of personal information in the course of providing our services. Federal, state and international laws and regulations govern the collection, use, retention, sharing and security of data that we receive from our customers and their users. Any failure, or perceived failure, by us to comply with U.S. federal, state, or international privacy or consumer protection-related laws, regulations or industry self-regulatory principles could result in proceedings or actions against us by governmental entities or others, which could potentially have an adverse effect on our business, operating results and financial condition. Additionally, we may also be contractually liable to indemnify and hold harmless our customers from the costs or consequences of inadvertent or unauthorized disclosure of their customers' personal data which we store or handle as part of providing our services.

The interpretation and application of privacy, data protection and data retention laws and regulations are currently unsettled in the U.S. and internationally, particularly with regard to location-based services, use of customer data to target advertisements and communication with consumers via mobile devices. Such laws may be interpreted and applied inconsistently from country to country and inconsistently with our current data protection policies and practices. Complying with these varying international requirements could cause us to incur substantial costs or require us to change our business practices in a manner adverse to our business, operating results or financial condition.

As privacy and data protection have become more sensitive issues, we may also become exposed to potential liabilities as a result of differing views on the privacy of personal information. These and other privacy concerns, including security breaches, could adversely impact our business, operating results and financial condition.

In the U.S., we have voluntarily agreed to comply with wireless carrier technological and other requirements for access to their customers' mobile devices, and also trade association guidelines and codes of conduct addressing the provision of location-based services, delivery of promotional content to mobile devices and tracking of users or devices for the purpose of delivering targeted advertising. We could be adversely affected by changes to these requirements, guidelines and codes, including in ways that are inconsistent with our practices or in conflict with the rules or guidelines in other jurisdictions.

**We currently rely on a small concentration of customers to use our products to generate our revenues, and the loss or change in any of these significant relationships could materially reduce our revenues.** Although we believe we have a good relationship with these customers, our contracts with these customers are short-term in nature. Should these customers choose to terminate their contracts with us or if material events occur that are detrimental to these customers or their operations, it could have a significant negative impact on our financial performance.

#### **Risks Related to our Common Stock**

**There has been a limited trading market for our common stock.** There has been a limited trading market for our common stock on the Over-the-Counter Bulletin Board. The lack of an active market may impair the ability to sell your shares at the time you wish to sell them or at a price that you consider reasonable. The lack of an active market may also reduce the fair market value of your shares. An inactive market may also impair our ability to raise capital by selling shares of capital stock and may impair our ability to acquire other companies or technologies by using common stock as consideration.

**The market price of our common stock may be, and is likely to continue to be, highly volatile and subject to wide fluctuations.** The market price of our common stock is likely to be highly volatile and could be subject to wide fluctuations in response to a number of factors that are beyond our control, including:

- dilution caused by our issuance of additional shares of common stock and other forms of equity securities, which we expect to make in connection with future acquisitions or capital financings to fund our operations and growth, to attract and retain valuable personnel and in connection with future strategic partnerships with other companies;
- announcements of new acquisitions or other business initiatives by our competitors;
- our ability to take advantage of new acquisitions or other business initiatives;
- quarterly variations in our revenues and operating expenses;
- changes in the valuation of similarly situated companies, both in our industry and in other industries;
- changes in analysts' estimates affecting us, our competitors and/or our industry;
- changes in the accounting methods used in or otherwise affecting our industry;
- additions and departures of key personnel;
- announcements by relevant governments pertaining to additional quota restrictions; and
- fluctuations in interest rates and the availability of capital in the capital markets.

Some of these factors are beyond our control, and the impact of these risks, singly or in the aggregate, may result in material adverse changes to the market price of our common stock and/or our results of operations and financial condition.

**We do not expect to pay dividends in the foreseeable future.** We do not intend to declare dividends for the foreseeable future, as we anticipate that we will reinvest any future earnings in the development and growth of our business. Therefore, investors will not receive any funds unless they sell their common stock, and stockholders may be unable to sell their shares on favorable terms or at all. Investors cannot be assured of a positive return on investment or that they will not lose the entire amount of their investment in the common stock.

**Our common stock may be considered to be a "penny stock" and, as such, any the market for our common stock may be further limited by certain SEC rules applicable to penny stocks.** To the extent the price of our common stock remains below \$5.00 per share or we have net tangible assets of \$2,000,000 or less, our common shares will be subject to certain "penny stock" rules promulgated by the SEC. Those rules impose certain sales practice requirements on brokers who sell penny stock to persons other than established customers and accredited investors (generally institutions with assets in excess of \$5,000,000 or individuals with net worth in excess of \$1,000,000). For transactions covered by the penny stock rules, the broker must make a special suitability determination for the purchaser and receive the purchaser's written consent to the transaction prior to the sale. Furthermore, the penny stock rules generally require, among other things, that brokers engaged in secondary trading of penny stocks provide customers with written disclosure documents, monthly statements of the market value of penny stocks, disclosure of the bid and asked prices and disclosure of the compensation to the brokerage firm and disclosure of the sales person working for the brokerage firm. These rules and regulations adversely affect the ability of brokers to sell our common shares and limit the liquidity of our securities.

**We are a "smaller reporting company" and, as such are allowed to provide less disclosure than larger public companies** We are currently a "smaller reporting company," meaning that we are not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent company that is not a smaller reporting company and have a public float of less than \$75 million and annual revenues of less than \$50 million during the most recently completed fiscal year. As a "smaller reporting company", we are able to provide simplified executive compensation disclosures in our SEC filings, are exempt from the provisions of Section 404(b) of the Sarbanes-Oxley Act requiring that independent registered public accounting firms provide an attestation report on the effectiveness of internal control over financial reporting, and have certain other decreased disclosure obligations in their SEC filings, including, among other things, only being required to provide two years of audited financial statements in annual reports. Decreased disclosures in our SEC filings due to our status as a "smaller reporting company" may make it harder for investors to analyze our results of operations and financial prospects.

**Item 1B. Unresolved Staff Comments.**

Not applicable.

**Item 2. Properties.**

We have a lease through December 2020 for 10,395 square feet of office space located at 55 N. Arizona Ave., Suite 310, Chandler, Arizona. Monthly rental payments, excluding common area maintenance charges, are \$20,416.

We have a lease through April 2022 for 3,248 square feet of office space located in Halifax, Nova Scotia, at a monthly rental expense of \$3,458 per month, excluding common area maintenance charges.

**Item 3. Legal Proceedings.**

As of the date of this report, there are no pending legal proceedings to which we or our properties are subject, except as described below and for routine litigation incurred in the normal course of business.

In February 2019, a complaint was filed against us and five of our employees in the U.S. Federal District Court for the Southern District of New York by mGage, LLC (mGage, LLC v. Glenn Stansbury, et al., No. 19-cv-1165-CM (S.D.N.Y. Filed 2/7/19)).

In the complaint, the plaintiff alleged that we and five of our employees, who previously worked at mGage, misappropriated confidential information belonging to mGage in violation of the federal Defend Trade Secrets Act, that those same individuals violated non-compete agreements through their employment at Mobivity and that we tortiously interfered with mGage's business opportunities. On February 7, 2019 the court granted a preliminary injunction enjoining Mobivity and the individual employees from working together at Mobivity or using any of the alleged confidential information. The court also directed expedited discovery. The court has set a conference date in the case for June 21, 2019. We deny all liability on the part of Mobivity and we intend to vigorously defend against this lawsuit.

**Item 4. Not applicable.**

**Part II**

**Item 5. Market for Registrant's Common Equity, Related Stockholder Matter and Issuer Purchases of Equity Securities**

Our common stock is quoted on the OTC Bulletin Board under the stock symbol "MFON".

Our common stock trades only sporadically and has experienced in the past, and is expected to experience in the future, significant price and volume volatility.

The following table shows the reported high and low closing bid quotations per share for our common stock based on information provided by the OTC Bulletin Board for the periods indicated. Quotations reflect inter-dealer prices, without markup, markdown or commissions and may not represent actual transactions.

Year Ended December 31, 2018	High		Low	
Fourth Quarter	\$	1.88	\$	1.16
Third Quarter	\$	1.60	\$	0.99
Second Quarter	\$	1.12	\$	0.80
First Quarter	\$	1.40	\$	0.95

Year Ended December 31, 2018	High		Low	
Fourth Quarter	\$	1.25	\$	1.00
Third Quarter	\$	1.18	\$	0.70
Second Quarter	\$	0.79	\$	0.60
First Quarter	\$	0.89	\$	0.70

**Holders of Record**

As of March 26, 2019, there were 580 holders of record of our common stock, not including shares held in street name.

#### Dividend Policy

We have not paid any cash dividends since our inception and do not contemplate paying dividends in the foreseeable future. It is anticipated that earnings, if any, will be retained for the operation of our business.

#### Stock Repurchases

We did not repurchase any of our common stock in 2018 or 2017.

#### Securities Authorized for Issuance Under Equity Compensation Plans

The following table sets forth additional information as of December 31, 2018 with respect to the shares of common stock that may be issued upon the exercise of options and other rights under our existing equity compensation plans and arrangements in effect as of December 31, 2018. The information includes the number of shares covered by, and the weighted average exercise price of, outstanding options and the number of shares remaining available for future grant, excluding the shares to be issued upon exercise of outstanding options.

Plan Category	Number of securities to be issued upon exercise of outstanding options (a)	Weighted-average exercise price of outstanding options	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a))
Equity compensation plans not approved by security holders <sup>(1)</sup>	5,012,218	\$ 1.15	5,572,797
Equity compensation plans approved by security holders	-	-	-
<b>Total</b>	<b>5,012,218</b>	<b>\$ 1.15</b>	<b>5,572,797</b>

(1) Comprised of our 2010, 2013, and 2016 Incentive Stock Plans.

#### Item 6. Selected Financial Data

As a smaller reporting company, as defined by Section 10(f)(1) of Regulation S-K, we are not required to provide the information set forth in this Item.

#### Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations

*The following discussion and analysis of our financial condition and results of operations should be read in conjunction with the financial statements and the related notes and other information that are included elsewhere in this Form 10-K. This discussion contains forward-looking statements based upon current expectations that involve risks and uncertainties, such as our plans, objectives, expectations, and intentions. Actual results and the timing of events could differ materially from those anticipated in these forward looking statements as a result of a number of factors, including those set forth under the cautionary note regarding "Forward Looking Statements" contained in Item 1.A – "Risk Factors".*

#### Overview

Mobivity Holdings Corp. (the "Company" or "we") is in the business of developing and operating proprietary platforms over which brands and enterprises can conduct national and localized, data-driven marketing campaigns. Our proprietary platforms, consisting of software available to phones, tablets, PCs, and POS systems, allow resellers, brands and enterprises to market their products and services to consumers through text messages sent directly to the consumers via mobile phones, mobile smartphone applications, and dynamically printed receipt content. We generate revenue by charging the resellers, brands and enterprises a per-message transactional fee, through fixed or variable software licensing fees, or via advertising fees. We help personal care, restaurant and retail brands realize their strategy of growing their business by increasing customer frequency, engagement and spend. Mobivity's analytics services and products provide solutions that allow brands to take validated marketing actions across all channels, based on real customer behavior to create personalized, relevant, localized and targeted campaigns. With national clients such as Subway, Sonic, Chick-fil-A, and Baskin-Robbins, Mobivity's goal is to unlock the power of internal and external customer data to create a system that provides data driven insight to continually adapt and enhance communications with customers.



According to the U.S. Census Bureau, only 7% of commerce in the US occurs online which means 93% is still happening in the physical world. We believe that brands, and in particular restaurant and retail brands, need a better way to tie marketing activities to customer purchases, and then use the information to build a more relevant, personal experience for each customer, at a local and national level. Mobivity is giving brands the ability to connect (and measure) marketing communications in the physical world by unlocking POS and mobile data and marrying it with other traditional tactics to create a closed loop: in some cases, increasing response rates from 0.05% to 5% (or greater); improving online advertising conversion by 10X; and increasing revenue per ad by more than 2.5X.

Mobivity's solution addresses the offline marketing problem and makes personalized marketing automation possible for offline commerce. Digital marketing is highly dynamic and personally targeted. According to studies published by McKinsey & Company, Point Drive, and the National Advertising Institute, targeted advertising generates conversion rates more than eleven times higher than non-targeted advertising, more than double the revenue per advertisement, and is 250% more efficient than non-targeted advertising. Combined with purchase data and analytics gathered by Mobivity's products and platforms, Mobivity customers are able to quickly transform traditionally low marketing campaign response rates to exponentially higher response rates.

Mobivity's Recurrency platform unlocks valuable POS and mobile data to help transform customer transactions into actionable and attributable marketing insights. Our technology provides transactional data, in real-time, that uncovers market-basket information and attributes both online and traditional promotions. Recurrency is comprised of Recapture, Recognition, Receipt, Reach, and Reup.

#### **Recent Events**

##### *2018 Warrant Exercise*

Between January 19, 2018 and March 31, 2018, we conducted an offer to the holders of our outstanding common stock purchase warrants pursuant to which our warrant holders will be permitted to exercise their warrants at a reduced exercise price for a period expiring on March 31, 2018. At the commencement of the warrant offer, there were warrants outstanding that entitled their holders to purchase 5,134,349 shares of our common stock at exercise prices of \$1.00 and \$1.20 per share. Pursuant to the offer, warrant holders exercised warrants to purchase 2,018,125 shares of our common stock, resulting in additional capital of \$2,018,125. We undertook this limited-time warrant exercise price reduction in order to raise additional capital without incurring further potential dilution to our stockholders. In addition, through the warrant holders' acceptance of our offer, we could significantly reduce the number of outstanding warrants and thereby simplify our capital structure. The warrant offer was conducted by our management and there were no commissions paid by us in connection with the solicitation.

##### *Unsecured Promissory Note Investments in 2018*

During February 2018, we conducted a private placement of Unsecured Promissory Notes (individually, a "Note" and collectively, the "Notes") in the aggregate principal amount of \$1,080,000 to certain investors, officers and directors of the Company. Each Note bears interest on the unpaid balance at the rate of fifteen percent (15%) per annum and the principal and accrued interest is due and payable no later than December 1, 2018. We may prepay any of the Notes without notice, subject to a two percent (2%) pre-payment penalty. The Note offer was conducted by our management and there were no commissions paid by us in connection with the solicitation. As of December 31, 2018, we have repaid \$1,000,000 and have \$80,000 as a remaining balance of these notes.

##### *2017 Customer Contract Renewal and Expansion*

On June 30, 2017 we renewed and expanded our partnership with one of our largest customers to foster additional customer engagement and long-term growth through utilization of the Mobivity platform. With personalized customer communications via text/social messaging (Reach), and optimized business performance (Recognition), we have crafted a complete and self-optimizing solution for increasing customer acquisition, frequency and spend.

The renewed and expanded partnership utilizes the Mobivity platform for all of our customer's locations for a term of 5 years and includes a co-marketing commitment from both companies to ensure the continued growth in consumer subscribers to the program. The 5-year term includes a six figure monthly minimum commitment that is prepaid to Mobivity on an annual basis.

##### *November 2018 Acquisition of Certain Belly, Inc Assets*

On November 14, 2018, we entered into an Asset Purchase Agreement with Belly, Inc., a Delaware corporation, pursuant to which we purchased from Belly, certain operating assets relating to Belly's proprietary digital customer loyalty platform, including client contracts, accounts receivable and intellectual property, in exchange for our payment of \$3,000,000, subject to working capital adjustments. Belly was founded in 2001 and was originally funded by Andreessen Horowitz, Lightbank, NEA, DAG Ventures, Cisco and 7-Ventures, LLC (a subsidiary of 7-Eleven, Inc). Belly is a platform-first technology company enabling businesses of all sizes to create digital connections that result in personal relationships with their customers. Belly's platform has been deployed to more than

5,000 merchant locations and 7 million consumers. Our acquisition of the Belly assets is expected to be accretive to our top and bottom line revenue figures. The Asset Purchase Agreement contains customary representations, warranties and indemnities on the part of Belly. The closing of the acquisition took place on November 14, 2018, subject to usual and customary closing conditions. We financed the acquisition through our cash on hand.

In connection with our acquisition of the Belly assets, on November 14, 2018, we entered into a Loan and Security Agreement with Wintrust Bank. The Loan and Security Agreement provides for a single-term loan to us in the original principal amount of \$1,000,000. Interest accrues on the unpaid principal amount at the rate of prime plus 1.5%. The loan is a three-year loan and is interest-only payable for the first six months of the loan. Commencing on May 1, 2019, we will commence monthly payments of principal in the amount of \$33,333.33 in addition to the monthly payment of accrued interest. The loan is secured by all of our assets other than our intellectual property. We used the proceeds of the loan to re-finance a loan in the principal amount of \$1,000,000 we assumed as part of the acquisition of the Belly assets.

**Results of Operations**

**Year Ended December 31, 2018 Compared to Year Ended December 31, 2017**

**Revenues**

Revenues consist primarily of a suite of products under the re•currency platform (formerly “SmartSuite”). The re•currency platform is comprised of re•capture, re•cognition (formerly “SmartAnalytics”), re•ceipt (formerly “SmartReceipt”), re•ach (formerly “SmartMessenger”), re•up (formerly “SmartScore”), Belly Loyalty, advertising model revenues which are paid on a per coupon redemption basis, and other revenues.

Revenues for the twelve months ended December 31, 2018 were \$11,556,536, an increase of \$2,964,581, or 35%, compared to \$8,591,955 for the twelve months ended December 31, 2017. This increase is primarily due to an increase in customer contracts and our adoption of ASC 606 as of January 1, 2018. The adoption of ASC 606 resulted in our realization of \$2,692,692 of revenue for the twelve months ended December 31, 2018 that we would not have realized in period under the revenue recognition standards prior to the adoption of ASC 606.

The following table sets forth our unaudited quarterly consolidated revenue, adjustments under ASC 606, and revenue under the previous standard, for the year ended December 31, 2018.

	<b>For the Quarters Ended</b>			
	<b>2018</b>			
	<b>December 31</b>	<b>September 30</b>	<b>June 30</b>	<b>March 31</b>
Revenues, as reported	\$ 1,935,601	\$ 4,561,368	\$ 1,366,239	\$ 3,693,328
Adjustments under ASC 606	938,514	(2,188,590)	206,115	(1,648,731)
Revenues under previous standard	\$ 2,874,115	\$ 2,372,778	\$ 1,572,354	\$ 2,044,597

**Cost of Revenues**

Cost of revenues consist primarily of cloud-based software licensing fees, short code maintenance expenses, personnel related expenses, and other expenses.

Cost of revenues for the twelve months ended December 31, 2018 was \$3,932,334, an increase of \$1,139,596, or 41%, compared to \$2,792,738 for the twelve months ended December 31, 2017. This increase is primarily due to higher SMS/MMS messages sent during the period and higher application costs associated with messaging fees and surcharges charged by text messaging carriers.

**General and Administrative**

General and administrative expenses consist primarily of salaries and personnel related expenses, stock-based compensation expense, consulting costs and other expenses.

General and administrative expenses for the twelve months ended December 31, 2018 were \$4,197,539, an increase of \$840,373, or 25%, compared to \$3,357,166 for the twelve months ended December 31, 2017. The increase in general and administrative expense was primarily due to an increase in overall operating costs and the recognition of \$148,287 in expenses related to the adoption of ASC 606.

**Sales and Marketing Expense**

Sales and marketing expenses consist primarily of salaries and personnel related expenses, stock-based compensation expense, sales travel, consulting costs and other expenses.

Sales and marketing expenses for the twelve months ended December 31, 2018 were \$3,931,469, an increase of \$299,742, or 8%, compared to \$3,631,727 for the twelve months ended December 31, 2017. This increase was primarily attributable to the increase in commissioned sales during the period.

**Engineering, Research, and Development Expense**

Engineering, research, and development expenses consist primarily of salaries and personnel related expenses, stock-based compensation expense, consulting costs and other expenses.

Engineering, research, and development expenses for the twelve months ended December 31, 2018 were \$3,713,787, a decrease of \$487,860, or 12%, compared to \$4,201,647 for the twelve months ended December 31, 2017. The decrease in engineering, research, and development expense was primarily due to a decrease in overall operating costs offset by the recognition of \$1,334,582 in expenses related to the adoption of ASC 606.

**Goodwill Impairment**

During 2018 and 2017, we recorded goodwill impairment charges of \$2,288,057 and \$0, respectively. The impairment charges were based on our valuation of these assets at December 31, 2018 and 2017. In the fourth quarter of 2018, through our annual testing of goodwill, we determined that this one-time, non-cash impairment was required. This non-cash impairment charge does not impact our ability to generate cash flow in the future and it is not tax deductible.

**Depreciation and Amortization Expense**

Depreciation and amortization expense consist of depreciation on our equipment and amortization of our intangible assets.

Depreciation and amortization expenses for the twelve months ended December 31, 2018 were \$486,255, an increase of \$99,951, or 26%, compared to \$386,304 for the twelve months ended December 31, 2017. This increase is primarily attributable to the increased amortization of our developed and acquired technologies.

**Interest Expense**

Interest expense consists of stated or implied interest expense on our notes payable, amortization of note discounts, and amortization of deferred financing costs.

Interest expense for the twelve months ended December 31, 2018 were \$210,422, an increase of \$41,378, or 24%, compared to \$169,044 for the twelve months ended December 31, 2017. The increase is primarily attributable to the interest on short and long term borrowings during the year.

**Foreign Currency**

The Company's financial results are impacted by volatility in the Canadian/U.S. Dollar exchange rate. The average U.S. Dollar exchange rate for the year ended December 31, 2018 and 2017 was \$1 Canadian equals \$0.77 U.S. Dollars. The Company's functional or measurement currency is the U.S. Dollar. Based on a U.S. Dollar functional currency, the following are the key areas impacted by foreign currency volatility:

- The Company sells products primarily in U.S. Dollars; therefore, reported revenues are not highly impacted by foreign currency volatility.
- A portion of the Company's expenses are incurred in Canadian Dollars and therefore fluctuate in U.S. Dollars as the U.S. Dollar varies. A weaker U.S. Dollar results in an increase in translated expenses, and a stronger U.S. Dollar results in a decrease.
- Changes in foreign currency rates also impact the translated value of the Company's working capital that is held in Canadian Dollars. Foreign exchange rate fluctuations result in foreign exchange gains or losses based upon movement in the translated value of Canadian working capital into U.S. Dollars.

The change in foreign currency was a loss of \$7,745 and \$3,978 for the years ended December 31, 2018 and 2017, respectively.

#### Liquidity and Capital Resources

As of December 31, 2018, we had current assets of \$2,471,091, including \$554,255 in cash, and current liabilities of \$6,051,270, resulting in working capital deficit of \$(3,580,179). Since December 31, 2018 and through the date of this report, we issued an unsecured note in the amount of \$1,500,000, which is due February 2021. We believe that as of the date of this report, our working capital on hand plus our expected cash flow from operations will be adequate to support our working capital for at least the next 12 months. However, there can be no assurance that we will not require additional capital within the next 12 months. If we require additional capital, we will seek to obtain this through the sale of our securities and, if available, bank lines of credit. However, there can be no assurance we will be able to obtain access to capital as and when needed and, if so, the terms of any available financing may not be subject to commercially reasonable terms.

#### Cash Flows

	Years ended December 31,	
	2018	2017
Net cash provided by (used in):		
Operating activities	\$ (4,548,912)	\$ (2,370,324)
Investing activities	(3,525,151)	(424,817)
Financing activities	8,226,826	1,066,199
Effect of foreign currency translation on cash flow	70,523	516
Net change in cash	<u>\$ 94,196</u>	<u>\$ (1,728,426)</u>

#### Operating Activities

We used cash in operating activities totaling \$4,548,912 in 2018 and \$2,370,324 in 2017, respectively. The increase in cash used in operating activities in 2018 compared to 2017 was due primarily to a decrease in other current assets and the non-cash impact of ASC606.

#### Investing Activities

Investing activities during 2018 includes the acquisition of certain Belly assets of \$3,000,000, \$504,845 of capitalized software development costs, and \$20,306 of equipment purchases. Investing activities during 2017 includes \$390,517 of capitalized software development costs, \$17,490 of additions to fixed assets and \$16,810 in capitalized patent costs.

#### Financing Activities

Financing activities for 2018 include net proceeds from the sale of common stock units of \$8,051,958, proceeds from notes payable of \$3,095,000 offset by payments on notes payable of \$3,049,222. Financing activities for 2017 include net proceeds from the sale of common stock units of \$82,798, proceeds from notes payable of \$107,679, and borrowings on the line of credit facility of \$890,722 offset by deferred financing issuance costs of \$15,000.

#### Critical Accounting Policies and Estimates

We prepare our consolidated financial statements in accordance with accounting principles generally accepted in the United States of America. The preparation of these financial statements requires the use of estimates and assumptions that affect the reported amounts of assets and liabilities and the disclosure of contingent assets and liabilities at the date of the financial statements and the reported amount of revenues and expenses during the reporting period. Our management periodically evaluates the estimates and judgments made, including those related to share-based compensation and valuation of the derivative liability. Management bases its estimates and judgments on historical experience and on various factors that are believed to be reasonable under the circumstances. Actual results may differ from these estimates.

The following critical accounting policies affect the more significant judgments and estimates used in the preparation of the Company's consolidated financial statements.

#### Income Taxes

We account for income taxes using the assets and liability method, which recognizes deferred tax assets and liabilities determined based on the difference between the financial statement and tax basis of assets and liabilities using enacted tax rates in effect for the year in which the differences are expected to affect taxable income. Valuation allowances are established to reduce deferred tax assets

when, based on available objective evidence, it is more likely than not that the benefit of such assets will not be realized. We recognize in the consolidated financial statements only those tax positions determined to be more likely than not of being sustained.

#### **Revenue Recognition and Concentrations**

Our Receipt and Reach and customer relationship management are hosted solutions. We generate revenue from licensing our software to clients in our software as a service model, per-message and per-minute transactional fees, and customized professional services. We recognize license/subscription fees over the period of the contract, service fees as the services are performed, and per-message or per-minute transaction revenue when the transaction takes place. Under Topic 606, revenue is recognized when control of the promised goods or services is transferred to our customers, in an amount that reflects the consideration we expect to be entitled to in exchange for those goods or services. We consider authoritative guidance on multiple deliverables in determining whether each deliverable represents a separate unit of accounting. Some customers are billed on a month-to-month basis with no contractual term and are collected by credit card. Revenue is recognized at the time that the services are rendered, and the selling price is fixed with a set range of plans. Cash received in advance of the performance of services is recorded as deferred revenue.

Accounting Standards Update (“ASU”) No. 2014-09, Revenue from Contracts with Customers (Accounting Standards Codification 606 (“ASC 606”), is a comprehensive revenue recognition standard that superseded nearly all existing revenue recognition guidance. The Company adopted this standard effective January 1, 2018, applying the modified retrospective method. Upon adoption, the Company discontinued revenue deferral under the sell-through model and commenced recording revenue upon delivery to distributors, net of estimated returns. Generally, the new standard results in earlier recognition of revenues.

We determine revenue recognition through the following steps:

- ① identification of the contract, or contracts, with a customer;
- ① identification of the performance obligations in the contract;
- ① determination of the transaction price;
- ① allocation of the transaction price to the performance obligations in the contract; and
- ① recognition of revenue when, or as, we satisfy a performance obligation.

During the years ended December 31, 2018 and 2017, two customers accounted for 67% and 71% of our revenues, respectively.

#### **Share-based compensation expense**

Share-based compensation cost is measured at the date of grant, based on the calculated fair value of the stock-based award, and is recognized as expense over the employee's requisite service period (generally the vesting period of the award). We estimate the fair value of employee stock options granted using the Black-Scholes Option Pricing Model. Key assumptions used to estimate the fair value of stock options include the exercise price of the award, the fair value of our common stock on the date of grant, the expected option term, the risk-free interest rate at the date of grant, the expected volatility and the expected annual dividend yield on our Company's common stock. We use comparable public company data among other information to estimate the expected price volatility and the expected forfeiture rate.

#### **Derivative Financial Instruments**

We do not use derivative instruments to hedge exposures to cash flow, market or foreign currency risks.

We review the terms of the common stock, warrants and convertible debt we issue to determine whether there are embedded derivative instruments, including embedded conversion options, which are required to be bifurcated and accounted for separately as derivative financial instruments. In circumstances where the host instrument contains more than one embedded derivative instrument, including the conversion option, that is required to be bifurcated, the bifurcated derivative instruments are accounted for as a single, compound derivative instrument.

Bifurcated embedded derivatives are initially recorded at fair value and are then revalued at each reporting date with changes in the fair value reported as non-operating income or expense. When the equity or convertible debt instruments contain embedded derivative instruments that are to be bifurcated and accounted for as liabilities, the total proceeds received are first allocated to the fair value of

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all the bifurcated derivative instruments. The remaining proceeds, if any, are then allocated to the host instruments themselves, usually resulting in those instruments being recorded at a discount from their face value.

The fair value of the derivatives is estimated using a Monte Carlo simulation model. The model utilizes a series of inputs and assumptions to arrive at a fair value at the date of inception and each reporting period. Some of the key assumptions include the likelihood of future financing, stock price volatility, and discount rates.

**Off-Balance Sheet Arrangements**

We have no off-balance sheet arrangements.

**Item 8. Financial Statements**

**REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM**

To the Board of Directors and  
Stockholders of Mobivity Holdings Corp.

**Opinion on the Financial Statements**

We have audited the accompanying consolidated balance sheets of Mobivity Holdings Corp. (the Company) as of December 31, 2018 and 2017, and the related consolidated statements of operations, stockholders' equity (deficit), and cash flows for each of the years in the two-year period ended December 31, 2018, and the related notes and schedules (collectively referred to as the consolidated financial statements). In our opinion, the consolidated financial statements present fairly, in all material respects, the financial position of the Company as of December 31, 2018 and 2017, and the results of its operations and its cash flows for each of the years in the two-year period ended December 31, 2018, in conformity with accounting principles generally accepted in the United States of America.

**Basis for Opinion**

These consolidated financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on the Company's consolidated financial statements based on our audits. We are a public accounting firm registered with the Public Company Accounting Oversight Board (United States) (PCAOB) and are required to be independent with respect to the Company in accordance with the U.S. federal securities laws and the applicable rules and regulations of the Securities and Exchange Commission and the PCAOB.

We conducted our audits in accordance with the standards of the PCAOB. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated financial statements are free of material misstatement, whether due to error or fraud. The Company is not required to have, nor were we engaged to perform, an audit of its internal control over financial reporting. As part of our audits, we are required to obtain an understanding of internal control over financial reporting, but not for the purpose of expressing an opinion on the effectiveness of the Company's internal control over financial reporting. Accordingly, we express no such opinion.

Our audits included performing procedures to assess the risks of material misstatement of the consolidated financial statements, whether due to error or fraud, and performing procedures that respond to those risks. Such procedures included examining, on a test basis, evidence regarding the amounts and disclosures in the consolidated financial statements. Our audits also included evaluating the accounting principles used and significant estimates made by management, as well as evaluating the overall presentation of the consolidated financial statements. We believe that our audits provide a reasonable basis for our opinion.

/s/ M&K CPAS, PLLC

We have served as the Company's auditor since 2012.

Houston, TX  
April 15, 2019

**Mobivity Holdings Corp.  
Consolidated Balance Sheets**

	December 31, 2018	December 31, 2017
<b>ASSETS</b>		
<b>Current assets</b>		
Cash	\$ 554,255	\$ 460,059
Accounts receivable, net of allowance for doubtful accounts of \$10,104 and \$2,280, respectively	601,658	885,743
Contracts receivable, current	578,869	-
Other current assets	736,309	209,536
<b>Total current assets</b>	<b>2,471,091</b>	<b>1,555,338</b>
Goodwill	537,550	803,118
Intangible assets, net	1,781,448	676,436
Contracts receivable, long term	2,113,823	-
Other assets	527,146	88,916
<b>TOTAL ASSETS</b>	<b>\$ 7,431,058</b>	<b>\$ 3,123,808</b>
<b>LIABILITIES AND STOCKHOLDERS' EQUITY</b>		
<b>Current liabilities</b>		
Accounts payable	\$ 1,731,628	\$ 1,096,003
Accrued interest	9,167	1,168
Accrued and deferred personnel compensation	350,311	590,500
Deferred revenue and customer deposits	1,956,938	1,429,266
Notes payable, net - current maturities	1,279,590	2,236,224
Other current liabilities	723,636	226,355
<b>Total current liabilities</b>	<b>6,051,270</b>	<b>5,579,516</b>
<b>Non-current liabilities</b>		
Notes payable, net - long term	194,328	180,810
Other long term liabilities	860,500	-
<b>Total non-current liabilities</b>	<b>1,054,828</b>	<b>180,810</b>
<b>Total liabilities</b>	<b>7,106,098</b>	<b>5,760,326</b>
<b>Commitments and Contingencies (See Note 9)</b>		
<b>Stockholders' equity</b>		
Common stock, \$0.001 par value; 100,000,000 shares authorized; 45,998,053 and 37,025,140, shares issued and outstanding	45,998	37,025
Equity payable	100,862	100,862
Additional paid-in capital	88,008,473	77,910,842
Accumulated other comprehensive loss	4,759	(65,764)
Accumulated deficit	(87,835,132)	(80,619,483)
<b>Total stockholders' equity</b>	<b>324,960</b>	<b>(2,636,518)</b>
<b>TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY</b>	<b>\$ 7,431,058</b>	<b>\$ 3,123,808</b>

*See accompanying notes to consolidated financial statements.*



**Mobivity Holdings Corp.**  
**Consolidated Statements of Operations**

	For the Year Ended December 31,	
	2018	2017
<b>Revenues</b>		
Revenues	\$ 11,556,536	\$ 8,591,955
Cost of revenues	3,932,334	2,792,738
<b>Gross profit</b>	7,624,202	5,799,217
<b>Operating expenses</b>		
General and administrative	4,197,539	3,357,166
Sales and marketing	3,931,469	3,631,727
Engineering, research, and development	3,713,787	4,201,647
Goodwill impairment	2,288,057	-
Depreciation and amortization	486,255	386,304
<b>Total operating expenses</b>	14,617,107	11,576,844
<b>Loss from operations</b>	(6,992,905)	(5,777,627)
<b>Other income/(expense)</b>		
Interest income	4,145	4,637
Interest expense	(210,422)	(169,044)
Gain on sale of fixed assets	(8,722)	-
Foreign currency (loss) gain	(7,745)	(3,978)
<b>Total other income/(expense)</b>	(222,744)	(168,385)
<b>Loss before income taxes</b>	(7,215,649)	(5,946,012)
Income tax expense	-	-
<b>Net loss</b>	(7,215,649)	(5,946,012)
<b>Other comprehensive loss, net of income tax</b>		
Foreign currency translation adjustments	70,523	(32,765)
<b>Comprehensive loss</b>	\$ (7,145,126)	\$ (5,978,777)
<b>Net loss per share:</b>		
<b>Basic and diluted</b>	\$ (0.17)	\$ (0.16)
<b>Weighted average number of shares:</b>		
<b>Basic and diluted</b>	42,133,368	36,575,762

*See accompanying notes to consolidated financial statements.*

**Mobivity Holdings Corp.**  
**Consolidated Statement of Stockholders' Equity (Deficit)**

	Common Stock		Equity	Additional	Accumulated Other	Accumulated	Total Stockholders'
	Shares	Dollars	Payable	Paid-in Capital	Comprehensive Loss	Deficit	Equity (Deficit)
<b>Balance, December 31, 2016</b>	<b>36,388,997</b>	<b>\$ 36,389</b>	<b>\$ 100,862</b>	<b>\$ 76,698,383</b>	<b>\$ (32,999)</b>	<b>\$ (74,673,471)</b>	<b>2,129,164</b>
Issuance of common stock for options exercised	152,085	152	-	82,646	-	-	82,798
Issuance of common stock for restricted stock awards	484,058	484	-	(484)	-	-	-
Stock based compensation	-	-	-	1,130,297	-	-	1,130,297
Foreign currency translation adjustment	-	-	-	-	(32,765)	-	(32,765)
Net loss	-	-	-	-	-	(5,946,012)	(5,946,012)
<b>Balance, December 31, 2017</b>	<b>37,025,140</b>	<b>\$ 37,025</b>	<b>\$ 100,862</b>	<b>\$ 77,910,842</b>	<b>\$ (65,764)</b>	<b>\$ (80,619,483)</b>	<b>\$ (2,636,518)</b>
Issuance of common stock for cash	5,775,000	5,775	-	5,769,225	-	-	5,775,000
Issuance of common stock for warrant conversion	2,102,804	2,103	-	2,253,359	-	-	2,255,462
Issuance of common stock for debt conversion	1,047,583	1,047	-	1,088,439	-	-	1,089,486
Issuance of common stock for cashless warrant conversion	10,234	10	-	(10)	-	-	-
Issuance of common stock for options exercised	37,292	37	-	21,458	-	-	21,495
Stock based compensation	-	-	-	965,161	-	-	965,161
Foreign currency translation adjustment	-	-	-	-	70,523	-	70,523
Net loss	-	-	-	-	-	(7,215,649)	(7,215,649)
<b>Balance, December 31, 2018</b>	<b>45,998,053</b>	<b>\$ 45,998</b>	<b>\$ 100,862</b>	<b>\$ 88,008,473</b>	<b>\$ 4,759</b>	<b>\$ (87,835,132)</b>	<b>\$ 324,960</b>

*See accompanying notes to consolidated financial statements.*

**Mobivity Holdings Corp.**  
**Consolidated Statements of Cash Flows**

	For the Year Ended December 31,	
	2018	2017
<b>OPERATING ACTIVITIES</b>		
Net loss	\$ (7,215,649)	\$ (5,946,012)
Adjustments to reconcile net loss to net cash used in operating activities:		
Bad debt expense	33,477	(6,857)
Loss on conversion of debt	41,903	-
Amortization of deferred financing costs	-	28,249
Stock-based compensation	965,161	1,130,297
Loss on disposal of fixed assets	8,722	-
Depreciation and amortization expense	425,247	386,304
Goodwill impairment	2,288,057	-
Adjustments due to ASC 606	(1,209,823)	-
Increase (decrease) in cash resulting from changes in:		
Accounts receivable	249,479	365,716
Other current assets	(946,448)	(29,620)
Other assets	-	10,957
Accounts payable	582,700	394,006
Accrued interest	120,304	(852)
Accrued and deferred personnel compensation	(244,874)	(82,056)
Other liabilities - non-current	(157,630)	-
Other liabilities - current	(17,550)	111,033
Deferred revenue and customer deposits	528,012	1,268,511
<b>Net cash used in operating activities</b>	<b>(4,548,912)</b>	<b>(2,370,324)</b>
<b>INVESTING ACTIVITIES</b>		
Purchases of equipment	(20,306)	(17,490)
Acquisition of Belly assets	(3,000,000)	-
Cash paid for patent	-	(16,810)
Capitalized software development costs	(504,845)	(390,517)
<b>Net cash used in investing activities</b>	<b>(3,525,151)</b>	<b>(424,817)</b>
<b>FINANCING ACTIVITIES</b>		
Payments on notes payable	(3,049,222)	-
Deferred financing costs	-	(15,000)
Net borrowings under line of credit agreement	-	890,722
Proceeds from notes payable	3,095,000	107,679
Proceeds from issuance of common stock, net of issuance costs	8,051,958	82,798
<b>Net cash provided by financing activities</b>	<b>8,097,736</b>	<b>1,066,199</b>
<b>Effect of foreign currency translation on cash flow</b>	<b>70,523</b>	<b>516</b>
<b>Net change in cash</b>	<b>94,196</b>	<b>(1,728,426)</b>
<b>Cash at beginning of period</b>	<b>460,059</b>	<b>2,188,485</b>
<b>Cash at end of period</b>	<b>\$ 554,255</b>	<b>\$ 460,059</b>
<b>Supplemental disclosures:</b>		
Cash paid during period for:		
Interest	\$ 210,422	\$ 169,044
Non cash investing and financing activities:		
Issuance of common stock for cashless exercise	\$ 10	\$ -
Issuance of common stock for debt conversion	\$ 1,047,584	\$ -
Issuance of common stock from restricted stock awards	\$ -	\$ 484

*See accompanying notes to consolidated financial statements.*

**Mobivity Holdings Corp.**  
**Notes to Consolidated Financial Statements**

**1. The Company and Summary of Significant Accounting Policies**

**The Company**

Mobivity Holdings Corp. (the “Company” or “we”) is in the business of developing and operating proprietary platforms over which brands and enterprises can conduct national and localized, data-driven marketing campaigns. Our proprietary platforms, consisting of software available to phones, tablets, PCs, and POS systems, allow resellers, brands and enterprises to market their products and services to consumers through text messages sent directly to the consumers via mobile phones, mobile smartphone applications, and dynamically printed receipt content. We generate revenue by charging the resellers, brands and enterprises a per-message transactional fee, through fixed or variable software licensing fees, or via advertising fees. We help personal care, restaurant and retail brands realize their strategy of growing their business by increasing customer frequency, engagement and spend. Mobivity's analytics services and products provide solutions that allow brands to take validated marketing actions across all channels, based on real customer behavior to create personalized, relevant, localized and targeted campaigns. With national clients such as Subway, Sonic, Chick-fil-A, and Baskin-Robbins, Mobivity's goal is to unlock the power of internal and external customer data to create a system that provides data driven insight to continually adapt and enhance communications with customers.

According to the U.S. Census Bureau, only 7% of commerce in the US occurs online which means 93% is still happening in the physical world. We believe that brands, and in particular restaurant and retail brands, need a better way to tie marketing activities to customer purchases, and then use the information to build a more relevant, personal experience for each customer, at a local and national level. Mobivity is giving brands the ability to connect (and measure) marketing communications in the physical world by unlocking POS and mobile data and marrying it with other traditional tactics to create a closed loop: in some cases, increasing response rates from 0.05% to 5% (or greater); improving online advertising conversion by 10X; and increasing revenue per ad by more than 2.5X.

Mobivity's solution addresses the offline marketing problem and makes personalized marketing automation possible for offline commerce. Digital marketing is highly dynamic and personally targeted. According to studies published by McKinsey & Company, Point Drive, and the National Advertising Institute, targeted advertising generates conversion rates more than eleven times higher than non-targeted advertising, more than double the revenue per advertisement, and is 250% more efficient than non-targeted advertising. Combined with purchase data and analytics gathered by Mobivity's products and platforms, Mobivity customers are able to quickly transform traditionally low marketing campaign response rates to exponentially higher response rates.

Mobivity's Recurrency platform (formerly “SmartSuite”) unlocks valuable POS and mobile data to help transform customer transactions into actionable and attributable marketing insights. Our technology provides transactional data, in real-time, that uncovers market-basket information and attributes both online and traditional promotions. Recurrency is comprised of Recapture, Recognition (formerly “SmartAnalytics”), Receipt (formerly “SmartReceipt”), Reach (formerly “SmartMessenger”), Reupbell.

We generate revenue by charging the resellers, brands and enterprises a per-message transactional fee, or through fixed or variable software licensing fees.

**Liquidity**

We have \$554,255 of cash as of December 31, 2018. We had a net loss of \$7.2 million for the year then ended, and we used \$4.6 million of cash in our operating activities during 2018. Since December 31, 2018 and through the date of this report, we issued an unsecured note in the amount of \$1,500,000, which is due February 2021. This unsecured note alleviated the doubt of a going concern for the Company. Based on our projected 2018 results and, if necessary, our ability to reduce certain variable operating expenses, we believe that our existing capital, and operations, will be sufficient to finance our operations through the first quarter of 2019.

If our cash reserves prove insufficient to sustain operations, we plan to raise additional capital by selling shares of capital stock or other equity or debt securities. However, there are no commitments or arrangements for future financings in place at this time, and we can give no assurance that such capital will be available on favorable terms or at all. We may need additional financing thereafter until we can achieve profitability. If we cannot, we will be forced to curtail our operations or possibly be forced to evaluate a sale or liquidation of our assets. Any future financing may involve substantial dilution to existing investors.

Although we are actively pursuing financing opportunities, we may not be able to raise cash on terms acceptable to us or at all. There can be no assurance that we will be successful in obtaining additional funding. Financings, if available, may be on terms that are dilutive to our shareholders, and the prices at which new investors would be willing to purchase our securities may be lower than the current price of our ordinary shares. The holders of new securities may also receive rights, preferences or privileges that are senior to

those of existing holders of our ordinary shares. If additional financing is not available or is not available on acceptable terms, we will have to curtail our operations in the short term.

#### **Principles of Consolidation and Basis of Presentation**

The accompanying financial statements are consolidated and include the financial statements of Mobivity Holdings Corp. and our wholly-owned subsidiary. Intercompany transactions are eliminated.

#### **Use of Estimates**

Preparation of our consolidated financial statements in conformity with accounting principles generally accepted in the United States of America (U.S. GAAP) requires management to make estimates and assumptions that affect the amounts reported in the consolidated financial statements and accompanying disclosures. These estimates are based on management's best knowledge of current events and actions we may undertake in the future. Significant estimates used are those related to: stock-based compensation; valuation of acquired assets, intangible assets and liabilities; useful lives for depreciation and amortization of long-lived assets; future cash flows associated with impairment testing for goodwill, indefinite-lived intangible assets and other long-lived assets; valuation of derivative liabilities; valuation allowance for deferred tax assets; and contingencies.

Actual results may ultimately differ from estimates, although management does not generally believe such differences would materially affect the consolidated financial statements in any individual year. However, in regard to ongoing impairment testing of goodwill and indefinite-lived intangible assets, significant deterioration in future cash flow projections or other assumptions used in estimating fair values versus those anticipated at the time of the initial valuations, could result in impairment charges that materially affect the consolidated financial statements in a given year.

#### **Reclassifications**

Certain prior year amounts have been reclassified to conform to the current year's presentation. The reclassifications had no effect on previously reported net loss.

#### **Acquisitions**

We account for acquired businesses using the purchase method of accounting. Under the purchase method, our consolidated financial statements reflect the operations of an acquired business starting from the completion of the acquisition. In addition, the assets acquired and liabilities assumed are recorded at the date of acquisition at their respective estimated fair values, with any excess of the purchase price over the estimated fair values of the net assets acquired recorded as goodwill.

#### **Cash and Cash Equivalents**

We minimize our credit risk associated with cash by periodically evaluating the credit quality of our primary financial institution. Our balances at times may exceed federally insured limits. We have not experienced any losses on our cash accounts.

#### **Accounts Receivable, Allowance for Doubtful Accounts and Concentrations**

Accounts receivable are carried at their estimated collectible amounts. We grant unsecured credit to substantially all of our customers. Ongoing credit evaluations are performed, and potential credit losses are charged to operations at the time the account receivable is estimated to be uncollectible. Since we cannot necessarily predict future changes in the financial stability of our customers, we cannot guarantee that our reserves will continue to be adequate.

As of December 31, 2018, and 2017, we recorded an allowance for doubtful accounts of \$10,104 and \$2,280, respectively.

From time to time, we may have a limited number of customers with individually large amounts due. Any unanticipated change in one of the customer's credit worthiness could have a material effect on the results of operations in the period in which such changes or events occurred.

As of December 31, 2018, we had one customer whose balance represented 34% of total accounts receivable. As of December 31, 2017, we had one customer whose balance represented 51% of total accounts receivable.

#### **Goodwill and Intangible Assets**

Goodwill is tested for impairment at a minimum on an annual basis. Goodwill is tested for impairment at the reporting unit level by first performing a qualitative assessment to determine whether it is more likely than not that the fair value of the reporting unit is less

than its carrying value. If the reporting unit does not pass the qualitative assessment, then the reporting unit's carrying value is compared to its fair value. The fair values of the reporting units are estimated using market and discounted cash flow approaches. Goodwill is considered impaired if the carrying value of the reporting unit exceeds its fair value. The discounted cash flow approach uses expected future operating results. Failure to achieve these expected results may cause a future impairment of goodwill at the reporting unit.

We conducted our annual impairment tests of goodwill as of December 31, 2018 and 2017. As a result of these tests, we recorded impairment charges to our goodwill of \$2,288,057 and \$0 for the years ended December 31, 2018 and 2017, respectively.

Intangible assets consist of patents and trademarks, purchased customer contracts, purchased customer and merchant relationships, purchased trade names, purchased technology, and non-compete agreements. Intangible assets are amortized over the period of estimated benefit using the straight-line method and estimated useful lives ranging from one to twenty years. No significant residual value is estimated for intangible assets. We evaluate long-lived assets (including intangible assets) for impairment whenever events or changes in circumstances indicate that the carrying amount of a long-lived asset may not be recoverable. An asset is considered impaired if its carrying amount exceeds the undiscounted future net cash flow the asset is expected to generate.

The Company's evaluation of its long-lived assets completed during the years ended December 31, 2018 and 2017 resulted in impairment charges of \$0 and \$0, respectively.

#### **Software Development Costs**

Software development costs include direct costs incurred for internally developed products and payments made to independent software developers and/or contract engineers. The Company accounts for software development costs in accordance with the FASB guidance for the costs of computer software to be sold, leased, or otherwise marketed ("ASC Subtopic 985-20"). Software development costs are capitalized once the technological feasibility of a product is established and such costs are determined to be recoverable. Technological feasibility of a product encompasses technical design documentation and integration documentation, or the completed and tested product design and working model. Technological feasibility is evaluated on a project-by-project basis. Amounts related to software development that are not capitalized are charged immediately to the appropriate expense account. Amounts that are considered 'research and development' that are not capitalized are immediately charged to engineering, research, and development expense.

Capitalized costs for those products that are cancelled or abandoned are charged to impairment expense in the period of cancellation. Commencing upon product release, capitalized software development costs are amortized to "Amortization Expense - Development" based on the straight-line method over a twenty-four month period.

The Company evaluates the future recoverability of capitalized software development costs on an annual basis. For products that have been released in prior years, the primary evaluation criterion is ongoing relations with the customer. The Company's evaluation of its capitalized software development asset completed during the years ended December 31, 2018 and 2017 resulted in impairment charges of \$0 and \$0, respectively.

#### **Derivative Financial Instruments**

We do not use derivative instruments to hedge exposures to cash flow, market or foreign currency risks.

We review the terms of the common stock, warrants and convertible debt we issue to determine whether there are embedded derivative instruments, including embedded conversion options, which are required to be bifurcated and accounted for separately as derivative financial instruments. In circumstances where the host instrument contains more than one embedded derivative instrument, including the conversion option, that is required to be bifurcated, the bifurcated derivative instruments are accounted for as a single, compound derivative instrument.

Bifurcated embedded derivatives are initially recorded at fair value and are then revalued at each reporting date with changes in the fair value reported as non-operating income or expense. When the equity or convertible debt instruments contain embedded derivative instruments that are to be bifurcated and accounted for as liabilities, the total proceeds received are first allocated to the fair value of all the bifurcated derivative instruments. The remaining proceeds, if any, are then allocated to the host instruments themselves, usually resulting in those instruments being recorded at a discount from their face value.

The fair value of the derivatives is estimated using a Monte Carlo simulation model. The model utilizes a series of inputs and assumptions to arrive at a fair value at the date of inception and each reporting period. Some of the key assumptions include the likelihood of future financing, stock price volatility, and discount rates.

### **Going Concern Assumption**

These financial statements are prepared on a going concern basis. This requires management to evaluate whether it is probable that known conditions or events, considered in the aggregate, would raise substantial doubt about the entity's ability to continue as a going concern within one year after the date that the financial statements are issued. If such conditions or events are identified, the standard requires management's mitigation plans to alleviate the doubt or a statement of the substantial doubt about the entity's ability to continue as a going concern to be disclosed in the financial statements. During management's evaluation, substantial doubt was raised about the entity's ability to continue as a going concern. As a result of this evaluation, the Company has undertaken financing efforts (as further described in Note 14) to provide continuing financial support so that the Company is able to pay its debts as and when they fall due. Management has concluded that the doubt raised has been alleviated by the additional financing.

### **Revenue Recognition and Concentrations**

Our Receipt and Reach and customer relationship management are hosted solutions. We generate revenue from licensing our software to clients in our software as a service model, per-message and per-minute transactional fees, and customized professional services. We recognize license/subscription fees over the period of the contract, service fees as the services are performed, and per-message or per-minute transaction revenue when the transaction takes place. Under Topic 606, revenue is recognized when control of the promised goods or services is transferred to our customers, in an amount that reflects the consideration we expect to be entitled to in exchange for those goods or services. We consider authoritative guidance on multiple deliverables in determining whether each deliverable represents a separate unit of accounting. Some customers are billed on a month to month basis with no contractual term and are collected by credit card. Revenue is recognized at the time that the services are rendered, and the selling price is fixed with a set range of plans. Cash received in advance of the performance of services is recorded as deferred revenue.

Accounting Standards Update ("ASU") No. 2014-09, Revenue from Contracts with Customers (Accounting Standards Codification 606 ("ASC 606")) is a comprehensive revenue recognition standard that superseded nearly all existing revenue recognition guidance. The Company adopted this standard effective January 1, 2018, applying the modified retrospective method. Upon adoption, the Company discontinued revenue deferral under the sell-through model and commenced recording revenue upon delivery to distributors, net of estimated returns. Generally, the new standard results in earlier recognition of revenues.

During the years ended December 31, 2018 and 2017, two customers accounted for 67% and 71% of our revenues, respectively.

### **Stock-based Compensation**

We primarily issue stock-based awards to employees in the form of stock options. We determine compensation expense associated with stock options based on the estimated grant date fair value method using the Black-Scholes valuation model. We recognize compensation expense using a straight-line amortization method over the respective vesting period.

### **Research and Development Expenditures**

Research and development expenditures are expensed as incurred, and consist primarily of compensation costs, outside services, and expensed materials.

### **Advertising Expense**

Direct advertising costs are expensed as incurred and consist primarily of E-commerce advertisements and other direct costs. Advertising expense was \$88,569 and \$22,509 for years ended December 31, 2018 and 2017, respectively.

### **Income Taxes**

We account for income taxes using the assets and liability method, which recognizes deferred tax assets and liabilities determined based on the difference between the financial statement and tax basis of assets and liabilities using enacted tax rates in effect for the year in which the differences are expected to affect taxable income. Valuation allowances are established to reduce deferred tax assets when, based on available objective evidence, it is more likely than not that the benefit of such assets will not be realized. We recognize in the consolidated financial statements only those tax positions determined to be more likely than not of being sustained.

### **Computation of Net Loss per Common Share**

Basic net loss per share is based upon the weighted average number of common shares outstanding. Diluted net loss per share is based on the assumption that all potential common stock equivalents (convertible notes payable, stock options, and warrants) are converted or exercised. The calculation of diluted net loss per share excludes potential common stock equivalents if the effect is anti-dilutive.

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Our weighted average common shares outstanding for basic and diluted are the same because the effect of the potential common stock equivalents is anti-dilutive.

We had the following dilutive common stock equivalents as of December 31, 2018 and 2017 which were excluded from the calculation because their effect was anti-dilutive.

	December 31,	
	2018	2017
Outstanding employee options	5,012,218	5,757,880
Outstanding restricted stock units	662,800	994,417
Outstanding warrants	2,087,060	5,134,349
	<u>7,762,078</u>	<u>11,886,646</u>

**Recent Accounting Pronouncements**

Accounting standards promulgated by the FASB are subject to change. Changes in such standards may have an impact on the Company's future financial statements. The following are a summary of recent accounting developments.

In May 2014, the FASB issued ASU No. 2014-09, Revenue from Contracts with Customers (Accounting Standards Codification 606 ("ASC 606")). ASU No. 2014-09 provides guidance for revenue recognition. The standard's core principle is that a company will recognize revenue when it transfers promised goods or services to customers in an amount that reflects the consideration to which the company expects to be entitled in exchange for those goods or services. In doing so, companies will need to use more judgment and make more estimates than under current guidance. These may include identifying performance obligations in the contract and estimating the amount of variable consideration to include in the transaction price attributable to each separate performance obligation. Subsequent to the initial standards, the FASB has also issued several ASUs to clarify specific revenue recognition topics. This guidance will be effective for the Company for its fiscal year 2018.

The Company adopted the modified retrospective approach to initially apply the update and recognize the remaining contract value at the date of application. The Company does not expect the adoption of ASU 2014-09 to have any impact on its total cash flows from operating, investing or financing activities.

*Revenue pursuant to ASU 2014-09*

The Company is continuing to assess the impact of adopting ASU 2014-09 on its financial position, results of operations and related disclosures and believes that the impact will be material. The most significant impact relates to the timing of revenue recognition for our Receipt product licenses sold with post contract support ("PCS"). Under the new guidance Vendor Specific Objective Evidence ("VSOE") is eliminated and we will recognize revenue for the attributable contract license revenue upon the installation to the customer's point-of-sale system. This will result in accelerated revenue recognition for this product.

The Company believes that the new standard will impact the following policies and disclosures:

- removal of the current limitation on contingent revenue will result in revenue being recognized earlier for certain contracts;
  - allocation of subscription and support revenue;
  - estimation of variable consideration for arrangements with location and usage-based fees;
  - required disclosures including disaggregation of revenues, information about the remaining transaction price and when the Company expects to recognize revenue; and
  - required disclosures including disaggregation of revenues, information about the remaining transaction price and when the Company expects to recognize revenue; and
- Ⓢ Capitalized costs to acquire a contract pursuant to ASU 2014-09

The accounting for capitalized costs to acquire a contract under the new standard is significantly different than the Company's current accounting for deferred commissions. The new guidance results in the capitalization of significantly more costs and longer amortization lives. Under the Company's current accounting, the Company expenses commissions as they are earned by way of payment from the customer. Currently, payments made to those employees not directly related to the sale of a new contract or those related to any renewals, including the associated fringe benefits and payroll taxes, and partner referral fees are not capitalized.

Under the new standard, the Company will capitalize incremental costs of acquiring a non-cancelable subscription and support revenue contract. The capitalized amounts will consist primarily of sales commissions paid to the Company's direct sales force. Capitalized amounts will also include (1) amounts paid to employees other than the direct sales force who earn incentive payouts



under annual compensation plans that are tied to the value of contracts acquired, and (2) commissions paid to employees upon renewals of subscription and support.

Capitalized costs related to new revenue contracts will be amortized on a straight-line basis over the term of the contract.

The Company believes it will be material to both its balance sheet and statement of operations due to the capitalization of additional costs and the longer period of amortization.

In February 2016, the Financial Accounting Standards Board (“FASB”) issued Accounting Standards Update (“ASU”) 2016-02, “Leases (Topic 842)”. Under this guidance, an entity is required to recognize right-of-use assets and lease liabilities on its balance sheet and disclose key information about leasing arrangements. This guidance offers specific accounting guidance for a lessee, a lessor and sale and leaseback transactions. Lessees and lessors are required to disclose qualitative and quantitative information about leasing arrangements to enable a user of the financial statements to assess the amount, timing and uncertainty of cash flows arising from leases. This guidance is effective for annual reporting periods beginning after December 15, 2018, including interim periods within that reporting period, and requires a modified retrospective adoption, with early adoption permitted. The Company is currently evaluating the impact of the adoption of this standard will have on our consolidated financial statements.

In November 2016, the FASB issued ASU No. 2016-18, “Statement of Cash Flows (Topic 230).” ASU No. 2016-18 requires that restricted cash be included with cash and cash equivalents when reconciling the change in cash flow. This guidance is reflected in these financial statements.

In January 2017, the FASB issued ASU 2017-04, Simplifying the Test for Goodwill Impairment, which removes the second step of the two-step goodwill impairment test. Under ASU 2017-04, an entity will apply a one-step quantitative test and record the amount of goodwill impairment as the excess of a reporting unit’s carrying amount over its fair value, not to exceed the total amount of goodwill allocated to the reporting unit. ASU 2017-04 does not amend the optional qualitative assessment of goodwill impairment. Additionally, an entity should consider income tax effects from any tax-deductible goodwill on the carrying amount of the reporting unit when measuring the goodwill impairment loss, if applicable. ASU 2017-04 is effective for annual or any interim goodwill impairment tests in fiscal years beginning after December 15, 2019; early adoption is permitted for interim or annual goodwill impairment tests performed on testing dates after January 1, 2017. The Company has not elected early adoption of this standard and is currently in the process of evaluating the impact of adopting ASU 2017-04 and cannot currently estimate the financial statement impact of adoption.

In May 2017, the FASB issued ASU No. 2017-09, “Compensation – Stock Compensation (Topic 718): Scope of Modification Accounting.” The amendments in this update provide guidance about which changes to the terms or conditions of a share-based award require an entity to apply modification accounting in Topic 718. The guidance will be effective for the Company for its fiscal year 2018, with early adoption permitted. The Company does not expect this ASU to materially impact the Company’s consolidated financial statements.

## **2. Acquisitions**

We completed the following acquisition in furtherance of our strategy to acquire small, privately owned enterprises in the mobile marketing sector through asset purchase structures. We made the acquisitions to expand our market presence and product offerings.

The purchase consideration for each acquisition was allocated to the tangible assets and identifiable intangible assets acquired and liabilities assumed based on their estimated fair values on the acquisition date, with the remaining unallocated consideration recorded as goodwill. An independent valuation expert assisted us in determining these fair values.

We have included the financial results of these acquisitions in our consolidated financial statements from the date of acquisition.

### **Acquisition of Certain Belly, Inc. Assets**

On November 14, 2018, we entered into an Asset Purchase Agreement with Belly, Inc., a Delaware corporation, pursuant to which we have agreed to purchase from Belly, and Belly has agreed to sell to us, certain operating assets relating to Belly’s proprietary digital customer loyalty platform, including client contracts, accounts receivable and intellectual property, in exchange for our payment of \$3,000,000, subject to working capital adjustments. Belly was founded in 2001 and was originally funded by Andreessen Horowitz, Lightbank, NEA, DAG Ventures, Cisco and 7-Ventures, LLC (a subsidiary of 7-Eleven, Inc). Belly is a platform-first technology company enabling businesses of all sizes to create digital connections that result in personal relationships with their customers. Belly’s platform has been deployed to more than 5,000 merchant locations and 7 million consumers. Our acquisition of the Belly assets is expected to be accretive to our top and bottom line revenue figures. The Asset Purchase Agreement contains customary representations, warranties and indemnities on the part of Belly. The closing of the acquisition is expected to take place on or about

November 14, 2018, subject to usual and customary closing conditions. We intended to finance the acquisition through our cash on hand.

In connection with our acquisition of the Belly assets, on November 14, 2018, we entered into a Loan and Security Agreement with Wintrust Bank. The Loan and Security Agreement provides for a single-term loan to us in the original principal amount of \$1,000,000. Interest accrues on the unpaid principal amount at the rate of prime plus 1.5%. The loan is a three-year loan and is interest-only payable for the first six months of the loan. Commencing on May 1, 2019, we will commence monthly payments of principal in the amount of \$33,333.33 in addition to the monthly payment of accrued interest. The loan is secured by all of our assets other than our intellectual property.

The acquisition was accounted for as an acquisition of asset and we valued all assets and liabilities acquired at their fair values on the date of acquisition. An independent valuation expert assisted us in determining these fair values. The assets and liabilities of the acquired entity were recorded at their estimated fair values at the date of the acquisition.

The allocation of the purchase price to assets and liabilities based upon fair value determinations was as follows:

<b>Estimated Tangible and Intangible Net Assets</b>	
Accounts receivable, net	\$ 9,400
Property and equipment	21,522
Other current assets & Prepaid expenses	18,009
IP/Technology/Patents	991,300
Goodwill	2,022,489
<b>Total identifiable assets acquired</b>	<b>3,062,720</b>
Liabilities assumed	(62,720)
<b>Net assets acquired</b>	<b>\$ 3,000,000</b>

The purchase price consisted of \$3 million in cash on hand.

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The following information presents unaudited pro forma consolidated results of operations for the years ended December 31, 2017 and 2018, as if the Belly asset acquisition described above had occurred on January 1, 2017. The pro forma financial information is not necessarily indicative of the operating results that would have occurred if the acquisition been consummated as of the date indicated, nor are they necessarily indicative of future operating results.

**Mobivity Holdings Corp.**  
**Unaudited Pro Forma Condensed Consolidated Statement of Operations**  
**For the year ended December 31, 2017**

	Mobivity	Belly	Pro Forma Combined
<b>Revenues</b>			
Revenues	\$ 8,591,955	\$ 3,305,808	\$ 11,897,763
Cost of revenues	2,792,738	1,505,690	4,298,428
<b>Gross profit</b>	<b>5,799,217</b>	<b>1,800,118</b>	<b>7,599,335</b>
<b>Operating expenses</b>			
General and administrative	3,357,166	1,961,830	5,318,996
Sales and marketing	3,631,727	302,231	3,933,958
Engineering, research, and development	4,201,647	70,028	4,271,675
Depreciation and amortization	386,304	43,230	429,534
<b>Total operating expenses</b>	<b>11,576,844</b>	<b>2,377,319</b>	<b>13,954,163</b>
<b>Loss from operations</b>	<b>(5,777,627)</b>	<b>(577,201)</b>	<b>(6,354,828)</b>
<b>Other income/(expense)</b>			
Interest income	4,637	-	4,637
Interest expense	(169,044)	-	(169,044)
Foreign currency (loss) gain	(3,978)	-	(3,978)
<b>Total other income/(expense)</b>	<b>(168,385)</b>	<b>-</b>	<b>(168,385)</b>
<b>Loss before income taxes</b>	<b>(5,946,012)</b>	<b>(577,201)</b>	<b>(6,523,213)</b>
Income tax expense	-	-	-
<b>Net loss</b>	<b>(5,946,012)</b>	<b>(577,201)</b>	<b>(6,523,213)</b>
<b>Other comprehensive loss/net of income tax</b>			
Foreign currency translation adjustments	(32,765)	-	(32,765)
<b>Comprehensive loss</b>	<b>\$ (5,978,777)</b>	<b>\$ (577,201)</b>	<b>\$ (6,555,978)</b>
<b>Net loss per share:</b>			
<b>Basic and diluted</b>	<b>\$ (0.16)</b>		<b>\$ (0.18)</b>
<b>Weighted average number of shares:</b>			
<b>Basic and diluted</b>	<b>36,575,762</b>		<b>36,575,762</b>

**Mobivity Holdings Corp.**  
**Unaudited Pro Forma Condensed Combined Statement of Operations**  
**For the Year Ended December 31, 2018**

	Mobivity	Belly	Pro Forma Combined
<b>Revenues</b>			
Revenues	\$ 11,556,536	\$ 2,374,846	\$ 13,931,382
Cost of revenues	3,932,334	658,999	4,591,333
<b>Gross profit</b>	<b>7,624,202</b>	<b>1,715,847</b>	<b>9,340,049</b>
<b>Operating expenses</b>			
General and administrative	4,197,539	542,136	4,739,675
Sales and marketing	3,931,469	71,543	4,003,012
Engineering, research, and development	3,713,787	64,699	3,778,486
Goodwill impairment	2,288,057	-	2,288,057
Depreciation and amortization	486,255	18,926	505,181
<b>Total operating expenses</b>	<b>14,617,107</b>	<b>697,304</b>	<b>15,314,411</b>
<b>Income (loss) from operations</b>	<b>(6,992,905)</b>	<b>1,018,543</b>	<b>(5,974,362)</b>
<b>Other income/(expense)</b>			
Interest income	4,145	-	4,145
Interest expense	(210,422)	-	(210,422)
Gain on sale of fixed assets	(8,722)	-	(8,722)
Other income	-	20,678	20,678
Foreign currency (loss) gain	(7,745)	-	(7,745)
<b>Total other income/(expense)</b>	<b>(222,744)</b>	<b>20,678</b>	<b>(202,066)</b>
<b>Income (loss) before income taxes</b>	<b>(7,215,649)</b>	<b>1,039,221</b>	<b>(6,176,428)</b>
Income tax expense	-	-	-
<b>Net Income (loss)</b>	<b>(7,215,649)</b>	<b>1,039,221</b>	<b>(6,176,428)</b>
<b>Other comprehensive income (loss), net of income tax</b>			
Foreign currency translation adjustments	70,523	-	70,523
<b>Comprehensive income (loss)</b>	<b>\$ (7,145,126)</b>	<b>\$ 1,039,221</b>	<b>\$ (6,105,905)</b>
<b>Net loss per share:</b>			
<b>Basic and diluted</b>	<b>\$ (0.17)</b>		<b>\$ (0.15)</b>
<b>Weighted average number of shares:</b>			
<b>Basic and diluted</b>	<b>42,133,368</b>		<b>42,133,368</b>

### 3. New Accounting Standards

#### Revenue from Contracts with Customers.

In May 2014, the Financial Accounting Standards Board (FASB) issued ASU 2014-09, *Revenue from Contracts with Customers* ("ASC 606"), which creates a single source of revenue guidance under U.S. GAAP for all companies in all industries and replaces most existing revenue recognition guidance in U.S. GAAP. Under the new standard, revenue is recognized when a customer obtains control of promised goods or services and is recognized in an amount that reflects the consideration which the entity expects to receive in exchange for those goods or services.

Our transition to ASC 606 represents a change in accounting principle. ASC 606 eliminates industry-specific guidance and provides a single revenue recognition model for recognizing revenue from contracts with customers. The core principle of ASC 606 is that a reporting entity should recognize revenue to depict the transfer of promised goods or services to customers in an amount that reflects the consideration to which the reporting entity expects to be entitled for the exchange of those goods or services.

The Company adopted the new standard in the first quarter of its fiscal 2018, using the modified retrospective method. The Company implemented internal controls and key system functionality to enable the preparation of financial information on adoption. The most significant impact of the adoption of ASC 606 to the Company relates to the acceleration of revenue recognition for sale of custom products subject to non-cancellable customer purchase orders.

The new standard will primarily impact the Company's revenue recognition for software arrangements. In this area, the new standard will accelerate the recognition of revenue. The table below details both the current and expected revenue recognition timing in these areas:

Software arrangements:	Past revenue standard	New ASC 606 revenue standard
Perpetual software licenses	Upfront	Upfront
Enterprise license agreements	Ratable	Upfront
Software support	Ratable	Ratable
SaaS	Ratable	Ratable

The adoption of ASC 606 has an impact on the Company's Consolidated Statements of Operations and Consolidated Balance Sheets but has no impact on cash provided by or used in operating, financing, or investing activities on the Consolidated Statements of Cash Flows.

**Financial Statement Impact of Transition to ASC 606**

As noted above, we transitioned to ASC 606 using the modified retrospective method on January 1, 2018. The cumulative effect of this transition to applicable contracts with customers that were not completed as of January 1, 2018 was recorded as an adjustment to stockholders' equity as of that date. As a result of applying the modified retrospective method to transition to ASC 606, the following adjustments were made to the consolidated balance sheet as of January 1, 2018:

	December 31, 2017	Adjustments due to ASC 606	Adjusted January 1, 2018
	As Reported		
<b>ASSETS</b>			
<b>Current assets</b>			
Cash	\$ 460,059	\$ -	\$ 460,059
Accounts receivable, net of allowance for doubtful accounts of \$2,280 and \$2,280, respectively	885,743	544,599	1,430,342
Other current assets	209,536	-	209,536
<b>Total current assets</b>	<b>1,555,338</b>	<b>544,599</b>	<b>2,099,937</b>
<b>Non-current assets</b>			
Goodwill	803,118	-	803,118
Intangible assets, net	676,436	-	676,436
Accounts receivable, long term	-	424,023	424,023
Other assets	88,916	-	88,916
<b>TOTAL ASSETS</b>	<b>\$ 3,123,808</b>	<b>\$ 968,622</b>	<b>\$ 4,092,430</b>
<b>LIABILITIES AND STOCKHOLDERS' EQUITY</b>			
<b>Current liabilities</b>			
Accounts payable	\$ 1,096,003	\$ -	\$ 1,096,003
Accrued interest	1,168	-	1,168
Accrued and deferred personnel compensation	590,500	-	590,500
Deferred revenue and customer deposits	1,429,266	-	1,429,266
Notes payable, net - current maturities	2,236,224	-	2,236,224
Other current liabilities	226,355	191,121	417,476
<b>Total current liabilities</b>	<b>5,579,516</b>	<b>191,121</b>	<b>5,770,637</b>
<b>Non-current liabilities</b>			
Notes payable, net - long term	180,810	-	180,810
Other long term liabilities	-	150,477	150,477
<b>Total non-current liabilities</b>	<b>180,810</b>	<b>150,477</b>	<b>331,287</b>
<b>Total liabilities</b>	<b>5,760,326</b>	<b>341,598</b>	<b>6,101,924</b>
<b>Commitments and Contingencies (See Note 9)</b>			
<b>Stockholders' equity</b>			
Common stock, \$0.001 par value; 100,000,000 shares authorized; 37,025,140 and 37,025,140, shares issued and outstanding	37,025	-	37,025
Equity payable	100,862	-	100,862
Additional paid-in capital	77,910,842	-	77,910,842
Accumulated other comprehensive loss	(65,764)	-	(65,764)
Accumulated deficit	(80,619,483)	627,024	(79,992,459)
<b>Total stockholders' equity</b>	<b>(2,636,518)</b>	<b>627,024</b>	<b>(2,009,494)</b>
<b>TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY</b>	<b>\$ 3,123,808</b>	<b>\$ 968,622</b>	<b>\$ 4,092,430</b>

The following tables reflect the impact of adoption of ASC 606 on our condensed consolidated statements of operations for the year ended December 31, 2018 and our condensed consolidated balance sheet as of December 31, 2018 and the amounts as if the Previous Standards were in effect ("Amounts Under Previous Standards"):

**Condensed Consolidated Statement of Operations**

	Twelve Months Ended December 31, 2018		
	As reported	Total Adjustments Under ASC 606	Amounts Under Previous Standards
<b>Revenues</b>			
Revenues	\$ 11,556,536	\$ 2,692,692	\$ 8,863,844
Cost of revenues	3,932,334	-	3,932,334
<b>Gross profit</b>	<b>7,624,202</b>	<b>2,692,692</b>	<b>4,931,510</b>
<b>Operating expenses</b>			
General and administrative	4,197,539	148,287	4,049,252
Sales and marketing	3,931,469	-	3,931,469
Engineering, research, and development	3,713,787	1,334,582	2,379,205
Goodwill impairment	2,288,057	-	2,288,057
Depreciation and amortization	486,255	-	486,255
<b>Total operating expenses</b>	<b>14,617,107</b>	<b>1,482,869</b>	<b>13,134,238</b>
<b>Income (loss) from operations</b>	<b>(6,992,905)</b>	<b>1,209,823</b>	<b>(8,202,728)</b>
<b>Other income/(expense)</b>			
Interest income	4,145	-	4,145
Interest expense	(210,422)	-	(210,422)
Gain on sale of fixed assets	(8,722)	-	(8,722)
Foreign currency (loss) gain	(7,745)	-	(7,745)
<b>Total other income/(expense)</b>	<b>(222,744)</b>	<b>-</b>	<b>(222,744)</b>
<b>Income (loss) before income taxes</b>	<b>(7,215,649)</b>	<b>1,209,823</b>	<b>(8,425,472)</b>
Income tax expense	-	-	-
<b>Net income (loss)</b>	<b>(7,215,649)</b>	<b>1,209,823</b>	<b>(8,425,472)</b>
<b>Other comprehensive income (loss), net of income tax</b>			
Foreign currency translation adjustments	70,523	-	70,523
<b>Comprehensive income (loss)</b>	<b>\$ (7,145,126)</b>	<b>\$ 1,209,823</b>	<b>\$ (8,354,949)</b>
<b>Net income (loss) per share:</b>			
<b>Basic</b>	<b>\$ (0.17)</b>	<b>\$ 0.03</b>	<b>\$ (0.20)</b>
<b>Weighted average number of shares outstanding:</b>			
<b>Basic</b>	<b>42,133,368</b>	<b>42,133,368</b>	<b>42,133,368</b>

**Condensed Consolidated Balance Sheet**

	December 31, 2018 As Reported	Total Adjustments Under ASC 606	Amounts Under Previous Standards
<b>ASSETS</b>			
<b>Current assets</b>			
Cash	\$ 554,255	\$ -	\$ 554,255
Accounts receivable, net of allowance for doubtful accounts of \$9,828	601,658	-	601,658
Contracts receivable, current	578,869	(578,869)	-
Other current assets	736,309	-	736,309
<b>Total current assets</b>	<b>2,471,091</b>	<b>(578,869)</b>	<b>1,892,222</b>
Goodwill	537,550	-	537,550
Intangible assets, net	1,781,448	-	1,781,448
Contracts receivable, long term	2,113,823	(2,113,823)	-
Other assets	527,146	-	527,146
<b>TOTAL ASSETS</b>	<b>\$ 7,431,058</b>	<b>\$ (2,692,692)</b>	<b>\$ 4,738,366</b>
<b>LIABILITIES AND STOCKHOLDERS' EQUITY</b>			
<b>Current liabilities</b>			
Accounts payable	\$ 1,731,628	\$ -	\$ 1,731,628
Accrued interest	9,167	-	9,167
Accrued and deferred personnel compensation	350,311	-	350,311
Deferred revenue and customer deposits	1,956,938	-	1,956,938
Notes payable, net - current maturities	1,279,590	-	1,279,590
Other current liabilities	723,636	(622,369)	101,267
<b>Total current liabilities</b>	<b>6,051,270</b>	<b>(622,369)</b>	<b>5,428,901</b>
<b>Non-current liabilities</b>			
Notes payable, net - long term	194,328	-	194,328
Other long term liabilities	860,500	(860,500)	-
<b>Total non-current liabilities</b>	<b>1,054,828</b>	<b>(860,500)</b>	<b>194,328</b>
<b>Total liabilities</b>	<b>7,106,098</b>	<b>(1,482,869)</b>	<b>5,623,229</b>
<b>Commitments and Contingencies (See Note 9)</b>			
<b>Stockholders' equity</b>			
Common stock, \$0.001 par value; 100,000,000 shares authorized; 45,998,053 and 45,998,053, shares issued and outstanding	45,998	-	45,998
Equity payable	100,862	-	100,862
Additional paid-in capital	88,008,473	-	88,008,473
Accumulated other comprehensive loss	4,759	-	4,759
Accumulated deficit	(87,835,132)	(1,209,823)	(89,044,955)
<b>Total stockholders' equity</b>	<b>324,960</b>	<b>(1,209,823)</b>	<b>(884,863)</b>
<b>TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY</b>	<b>\$ 7,431,058</b>	<b>\$ (2,692,692)</b>	<b>\$ 4,738,366</b>



**4. Goodwill and Intangible Assets**

**Goodwill**

The following table presents goodwill and impairment for the years ended December 31, 2018 and 2017:

<b>Goodwill</b>	
December 31, 2016	\$ 803,118
Acquired	-
Impairment	-
December 31, 2017	803,118
Acquired	2,022,489
Impairment	(2,288,057)
December 31, 2018	<u>\$ 537,550</u>

We conducted our annual impairment test of goodwill as of December 31, 2018 and 2017, which resulted in impairment charges of \$2,288,057 and \$0, respectively.

**Intangible assets**

The following table presents components of identifiable intangible assets for the years ended December 31, 2018 and 2017:

	<b>December 31, 2018</b>				<b>December 31, 2017</b>			
	Gross Carrying Amount	Accumulated Amortization	Net Carrying Amount	Weighted Average Useful Life (Years)	Gross Carrying Amount	Accumulated Amortization	Net Carrying Amount	Weighted Average Useful Life (Years)
Patents and trademarks	\$ 177,944	\$ (72,957)	\$ 104,986	15	\$ 179,053	\$ (60,875)	\$ 118,178	15
Customer and merchant relationships	2,343,112	(1,507,024)	836,088	10	1,620,112	(1,466,664)	153,448	10
Trade name	197,868	(137,872)	59,996	10	171,969	(130,936)	41,033	10
Acquired technology	684,540	(523,448)	161,092	10	521,540	(521,540)	-	10
Non-compete agreement	79,299	(2,508)	76,791	-	-	-	-	-
	<u>\$ 3,482,763</u>	<u>\$ (2,243,810)</u>	<u>\$ 1,238,953</u>		<u>\$ 2,492,674</u>	<u>\$ (2,180,015)</u>	<u>\$ 312,659</u>	

During the years ended December 31, 2018 and 2017, we recorded amortization expense related to our intangible assets of \$63,795 and \$40,148, respectively, which is included in depreciation and amortization in the consolidated statement of operations.

During the years ended December 31, 2018 and 2017, we recorded impairment charges related to our intangible assets of \$0 and \$0, respectively.

Expected future intangible asset amortization as of December 31, 2018 is as follows:

<b>Year ending December 31,</b>	<b>Amount</b>
2019	\$ 143,832
2020	143,832
2021	147,766
2022	145,886
2023	145,886
Thereafter	501,751
Total	<u>\$ 1,238,953</u>

**4. Software Development Costs**

The Company has capitalized certain costs for software developed or obtained for internal use during the application development stage as it relates to specific contracts. The amounts capitalized include external direct costs of services used in developing internal-use software and for payroll and payroll-related costs of employees directly associated with the development activities.

The following table presents details of our software development costs for the years ended December 31, 2018 and 2017:

	December 31, 2018			Weighted Average Useful Life (Years)	December 31, 2017			Weighted Average Useful Life (Years)
	Gross Carrying Amount	Accumulated Amortization	Net Carrying Amount		Gross Carrying Amount	Accumulated Amortization	Net Carrying Amount	
Software Development Costs	\$ 1,781,902	\$ (1,239,408)	\$ 542,495	2	\$ 886,539	\$ (597,616)	\$ 288,923	2
	<u>\$ 1,781,902</u>	<u>\$ (1,239,408)</u>	<u>\$ 542,495</u>		<u>\$ 886,539</u>	<u>\$ (597,616)</u>	<u>\$ 288,923</u>	

Software development costs are being amortized on a straight line basis over their estimated useful life of two years.

During the years ended December 31, 2018, we recorded amortization expense for software development costs of \$326,631 and \$315,663, respectively which is included in depreciation and amortization in the consolidated statement of operations.

During the years ended December 31, 2018 and 2017, we recorded impairment charges of \$0 and \$417,816, respectively, related to our software development costs as a result of customer contracts that became impaired.

The estimated future amortization expense of software development costs as of December 31, 2018 is as follows:

Year ending December 31,	Amount
2019	\$ 390,936
2020	151,559
2021	-
2022	-
2023	-
Thereafter	-
Total	<u>\$ 542,495</u>

## 5. Notes Payable and Interest Expense

### Notes Payable

The following table presents details of our notes payable as of December 31, 2018 and 2017:

Facility	Maturity	Interest Rate	Balance at December 31, 2018	Balance at December 31, 2017
BDC Term Loan	September 15, 2019	12 %	\$ 252,837	\$ 358,466
ACO A Note	May 1, 2021	-	141,081	175,632
SVB Working Capital Line of Credit Facility	March 30, 2018	Variable	-	1,882,936
Wintrust Bank	November 1, 2021	6.75%	1,000,000	-
Related Party Note	March 31, 2020	15 %	80,000	-
<b>Total Debt</b>			<u>1,473,918</u>	<u>2,417,034</u>
Debt discount			-	7,786
Less current portion			(1,279,590)	(2,244,010)
<b>Long-term debt, net of current portion</b>			<u>\$ 194,328</u>	<u>\$ 180,810</u>

### BDC Term Loan

On January 8, 2016, Livelenz (a wholly-owned subsidiary of the Company,) entered into an amendment of their original loan agreement dated August 26, 2011 with the Business Development Bank of Canada ("BDC"). Under this agreement the loan will mature, and the commitments will terminate on December 15, 2018. The company recorded \$1,529 of debt issuance costs as part of the acquisition of Livelenz. During the twelve months ended December 31, 2018, the company recorded \$856 of amortization expense. As of December 31, 2018, the company has \$0 of debt issuance costs remaining. On January 8, 2018, Livelenz (a wholly-

owned subsidiary of the Company,) entered into an amendment of their original loan agreement dated August 26, 2011 with the Business Development Bank of Canada (“BDC”). Under this agreement the loan will mature, and the commitments will terminate on September 15, 2019. Under this amendment the interest rate on the loan increases to 20%.

**ACOA Note**

On November 6, 2017, Livelenz (a wholly-owned subsidiary of the Company), entered into an amendment of the original agreement dated December 2, 2014 with the Atlantic Canada Opportunities Agency (“ACOA”). Under this agreement the note will mature, repayments began on June 1, 2016, and the commitments will terminate on May 1, 2023.

**SVB Working Capital Line of Credit Facility**

In March 2016, we entered into a Working Capital Line of Credit Facility (the “Facility”) with Silicon Valley Bank (“SVB”) to provide up to \$2 million to finance our general working capital needs. The Facility is funded based on cash on deposit balances and advances against our accounts receivable based on customer invoicing. Interest on Facility borrowings is calculated at rates between the prime rate minus 1.75% and prime rate plus 3.75% based on the borrowing base formula used at the time of borrowing. The Facility contains standard events of default, including payment defaults, breaches of representations, breaches of affirmative or negative covenants, and bankruptcy. During the twelve months ended December 31, 2017, the Company borrowed \$1,000,000 under this Facility. As of March 31, 2018, this Facility was paid off and closed.

Under the terms of the Facility, the Company is obligated to pay a commitment fee on the available unused amount of the Facility commitments equal to 0.5% per annum.

The Company capitalized debt issuance costs of \$47,287 as of December 31, 2017 related to the Facility, which are being amortized on a straight-line basis to interest expense over the two-year term of the Facility. During the twelve months ended December 31, 2018, the company recorded \$27,393 of amortization expense. As of December 31, 2018, the company has \$0 of debt issuance costs remaining.

**Bridge Loan Promissory Note**

On April 19, 2018, the Company entered into a bridge financing agreement (“Promissory Note”) for up to \$1,000,000. The Promissory Note carries an interest rate of 2% per thirty days and a facility fee of 1% of the maximum loan amount. Under this agreement the note automatically renews every thirty days until paid in full. As of September 30, 2018, this Promissory Note has been paid off and closed.

**Wintrust Loan**

On November 14, 2018, we entered into a Loan and Security Agreement with Wintrust Bank. The Loan and Security Agreement provides for a single-term loan to us in the original principal amount of \$1,000,000. Interest accrues on the unpaid principal amount at the rate of prime plus 1.5%. The loan is a three-year loan and is interest-only payable for the first six months of the loan. Commencing on May 1, 2019, we will commence monthly payments of principal in the amount of \$33,333.33 in addition to the monthly payment of accrued interest. The loan is secured by all of our assets other than our intellectual property. We used the proceeds of the loan to finance a loan in the principal amount of \$1,000,000 we assumed as part of the acquisition of the Belly assets.

**Related Party Notes**

During February 2018, we conducted a private placement of Unsecured Promissory Notes (individually, a “Note” and collectively, the “Notes”) in the aggregate principal amount of \$1,080,000 to certain investors, officers and directors of the Company. Each Note bears interest on the unpaid balance at the rate of fifteen percent (15%) per annum and the principal and accrued interest is due and payable no later than December 1, 2018. We may prepay any of the Notes without notice, subject to a two percent (2%) pre-payment penalty. The Note offer was conducted by our management and there were no commissions paid by us in connection with the solicitation. As of December 31, 2018, we have repaid \$1,000,000 and have \$80,000 as a remaining balance of these notes.

**Interest Expense**

The following table summarizes interest expense for the years ended December 31, 2018 and 2017:

	December 31,	
	2018	2017
Interest expense	\$ 210,421	\$ 169,044
Total interest expense	\$ 210,421	\$ 169,044

## **6. Common Stock and Equity Payable**

### ***Common Stock***

#### **2017**

On June 27, 2017, we issued 61,980 shares of our common stock, at a price of \$0.48 per share, for the gross proceeds of \$29,750 in conjunction with one employee that exercised vested stock options.

On July 17, 2017, we issued 263,731 shares of our common stock to four board members in accordance with their restricted stock unit agreements.

On August 22, 2017, we issued 4,688 shares of our common stock, at a price of \$0.41 per share, for the gross proceeds of \$1,922 in conjunction with one employee that exercised vested stock options.

On August 30, 2017, we issued 37,500 shares of our common stock, at a price of \$0.75 per share, for the gross proceeds of \$28,125 in conjunction with one employee that exercised vested stock options.

On November 30, 2017, we issued 220,327 shares of our common stock to two former board members in accordance with their restricted stock unit agreements.

On December 21, 2017, we issued 47,917 shares of our common stock, at a price of \$0.48 per share, for the gross proceeds of \$23,000 in conjunction with one employee that exercised vested stock options.

#### **2018**

On February 7, 2018, the Company issued 12,500 shares of our common stock, at a price of \$0.78 per share, for the gross proceeds of \$9,595 in conjunction with one employee that exercised vested stock options.

On February 23, 2018, the Company issued 1,808 shares of our common stock in a cashless transaction related to a 25,000 warrant exercise.

During the three months ended March 31, 2018, the Company issued 2,018,125 shares of common stock for \$2,018,125 related to the exercise of certain warrants.

In June 2018, the Company commenced a private placement of its common shares at an offering price of \$1.00 per share. As of September 30, 2018, the Company had sold 5,775,000 shares of its common stock for gross proceeds of \$5,775,000. In addition the Company issued 1,047,583 shares of its common stock associated with the cancellation of \$1,000,000 of principal, \$47,583 of accrued interest, and a loss on conversion of \$41,902 under its February 2018 private placement Notes (See Note 5).

On August 29, 2018, the Company issued 24,792 shares of our common stock, at a price of \$0.48 per share, for the gross proceeds of \$11,875 in conjunction with one employee that exercised vested stock options.

On October 19, 2018, the Company issued 84,679 shares of our common stock, at a price of \$1.20 per share, for the gross proceeds of \$101,615 in conjunction with the exercise of warrants.

On November 6, 2018, the Company issued 8,426 shares of our common stock in a cashless transaction related to a 25,000 warrant exercise.

On December 31, 2018, the Company recorded stock based compensation expense of \$260,000 related to restricted stock units for members of our board of directors.

As of December 31, 2018, and 2017 we had an equity payable balance of \$100,862.

## **7. Stock-based Plans and Stock-based Compensation**

### ***Stock-based Plans***

We have the 2010 Incentive Stock Option Plan and the 2013 Incentive Stock Option Plan under which we have granted stock options to our directors, officers and employees. At December 31, 2018, 6,818,948 shares were authorized under the plans and (733,933) shares were available for future grant.

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We believe that such awards better align the interests of our directors, officers and employees with those of our shareholders. Option awards are generally granted with an exercise price that equals the fair market value of our stock at the date of grant. These option awards generally vest based on four years of continuous service and have five-year or 10-year contractual terms.

The following table summarizes stock option activity under our stock-based plans as of and for the years ended December 31, 2018 and 2017:

	Shares	Weighted Average Exercise Price	Weighted Average Remaining Contractual Term (Years)	Aggregate Intrinsic Value
Outstanding at December 31, 2016	5,757,880	\$ 1.37	8.12	\$ 209,690
Granted	3,027,500	\$ 0.69	-	-
Exercised	(152,085)	\$ 0.54	-	-
Forfeit/canceled	(1,451,053)	\$ 0.70	-	-
Expired	(363,294)	\$ 1.10	-	-
Outstanding at December 31, 2017	6,818,948	\$ 1.06	8.12	\$ 209,946
Granted	855,000	\$ 0.69	-	-
Exercised	(12,500)	\$ 0.75	-	-
Forfeit/canceled	(1,566,589)	\$ 0.74	-	-
Expired	(1,082,641)	\$ 1.18	-	-
Outstanding at December 31, 2018	5,012,218	\$ 1.15	7.11	\$ 1,232,545
Expected to vest at December 31, 2018	3,001,272	\$ 1.32	6.06	\$ 570,946
Exercisable at December 31, 2018	3,011,272	\$ 1.32	6.06	\$ 564,337
Unrecognized expense at December 31, 2018	\$ 1,232,545			

The aggregate intrinsic value of options was calculated as the difference between the exercise price of the underlying awards and the quoted price of our common stock. At December 31, 2018, options to purchase 3,079,500 shares of common stock were in-the-money.

The weighted average grant-date fair value of options granted during the years 2018 and 2017 was \$1.25 and \$0.50, respectively.

2017

On March 23, 2017, the Company granted seven employees a total of 322,500 options to purchase shares of the Company common stock at the closing price as of March 23, 2017 of \$0.72 per share. The options vest 25% on the first anniversary of the grant, then equally in 36 monthly installments thereafter and are exercisable until March 23, 2027. The total estimated value using the Black-Scholes Model, based on a volatility rate of 86% and an option value of \$0.52 was \$167,700.

On May 15, 2017, the Company granted eight employees a total of 2,105,000 options to purchase shares of the Company common stock at the closing price as of May 15, 2017 of \$0.60 per share. The options vest 25% on the first anniversary of the grant, then equally in 36 monthly installments thereafter and are exercisable until May 15, 2027. The total estimated value using the Black-Scholes Model, based on a volatility rate of 85% and an option value of \$0.43 was \$905,150.

On June 28, 2017, the Company granted two employees a total of 150,000 options to purchase shares of the Company common stock at the closing price as of June 28, 2017 of \$0.76 per share. The options vest 25% on the first anniversary of the grant, then equally in 36 monthly installments thereafter and are exercisable until June 28, 2027. The total estimated value using the Black-Scholes Model, based on a volatility rate of 86% and an option value of \$0.55 was \$82,500.

On August 14, 2017, the Company granted two employees a total of 165,000 options to purchase shares of the Company common stock at the closing price as of August 14, 2017 of \$0.895 per share. The options vest 25% on the first anniversary of the grant, then equally in 36 monthly installments thereafter and are exercisable until August 14, 2027. The total estimated value using the Black-Scholes Model, based on a volatility rate of 86% and an option value of \$0.65 was \$107,250.

On November 30, 2017, the Company granted fifteen employees a total of 285,000 options to purchase shares of the Company common stock at the closing price as of November 30, 2017 of \$1.15 per share. The options vest 25% on the first anniversary of the grant, then equally in 36 monthly installments thereafter and are exercisable until November 30, 2027. The total estimated value using the Black-Scholes Model, based on a volatility rate of 84% and an option value of \$0.82 was \$235,452.

**2018**

On February 7, 2018, the Company issued 12,500 shares of our common stock, at a price of \$0.78 per share, for the gross proceeds of \$9,595 in conjunction with one employee that exercised vested stock options.

On March 26, 2018, the Company granted one employee a total of 300,000 options to purchase shares of the Company common stock at the closing price as of March 26, 2018 of \$1.10 per share. The Option Shares will vest ratably over forty-eight (48) months, and are exercisable until March 26, 2028. The total estimated value using the Black-Scholes Model, based on a volatility rate of 102% and an option fair value of \$.88 was \$265,575.

In the six months ended June 30, 2018, the Company granted seven employees a total of 250,000 options to purchase shares of the Company common stock at prices ranging from \$0.90 to \$1.40 per share. The options vest 25% on the first anniversary of the grant, then equally in 36 monthly installments thereafter and are exercisable until 2028. The total estimated value using the Black-Scholes Model, based on a volatility rate of 84% and an option value of \$0.82 was \$235,452.

In the three months ended December 31, 2018, the Company granted seven employees a total of 305,000 options to purchase shares of the Company common stock at prices ranging from \$0.90 to \$1.40 per share. The options vest 25% on the first anniversary of the grant, then equally in 36 monthly installments thereafter and are exercisable until 2028. The total estimated value using the Black-Scholes Model, based on a volatility rate of 84% and an option value of \$0.82 was \$235,452.

**Stock-based Compensation Expense**

The impact on our results of operations of recording stock-based compensation expense for the years ended December 31, 2018 and 2017 was as follows:

	Years ended December 31,	
	2018	2017
General and administrative	\$ 311,303	\$ 570,170
Sales and marketing	225,275	166,083
Engineering, research, and development	131,334	175,443
	<u>\$ 667,912</u>	<u>\$ 911,696</u>

As of December 31, 2018, there was approximately \$2,080,959 of unearned stock-based compensation that will be expensed from 2018 through 2022. If there are any modifications or cancellations of the underlying unvested awards, we may be required to accelerate, increase or cancel all or a portion of the remaining unearned stock-based compensation expense. Future unearned stock-based compensation will increase to the extent we grant additional equity awards.

**Stock Option Valuation Assumptions**

We calculated the fair value of each stock option award on the date of grant using the Black-Scholes option pricing model. The ranges of assumptions were used for the years ended December 31, 2018 and 2017:

	Years ended December 31,	
	2018	2017
Risk-free interest rate	2.24% to 3.10%	1.86% to 2.20%
Expected life (years)	6.06	6.00
Dividend yield	-	-
Expected volatility	90.88% to 104.06%	84.42% to 85.79%

The risk-free interest rate assumption is based upon published interest rates appropriate for the expected life of our employee stock options.

The expected life of the stock options represents the weighted-average period that the stock options are expected to remain outstanding and was determined based on historical experience of similar awards, giving consideration to the contractual terms of the stock-based awards, vesting schedules and expectations of future employee behavior as influenced by changes to the terms of its stock-based awards.

The dividend yield assumption is based on our history of not paying dividends and no future expectations of dividend payouts.

The expected volatility in 2018 and 2017 is based on the historical publicly traded price of our common stock.

**Restricted stock units**

The following table summarizes restricted stock unit activity under our stock-based plans as of and for the years ended December 31, 2018 and 2017:

	Shares	Weighted Average Grant Date Fair Value	Weighted Average Remaining Contractual Term (Years)	Aggregate Intrinsic Value
Outstanding at December 31, 2016	994,417	\$ 0.72	0.08	\$ 731,845
Awarded	199,513	\$ 0.73	0.70	\$ -
Released	(484,058)	\$ -	-	\$ -
Forfeit	(47,072)	\$ 0.72	-	\$ -
Outstanding at December 31, 2017	662,800	\$ 0.72	0.70	\$ 795,360
Awarded	-	\$ -	-	\$ -
Released	-	\$ -	-	\$ -
Forfeit	-	\$ -	-	\$ -
Outstanding at December 31, 2018	662,800	\$ 0.72	-	\$ 785,418
Expected to vest at December 31, 2018	662,800	\$ 0.72	-	\$ -
Unrecognized expense at December 31, 2018	\$ -	-	-	\$ -

**2018**

In the twelve months ended December 31, 2018, the Company did not issue and restricted stock units. In the twelve months ended December 31, 2018, the company recorded \$37,249 in restricted stock units amortization and \$260,000 in board compensation.

**2017**

On March 23, 2017 the Company granted five independent directors a total of 112,845 restricted stock units. The units were valued at \$81,248, or \$0.72 per share, based on the closing stock price on the date of grant. All units vest equally in 12 monthly installments beginning March 23, 2017. The shares of Common Stock associated with the Restricted Stock Unit evidenced by this Agreement will be issued to the director upon the earliest to occur of (A) March 23, 2020, (B) a change in control of the Company, and (C) the termination of the director's service with the Company.

On May 15, 2017 the Company granted the Chairman of the Board 1,000,000 performance stock units. The units were valued at \$600,000 or \$0.60 per share, based on the closing stock price on the date of grant. These units vest upon meeting certain performance criteria. The Company expects that these units will be fully vested by December 31, 2017.

On May 19, 2017 the Company granted four independent directors a total of 86,668 restricted stock units. The units were valued at \$65,001 or \$0.75 per share, based on the closing stock price on the date of grant. All units vest equally in 12 monthly installments beginning May 19, 2017. The shares of Common Stock associated with the Restricted Stock Unit evidenced by this Agreement will be issued to the director upon the earliest to occur of (A) May 19, 2020, (B) a change in control of the Company, and (C) the termination of the director's service with the Company.

**Restricted Stock Unit Compensation Expense**

The impact on our results of operations of recording stock-based compensation expense for years ended December 31, 2018 and 2017 was as follows:

	Years ended December 31,	
	2018	2017
General and administrative	\$ 297,249	\$ 218,601
	<u>\$ 297,249</u>	<u>\$ 218,601</u>

**8. Warrants to Purchase Common Stock**

The following table summarizes investor warrant activity as of and for the years ended December 31, 2018 and 2017:

	Shares	Weighted Average Exercise Price	Weighted Average Remaining Contractual Term (Years)
Outstanding at December 31, 2016	5,134,349	\$ 1.20	3.00
Granted	-	\$ -	-
Exercised	-	\$ -	-
Canceled/forfeited/expired	-	\$ -	-
Outstanding at December 31, 2017	5,134,349	\$ 1.19	2.17
Granted	-	\$ -	-
Exercised	(2,152,804)	\$ -	-
Canceled/forfeited/expired	(894,485)	\$ -	-
Outstanding at December 31, 2018	<u>2,087,060</u>	<u>\$ 1.19</u>	<u>1.17</u>

We recorded stock-based compensation expense of \$0 and \$208,195 in general and administrative expense for the year ended December 31, 2018 and 2017, respectively in connection with the exercise of investor-based warrants.

***Warrants Exercised in 2018***

Between January 19, 2018 and March 31, 2018, we conducted an offer to the holders of our outstanding common stock purchase warrants pursuant to which our warrant holders were permitted to exercise their warrants at a reduced exercise price for a period expiring on March 31, 2018. At the commencement of the warrant offer, there were warrants outstanding that entitled their holders to purchase 5,134,349 shares of our common stock at exercise prices of \$1.00 and \$1.20 per share. Pursuant to the offer, warrant holders exercised warrants to purchase 2,018,125 shares of our common stock, resulting in additional capital of \$2,018,125. We undertook this limited-time warrant exercise price reduction in order to raise additional capital without incurring further potential dilution to our stockholders. In addition, through the warrant holders' acceptance of our offer, we significantly reduced the number of outstanding warrants and thereby simplified our capital structure. The warrant offer was conducted by our management and there were no commissions paid by us in connection with the solicitation.

In addition, during the twelve months ended December 31, 2018, warrant holders exercised warrants to purchase 84,679 shares of common stock at \$1.20, resulting in additional capital of \$101,615 and 50,000 warrants were exercised in cashless exercises resulting in the issuance of 10,234 shares of common stock.

**9. Income Taxes**

For the years ended December 31, 2018 and 2017 the provisions for income taxes were as follows:

	2018	2017
Federal – current	\$ -	\$ -
State – current	-	-
Foreign – current	-	-
Total	<u>\$ -</u>	<u>\$ -</u>



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Under ASC 740, deferred income tax assets and liabilities reflect the net tax effects of temporary differences between the carrying amounts of assets and liabilities for financial reporting purposes and the amounts used for income tax purposes.

Significant components of our net deferred tax assets and liabilities as of December 31, 2018 and 2017 are as follows:

	2018	2017
Deferred tax assets (liabilities):		
Net operating loss carryforwards	\$ 11,621,000	\$ 9,935,000
Stock based compensation	3,551,000	3,305,000
Accruals	16,000	23,000
Depreciation and amortization	4,759,000	4,575,000
Other compensation	20,000	41,000
Total deferred tax assets	19,967,000	17,879,000
Valuation allowance for net deferred tax assets	(19,967,000)	(17,879,000)
Total	<u>\$ -</u>	<u>\$ -</u>

The Company has provided a valuation allowance against deferred tax assets recorded as of December 31, 2018 and 2017 due to uncertainties regarding the realization of such assets.

The net change in the total valuation allowance for the year ended December 31, 2018 was an increase of approximately \$2,088,000. The net change in the total valuation allowance for the year ended December 31, 2017 was a decrease of approximately \$5,413,000. In assessing the valuation of deferred tax assets, the Company considers whether it is more likely than not that some portion or all of the deferred tax assets will not be realized. The ultimate realization of deferred tax assets is dependent upon the generation of future taxable income during periods in which those temporary differences become deductible. The Company considers projected future taxable income and planning strategies in making this assessment. Based on the level of historical operating results and projections for the taxable income for the future, the Company has determined that it is more likely than not that the deferred tax assets will not be realized. Accordingly, the Company has recorded a valuation allowance to reduce deferred tax assets to zero. There can be no assurance that the Company will ever be able to realize the benefit of some or all of the federal and state loss carryforwards, either due to ongoing operating losses or due to ownership changes, which limit the usefulness of the loss carryforwards.

As of December 31, 2018, the Company has available net operating loss carryforwards of approximately \$42,000,000 for federal income tax purposes, which will start to expire in 2026. The net operating loss carryforwards for state purposes are approximately \$42,000,000 and will start to expire in 2028.

The difference between the provision for income taxes and income taxes computed using the U.S. federal income tax rate for the years ended December 31, 2018 and 2017 was as follows:

	2018	2017
Computed expected tax expense	\$ (1,515,000)	\$ (2,022,000)
State taxes, net of federal benefit	(630,000)	(447,000)
Effect of tax rate changes on deferred tax assets and liabilities	-	7,657,000
Expiration of NOL carryforwards	44,000	188,000
Other	13,000	37,000
Change in valuation allowance	2,088,000	(5,413,000)
Total	<u>\$ -</u>	<u>\$ -</u>

The Company has determined that during 2010 it experienced a “change of ownership” as defined by Section 382 of the Internal Revenue Code. As such, utilization of net operating loss carryforwards and credits generated before the 2010 change in ownership will be limited to approximately \$207,000 per year until such carryforwards are fully utilized. The pre change net operating loss carryforward was approximately \$6,000,000.

The Company files income tax returns in the U.S. federal jurisdiction, Arizona, and California. It also files income tax returns in Nova Scotia, Canada. Because the Company is carrying forward federal and state net operating losses from 2006, the Company is subject to U.S. federal and state income tax examinations by tax authorities for all years since 2006. The Company does not have a liability for any uncertain tax positions. As of December 31, 2018, no accrued interest or penalties are recorded in the financial statements.

On December 22, 2017, the United States enacted the Tax Cuts and Jobs Act (“TCJA”), which instituted fundamental changes to the taxation of multinational corporations, including a reduction the U.S. corporate income tax rate to 21% beginning in 2018. As a result, the Company re-measured its deferred tax assets and deferred tax liabilities at the new lower corporate income tax rate and reduced its

net deferred tax assets by \$7,657,000, with a corresponding net adjustment to the valuation allowance of \$7,657,000 for the year ended December 31, 2017.

In December 2017, the SEC staff issued Staff Accounting Bulletin No. 118 ("SAB 118") to address the application of U.S. GAAP in situations when a registrant does not have the necessary information available, prepared, or analyzed (including computations) in reasonable detail to complete the accounting for certain income tax effects of the TCJA. The Company has recognized the provisional tax impacts related to the revaluation of the deferred tax assets and liabilities and included these amounts in its consolidated financial statements for the year ended December 31, 2017. The ultimate impact may differ from these provisional amounts due to, among other things, additional analysis, changes in interpretations and assumptions the Company has made, additional regulatory guidance that may be issued, and actions the Company may take as a result of the TCJA. The Company completed the accounting for all of the enacted date income tax effects of the TCJA during 2018. No adjustments were recognized to the provisional amounts recorded at December 31, 2017.

**10. Fair Value Measurements of Financial Instruments**

The following table summarizes our financial assets and liabilities measured at fair value on a recurring basis as of December 31, 2018:

Description	Level 1	Level 2	Level 3	Gains (Losses)
Goodwill (non-recurring)	\$ -	\$ -	\$ 537,550	\$ -
Intangibles, net (non-recurring)	\$ -	\$ -	\$ 1,781,448	\$ -

The following table summarizes our financial assets and liabilities measured at fair value on a recurring basis as of December 31, 2017:

Description	Level 1	Level 2	Level 3	Gains (Losses)
Goodwill (non-recurring)	\$ -	\$ -	\$ 803,118	\$ -
Intangibles, net (non-recurring)	\$ -	\$ -	\$ 676,436	\$ -

The Company recorded goodwill, intangible assets and an earn-out payable as a result its business combinations, and these assets were valued with the assistance of a valuation consultant and consisted of Level 3 valuation techniques.

The Company's financial instruments consist of cash, accounts receivable, accounts payable, and accrued liabilities. The estimated fair value of cash, accounts receivable, accounts payable and accrued liabilities approximate their carrying amounts due to the short-term nature of these instruments. None of these instruments are held for trading purposes.

**11. Commitments and Contingencies**

**Litigation**

As of the date of this report, there are no pending legal proceedings to which we or our properties are subject, except as described below and for routine litigation incurred in the normal course of business.

In February 2019, a complaint was filed against us and five of our employees in the U.S. Federal District Court for the Southern District of New York by mGage, LLC (mGage, LLC v. Glenn Stansbury, et al., No. 19-cv-1165-CM (S.D.N.Y. Filed 2/7/19)).

In the complaint, the plaintiff alleged that we and five of our employees, who previously worked at mGage, misappropriated confidential information belonging to mGage in violation of the federal Defend Trade Secrets Act, that those same individuals violated non-compete agreements through their employment at Mobivity and that we tortiously interfered with mGage's business opportunities. On February 7, 2019 the court granted a preliminary injunction enjoining Mobivity and the individual employees from working together at Mobivity or using any of the alleged confidential information. The court also directed expedited discovery. The court has set a conference date in the case for June 21, 2019. We deny all liability on the part of Mobivity and we intend to vigorously defend against this lawsuit.

**Operating Lease**

The Company has a lease agreement for 10,395 square feet, for its office facilities in Chandler, AZ through December 2020. Monthly rental payments, including common area maintenance charges, are \$20,416. As of December 31, 2018, we have a deferred rent balance for this lease of \$25,830 recorded in accordance with ASC 840.

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The Company also has a lease through April 2022 for 3,248 square feet of office space located in Halifax, Nova Scotia, at a monthly rental expense of \$3,458 per month, excluding common area maintenance charges. As of December 31, 2018, we have a deferred rent balance for this lease of \$7,450 recorded in accordance with ASC 840.

The minimum lease payments that are required over the next five years are shown below.

<b>Minimum Lease Payments</b>		
2019	\$	264,147
2020		271,848
2021		35,748
2022		11,916
2023		-
Thereafter		-
	\$	<u>857,740</u>

Rent expense was \$416,080 and \$335,750 for the years ended December 31, 2018 and 2017.

**12. Employee Benefit Plan**

The Company has an employee savings plan (the "Plan") pursuant to Section 401(k) of the Internal Revenue Code (the "Code"), covering all of its employees. Participants in the Plan may contribute a percentage of compensation, but not in excess of the maximum allowed under the Code. The Company may make contributions at the discretion of its Board of Directors. During the years ended December 31, 2018 and 2017, the Company made no contributions to the Plan.

**13. Related Party Transactions**

***Unsecured Promissory Note Investments in 2018***

During February 2018, we commenced an offer to certain investors, officers and directors of the Company of up to \$750,000 in Unsecured Promissory Notes (individually, a "Note" and collectively, the "Notes"). Each Note bears interest on the unpaid balance at the rate of fifteen percent (15%) per annum and the principal and accrued interest is due and payable no later than December 1, 2018. The Company may prepay any of the Notes without notice, subject to a two percent (2%) pre-payment penalty. As of the date of this report, Note investments of \$1,080,000 have been received from certain investors, officers and directors of the Company. The Note offer was conducted by our management and there were no commissions paid by us in connection with the solicitation. As of December 31, 2018, we have repaid \$1,000,000 and have \$80,000 as a remaining balance of these notes.

**14. Subsequent Events**

Since December 31, 2018 and through the date of this report, we issued unsecured notes in the principle aggregate amount of \$1,500,000, which is due February 2021. These notes bear interest on the unpaid balance at the rate of fifteen percent (15%) per annum. The Company may prepay any of the Notes without notice, subject to a two percent (2%) pre-payment penalty.

**Item 9. Changes in and Disagreements with Accountants on Accounting and Financial Disclosure**

None

**Item 9A. Controls and Procedures**

**Evaluation of Disclosure Controls and Procedures**

Disclosure controls and procedures are controls and other procedures that are designed to ensure that information required to be disclosed in our reports filed or submitted under the Securities Exchange Act of 1934 (the "Exchange Act") is recorded, processed, summarized and reported, within the time periods specified in the Securities and Exchange Commission's ("SEC") rules and forms. Disclosure controls and procedures include controls and procedures designed to ensure that information required to be disclosed in our reports filed or submitted under the Exchange Act is accumulated and communicated to management to allow timely decisions regarding required disclosure.

As required by paragraph (b) of Rules 13a-15 or 15d-15 under the Exchange Act, our management, with the participation of our president (our principal executive officer) and our chief financial officer (our principal financial officer and principal accounting officer) evaluated the effectiveness of our disclosure controls and procedures as of the end of the period covered by this annual report, being December 31, 2018 (the "Evaluation Date"). Based on such evaluation and subject to the foregoing, such officers have concluded that, as of the Evaluation Date, the Company's disclosure controls and procedures are not effective at the reasonable assurance level to ensure that information required to be disclosed by the Company in the reports that the Company files or submits under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms and to ensure that information required to be disclosed by the Company in the reports that the Company files or submits under the Exchange Act is accumulated and communicated to the Company's management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.

Because of the inherent limitations in all control systems, no evaluation of controls can provide absolute assurance that all control issues, if any, within our company have been detected. These inherent limitations include the realities that judgments in decision-making can be faulty and that breakdowns can occur because of simple error or mistake.

**Management's Report on Internal Control over Financial Reporting**

Our management is responsible for establishing and maintaining adequate internal control over financial reporting. The term "internal control over financial reporting" is defined as a process designed by, or under the supervision of, an issuer's principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

- (1) pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
- (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer.

Under the supervision of our Chief Executive Officer, being our principal executive officer, and our Chief Financial Officer, being our principal financial officer and principal accounting officer, we conducted an evaluation of the effectiveness of our internal control over financial reporting as of December 31, 2018 using the criteria established in Internal Control—2013 Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO). This evaluation included review of the documentation of controls, evaluation of the design effectiveness of controls, testing of the operating effectiveness of controls and a conclusion on this evaluation. Based on this evaluation under the criteria established in Internal Control – Integrated Framework, our management concluded that our internal control over financial reporting was not effective as of December 31, 2018.

This annual report does not include an attestation report of our registered public accounting firm regarding internal control over financial reporting. Management's report is not subject to attestation by our registered, public accounting firm pursuant to the rules of the Securities and Exchange Commission that permit us to provide only management's report in this annual report.

A material weakness is a deficiency, or combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of our company's annual or interim financial statements will not be prevented or

detected on a timely basis. In its assessment of the effectiveness of our internal control over financial reporting as of December 31, 2018, we determined that there was a control deficiency that constituted a material weakness:

- (1) Due to the Company not having formal Control procedures related to the approval of related party transactions.
- (2) Due to the one-time, non-recurring audit adjustments proposed by our external auditors and recorded in our accounting records as of December 31, 2018.

This control deficiency resulted in a reasonable possibility that a material misstatement of the annual or interim financial statements could not have been prevented or detected on a timely basis. As a result of the material weakness described above, we concluded that we did not maintain effective internal control over financial reporting as of December 31, 2018, based on criteria established in Internal Control—2013 Integrated Framework issued by COSO. Our management continues to evaluate remediation plans for the above deficiency. We plan to take steps to enhance and improve the design of our internal control over financial reporting.

#### **Changes in Internal Control**

There was no change in our internal control over financial reporting, as defined in Rules 13a-15(f) under the Exchange Act, that occurred during the fiscal year ended December 31, 2018 that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

#### **Item 9B. Other Information**

On December 31, 2017, William Van Epps resigned from our Board of Directors. Mr. Van Epps resignation did not result from any disagreement with the Company on any matters relating to the Company's operations, policies, or practices.

### **PART III**

#### **Item 10. Directors and Executive Officers**

##### **Directors and Executive Officers**

The following table sets forth information concerning our executive officers and directors, including their ages, as of March 15, 2019:

<b>Name</b>	<b>Age</b>	<b>Position</b>
Dennis Becker	45	Chief Executive Officer and Chairman of the Board
Charles Mathews	55	Chief Financial Officer
John Harris	70	Lead Director and Chairman of Compensation Committee
Philip Guarascio	77	Chairman of Governance and Nominating Committee and Director
Doug Schneider	56	Director
Tom Akin	66	Chairman of Audit Committee and Director

##### ***Dennis Becker - Chief Executive Officer, Executive Chairman and Director***

Dennis Becker was appointed our Chief Executive Officer and a Director effective as of our acquisition of Mobivity, Inc. in November 2010. Mr. Becker has also served as President and Chief Executive Officer of Mobivity, Inc. since September 2007. Our board of directors appointed Mr. Becker as Chairman of the Board of Directors effective as of March 31, 2017. Mr. Becker was a founder of Frontieric Corporation, a pioneer in providing complex call routing and merchant processing applications, where he was Chief Executive Officer from 2002 to 2005. Mr. Becker was also Chief Executive Officer of Bexel Technologies, which served solutions to large enterprises, from 1999 to 2001. Mr. Becker studied Computer Science at the University of Oregon and served in the United States Air Force.

Mr. Becker has extensive knowledge of the mobile message marketing industry. As a result of these and other professional qualifications, we have concluded that Mr. Becker is qualified to serve as a director.

##### ***Charles Mathews - Chief Financial Officer***

On March 26, 2018 the board of directors of the Company appointed Charles Mathews to serve as Chief Financial Officer of the Company. Mr. Mathews has over 25 years of executive financial management experience with both public and private companies. Since 2000, Mr. Mathews has been a sole practitioner as Charles B. Mathews, CPA, an accounting and business consulting firm in Phoenix, Arizona. From July 2016 to April 2018, Mr. Mathews served as the Chief Financial Officer of Enssolutions Group Inc. (TSXV: ENV.H), a Toronto exchange traded company providing manufacturing and distribution of environmentally responsible dust control emulsion products. From April 2015 to April 2016, Mr. Mathews served as Chief Financial Officer for mCig, Inc. and Vitacig,

Inc., publicly traded companies in the ecig and cannabis related sector. From September 2011 to November 2015, Mr. Mathews was CFO of Café Serendipity, a publicly traded company in the recreational marijuana sector. From October 2010 to April 2011, Mr. Mathews was Chief Financial Officer for Global Entertainment Corporation, a publicly traded integrated event and entertainment company that is engaged, through its wholly owned subsidiaries, in sports management, multipurpose events center development, facility and venue management and marketing, and venue ticketing. From December 2007 to March 2009, Mr. Mathews was Chief Financial Officer of Education 2020, a virtual education company focused on students in grades 6-12. From March 2004 to November 2007, Mr. Mathews was Executive Vice President and Chief Financial Officer of Quepasa Corporation, a publicly traded leading Hispanic internet portal. Mr. Mathews, a Certified Public Accountant, earned his B.A. in Business Administration from Alaska Pacific University and an M.B.A. from Arizona State University.

***John Harris – Non-Executive Chairman and Chairman of Compensation Committee***

Mr. Harris has been a director since January 2011. Mr. Harris has served as an operating partner with Glendon Todd Capital, a Dallas based private equity firm from February 2011 to February 2015. From 2010 to 2012 Mr. Harris was CEO and investor with Chemical Information Services, a leading provider of database services to the chemical and pharmaceutical industries. From 2006 to 2009, Mr. Harris was President and CEO of eTelecare Global Solutions; a business process outsourcing (“BPO”) company delivering technical support, sales, and customer care services to the Fortune 1000 market. In that capacity, he successfully led the company’s IPO, privatization and ultimate merger in 2009 that created a \$1 billion BPO services company. Previously, Mr. Harris served in various executive level positions with Electronic Data Systems over a 25-year period. Mr. Harris graduated from the University of West Georgia with a BBA and MBA and is on the Board of Advisors to the Richardson School of Business. He has held board positions with a number of public and private telecommunications and technology services companies, and he currently sits on the board of The Hackett Group and is the head of their compensation committee.

Mr. Harris has extensive knowledge of corporate management. As a result of these and other professional qualifications, we have concluded that Mr. Harris is qualified to serve as a director.

***Philip Guarascio - Chairman of Governance and Nominating Committee and Director***

Mr. Guarascio has served as a director since March 2014. Mr. Guarascio has been the Chairman and Chief Executive Officer of PG Ventures LLC since May 2000 where he serves as a marketing and advertising business consultant. He was Lead Executive, Marketing and Sales at the National Football League from 2003-2007 and has been a consultant for the William Morris Agency since October 2001. For 16 years, Mr. Guarascio was with General Motors where he served as Vice President of Corporate Advertising and Marketing primarily responsible for worldwide advertising resource management, managing consolidated media placement and before that as General Manager of Marketing and Advertising for General Motors' North American Operations. Mr. Guarascio introduced the GM Card and managed the General Motors corporate brand to a 20 percent increase in customer purchase consideration. He joined General Motors in 1985 after 21 years with the New York advertising agency, D'Arcy, Masius, Benton & Bowles.

Mr. Guarascio has extensive experience in the marketing and advertising industry. Based on this and other professional qualifications, we have concluded that Mr. Guarascio is qualified to serve as a director.

***Doug Schneider – Director***

Mr. Schneider has been a director since December 2010. Mr. Schneider has a twenty-year track record of leadership and success in launching, building, and managing high-tech service-oriented companies. He has served as Executive Vice President of the SMB Solutions for the Melbourne IT Group since July 2012 and oversees a \$75MM per year hosting and domain registration business across North American and Asia Pacific. From 2011 to 2012, Mr. Schneider served as CEO for Transaction Wireless, a venture backed technology company where he still resides on the board. From 2007 to 2010, Mr. Schneider was the CEO of Genea Energy, a clean tech company that provides an innovative and comprehensive SaaS based energy services platform for commercial office building portfolios. Mr. Schneider received a Bachelor's degree in Mechanical Engineering from University of California, Davis and an M.B.A. from the Kellogg School of Management at Northwestern University. He also serves as an industry advisor to Pelion Venture Partners, a venture capital firm focused on the information technology sector.

Mr. Schneider has extensive knowledge of corporate management. As a result of these and other professional qualifications, we have concluded that Mr. Schneider is qualified to serve as a director.

***Thomas Akin – Chairman of the Audit Committee and Director***

Mr. Akin has been a director since March 2015. Mr. Akin has been the Managing General Partner of Talkot Partners I, Talkot Partners II, LLC, Talkot Crossover Fund, LP, and Talkot Capital LLC since 1996 and was appointed as a director in March 2015. Mr. Akin served as the Chief Executive Officer of Dynex Capital Inc, from February 2008 to 2013. Mr. Akin had been with Merrill Lynch and Co., including served as its Managing Director of the Western United States for Merrill Lynch Institutional Services from 1991 to

1994 and as Regional Director of the San Francisco and Los Angeles regions for Merrill Lynch Institutional Services from 1981 to 1991. Mr. Akin had been with Salomon Brothers from 1978 to 1981. He has been an Executive Chairman of Dynex Capital Inc. since January 2014 and has been its the Chairman since May 30, 2003. He served as the Chairman of Infotec since 2001. Mr. Akin has been a Director of Acacia Technologies Group of Acacia Research Corp. since May 1998, Dynex Capital Inc, since May 2003, Acacia Research Corp. since May 1998 and eFax.com, Inc. since July 1996. He serves as a Director of ADX. He served as a Director CombiMatrix Corporation since May 1998. Mr. Akin holds a B.A. in Biology from the University of California at Santa Cruz and an M.B.A. from the University of California at Los Angeles.

Because Mr. Akin has extensive experience as a professional investor and public company director, we have concluded that Mr. Akin is qualified to serve as a director.

#### **Section 16(a) Beneficial Ownership Reporting Compliance**

Section 16(a) of the Securities Exchange Act of 1934, as amended, or the Exchange Act, requires our directors and executive officers, and persons who beneficially own more than ten percent of a registered class of our equity securities, to file with the SEC initial reports of ownership and reports of changes of ownership of common stock and our other equity securities. Officers, directors and greater than ten percent stockholders are required by SEC regulation to furnish us with copies of all Section 16(a) forms they file.

To our knowledge, based solely on a review of the copies of such reports furnished to us and written representations that no other reports were required, during the fiscal year ended December 31, 2018, our officers, directors and greater than ten percent beneficial owners complied with all Section 16(a) filing requirements applicable to them.

#### **Additional Information about our Board and its Committees**

All of our directors except Mr. Becker are considered by our board of directors to be "independent" as defined in Rule 5605 of the NASDAQ Marketplace Rules.

#### **Audit Committee**

During the year ended December 31, 2018, our audit committee was comprised of Thomas Akin, John Harris, and Doug Schneider. Our board of directors has appointed Mr. Akin to serve as chairman of the audit committee effective as of April 1, 2017. All members of our audit committee are independent, as independence is defined in Rule 5605(a)(2) of the NASDAQ Marketplace Rules.

#### **Compensation Committee**

During the year ended December 31, 2018, our compensation committee was comprised of John Harris, Phil Guarascio and Tom Akin. Mr. Harris currently serves as compensation committee chair.

#### **Governance and Nominating Committee**

During the year ended December 31, 2018, our governance and nominating committee was comprised of Phil Guarascio, John Harris and Thomas Akin. Mr. Guarascio currently serves as governance and nominating committee chair.

#### **Committee Interlocks and Insider Participation**

None of our executive officers serve on the board of directors of another entity, whose executive officers serves on our board of directors.

#### **Code of Ethics**

We have adopted a code of ethics for all our employees, including our chief executive officer, principal financial officer and principal accounting officer or controller, and/or persons performing similar functions, which is available on our website, under the link entitled "Code of Ethics".

**Item 11. Executive Compensation**

The following table summarizes the total compensation earned by our Chief Executive Officer and our other two most highly paid executive officers for the years ended December 31, 2018 and 2017.

**Summary Compensation Table\***

Name and Principal Position	Year	Salary	Bonus	Stock Awards (1)	Option Awards (1)	All Other Compensation	Total
Dennis Becker, Chairman & CEO	2018	\$ 310,000	\$ -	\$ -	\$ -	\$ -	\$ 310,000
	2017	\$ 333,556	\$ -	\$ -	\$ 430,685	\$ -	\$ 764,241
Charles Mathews, CFO	2018	\$ 149,231	\$ -	\$ -	\$ 265,575	\$ -	\$ 414,806

\* In accordance with the rules and regulations promulgated by the Securities and Exchange Commission, the table omits columns that are not applicable.

(1) The value of the stock and stock option compensation was computed using the Black-Scholes Option Pricing Model and represents the aggregate grant date fair value computed in accordance with ASC Topic 718. For information on the method and assumptions used to calculate the compensation costs, see Note 7 to our audited consolidated financial statements contained herein.

The following table presents the outstanding option awards held by each of our named executive officers as of December 31, 2018, including the value of the options awards.

**Outstanding Equity Awards at December 31, 2018\***

Name	Number of Securities Underlying Unexercised Options (#) Exercisable	Equity Incentive Plan Awards; Number of Securities Underlying Unexercised Unearned Options (#) Unexercisable	Option Exercise Price	Option Expiration Date
Dennis Becker, CEO & Chairman	100,000	-	\$ 1.28	1/22/2025
Dennis Becker, CEO & Chairman	1,251,978	-	\$ 1.80	6/17/2023
Dennis Becker, CEO & Chairman	458,334	541,666	\$ 0.60	5/15/2027
Charles Mathews, CFO	68,750	231,250	\$ 1.30	2/16/2025

\* In accordance with the rules and regulations promulgated by the Securities and Exchange Commission, the table omits columns that are not applicable.

**Employment Agreements**

**Dennis Becker**

On January 11, 2011, we entered into an employment agreement with Dennis Becker. Under the terms of the agreement, Mr. Becker will serve as our President and Chief Executive Officer for an initial term of three years from December 24, 2010 (the "Effective Date"). Unless terminated no less than 90 days prior to the expiration date by either party, the agreement is renewed automatically for successive one-year periods. Under the agreement, Mr. Becker is paid a base annual salary of \$120,000. The base salary is subject to an annual increase at the sole discretion our board of directors. In addition to regular annual increases, the base salary will be increased by \$30,000 (up to a cumulative maximum of \$60,000) for each acquisition of the stock or all or substantially all of the assets of a third party entity, or the formation of joint ventures resulting in operating cash flows minus capital expenditures and dividends of no less than \$25,000 during a three month period ending six months after the completion of each such acquisition or formation of such joint venture. In addition, his salary will be increased to \$225,000 in the event we complete a financing transaction of no less than \$3,000,000 and we complete one acquisition. The board may further award him, at its sole discretion, an annual bonus of up to 50% of his base salary and grant him stock options.

Effective March 30, 2015, based on the successful results of the March 2015 capital raise, the board increased Mr. Becker's annual base salary by \$50,000 to \$275,000, awarded him a bonus payment of \$30,000, and also granted him options to purchase 100,000 shares of our common stock at an exercise price of \$1.28 with 25% vesting after 1 year from date of grant and 1/36 per month afterwards.

Effective November 17, 2016, the board increased Mr. Becker's annual base salary by \$35,000 to \$310,000 based on his annual merit review.



On May 15, 2017, the Company has granted Mr. Becker an option to purchase 1,000,000 shares of Company common stock, over a ten-year period from the date of grant, at an exercise price of \$0.60 per share, representing the closing price of the Company's common stock on May 15, 2017. The options will vest and first become exercisable at the rate of 1/48th per month over a 48-month period commencing on the date of grant. Mr. Becker's options shall otherwise be on terms and conditions contained in the Company's current equity incentive plan.

If the agreement is terminated by us without cause (as defined in the agreement) or the we notify Mr. Becker that we will not renew the agreement, we will be required to pay him a severance payment equal to six months of his base salary payable in regular intervals following such termination or expiration of the agreement.

The agreement includes non-compete, non-solicitation, intellectual property assignment and confidentiality provisions that are customary in our industry.

**Charles Mathews**

On March 26, 2018, we appointed Charles Mathews as Chief Financial Officer. In connection with the appointment, the Company entered into an employment agreement dated March 26, 2018 with Mr. Mathews.

Pursuant to his employment agreement, the Company agreed to pay Mr. Mathews an annual base salary of \$200,000, subject to annual review by the board. Mr. Mathews will be eligible for annual performance bonuses of up to 30% of his base salary for meeting key performance requirements, quotas, and assigned objectives determined annually by the board. Also pursuant to his employment agreement with the Company, Mr. Mathews is eligible to participate in all benefits, plans, and programs, including improvements or modifications of the same, which are now, or may hereafter be, available to other executive employees of Company. Mr. Mathews' employment agreement contains standard provisions concerning noncompetition, nondisclosure and indemnification.

Pursuant to Mr. Mathews' employment agreement, the Company has granted Mr. Mathews an option to purchase 300,000 shares of Company common stock, over a ten-year period from the date of grant, at an exercise price of \$1.10 per share, representing the closing price of the Company's common stock on March 26, 2018. The options will vest and first become exercisable at the rate of 1/48th per month over a 48-month period commencing on the date of grant. Mr. Mathews' options shall otherwise be on terms and conditions contained in the Company's current equity incentive plan.

In the event Mr. Mathews' employment with the Company is terminated by the Company without cause, the Company shall pay Mr. Mathews, in addition to all other amounts then due and payable, six (6) additional monthly installments of his base salary.

The agreement includes non-compete, non-solicitation, intellectual property assignment and confidentiality provisions that are customary in our industry.

**Non-Employee Director Compensation**

**2018 Director Compensation Table**

Name	Fees Earned	Stock Awards	Option Awards	Non-Equity Incentive Plan Compensation	Deferred Compensation Earnings	All Other Compensation	Total
Doug Schneider	\$ 65,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 65,000
John Harris	\$ 65,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 65,000
Thomas Akin	\$ 65,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 65,000
Phil Guarascio	\$ 65,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 65,000

As of December 31, 2018, the Company recorded an expense of \$65,000 per director related to restricted stock units for members of our board of directors for the twelve months ended December 31, 2018.

**Item 12. Security Ownership of Certain Beneficial Owners and Management**

The following table sets forth as of March 15, 2019, certain information regarding the beneficial ownership of our common stock. The table sets forth the beneficial ownership of (i) each person who, to our knowledge, beneficially owns more than 5% of our outstanding shares of Common Stock; (ii) each of our directors and executive officers; and (iii) all of our executive officers and directors as a group. The number of shares owned includes all shares beneficially owned by such persons, as calculated in accordance with Rule 13d-3 promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The number of shares beneficially owned by a person includes shares of common stock underlying options or warrants held by that person that are currently exercisable

or exercisable within 60 days of March 15, 2018. The shares issuable pursuant to the exercise of those options or warrants are deemed outstanding for computing the percentage ownership of the person holding those options and warrants but are not deemed outstanding for the purposes of computing the percentage ownership of any other person. Unless otherwise indicated, the address of each shareholder is c/o the Company, 55 N. Arizona Place, Suite 310, Chandler, AZ 85225.

Name of Beneficial Owner	Shares Beneficially Owned	Percentage of Shares Beneficially Owned (1)
Dennis Becker (2)	2,085,648	4 %
Charles Mathews (3)	88,750	
Doug Schneider (4)	301,518	* %
John Harris (5)	337,288	* %
Phil Guarascio (6)	249,391	* %
Thomas Akin (7)	9,009,673	20 %
Executive Officers and Directors as a Group (six persons)	12,072,268	26 %
<b>5% Beneficial Owners</b>		
Ballyshannon Family Partners	4,936,082	11 %
Cornelis F. Wit	3,754,169	8 %
Porter Partners, L.P.	3,531,612	8 %

\* Denotes 1% or less

- (1) Applicable percentage of ownership is based upon 37,039,448 shares of common stock outstanding as of March 15, 2019.
- (2) Includes 1,893,645 shares of common stock issuable pursuant to presently exercisable stock options, including options that will vest within 60 days of March 15, 2019.
- (3) Includes 68,750 shares of common stock issuable pursuant to presently exercisable stock options, including options that will vest within 60 days of March 15, 2019.
- (3) Includes 161,203 shares of common stock issuable upon settlement of restricted stock units, including restricted stock units that will vest within 60 days of March 15, 2019. Includes 74,447 shares of common stock owned of record by The Schneider Family Trust.
- (4) Includes 211,456 shares of common stock issuable upon settlement of restricted stock units, including restricted stock units that will vest within 60 days of March 15, 2019.
- (5) Includes 172,394 shares of common stock issuable upon settlement of restricted stock units, including restricted stock units that will vest within 60 days of March 15, 2019.
- (7) Includes 4,257,242 shares of Common Stock owned of record by Talkot Fund, L.P. and 110,527 shares of common stock issuable upon settlement of restricted stock units, including restricted stock units that will vest within 60 days of March 15, 2019.

### Item 13. Certain Relationships and Related Transactions, and Director Independence

#### Certain Relationships and Related Transactions

During February 2018, we conducted a private placement of Unsecured Promissory Notes (individually, a “Note” and collectively, the “Notes”) in the aggregate principal amount of \$1,080,000 to certain investors, officers and directors of the Company. Each Note bears interest on the unpaid balance at the rate of fifteen percent (15%) per annum and the principal and accrued interest is due and payable no later than December 1, 2018. We may prepay any of the Notes without notice, subject to a two percent (2%) pre-payment penalty. The Note offer was conducted by our management and there were no commissions paid by us in connection with the solicitation. The Note offer was conducted by our management and there were no commissions paid by us in connection with the solicitation. As of December 31, 2018, we have repaid \$1,000,000 and have \$80,000 as a remaining balance of these notes.

The board conducts an appropriate review of and oversees all related party transactions on a continuing basis and reviews potential conflict of interest situations where appropriate. The board has not adopted formal standards to apply when it reviews, approves or ratifies any related party transaction. However, the board has followed the following standards: (i) all related party transactions must be fair and reasonable to us and on terms comparable to those reasonably expected to be agreed to with independent third parties for the same goods and/or services at the time they are authorized by the board and (ii) all related party transactions should be authorized, approved or ratified by the affirmative vote of a majority of the directors who have no interest, either directly or indirectly, in any such related party transaction.

**Indemnification Agreements with Directors and Executive Officers**

We have entered into indemnity agreements with certain directors, officers and other key employees of ours under which we agreed to indemnify those individuals under the circumstances and to the extent provided for in the agreements, for expenses, damages, judgments, fines, settlements and any other amounts they may be required to pay in actions, suits or proceedings which they are or may be made a party or threatened to be made a party by reason of their position as a director, officer or other agent of ours, and otherwise to the fullest extent permitted under Nevada law and our bylaws. We also have an insurance policy covering our directors and executive officers with respect to certain liabilities, including liabilities arising under the Securities Act of 1933, as amended, or otherwise. We believe that these provisions and insurance coverage are necessary to attract and retain qualified directors, officers and other key employees.

**Item 14. Principal Accounting Fees and Services**

The following table represents aggregate fees billed to us for the years ended December 31, 2018 and 2017 by M&K CPAs, our principal auditors for such periods. All fees described below were approved by the board of directors.

	2018		2017	
Audit Fees	\$	65,172	\$	64,000
Audit-Related Fees		41,100		25,200
Tax Fees		3,900		6,416
All Other Fees		-		2,950
Total Fees	\$	<u>110,172</u>	\$	<u>98,566</u>

**Board of Directors' Pre-Approval Policies and Procedures**

The board of directors has adopted a policy for the pre-approval of audit and non-audit services rendered by our independent auditors, M&K CPAs. The policy generally pre-approves specified services in the defined categories of audit services, audit-related services and tax services up to specified amounts. Pre-approval may also be given as part of the board's approval of the scope of the engagement of the independent auditors or on an individual explicit case-by-case basis before the independent auditors are engaged to provide each service.

The board of directors has determined that the rendering of the services other than audit services by M&K CPAs is compatible with maintaining the principal accountant's independence.

**PART IV**

**Item 15. Exhibits and Financial Statement Schedules.**

(a)(1) Financial Statements

The Financial Statements of Mobivity Holdings Corp. and Report of Independent Registered Public Accounting Firm are included in a separate section of this Form 10-K beginning on page F-1.

(a)(2) Financial Statement Schedules

The schedules required to be filed by this item have been omitted because of the absence of conditions under which they are required, or because the required information is included in the financial statements or the notes thereto.

(a)(3) Exhibits

<b>Exhibit Number</b>	<b>Description</b>
3.1	<a href="#">Articles of Incorporation (1)</a>
3.2	<a href="#">Bylaws (1)</a>
3.3	<a href="#">Amendment to Bylaws (2)</a>
3.4	<a href="#">Articles of Merger filed August 6, 2012 (4)</a>
3.5	<a href="#">Amendment No. 2 to the Bylaws, effective as of May 20, 2013 (8)</a>
3.6	<a href="#">Amendment to Articles of Incorporation filed with the Nevada Secretary of State on November 12, 2013 (6)</a>
4.6	<a href="#">Form of Common Stock Purchase Warrant issued pursuant to Securities Purchase Agreement dated March 2, 2015 (7)</a>
10.1	<a href="#">Employment Agreement dated December 24, 2010 with Dennis Becker (3)**</a>
10.2	<a href="#">Employment Agreement dated March 26, 2018 with Charles Mathews (9)**</a>
10.4	<a href="#">2013 Stock Incentive Plan of the Company adopted July 18, 2013 (5) **</a>
10.5	<a href="#">Securities Purchase Agreement dated June 28, 2018 between the Company and the Buyers named therein (10)</a>
10.6	<a href="#">Asset Purchase Agreement dated November 14, 2018 between the Company and Belly, Inc. *</a>
10.7	<a href="#">Loan and Security Agreement dated November 14, 2018 between the Company and Wintrust Bank *</a>
21.1	<a href="#">List of Subsidiaries *</a>
31.1	<a href="#">Certification of Dennis Becker, Chief Executive Officer, pursuant to Section 302 of the Sarbanes-Oxley Act of 2002*</a>
31.2	<a href="#">Certification of Charles Mathews, Chief Financial Officer, pursuant to Section 302 of the Sarbanes-Oxley Act of 2002*</a>
32.1	<a href="#">Certification of Dennis Becker, Chief Executive Officer, and Charles Mathews, Chief Financial Officer, pursuant to Section 906 of the Sarbanes-Oxley Act of 2002*</a>
101.INS	XBRL Instance Document*
101.CAL	XBRL Taxonomy Extension Calculation Linkbase Document*
101.LAB	XBRL Taxonomy Extension Label Linkbase Document*
101.PRE	XBRL Taxonomy Extension Presentation Linkbase Document*
101.DEF	XBRL Taxonomy Extension Definition Linkbase Document*

\* Filed herewith

\*\* Indicates management compensatory plan, contract or arrangement

- (1) Incorporated by reference to the Registration Statement on Form S-1 filed with the SEC on October 20, 2008, File No. 333-154455
- (2) Incorporated by reference to the Company's Current Report on Form 8-K filed December 2, 2011
- (3) Incorporated by reference to the Company's Current Report on Form 8-K filed January 18, 2011
- (4) Incorporated by reference to the Company's Current Report on Form 8-K filed August 10, 2012
- (5) Incorporated by reference to the Company's Quarterly Report on Form 10-Q filed August 14, 2013
- (6) Incorporated by reference to the Company's Quarterly Report on Form 10-Q filed November 14, 2013
- (7) Incorporated by reference to the Company's Current Report on Form 8-K filed March 6, 2015
- (8) Incorporated by reference to the Company's Current Report on Form 8-K filed May 24, 2013
- (9) Incorporated by reference to the Company's Annual Report on Form 10-K filed on April 11, 2018
- (10) Incorporated by reference to the Company's Current Report on Form 8-K filed July 5, 2018

**SIGNATURES**

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, as amended, the Registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

DATE: April 15, 2019

**MOBIVITY HOLDINGS CORP.**  
/s/ Dennis Becker  
Dennis Becker  
Chief Executive Officer

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the dates indicated.

<u>Signature</u>	<u>Title</u>	<u>Date</u>
<u>/s/ Dennis Becker</u>	Chief Executive Officer and Chairman of the Board	April 15, 2019
<u>/s/ Charles Mathews</u>	Chief Financial Officer	April 15, 2019
<u>/s/ Philip Guarascio</u>	Director	April 15, 2019
<u>/s/ John Harris</u>	Director	April 15, 2019
<u>/s/ Doug Schneider</u>	Director	April 15, 2019
<u>/s/ Thomas Akin</u>	Director	April 15, 2019

**ASSET PURCHASE Agreement**

by and among

**MOBIVITY HOLDINGS CORP.,**

**MOBIVITY, INC.**

and

**BELLY, INC.**

**ASSET PURCHASE agreement**

ASSET PURCHASE AGREEMENT, dated as of November 14, 2018 (this "Agreement"), by and among Mobivity Holdings Corp., a Nevada corporation ("Parent"), Mobivity, Inc., a Nevada corporation ("Buyer"), and Belly, Inc., a Delaware corporation ("Seller").

**WITNESSTH:**

WHEREAS, Seller provides: (i) digital loyalty programs for small and mid-sized businesses under the name "Belly" (the "Acquired Business") and (ii) a loyalty and customer engagement platform business (the "Hatch Business");

WHEREAS, Buyer desires to purchase substantially all of the assets of the Business from Seller, and Seller desires to sell substantially all of the assets of the Business to Buyer, upon the terms and subject to the conditions hereinafter set forth; and

NOW, THEREFORE, the parties hereto agree as follows:

**ARTICLE I  
DEFINITIONS**

**Section 1.01**     **Definitions.**

---

(a) The following terms, as used herein, have the following meanings:

"Business Day" means a day (i) other than Saturday or Sunday and (ii) on which commercial banks are open for business in New York, New York.

"Closing Date" means the date of the Closing.

"Code" shall mean the United States Internal Revenue Code of 1986, as amended.

"GAAP" means United States generally accepted accounting principles applied on a consistent basis.

"Hatch Assets" means any asset of Seller used, to any material extent, in the conduct of the Hatch Business.

"Legal Requirements" means any federal, state, foreign, local, municipal or other law, statute, constitution, principle of common law, resolution, ordinance, code, edict, decree, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Entity and any orders, writs, injunctions, awards, judgments and decrees applicable to the Seller or to any of its assets, properties or businesses.

"Lien" means, with respect to any asset, any mortgage, lien, pledge, charge, security interest or encumbrance of any kind in respect of such asset.

"Net Working Capital" means the result of (i) the sum of all of the accounts receivable (net of allowance for doubtful accounts), inventory and prepaid expenses (each as defined by and determined in accordance with GAAP) included in the Acquired Assets as of Closing Date, *minus* (ii) the total current liabilities (as defined by and determined in accordance with GAAP but other than deferred revenue obligations) included in the Assumed Liabilities as of the Closing Date.

"Net Working Capital Target" means an amount equal to \$0.

"Permitted Liens" mean (a) Liens for taxes not yet due or being contested in good faith, and (b) Liens which do not materially detract from the value of any Acquired Asset as now used, or materially interfere with any present or intended use of any Acquired Asset.

"Person" means an individual, a corporation, a limited liability company, a partnership, an association, a trust or other entity or organization, including a government or political subdivision or an agency or instrumentality.

"Post-Closing Tax Period" means any Tax period (or portion thereof) ending after the Closing Date.

“Pre-Closing Tax Period” means any Tax period (or portion thereof) ending on or before the close of business on the Closing Date.

“Proceeding” means any action, arbitration, audit, hearing, investigation, litigation, suit (whether civil, criminal, administrative, investigative or informal) commenced, brought, conducted, or heard by or before, or otherwise involving, any Governmental Entity or arbitrator.

“Seller License Agreement” means the Hatch Loyalty Software as a Service (SaaS) License Agreement by and between Seller and Buyer, in the form of **Exhibit A** hereto.

“Taxes” means any net income, alternative or add-on minimum tax, gross income, gross receipts, sales, uses, ad valorem, franchise, capital, paid-up capital, profits, greenmail, license, withholding, payroll, employment, excise, severance, stamp, occupation, premium, property, environmental or windfall profit tax, custom, duty or other tax, governmental fee or other like assessment or charge of any kind whatsoever, together with any interest or any penalty, addition to tax or additional amount imposed by any Governmental Entity responsible for the imposition of any such tax.

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

<u>Term</u>	<u>Section</u>
Acquired Assets	2.01
Acquired Business	Recitals
Assumed Liabilities	2.03
Business Products	3.15(a)
Closing	2.07
Contracts	2.01(c)
Damages	7.02
Employee	3.16(h)
Excluded Assets	2.02
Excluded Contracts	2.02(a)
Excluded Liabilities	2.04
Fundamental Representations	7.01
Governmental Entity	3.03
Indemnified Parties	7.02
Intellectual Property Rights	3.15(a)
Material Adverse Effect	3.01
Permits	3.12
Purchase Price	2.06
Seller Balance Sheet	3.08
Seller Balance Sheet Date	3.06
Seller Employee Plan	3.16(h)
Technology	3.15(a)
Third Party Claim	7.03(a)
Transferred Employee	5.03(f)



**ARTICLE II  
PURCHASE AND SALE**

**Section 2.01 Purchase and Sale.** Upon the terms and subject to the conditions of this Agreement, Buyer agrees to purchase from Seller and Seller agrees to sell, transfer, assign and deliver, or cause to be sold, transferred, assigned and delivered, to Buyer at Closing, free and clear of all Liens, other than Permitted Liens, all of the assets, properties and business, other than the Excluded Assets, of every kind and description, wherever located, real, personal or mixed, tangible or intangible, owned, held or used exclusively in the conduct of the Acquired Business by Seller as the same shall exist on the Closing Date, including all of the assets shown on the Seller Balance Sheet and not disposed of in the ordinary course of business, and all assets of the Acquired Business thereafter acquired by Seller (the "Acquired Assets"), and including, without limitation, all right, title and interest of Seller in, to and under:

- (a) All accounts receivable of the Acquired Business;
- (b) All personal property and interest therein, including all equipment, furniture, office equipment, communications equipment, computer equipment (including laptops) identified on the Acquired Business's fixed asset schedule attached as Schedule 2.01(b);
- (c) All rights under all contracts, agreements, leases, licenses, commitments, sales and purchase orders and other instruments, including without limitation the items listed on Sections 3.11 and 3.15 of the Seller Disclosure Schedule (collectively, the "Contracts"), other than the Excluded Contracts;
- (d) All prepaid expenses and deposits relating to the operation of the Acquired Business, including those identified on Schedule 2.01(d);
- (e) All rights, claims, credits, causes of action or rights of set-off against third parties relating to the Acquired Assets, including (without limitation) un-liquidated rights under manufacturers' and vendors' warranties;
- (f) All Technology and Intellectual Property Rights related to the Acquired Business, including but not limited to: (i) the goodwill associated with any trademarks or service; (ii) rights to sue for past, present and future infringements or misappropriation of any Technology or Intellectual Property Rights, including the right to recover damages therefore, and the right to receive royalties, license fees and income from any Technology or Intellectual Property Rights; and (iii) any rights at common law directly arising from any Technology or Intellectual Property Rights and any licenses with respect to any Technology or Intellectual Property Rights, including, without limitation, those listed on Sections 3.15(c) of the Seller Disclosure Schedule;
- (g) All social media presence related to the Acquired Business, including (without limitation) all associated passwords and other account management information in Seller's possession;

(h) All transferable licenses, permits or other governmental authorizations affecting, or relating in any way to, the Acquired Business, including (without limitation) the items listed on Section 3.12 of the Seller Disclosure Schedule;

(i) All books, records, files and papers, whether in hard copy or computer format, used in the Acquired Business, including (without limitation) engineering information, sales and promotional literature, manuals and data, sales and purchase correspondence, lists of present and former suppliers, lists of present and former customers, and any information relating to Tax imposed on the Acquired Assets; and

(i) All goodwill associated with the Acquired Business or the Acquired Assets, together with the right to represent to third parties that Buyer is the successor to the Acquired Business.

**Section 2.02 Excluded Assets.** Buyer expressly understands and agrees that the following assets and properties of Seller (the "Excluded Assets") will be excluded from the Acquired Assets:

(a) Any Contract listed on Schedule 2.02(a) (the "Excluded Contracts");

(b) Any Acquired Assets sold or otherwise disposed of in the ordinary course of the operation of the Acquired Business and not in violation of any provisions of this Agreement during the period from the date hereof until the Closing Date;

(c) Cash and cash equivalents;

(d) All bank accounts (other than merchant settlement and processing accounts relating to the Acquired Business);

(e) Insurance and employee benefit plans; and

(f) Any Hatch Assets.

**Section 2.03 Assumption of Liabilities.** Upon the terms and subject to the conditions of this Agreement, Buyer agrees, effective at the time of the Closing to assume only the following liabilities and obligations of Seller (the "Assumed Liabilities"):

(a) Obligations to be performed after the Closing under the Contracts (other than the Excluded Contracts), but specifically excluding any liability or obligation that arises out of or relates to any warranty or indemnification obligation thereunder or any default, breach, violation or failure to perform or comply with the terms thereof relating to periods prior to, or that occurred on or before, the Closing Date; and

(b) the liabilities or obligations for current liabilities (as defined by and determined in accordance with GAAP) which are included in the calculation of the Net Working Capital.

**Section 2.04 Excluded Liabilities.** Notwithstanding any provision in this Agreement or any other writing to the contrary, Buyer is assuming only the Assumed Liabilities and is not assuming any other liability or obligation of Seller of whatever nature whether presently in existence or arising hereafter. All such other liabilities and obligations shall be retained by and remain obligations and liabilities of Seller (all such liabilities and obligations not being assumed being herein referred to as the “Excluded Liabilities”), and Seller will pay all such Excluded Liabilities as they become due. Without limiting the foregoing, none of the following shall be Assumed Liabilities (and each shall be an Excluded Liability) for the purposes of this Agreement:

- (a) Any liability or obligation for Tax arising from or with respect to the Acquired Assets or the operations of the Acquired Business which is incurred in or attributable to the Pre-Closing Tax Period;
- (b) Any liability or obligation for any accounts payable or other accruals arising on or prior to the Closing Date, unless expressly assumed by Buyer pursuant to Section 2.03(b);
- (c) Any liability or obligation under the Contracts that arises after the Closing Date but that arises out of or relates to any default, breach, violation or failure to perform or comply with the terms thereof that occurred on or before the Closing Date;
- (d) Any liability or obligation under any Excluded Contract whether arising before or after the Closing Date;
- (e) Any indemnification and warranty obligations, arising out of or related to any products or services, manufactured, distributed or sold in connection with the Acquired Business on or prior to the Closing Date;
- (f) Any liability or obligation relating to employees of, or independent contractors or consultants to, the Acquired Business for all periods ending on or prior to the Closing Date, including, without limitation, any liability or obligation under any Seller Employee Plan, workers’ compensation claims, disability and occupational diseases in each case without regard to whether such injuries, claims, conditions, events and occurrences are known or otherwise manifest on or prior to the Closing Date and any bonuses (including, without limitation, a pro rata portion of any bonus paid by Buyer to any Transferred Employee in respect of any period, a portion of which includes the period on or prior to the Closing Date), vacation pay, or severance or retention obligations to such employees, whether or not accrued on Seller’s books and records; and
- (g) Any liability or obligation relating to any Excluded Asset.

**Section 2.05 Assignment of Contracts and Rights.** Anything in this Agreement to the contrary notwithstanding, this Agreement shall not constitute an agreement to assign any Acquired Asset or any claim or right or any benefit arising thereunder or resulting therefrom if an attempted assignment thereof, without the consent of a third party thereto, would constitute a breach or other contravention thereof to in any way adversely affect the rights of Buyer or Seller thereunder. Each of Seller and Buyer will use their best efforts (but without any

payment of money by Seller or Buyer) to obtain the consent of the other parties to any such Acquired Asset or any claim or right or any benefit arising thereunder for the assignment thereof to Buyer as Buyer may request. If such consent is not obtained, or if an attempted assignment thereof would be ineffective or would adversely affect the rights of Seller thereunder so that Buyer would not in fact receive all such rights, each of Seller and Buyer will cooperate in a mutually agreeable arrangement under which Buyer would obtain the benefits and assume the obligations thereunder in accordance with this Agreement, including subcontracting, sublicensing, or subleasing to Buyer, or under which Seller would enforce for the benefit of Buyer, with Buyer assuming Seller's obligations, any and all rights of Seller against a third party thereto. Seller will promptly pay to Buyer when received all monies received by Seller under any Acquired Asset or any claim or right or any benefit arising thereunder. In such event, Seller, and Buyer shall, to the extent the benefits therefrom and obligations thereunder have not been provided by alternative arrangements satisfactory to Buyer and Seller, negotiate in good faith an adjustment in the consideration paid by Buyer for the Acquired Assets.

**Section 2.06     Purchase Price.**

- (a)     The purchase price for the Acquired Assets (the "Purchase Price") is \$3,000,000 in cash.
- (b)     The Purchase Price will be paid as provided in this Section 2.06 and in Section 2.07, and shall be adjusted (plus or minus) by the Closing Working Capital Adjustment as provided in Section 2.08 hereof.
- (c)     The Purchase Price will be paid to Seller at Closing to satisfy the Seller liabilities set forth on Schedule 2.06(c) (the "Seller Obligations").

**Section 2.07     Closing.** The closing (the "Closing") of the purchase and sale of the Acquired Assets and the assumption of the Assumed Liabilities hereunder shall take place at the offices of Buyer in Chandler, Arizona (or via electronic exchange of closing documentation in PDF or other mutually acceptable format) as soon as possible, but in no event later than three Business Days, after the satisfaction of the conditions set forth in Article VI, or at such other time or place as Buyer and Seller may agree. At the Closing,

- (a)     Buyer will deliver the Purchase Price as provided in Section 2.06(c);
- (b)     Seller and Buyer will enter into the Seller License Agreement and Buyer will pay the license fee of \$1,000,000 in cash to Seller by wire transfer of immediately available funds to the account designated by Seller;
- (c)     Seller and Buyer will enter into an Assignment and Assumption Agreement substantially in the form attached hereto as **Exhibit B**; and

**Section 2.08**     Seller will deliver to Buyer such deeds, bills of sale, assignment, certificates or title, documents and other instruments of transfer and conveyance as may reasonably be requested by Buyer, each in form and substance satisfactory to Buyer and its legal counsel and executed by Seller. Closing Working Capital Adjustment. The Purchase Price will be subject to adjustment as follows:

(a) Three days prior to the closing, Seller will deliver to Buyer a statement (in the form of Schedule 2.08 hereto) setting forth the Seller's good faith estimate of the Net Working Capital as of the close of business on the day prior to the Closing Date (the "Estimated Working Capital Statement") prepared in accordance with GAAP (the "Estimated Working Capital").

(b) Within 45 days after the Closing Date, Buyer will prepare and deliver to Seller a reasonably detailed statement (the "Closing Working Capital Statement") of the Net Working Capital as of the close of business on the day prior to the Closing Date (the "Closing Working Capital"). The Closing Working Capital Statement shall be prepared in accordance with GAAP and shall be in the same format (and include each of the same matters contained in) as the Estimated Working Capital Statement. Following the Closing Date, Buyer agrees that it will cooperate with Seller and its advisors in making available to Seller and its advisors such books, records, financial information, work papers, and supporting data, as reasonably requested, in connection with Seller's review of the Closing Working Capital Statement.

(c) Seller may deliver a written notice to Buyer within 30 days after Seller's receipt of the Closing Working Capital Statement stating whether Seller has any objections to the Closing Working Capital, describing in reasonable detail any objections thereto. Failure to give an objection notice on or before the expiration of such 30-day period (or written notification from Seller that it has no objection to the Closing Working Capital Statement) will constitute acceptance and approval of the Closing Working Capital set forth therein, and such Closing Working Capital will be final and binding upon the Parties.

(d) If Seller notifies Buyer of any objection to the Closing Working Capital Statement within the time period set forth in Section 2.08(c), Buyer and Seller will attempt in good faith to reach an agreement as to the matter in dispute. If such parties fail to resolve any such disputed item within 15 days after receipt of timely notice of such objection, then any such disputed item will be submitted to and determined by a regional independent accounting firm mutually selected by Buyer and Seller within 7 days of such 15-day period (the "Independent Accounting Firm"). The Independent Accounting Firm will be given reasonable access to records of Buyer and Seller to resolve any disputed item regarding the Closing Working Capital Statement, and will be instructed to submit its determination in writing with respect to any disputed matters to Buyer and Seller within 20 days. The Independent Accounting Firm will address only those items properly disputed in accordance with Section 2.08(c) and the Independent Accounting Firm may not assign a value greater than the greatest value or lower than the lowest value for any such item claimed by Buyer, on the one hand, or Seller, on the other hand. The fees and expenses of the Independent Accounting Firm incurred in resolving the disputed matter will be equitably apportioned by such accountants based on the extent to which Buyer, on the one hand, or Seller, on the other hand, is determined by the Independent Accounting Firm to be the prevailing party in the resolution of each such disputed matter. The Closing Working Capital Statement properly disputed under this Section 2.07(d) will, after resolution of such dispute pursuant to this Section 2.07(d), be final, binding and conclusive on all parties.

(e) If the Closing Working Capital as finally determined is less than the Net Working Capital Target (such lesser amount, the “Shortfall”), then, the Seller shall pay to the Buyer, in immediately available funds, an amount equal to the Shortfall.

(f) If the Closing Working Capital as finally determined is equal to or greater than the Net Working Capital Target (such greater amount, the “Excess”), then the Buyer shall pay to the Seller in immediately available funds, an amount equal to the Excess.

(g) Any payment pursuant to Sections 2.08(e) or 2.08(f) to the Buyer or the Seller, as applicable, will be made within 5 business days after the determination of Closing Working Capital becomes final and binding

### **ARTICLE III REPRESENTATIONS AND WARRANTIES OF SELLER**

Seller hereby represents and warrants to Buyer that:

**Section 3.01 Organization.** Seller is a corporation organized, validly existing and in good standing under the laws of the State of Delaware and has all requisite power and authority to own, lease and operate its properties and to carry on its business as now being conducted. Seller is duly qualified or licensed and in good standing to do business in each jurisdiction in which the property owned, leased or operated by it or the nature of the business conducted by it makes such qualification or licensing necessary, except in such jurisdictions where the failure to be so duly qualified or licensed and in good standing would not in the aggregate have a material adverse effect on the business, assets, condition (financial or otherwise), results of operations or prospects (a “Material Adverse Effect”) of the Acquired Business.

**Section 3.02 Authorization.** The execution, delivery and performance by Seller of this Agreement and the consummation by it of the transactions contemplated hereby are within its organizational powers and have been duly authorized by all necessary organizational action of Seller. This Agreement has been duly and validly executed and delivered by Seller and constitutes a valid and binding agreement of Seller, enforceable against Seller in accordance with its terms.

**Section 3.03 Governmental Authorization; Consents.**

(a) The execution, delivery and performance by Seller of this Agreement require no action by or in respect of, or filing with, any governmental body, agency, official or authority (a “Governmental Entity”).

(b) Except as set forth on Section 3.03 of the Seller Disclosure Schedule, no consent, approval, waiver or other action by any Person (other than any Governmental Entity referred to in (a) above) under any contract, agreement, indenture, lease, instrument, or other document to which Seller is a party or by which the Seller is bound is required or necessary for the execution, delivery and performance of this Agreement by Seller or the consummation of the transactions contemplated hereby.

**Section 3.04 Non-Contravention.** The execution, delivery and performance by Seller of this Agreement does not and will not (a) contravene or conflict with the certificate of incorporation or bylaws of Seller, (b) contravene or conflict with or constitute a violation of any provision of any law, regulation, judgment, injunction, order or decree binding upon or applicable to Seller, (c) constitute a default under or give rise to any right of termination, cancellation or acceleration of any right or obligation of Seller or to a loss of any benefit to which Seller is entitled under any provision of any agreement, contract, or other instrument binding upon Seller or any license, franchise, permit or other similar authorization held by Seller or (d) result in the creation or imposition of any Lien on any Acquired Asset.

**Section 3.05 Sufficiency of and Title to Acquired Assets.**

(a) The Acquired Assets constitute, and on the Closing Date will constitute, all or the assets or property (i) used or held for use by Seller or any other Person in the Acquired Business, other than Excluded Assets and (ii) necessary for the conduct of the Acquired Business in the manner and to the extent presently conducted by Seller.

(b) Upon Closing, Buyer will have acquired good and marketable title in and to, or a valid leasehold interest in, each of the Acquired Assets, free and clear of all Liens, except for Permitted Liens, and without incurring any penalty, fee, expense or other adverse consequence, including any increase in rentals, royalties, license or other fees or expenses imposed as a result of, or arising from, the consummation of the transactions contemplated hereby.

**Section 3.06 Financial Statements.** The unaudited financial statements of operations for the Acquired Business for the fiscal years ended December 31, 2015, December 31, 2016, and December 31, 2017 and the eight months ended September 30, 2018 (the "Seller Balance Sheet Date" ) previously delivered to Buyer fairly present, in all material respects, all of the assets, liabilities, transactions, results of operations and the financial position of the Acquired Business taken as a whole as of the dates thereof and its results of operations and cash flows for the periods then ended.

**Section 3.07 Absence of Certain Changes.** Except as set forth in Section 3.07 of the Seller Disclosure Schedule, since September 30, 2018, Seller has conducted the Acquired Business in the ordinary course consistent with past practices and has not:

(a) suffered any event or events that have had, or would reasonably be expected to have, a Material Adverse Effect on the Acquired Business;

(b) sold, transferred, leased, licensed or otherwise disposed of any Acquired Assets or any rights thereto;

(c) incurred, assumed or guaranteed any indebtedness for borrowed money with respect to the Acquired Business;

(d) permitted or allowed any of the Acquired Assets to be subjected to any Lien, other than Liens that will be released at or prior to the Closing;

(e) suffered any damage, destruction or other casualty loss (whether or not covered by insurance) affecting the Acquired Business or any Acquired Asset;

(f) allowed any insurance policy covering the Acquired Business or the Acquired Assets to lapse or be cancelled or reduced the coverage or increased the deductible under any such insurance policy;

(g) received any notice of termination of any Contract related to the Acquired Business other than in the ordinary course of business and consistent with past practice;

(h) transferred or granted any rights under, or entered into any Contract, in respect of the Acquired Business, regarding any Technology or Intellectual Property Rights or similar rights (including, without limitation, any settlement regarding the breach or infringement or alleged breach or infringement thereof) or modified any existing rights with respect thereto;

(i) instituted, been made a party to, settled or agreed to settle, any Proceeding related to any Acquired Asset or the Acquired Business or suffered any material adverse determination in any Proceeding related to any Acquired Asset or the Acquired Business;

(j) made any transaction or commitment, or entered into any contract or agreement, relating to any Acquired Asset or the Acquired Business (including the acquisition or disposition of any assets) or relinquished any material contract or other right, other than transactions and commitments in the ordinary course consistent with past practices and those contemplated by this Agreement;

(k) changed any method of accounting or accounting practice with respect to the Acquired Business, except for any such change after the date hereof required by reason of a concurrent change in generally accepted accounting principles;

(l) (i) granted any severance or termination pay to any employee of the Acquired Business, (ii) entered into any employment, deferred compensation or other similar agreement (or any amendment to any such existing agreement) with any employee of the Acquired Business, (iii) increased benefits payable under an existing severance or termination pay policies or employment agreements or (iv) increased compensation, bonus or other benefits payable to employees of the Acquired Business; or

(m) entered into any contract or agreement or made any other commitment to take any of the types of actions described in paragraphs (a) through (l) above.

**Section 3.08 No Undisclosed Liabilities.** Except as and to the extent set forth in Section 3.08 of the Seller Disclosure Schedule, there are no liabilities of the Acquired Business of any kind whatsoever, whether accrued, contingent, absolute, determined, determinable or otherwise, and there is no existing condition, situation or set of circumstances which would reasonably be expected to result in such a liability, other than:



(a) Liabilities disclosed or provided for in the unaudited balance sheet of the Acquired Business as of September 30, 2018 (the “Seller Balance Sheet”) previously delivered to Buyer;

(b) Liabilities incurred in the ordinary course of business consistent with past practice since the Seller Balance Sheet Date, which in the aggregate are not material to the Acquired Business; and

(c) Liabilities not required under generally accepted accounting principles to be shown on the Seller Balance Sheet for reasons other than the contingent nature thereof or the difficulty of determining the amount thereof.

**Section 3.09 Properties.**

(a) Seller does not own or lease any real property for the operation of the Acquired Business.

(b) Seller has good and marketable title to, or in the case of leased property has valid leasehold interests in, all Acquired Assets (whether real or personal, tangible or intangible) reflected on the Seller Balance Sheet or acquired after the Seller Balance Sheet Date, except for properties and assets sold since the Seller Balance Sheet Date in the ordinary course of business consistent with past practices or as contemplated by this Agreement. No Acquired Asset is subject to any Lien, except:

(i) Liens disclosed on the Seller Balance Sheet;

(ii) Permitted Liens; or

(iii) Liens which will be discharged at Closing by Wintrust Bank upon the payment of the Purchase Price pursuant to Section 2.06(c).

(e) The equipment included in the Acquired Assets (i) is adequate for the conduct of the Acquired Business as currently conducted, and (ii) is in good operating condition, regularly and properly maintained, subject to normal wear and tear.

**Section 3.10 Litigation.** Section 3.10 of the Seller Disclosure Schedule lists all Proceedings currently or at any time within the last twenty-four months pending or, to the knowledge of Seller, threatened against the Seller, relating to the Acquired Business or involving the Acquired Assets. None of the matters set forth on Section 3.10 of the Seller Disclosure Schedule has had or would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect on the Acquired Business. None of the matters set forth on Section 3.10 of the Seller Disclosure Schedule would affect the legality, validity or enforceability of this Agreement or the consummation of the transactions contemplated hereby. Except as set forth on Section 3.10 of the Seller Disclosure Schedule, Seller has no knowledge of any facts or circumstances existing which are reasonably likely to lead to the instigation of any other Proceeding relating to the Acquired Business or involving the Acquired Assets.

**Section 3.11 Material Contracts.**

(a) Except for agreements, contracts, plans, leases, arrangements or commitments set forth in Section 3.11 of the Seller Disclosure Schedule, with respect to the Acquired Business, Seller is not a party to or subject to:

- (i) Any lease providing for annual rentals of \$1,000 or more;
- (ii) Any contract for the purchase of materials, supplies, goods, services, equipment or other assets providing for annual payments of \$1,000 or more;
- (iii) Any sales, distribution or other similar agreement providing for the sale of materials, supplies, goods, services, equipment or other assets;
- (iv) Any partnership, joint venture or other similar contract or arrangement;
- (v) Any contract relating to indebtedness for borrowed money or the deferred purchase price of property (whether incurred, assumed, guaranteed or secured by any asset), except contracts relating to indebtedness incurred in the ordinary course of business in an amount not exceeding \$1,000;
- (vi) Any license agreement, franchise agreement or agreement in respect of similar rights granted to or held by Seller;
- (vii) Any agency, dealer, reseller, sales representative, affiliate or similar agreement;
- (viii) Any agreement, contract or commitment that imposes a restriction on Seller: (A) to compete with any other Person; (B) to acquire any product or other asset or any services from any other Person, to sell any product or other asset to or perform any services for any other Person or to transact business or deal in any other manner with any other Person; or (C) to develop or distribute any technology;
- (ix) Any agreement, contract or commitment: (A) granting exclusive rights to license, market, sell or deliver any of the products or services of Seller; or (B) otherwise contemplating an exclusive relationship between Seller and any other Person;
- (x) Any agreement, contract or commitment which is or relates to an agreement with or for the benefit of any affiliate of Seller; or
- (xi) Any other contract or commitment not made in the ordinary course of business that is material to the Acquired Business.

(b) Seller has provided or otherwise made available to Buyer complete and accurate copies of all standard form agreements used by the Seller that relate to the Acquired Business or the Acquired Assets, including all customer agreements, development agreements, distributor or reseller agreements, employee agreements containing intellectual property assignments or licenses or confidentiality provisions, consulting or independent contractor agreements containing intellectual property assignments or licenses or confidentiality provisions, and confidentiality or nondisclosure agreements. Section 3.11 of the Seller Disclosure Schedule sets

forth a complete and accurate list of all Contracts entered into by the Seller that include deviations from such standard form agreements.

(c) Seller has provided to Buyer complete and accurate copies of all Contracts identified in Section 3.11 of the Seller Disclosure Schedule, including all amendments or modifications thereto. There is no Contract (or amendment or modification thereto) that is not in written form. Each agreement, contract, plan, lease, arrangement and commitment required to be disclosed on Section 3.11 of the Seller Disclosure Schedule is a valid and binding agreement of Seller and is in full force and effect, and neither Seller nor any other party thereto is in default in any material respect under the terms of any such agreement, contract, plan, lease, arrangement or commitment, nor to the knowledge of Seller, has any event or circumstance occurred that, with notice or lapse of time or both, would constitute any event of default thereunder; subject to the effect of (A) applicable bankruptcy, insolvency, reorganization, moratorium or other similar Legal Requirements now or hereafter in effect relating to rights of creditors generally and (B) Legal Requirements governing specific performance, injunctive relief and other equitable remedies. Except as set forth on Section 3.11 of the Seller Disclosure Schedule, Seller has performed all obligations required to be performed by it under each Contract prior to the Closing.

(d) Except as set forth on Section 3.11 of the Seller Disclosure Schedule, (i) the consummation of the transactions contemplated hereby will not afford any other party the right to terminate, modify, or exercise any right to increased or accelerated performance under, any Contract and (ii) none of the Contracts (A) contains a provision preventing, prohibiting or requiring any consent or notice in connection with the transfer or assignment of such Contract to Buyer or (B) contains a “change of control” or similar provision triggered by the consummation of the transactions contemplated hereby.

**Section 3.12 License and Permits.** Section 3.12 of the Seller Disclosure Schedule correctly describes each license, franchise, permit or other similar authorization affecting, or relating in any way to, the Acquired Business, together with the name of the Governmental Entity issuing such license or permit (the “Permits”). Except as set forth on Section 3.12 of the Seller Disclosure Schedule, such Permits are valid and in full force and effect and are transferable by Seller, and none of the Permits will be terminated or impaired or become terminable as a result of the transactions contemplated hereby. Upon consummation of such transactions, Buyer will have all right, title and interest to all such Permits.

**Section 3.13 Insurance.** Section 3.13 of the Seller Disclosure Schedule sets forth a list of all insurance policies and fidelity bonds covering the Acquired Assets, the business and operations of the Acquired Business and its employees (except for standard general liability insurance coverage which is not an Acquired Asset). There is no claim pending under any of such policies or bonds as to which coverage has been questioned, denied or disputed by the underwriters of such policies or bonds. All premiums payable under all such policies and bonds have been paid and Seller is otherwise in full compliance with the terms and conditions of all such policies and bonds. Such policies of insurance and bonds (or other policies and bonds providing substantially similar insurance coverage) will remain in full force and effect through the Closing Date. Such policies of insurance and bonds are of the type and in amounts customarily carried by Persons conducting businesses similar to the Acquired Business. Seller

does not know of any threatened termination of, or premium increase with respect to, any of such policies or bonds.

**Section 3.14 Compliance with Laws.** Seller is not in violation of, has violated, or to Seller's knowledge, is under investigation with respect to or has been threatened to be charged with or given notice of any violation of, any Legal Requirement applicable to the Acquired Assets or the conduct of the Acquired Business.

**Section 3.15 Intellectual Property.**

(a) As used in this Section 3.15 or elsewhere in this Agreement, the following terms have the meanings indicated below:

(i) "Behavioral Information" means data collected by Seller in connection with the Acquired Business by any means (including, without limitation, from a point of sale terminal, computer, Web browser, mobile telephone, or other device or application), where such data is or may be used to identify or contact an individual or device or application, to predict or infer the preferences, interests, or other characteristics of the device or application or of a user of such device or application, or to target advertisements or other content to a device or application, or to a user of such device or application.

(ii) "Business Intellectual Property Agreements" means the Inbound License Agreements and the Outbound License Agreements. For clarity, "Business Intellectual Property Agreements" excludes Ordinary Course In-Licenses and Ordinary Course Out-Licenses (each as defined below).

(iii) "Business Intellectual Property" means any and all Intellectual Property Rights and Technology related to the Business that are owned or purported to be owned by Seller, excluding any Hatch Assets.

(iv) "Business Products" means all products and services developed, produced, marketed, licensed, sold, distributed or performed by or on behalf of the Acquired Business prior to the Closing, and all products and services currently under development by the Acquired Business.

(v) "Business Source Code" means, collectively, any software source code or database specifications or designs, or any proprietary information, build scripts, test scripts, documentation, instructions or algorithms contained in or relating to any software included in the Business Intellectual Property or the Business Products which is on [github.com/bellycard](https://github.com/bellycard).

(vi) "Customer Data" means all data and content (x) uploaded or otherwise provided by or on behalf of the customers of the Acquired Business to, or stored by customers of the Acquired Business on, the Business Products; or (y) collected by the Business Products; including all Behavioral Information.

(vii) "Intellectual Property Rights" means any and all rights in, arising out of, or associated with any of the following, throughout the world: (A) patents, including utility models, industrial designs and design patents, and applications therefor (and any patents that issue as a result of those patent applications), and including all divisionals, continuations, continuations-in-part, continuing prosecution applications, substitutions, reissues, re-examinations, renewals, provisionals and extensions thereof, and any counterparts worldwide claiming priority therefrom, and all rights in and to any of the foregoing ("Patents"), (B) trade and industrial secrets, confidential or proprietary information and any know how ("Trade Secrets"), (C) trade names, logos, trademarks, service marks, service names, trade dress, company names, collective membership marks, certification marks, slogans, 800 numbers, social media pages, hash tags and other similar forms indicia of origin, whether or not registerable as a trademark in any given country, together with registrations and applications therefor, and the goodwill associated with any of the foregoing ("Trademarks"), (D) Internet domain names and URLs, (E) copyrights, and any other similar rights of authors or in works of authorship ("Copyrights"), (F) all rights in data collections and databases and documentation related thereto, (G) all moral and economic rights of authors and inventors, however denominated, throughout the world, (H) applications for, registrations of, and divisions, continuations, continuations-in-part, reissues, renewals, extensions, restorations and reversions of the foregoing (as applicable) and (I) all other similar or equivalent intellectual property or proprietary rights now known or hereafter recognized anywhere in the world, including the right to enforce and recover damages for the infringement or misappropriation of any of the foregoing.

(viii) "Open Source Materials" means software or other material that is distributed as "free software," "open source software" or under similar licensing or distribution terms (including but not limited to the GNU General Public License (GPL), GNU Lesser General Public License (LGPL), Mozilla Public License (MPL), BSD licenses, the Artistic License, the Netscape Public License, the Sun Community Source License (SCSL) the Sun Industry Standards License (SISL), Open Source Initiative, and the Apache License) that (a) could require or could condition the use or distribution of such software or other material, or portion thereof, on (1) the disclosure, licensing, or distribution of any source code for any portion of such software, or (2) the granting to licensees of the right to make derivative works or other modifications to such software or other material or portions thereof, or (b) could otherwise impose any limitation, restriction, or condition on the right or ability of the Acquired Business to use, sell, offer for sale, license, distribute or charge for any Business Product.

(ix) "Personally Identifiable Information" means any information or data that alone or in combination with other information collected, held, or otherwise managed by the Seller in connection with the Acquired Business can be used to specifically identify an individual, along with any other information or data associated directly with such identifying information.

(x) "Private Information" means Behavioral Information and Personally Identifiable Information.

(xi) "Registered IP" means Intellectual Property Rights that have been registered, filed or issued under the authority of, with or by any Governmental Entity, or other

public or quasi-public legal authority, including the United States Patent and Trademark Office, the U.S. Copyright Office and their equivalents worldwide.

(xii) "Technology" means any or all of the following and any tangible embodiments thereof: (i) works of authorship, including computer programs, whether in source code or in executable code form, application programming interfaces, software architecture, and any associated documentation, (ii) inventions (whether or not patentable), discoveries and improvements, and any associated lab notebooks or other indicia or records of invention, (iii) proprietary and confidential information, Trade Secrets, (iv) databases, data compilations and collections and technical data and performance data, (v) logos, trade names, trade dress, trademarks and service marks, (vi) domain names, web addresses and sites, (vii) methods and processes, (viii) devices, prototypes, data bases, designs and schematics, including for any Business Products, and (ix) any other tangible embodiments of Intellectual Property Rights.

(xiii) "Third Party Intellectual Property" means any and all Intellectual Property Rights and Technology owned by a third party.

**(b) Title to Business Intellectual Property.** All Business Intellectual Property is owned exclusively by the Seller free and clear of all Liens, other than Permitted Liens. Seller has the exclusive right to bring a claim or suit against a third party for infringement or misappropriation of the Business Intellectual Property. Seller has not transferred ownership of, or agreed to transfer ownership of, or permitted any person to, retain, any exclusive rights, or joint ownership of, any Intellectual Property Rights that are or were Business Intellectual Property to any third party or permitted any rights of Seller that are or were material Business Intellectual Property to enter the public domain. To the knowledge of Seller, there has not been and there is no unauthorized use, unauthorized disclosure, infringement or misappropriation of any Business Intellectual Property by any third party.

**(c) Business Registered IP.** Section 3.15(c) of the Seller Disclosure Schedule lists a true and complete list of all Registered IP related to the Acquired Business owned or purported to be owned by, filed in the name of, or licensed exclusively to, Seller ("Business Registered IP"), indicating for each item the registration or application number and the applicable jurisdiction. Each item of Business Registered IP is and at all times has been in compliance with all Legal Requirements (including payment of filing, examination and maintenance fees and proofs of use), is valid, subsisting and enforceable, and there are no facts or circumstances known to Seller that would render any Business Registered IP invalid or unenforceable. No application for a Patent or a material Copyright, mask work, or Trademark registration or any other type of material Business Registered IP filed by or on behalf of Seller at any time since January 1, 2013 has been abandoned, allowed to lapse, or rejected. Seller and its patent counsel have complied with their duty of candor and disclosure and have made no material misrepresentations in the filings submitted to the applicable Governmental Entities with respect to all Patents included in the Business Registered IP. To the knowledge of the Seller, Seller has not engaged in Patent or Copyright misuse or any fraud or inequitable conduct in connection with any Business Registered IP. To the knowledge of Seller, no Trademark related to the Acquired Business owned, used, or applied for by Seller conflicts or interferes with any Trademark owned, used, and applied for by any other Person. To the knowledge of Seller, no event or circumstance (including a failure to exercise adequate quality controls and an

assignment in gross without accompanying goodwill) has occurred or exists that has resulted in, or would reasonably be expected to result in, the abandonment of any material Trademark related to the Acquired Business owned, used, or applied for by Seller. All necessary maintenance and renewal fees currently due in connection with Business Registered IP have been made, and all necessary documents, recordations and certifications in connection with such Business Registered IP have been filed, with the relevant patent, copyright, trademark or other authorities in the United States or foreign jurisdictions, as the case may be, for the purpose of prosecuting and maintaining such Business Registered IP. Except as set forth in Section 3.15(c) of the Seller Disclosure Schedule, there are no actions that are required to be taken by the Seller within 180 days of the Closing Date, including the payment of any registration, maintenance or renewal fees or the filing of any documents, applications or certificates, for the purposes of perfecting, maintaining, or renewing any Business Register IP.

**(d) Employees.** All rights in, to and under all Intellectual Property Rights and Technology related to the Acquired Business created by Seller's employees or founders for or on behalf of Seller, if any (i) prior to the inception of Seller or (ii) prior to their commencement of employment with seller have been duly and validly assigned to Seller and Seller has no reason to believe that any such Person is unwilling to provide Seller or Buyer with such cooperation as may reasonably be required to complete and prosecute all appropriate U.S. and foreign patent and copyright filings related thereto.

**(e) Invention Assignment and Confidentiality Agreement.** In each case in which Seller has engaged any consultant, advisor, employee or independent contractor to independently or jointly conceive, reduce to practice, create or develop any Intellectual Property Rights or Technology, in each case relating to the Acquired Business, for or on behalf of Seller (each an "Author"), Seller has obtained written and enforceable proprietary information and invention disclosure and Intellectual Property Rights assignments from the Author in the form of Seller's standard form of employee proprietary information agreement containing any assignment or license of Intellectual Property Rights (the "Employee Proprietary Information Agreement") or Seller's standard form of professional services, outsourced development, consulting, or independent contractor agreements containing any assignment or license of Intellectual Property Rights (the "Consultant Proprietary Information Agreement"), as applicable, copies of which are attached to Section 3.15(f)(i) and Section 3.15(f)(ii), respectively, of the Seller Disclosure Schedule. No Author has retained any ownership rights in any Intellectual Property Rights or Technology developed by such Author for Seller and Seller has obtained from such Authors a waiver of all waivable non-assignable rights, including moral rights. Seller has made available to Buyer copies of all such forms currently and historically used by Seller. Section 3.15(f)(i) of the Seller Disclosure Schedule accurately identifies as of the date of this Agreement each Employee Proprietary Information Agreement and Consultant Proprietary Information Agreement containing any assignment or license of Intellectual Property Rights that deviates in any material respect from the corresponding standard form agreement made available to Buyer.

**(f) No Violation.** No current or former employee, consultant, advisor or independent contractor of Seller engaged with the Acquired Business: (i) is in violation of any material term or covenant of any Contract relating to employment, invention disclosure, invention assignment, non-disclosure or non-competition or any other Contract with any other party by virtue of such employee's, consultant's, advisor's or independent contractor's being employed by, or performing

services for, Seller or using Trade Secrets or proprietary information of others without permission; or (ii) has developed any Technology for Seller that is subject to any agreement under which such employee, consultant, advisor or independent contractor has assigned or otherwise granted to any third party any rights (including Intellectual Property Rights) in or to such Technology.

**(g) Confidential Information.** Seller has taken reasonable steps to protect and preserve the confidentiality of all confidential or non-public information of the Acquired Business ("Business Confidential Information"). All current and former Employees and any other third party having access to Business Confidential Information have executed and delivered to Seller a written legally binding agreement sufficient to protect such Business Confidential Information. Seller has implemented and maintains reasonable and appropriate disaster recovery and security plans, procedures and facilities and has taken other reasonable steps consistent with (or exceeding) industry practices of companies offering similar services to safeguard the Business Confidential Information, Private Information and Customer Data, and information technology systems utilized in the operation of the Acquired Business, from unauthorized or illegal access and use. There has been no breach of security or unauthorized access by third parties to such information technology systems utilized in the operation of the Acquired Business or the Business Confidential Information, Private Information or Customer Data. Seller has at all times materially complied with the Payment Card Industry Data Security Standard and other requirements of each credit card issuer and network or other payment system for which Seller processes transactions or receives or stores cardholder or member information.

**(h) Non-Infringement.** Seller has not brought any action, suit or proceeding against any third party for infringement or misappropriation of any Business Intellectual Property. The Business Products, and the operation of the Acquired Business, including the design, development, manufacture, coding, use, sale, provision, offer to sell and distribution of any Business Products, to Seller's knowledge (but without having conducted any patent search), has not and is not infringing, misappropriating or violating and will not infringe, misappropriate or violate when conducted in substantially the same manner by Buyer following the Closing, the Intellectual Property Rights of any third party, has not and does not violate any right of any person (including any right to privacy or publicity), or has not and does not constitute unfair competition or trade practices under the Legal Requirements of any jurisdiction. No claim or action has been brought or asserted against Seller by, and Seller has not received notice or any other overt threats, including indemnification claims, from any third party (nor does Seller have knowledge of any reasonable basis therefor), (i) challenging the Business Intellectual Property, (ii) inviting Seller to license such third party's Intellectual Property Rights in connection with the Acquired Business, or (iii) claiming that any Business Product or the operation of the Acquired Business, infringes or misappropriates the Intellectual Property Rights of any third party, violates the rights of any third party (including any right to privacy or publicity), or constitutes unfair competition or trade practices under the Legal Requirements of any jurisdiction (nor does Seller have knowledge of any reasonable basis therefor). There are no forbearances to sue, consents, settlement agreements, judgments, orders or similar obligations, other than the Business Intellectual Property Agreements set forth on Section 3.15(h) of the Seller Disclosure Schedule, that do or may: (x) restrict the rights of Seller to use, transfer, license or enforce any of the Business Intellectual Property, (y) restrict the conduct of the Acquired Business in order to accommodate a third party's Intellectual Property Rights, or (z) grant any third party any right



with respect to any Business Intellectual Property, other than non-disclosure agreements, evaluation licenses and non-exclusive end-user licenses or service agreements granted in the ordinary course of business consistent with past practice.

**(i) Licenses; Agreements.** Section 3.15(i)(i) of the Seller Disclosure Schedule sets forth a complete and accurate list of all Contracts under which Seller grants to a third party any rights under or with respect to any Business Intellectual Property or Business Product (each an "Outbound License Agreement"), other than non-disclosure agreements, evaluation licenses and non-exclusive end-user licenses or service agreements granted by Seller to Seller's customers in the ordinary course of business (collectively, "Ordinary Course Out-Licenses"). Except for Outbound License Agreements set forth in Section 3.15(i)(i) of the Seller Disclosure Schedule and Ordinary Course Out-Licenses, Seller has not granted any options, licenses or agreements of any kind relating to any Business Intellectual Property or Business Products, including any covenant or other provision that in any way limits or restricts the ability of Seller to use, assert, enforce, or otherwise exploit any Business Intellectual Property or Business Products anywhere in the world. Section 3.15(i)(ii) of the Seller Disclosure Schedule sets forth a complete and accurate list of all Contracts under which a third party grants to Seller any rights under or with respect to any Intellectual Property Rights included in or used in (i) the development of Business Products, or (ii) the operation of the Business (each, an "Inbound License Agreement"), other than licenses for commercially available "off-the-shelf" software licensed to Seller in object code form ("Shrink-Wrap Licenses"), licenses of Open Source Materials, non-disclosure agreements, evaluation licenses and standard licenses granted to Seller that are contained in Seller's Ordinary Course Out-Licenses in the ordinary course of business (collectively, "Ordinary Course In-Licenses").

**(j) Business Intellectual Property Agreements.** All Business Intellectual Property Agreements are in full force and effect. With respect to the Business Intellectual Property Agreements:

(i) Seller is not (and will not be as a result of the execution and delivery or effectiveness of this Agreement or the performance of Seller's obligations under this Agreement), and, to the knowledge of Seller, all other parties are not, in breach of any Business Intellectual Property Agreement and the consummation of the transactions contemplated by this Agreement will not result in the modification, cancellation, termination, suspension of, or acceleration of any payments with respect to any Business Intellectual Property Agreements, or give any counterparty to any Business Intellectual Property Agreement the right to do any of the foregoing;

(ii) At the Closing, Buyer will be permitted to exercise all of Seller's rights under the Business Intellectual Property Agreements to the same extent seller would have been able to had the transactions contemplated by this Agreement not occurred and without the payment of any additional amounts or consideration other than ongoing fees, royalties or payments which Seller would otherwise be required to pay;

(iii) There are no disputes involving Seller or any contractors, consultants, employees, founders, officers or directors of Seller regarding the scope of any Business

Intellectual Property Agreements, or performance under any Business Intellectual Property Agreements including with respect to any payments to be made or received by Seller thereunder;

(iv) No Business Intellectual Property Agreement requires Seller to return or refund any amounts paid to it, or grant any credit to any third party, or pay any liquidated damages or penalties in the event of any breach of any warranty or any failure of Seller to perform under such Business Intellectual Property Agreement; and

(v) No third party that has licensed Intellectual Property Rights to Seller has retained ownership of, or license rights under, any Intellectual Property Rights in or to improvements or derivative works made by Seller in such Third Party Intellectual Property.

**(k) No Conflict.** Neither this Agreement, the transactions contemplated by this Agreement, nor the assignment to Buyer of any Contracts to which Seller is a party, will result in, by the terms of such Contracts: (i) Buyer or any of its affiliates granting to any third party any right to or with respect to any Intellectual Property Rights owned by, or licensed to Buyer or any of its affiliates, or (ii) Buyer or any of its affiliates, being bound by or subject to, any exclusivity obligations, non-compete or other restriction on the operation or scope of their respective businesses.

**(l) Software; Source Code.** Seller has not disclosed, delivered, licensed or made available to any Person or agreed or obligated itself to disclose, deliver, license or make available to any Person, or permitted the disclosure or delivery to any escrow agent or other Person of, any Business Source Code, other than disclosures to employees and consultants involved in the development of Business Products under binding written agreements that prohibit use or disclosure except in the performance of services for Seller. No event has occurred, and no circumstance or condition exists, that (with or without notice or lapse of time, or both) will, or would reasonably be expected to, result in the disclosure, delivery or license by Seller of any Business Source Code, other than disclosures to employees and consultants involved in the development of Business Products under binding written agreements that prohibit use or disclosure except in the performance of services for Seller. Without limiting the foregoing, neither the execution of this Agreement nor any of the transactions contemplated by this Agreement will result in a release from escrow or other delivery to a third party of any Business Source Code. The software used by Seller in the provision of any Business Product: (i) to the knowledge of Seller, has sufficiently documented source code enabling a reasonably skilled software developer to understand, modify, compile and otherwise utilize the related technology; and (ii) does not contain any disabling mechanisms or protection features which are designed to disrupt, disable, harm or otherwise impede in any manner the operation of, or provide unauthorized access to, a computer system or network or other device on which Business Product software is stored or installed or damage or destroy any data or file without the user's consent. Seller has implemented procedures consistent with standard industry practices to ensure that each Business Product and any software included in the Business Intellectual Property are free from viruses, disabling or other malicious codes. The Business Products and the software included in the Business Intellectual Property do not contain any errors or bugs that adversely affect, or may reasonably be expected to adversely affect, the value, functionality or fitness for the intended purpose of such Business Products or software included in the Business Intellectual Property. None of the software used in the provision of any Business Product fails to comply

with any applicable warranty or other contractual commitment relating to the use, functionality or performance of such Business Product or any product or system containing or used in conjunction with such Business Product.

**(m) Open Source Software.** Section 3.15(m)(i) of the Seller Disclosure Schedule lists any licenses for Open Source Materials pursuant to which any Business Products are made available by Seller to any Person, and all Open Source Materials included in, combined with, or used in the delivery of, any Business Product or other Business Intellectual Property, as the case may be, and identifies each relevant license for such Open Source Materials and describes the manner in which such Open Source Materials were used (such description shall include whether (and, if so, how) the Open Source Materials were modified and/or distributed by Seller). With respect to Open Source Materials that are or have been included in, combined with, or used by Seller in connection with any Business Product, Seller has been and is in compliance with the terms and conditions of all applicable licenses for the Open Source Materials, including attribution and copyright notice requirements. Except as set forth in Section 3.15(m)(ii) of the Seller Disclosure Schedule, there are no Open Source Materials included in, or distributed with, any Business Products or other Business Intellectual Property, which subject such Business Products or other Business Intellectual Property to the terms of the license agreement to which such Open Source Materials are subject, including in such a way that creates, or purports to create obligations for Seller with respect thereto or grants, or purport to grants, to any third party, any rights or immunities thereunder (including using any Open Source Materials that require, as a condition of use, modification and/or distribution of such Open Source Materials that other software incorporated into, derived from or distributed with such Open Source Materials be (A) disclosed or distributed in source code form, (B) be licensed for the purpose of making derivative works, or (C) be redistributable at no charge).

**(n) Sufficiency.** Seller owns or otherwise has the right to use all Intellectual Property Rights and Technology used in or necessary for the conduct of the Acquired Business as currently conducted or as currently proposed by Seller to be conducted, including the design, development, manufacture, coding, license, sale, provision, maintenance and support, and use, of all Business Products currently under development or in production. The Business Intellectual Property, together with the Third Party Intellectual Property licensed pursuant to the Seller License Agreement, Inbound License Agreements, Shrink-Wrap Licenses and other Ordinary Course In-Licenses, constitutes all of the Intellectual Property Rights and Technology used in or necessary for the conduct of the Acquired Business as currently conducted or as proposed by Seller to be conducted.

**(p) Effect of Transaction.** Neither the execution, delivery, or performance of this Agreement nor the consummation of any of the transactions or agreements contemplated by this Agreement will, with or without notice or the lapse of time, by operation of any Contracts to which Seller is a party, result in, or give any other Person the right or option to cause or declare, (i) a loss of, or Lien on, any Business Intellectual Property; (ii) a breach of, termination of, or acceleration or modification of any right or obligation under any Business Intellectual Property Agreements; (iii) the grant, assignment, or transfer to any other Person of any license or other right or interest under, to, or in any Business Intellectual Property; or (iv) a consent right that could prevent the transfer of, or diminution of rights to use, any Customer Data or any Personally Identifiable Information.

**(q) Privacy and Data Security.** Section 3.15(q) of the Seller Disclosure Schedule identifies and describes each distinct electronic or other database containing (in whole or in part) Private Information and Customer Data maintained by or for Seller at any time, the types of Private Information and Customer Data in each such database, the means by which the Private Information and Customer Data was collected, and the security policies that have been adopted and maintained with respect to each such database. Seller has established privacy policies which are in conformance with reputable industry practice and all applicable Legal Requirements. At all times since inception, Seller has provided accurate notice of its privacy practices on all of its websites (and through client-side and web interface products) and these notices have not contained any material omissions of Seller's privacy practices and have not been misleading, deceptive, or in violation of applicable Legal Requirements. Seller has complied with and is in compliance with all applicable Legal Requirements, all rules, policies, and requirements of self-regulatory organizations, and its internal and external privacy policies, and with any contractual obligations and consumer-facing statements on its Web site and in any marketing or promotional materials relating to its use, collection, retention, storage, disclosure, transfer, disposal, and other processing of any Private Information and Customer Data, and the execution, delivery and performance of this Agreement will not result in a breach or violation of any of the foregoing. Seller has obtained all consents necessary from providers of Customer Data and Personally Identifiable Information (a) to collect and use such Customer Data and Personally Identifiable Information in the conduct of the Acquired Business as currently conducted and as proposed by Seller to be conducted and (b) to transfer such Customer Data and Personally Identifiable Information to Seller. Seller has not received, and to the knowledge of Seller, there has been no, complaint to any regulatory or other governmental body or official, foreign or domestic, or any audit, proceeding, investigation (formal or informal), or claim against, Seller or any of its customers (in the case of customers, to the extent relating to the Business Products) by any private party or any regulatory or other governmental body or official, foreign or domestic, regarding the collection, use, retention, storage, transfer, disposal, disclosure or other processing of Private Information or Customer Data.

**(r) Domain Names and Social Media Presence.** Section 3.15(r) of the Seller Disclosure Schedule identifies and describes each Internet domain name and URL and each distinct social media presence (in each case, related to the Acquired Business) maintained by or for Seller at any time, and the passwords and other account management information with respect to each such Internet domain names, URLs and social media presence.

**Section 3.16     Employees.**

(a)     Section 3.16(a) of the Seller Disclosure Schedule contains a complete and accurate list of the current employees of Seller engaged in the Acquired Business as of the date hereof and shows with respect to each such employee (i) the employee's name, position held, base salary or hourly wage rate, as applicable, including each employee's designation as either exempt or non-exempt from the overtime requirements of the Fair Labor Standards Act incentive and bonus arrangements to which Seller is a party, whether legally binding or not, (ii) the date of hire, (iii) vacation eligibility for the current calendar year (including accrued vacation from prior years), (iv) leave status (including type of leave, expected return date for non-disability related leaves and expiration dates for disability leaves), (v) visa status, if applicable, (vi) accrued sick

days for current calendar year, if any (vii) relevant contractual prior notice period required in the event of termination, if any (viii) eligibility to Seller car or travel expenses, if any and (ix) any severance or termination payment (in cash or otherwise) to which any employee could be entitled. To the knowledge of Seller, no employee listed on Section 3.16(a) of the Seller Disclosure Schedule intends to terminate his or her employment for any reason. Except as set forth in Section 3.16(a) of the Seller Disclosure Schedule, at the Closing, all salaries, wages, vacation pay, bonuses, commissions and other compensation due from Seller will have been paid.

(b) Section 3.16(b) of the Seller Disclosure Schedule contains a true, correct and complete list of (i) all current independent contractors, and Persons that have or have had a consulting or advisory relationship with providing services to Seller in respect of the Acquired Business, (ii) the location at which such independent contractors, are providing services and (iii) the rate of compensation payable to such independent contractors. All such independent contractors, consultants and advisors to Seller can be terminated with less than 90 days' notice and without notice or liability on the part of Seller.

(c) Section 3.16(c) of the Seller Disclosure Schedule contains a complete and accurate list of each employment, consulting, compensation, incentive or deferred compensation, severance, relocation, retention, transaction, change in control, termination, retirement, pension, supplemental retirement, deferred compensation, excess benefit, profit-sharing, bonus, incentive, performance award, stock option, restricted stock, deferred stock, phantom stock or other equity or equity-linked, savings, life, vacation, paid-time-off, cafeteria, insurance, flex spending, tuition, medical, health, welfare, disability, death, fringe benefit or other employee compensation or benefit plan, program, policy, practice, commitment, agreement, arrangement or contract, including, in each case, each "employee benefit plan" within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (whether or not subject to ERISA) which is maintained, contributed to, participated in, sponsored by or required to be contributed to by Seller or with respect to which Seller has or may have any liability or obligation, whether actual or contingent (collectively, the "Seller Employee Plans").

(d) Seller has made available to Buyer true, correct and complete copies, as applicable, of (i) each Seller Employee Plan including all amendments thereto and all related trust documents (and descriptions of the material terms of any such plan that is not in writing), (ii) the three most recent annual reports (Form Series 5500 and all schedules and financial statements attached thereto), if any, required to be filed in connection with each Seller Employee Plan, (iii) if the Seller Employee Plan is funded, the most recent annual and periodic accounting of such Seller Employee Plan assets, (iv) the most recent summary plan description together with the summary(ies) of material modifications thereto, if any, (v) all material written agreements and contracts relating to each Seller Employee Plan, including administrative service agreements and group insurance contracts, (vi) all correspondence to or from any Governmental Entity relating to any Seller Employee Plan other than routine correspondence in the normal course of operations of such Seller Employee Plan, (vii) all forms of COBRA notices, (viii) policies pertaining to fiduciary liability insurance covering the fiduciaries for each Seller Employee Plan, (ix) all discrimination tests for each Seller Employee Plan for the three most recent plan years, and (x) the most recent Internal Revenue Service (or any other applicable Taxing authority) determination or opinion letter issued with respect to each Seller Employee Plan, if applicable.

(e) Seller has performed in all material respects all obligations required to be performed by them under, is not in default or violation of, and, as of the date hereof, Seller does not have any knowledge of any material default or material violation by any other party to, any Seller Employee Plan, and each Seller Employee Plan has been established and maintained in all material respects in accordance with its terms and in compliance with all applicable Legal Requirements.

(f) The execution of this Agreement and the consummation of the transactions contemplated herein will not (either alone or upon the occurrence of any additional or subsequent events) result in or entitle any Person to any payment, acceleration, forgiveness of indebtedness, vesting, distribution, increase in compensation or benefits or obligation to fund benefits.

(g) No Seller Employee Plan is, and Seller has never maintained, established, sponsored, participated in, or contributed to, a pension plan subject to Part 3 of Subtitle B of Title I of ERISA, Title IV of ERISA or Section 412 of the Code. The obligations of all Seller Employee Plans that provide health, welfare or similar insurance are fully insured by bona fide third-party insurers. No Seller Employee Plan is maintained through a human resources and benefits outsourcing entity, professional employer organization, or other similar vendor or provider.

(h) Seller is in compliance in all material respects with all applicable Legal Requirements, judgments or arbitration awards of any court, arbitrator or any Governmental Entity, extension orders and binding customs respecting labor and employment, including Legal Requirements relating to employment practices, terms and conditions of employment, discrimination, disability, fair labor standards, workers compensation, wrongful discharge, immigration, occupational safety and health, family and medical leave, wages and hours (including overtime wages), worker classification, equal opportunity, pay equity, meal and rest periods, and employee terminations, and in each case, with respect to any current or former employee, consultant, independent contractor, advisor or director of Seller (each, an "Employee"): (i) has withheld and reported all amounts required by Legal Requirement or by agreement to be withheld and reported with respect to wages, salaries and other payments to Employees, (ii) is not liable for any arrears of wages, severance pay or any Taxes or any penalty for failure to comply with any of the foregoing, and (iii) is not liable for any payment to any trust or other fund governed by or maintained by or on behalf of any Governmental Entity, with respect to unemployment compensation benefits, social security or other benefits or obligations for Employees (other than routine payments to be made in the ordinary course of business and consistent with past practice). There are no actions, suits, claims or administrative matters pending, reasonably anticipated or, to the knowledge of Seller, threatened against Seller or any of its Employees relating to any Employee. There are no pending, reasonably anticipated or, to the knowledge of Seller, threatened claims or actions against Seller or any Seller trustee under any worker's compensation policy or long term disability policy. The services provided by each of the Employees are terminable at the will of Seller, and any such termination would result in no liability to Seller. The Seller has no liability with respect to any misclassification of (x) any Person or Employee as an independent contractor rather than as an employee; (y) any Employee leased from another employer; or (z) any Employee currently or formerly classified as exempt from overtime wages.

(i) Seller is not or ever has been a party to any collective bargaining agreements, and there are no labor unions or other organizations representing, purporting to represent or attempting to represent, any employee of Seller. Seller has not experienced any strikes, labor disputes, concerted refusal to work overtime, slowdowns, work stoppages, lockouts, or threats thereof, by or with respect to any employees of Seller. Seller has not engaged in any unfair labor practices within the meaning of the National Labor Relations Act.

(j) In the three years prior to the date hereof, Seller has not taken any action which would constitute a "plant closing" or "mass layoff" within the meaning of the Worker Administration and Retraining Notification Act ("*WARN*") or similar state or local law, issued any notification of a plant closing or mass layoff required by *WARN* or similar state or local law, or incurred any liability or obligation under *WARN* or any similar state or local law that remains unsatisfied. No terminations prior to the Closing would trigger any notice or other obligations under *WARN* or any similar state or local law.

**Section 3.17 Environmental Compliance.** Seller is not in violation of any applicable Legal Requirement relating to the environment or occupational health and safety, and to its knowledge, no material expenditures are or will be required in order to comply with any such existing statute, law or regulation.

**Section 3.18 Tax Matters.** Except as set forth in Section 3.18 of the Seller Disclosure Schedule:

(a) All Tax returns required to be filed by or on behalf of Seller have been timely and properly filed and are true, accurate and complete in all material respects.

(b) Seller has timely paid all Taxes, and all interest and penalties due thereon and payable by them for the Pre-Closing Tax Period which will have been required to be paid on or prior to the Closing Date, the non-payment of which would result in a Lien on any Acquired Asset, would otherwise adversely affect the Acquired Business or would result in Buyer becoming liable or responsible therefore.

(c) Seller has established, in accordance with generally accepted accounting principles applied on a basis consistent with that of preceding periods, adequate reserves for the payment of, and will timely pay all Tax liabilities, assessments, interest and penalties which arise from or with respect to the Acquired Assets or the operation of the Acquired Business and are incurred in or attributable to the Pre-Closing Tax Period, the non-payment of which would result in a Lien on any Acquired Asset, would otherwise adversely affect the Acquired Business or would result in Buyer becoming liable or responsible therefore.

**Section 3.19 Customers.** Section 3.19 of the Seller Disclosure Schedule lists all active customers of the Acquired Business and, for each such customer, (a) lists all agreements or other arrangements between Seller and the customers, (b) summarizes all material terms and conditions of the agreements or other arrangements, (c) list any deferred or unearned revenue or customer deposits associated with the agreements or other arrangements and (d) indicates the manner in which such customer makes remittances to Seller (e.g., by credit card or by check). Seller has not received any written, oral or other notice (including by email, text message or

otherwise) that any customer of the Acquired Business expects or intends to cease doing business with Seller, reduce the amount of business such customer does with Seller or modify its relationship with Seller in a manner adverse to Seller. The Business Products conform and comply with all applicable contractual commitments, warranties and customer specifications. Seller has not received any warranty claim or other complaint from any customer. Seller has any knowledge of any facts or circumstances existing which are reasonably likely to lead to any warranty claim or other complaint related to the Acquired Business from any customer.

**Section 3.20 Books and Records.** The records and documents of Seller accurately reflect in all material respects the information relating to the Acquired Business, the location of the Acquired Assets, and the nature of all transactions giving rise to the obligations or accounts receivable of the Acquired Business.

**Section 3.21 Finders' Fees.** There is no investment banker, broker, finder or other intermediary that has been retained by or is authorized to act on behalf of Seller who might be entitled to any fee or commission from Buyer or Parent or any of their respective affiliates upon consummation of the transactions contemplated by this Agreement.

**Section 3.22 Absence of Certain Relationships.** Except as set forth in Section 3.22 of the Seller Disclosure Schedule, none of (a) Seller, (b) any officer of Seller, or (c) any member of the immediate family of any officer of Seller, has any financial or employment interest in any subcontractor, supplier, or customer of the Acquired Business (other than holdings in publicly held companies of less than 2% of the outstanding capital stock of any such publicly held company).

**Section 3.23 No Questionable Payments.** Neither Seller nor any director, officer, agent, employee, or other person associated with, or acting on behalf of, Seller, nor any shareholder of Seller has, directly or indirectly: used any corporate funds for unlawful contributions, gifts, entertainment, or other unlawful expenses relating to political activity; made any unlawful payment to foreign or domestic government officials or employees or to foreign or domestic political parties or campaigns from corporate funds; violated any provision of the Foreign Corrupt Practices Act of 1977, as amended; or made any bribe, rebate, payoff, influence payment, kickback, or other unlawful payment.

**Section 3.24 Completeness of Disclosure.** No representation or warranty by Seller in this Agreement contains or, and at the Closing Date will contain, an untrue statement of material fact or omits or, at the Closing Date, will omit to state a material fact required to be stated therein or necessary to make the statements made not misleading.



**ARTICLE IV  
REPRESENTATIONS AND WARRANTIES OF  
BUYER AND PARENT**

Buyer and Parent hereby represent and warrant to Seller that:

**Section 4.01     Organization.** Each of Parent and Buyer is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and has all requisite power and authority to own, lease and operate its properties and to carry on its business as now being conducted, except in such jurisdictions where the failure to be so duly qualified or licensed and in good standing would not in the aggregate have a Material Adverse Effect on Parent and its subsidiaries, taken as a whole.

**Section 4.02     Corporate Authorization.** The execution, delivery and performance by each of Parent and Buyer of this Agreement and the consummation by each of Parent and Buyer of the transactions contemplated hereby are within their respective corporate powers and will have been duly authorized by all necessary corporate action of each of Parent and Buyer. This Agreement has been duly and validly executed and delivered by each of Parent and Buyer and constitutes a valid and binding agreement of each of Parent and Buyer, enforceable against them in accordance with its terms.

**Section 4.03     Governmental Authorization; Consents.**

(a) The execution, delivery and performance by Parent and Buyer of this Agreement require no action by or in respect of, or filing with, any Governmental Entity.

(b) No consent, approval, waiver or other action by an Person (other than any Governmental Entity referred to in (a) above) under any contract, agreement, indenture, lease, instrument, or other document to which Parent or Buyer is a party or by which it is bound is required or necessary for the execution, delivery and performance of this Agreement by Parent or Buyer or the consummation of the transactions contemplated hereby.

**Section 4.04     Non-Contravention.** The execution, delivery and performance by Parent and Buyer of this Agreement do not and will not (i) contravene or conflict with the articles of incorporation or bylaws of Parent or Buyer, or (ii) contravene or conflict with or constitute a violation of any provision of any law, regulation, judgment, injunction, order or decree binding upon or applicable to Parent or Buyer.

**Section 4.05     Litigation.** There is no action, suit, investigation, proceeding, review pending against, or to the knowledge of Parent and Buyer threatened against or affecting, Parent or Buyer before any court or arbitrator or any Governmental Entity which in any manner challenges or seeks to prevent, enjoin, alter or materially delay the transactions contemplated hereby.

**ARTICLE V  
COVENANTS**

**Section 5.01     Covenants of Seller.** Seller agrees that:

(a) **No Inconsistent Actions.** During the period from the date of this Agreement and continuing until the Closing Date, Seller will not (i) take or agree or commit to take any action that would make any representation and warranty of Seller inaccurate in any material respect at, or as of any time prior to, the Closing Date, or (ii) omit or agree or commit to omit to take any action necessary to prevent any such representation or warranty from being inaccurate in any material respect at any such time.

(b) **Access to Information.** Upon reasonable notice and subject to restrictions contained in confidentiality agreements to which such party is subject (from which such party shall use reasonable efforts to be released), Seller shall afford to the officers, employees, accountants, counsel and other representatives of Buyer, access, during normal business hours during the period prior to the Closing, to Seller's properties, books, contracts, commitments and records to the extent relating to the Acquired Assets and, during such period, Seller shall furnish promptly to the other all information concerning the Acquired Assets as Buyer may reasonably request. Unless otherwise required by law or court order, Buyer will hold any such information which is nonpublic in confidence until such time as such information otherwise becomes publicly available through no wrongful act of Buyer, and in the event of termination of this Agreement for any reason Buyer shall promptly return all nonpublic documents obtained from Seller, and any copies or summaries made of such documents, to Seller.

(c) **Noncompetition.**

(i) Seller agrees that for a period of five years following the Closing Date, neither Seller nor any of affiliate of Seller (which, for clarity and avoidance of doubt, shall not include any directors or stockholders of Seller (or affiliates thereof) that are not officers or employees of Seller) will (x) engage, either directly or indirectly, as a principal or for his, her or its own account or solely or jointly with others, or as an equity interest holder in or lender to, in any business that competes with the Acquired Business as it exists on the Closing Date anywhere in the world; (y) directly or indirectly solicit or induce any Person that was a customer or supplier or active prospective customer or supplier of the Acquired Business as of the Closing to terminate its business relationship with Buyer or to patronize any business directly in competition with the Acquired Business anywhere in the world; or (z) employ or solicit, or receive or accept the performance of services by, any employee currently employed by the Acquired Business.

(ii) Seller acknowledges and agrees that (a) Seller is selling the goodwill related to the Acquired Business to Buyer in the transactions contemplated by this Agreement, (b) the relationships that the Acquired Business has with its customers, and suppliers are significant relationships necessary for Buyer to continue to conduct the Acquired Business, (c) the Acquired Business has an international scope, and (d) Buyer has a reasonable, necessary and legitimate business interest in protecting the aforesaid assets and relationships, and that the covenants set forth in this Section 5.01(c) are reasonable in scope, duration and geographic area, and are necessary in order to protect these legitimate business interests. Seller also acknowledges and agrees that the covenants it makes herein will not prevent it from practicing its profession for clients in any industry other than those covered by the Acquired Business or as permitted herein, and that its skills and expertise are transferable to serve clients operating in other industries. Further, each of Seller has been advised by the Buyer that the covenants and agreements set forth

in this Section 5.01(c) are a material reason Buyer has agreed to consummate the transactions contemplated hereby.

(iii) If any provision contained in this Section 5.01(c) shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect the other provisions of this Section, but this Section shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. It is the intention of the parties that if any of the restrictions or covenants contained herein is held to cover a geographic area or to be for a length of time which is not permitted by applicable law, or in any way construed too broad or to any extent invalid, such provision shall not be construed to be null, void and of no effect, but to the extent such provision would be valid or enforceable under applicable law, a court of competent jurisdiction shall construe and interpret or reform this Section to provide for a covenant having the maximum enforceable geographic area, time period and other provisions (not greater than those contained herein) as shall be valid and enforceable under applicable law. Seller acknowledges that Buyer would be irreparably harmed by any breach of this Section and that there would be no adequate remedy at law or in damages to compensate Buyer for any such breach. Seller agrees that Buyer shall be entitled to injunctive relief requiring specific performance by Seller of this Section, and Seller consents to entry thereof.

(iv) Notwithstanding the foregoing, neither (A) Seller's conduct of its Hatch Business nor (B) the placement of general advertisements that may be targeted to a particular geographic or technical area but that are not specifically targeted toward employees currently employed by the Acquired Business or Buyer or its successors or assigns, shall be deemed to be a breach of this Section 5.01(c).

(d) **Audit Cooperation.** Seller will use its best efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things reasonably requested by Parent or Buyer to assist Parent and Buyer in their completion of their audit of the financial statements of the Acquired Business, which is expected to be completed within 75 days following the Closing. Without limiting the foregoing, Seller will (i) provide to Parent and Buyer a complete set of financial statements with all entries necessary to close the books and present the statements in accordance with U.S. generally accepted accounting principles having been posted along with all schedules necessary to support the balances in the statements, (ii) fulfill the financial statement auditor request list which will be provided by Buyer and (iii) during normal business hours, make available to Parent and Buyer its employees to respond to auditor inquiries and requests for source documents through the duration of the audit.

(e) **Third Party Consents.** Seller will use commercially reasonable efforts to promptly obtain such written consents and authorizations of third parties, give notices to third parties and take such other actions as may be necessary or appropriate in order to effect the transactions contemplated by this Agreement, including all required third party consents (as set forth on Section 3.03 of the Seller Disclosure Schedule). Seller will (i) consult with Buyer beforehand regarding the process for seeking such consents and providing such notices, (ii) provide Buyer with a reasonable opportunity to review and comment in advance on the forms of such consent requests and notices, and (iii) incorporate any reasonable comments thereto made by Buyer.

(f) **Change of Corporate Name.** Within 60 days following the Closing, Seller will change its corporate name to a name not using the “Belly” names or any similar names. From and after the 60thday following Closing, the Seller shall will not make any external use of the name “Belly”, except to the extent necessary for the Seller to pay its liabilities and to prepare its Tax Returns and similar reports

**Section 5.02 Covenants of Buyer.** Buyer agrees that:

(a) **No Inconsistent Actions.** During the period from the date of this Agreement and continuing until the Closing Date, Parent and Buyer will not (i) take or agree or commit to take any action that would make any representation and warranty of Parent or Buyer inaccurate in any respect at, or as of any time prior to, the Closing Date or (ii) omit or agree or commit to omit to take any action necessary to prevent any such representation or warranty from being inaccurate in any respect at any such time.

**Section 5.03 Covenants of All Parties.** Each party agrees that:

(a) **Best Efforts.** Subject to the terms and conditions of this Agreement, each of the parties hereto agrees to use its best efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement. The parties each agree to execute and deliver such other documents, certificates, agreements and other writings and to take such other actions as may be necessary or desirable in order to consummate or implement expeditiously the transactions contemplated by this Agreement.

(b) **Certain Filings.** The parties will cooperate with one another (i) in determining whether any action by or in respect of, or filing with, any Governmental Entity is require or any actions, consents, approvals or waivers are required to be obtained from parties to any material contracts, in connection with the transactions contemplated by this Agreement and (ii) in taking such actions or making any such filings, furnishing information required in connection therewith and seeking timely to obtain any such actions, consents, approvals or waivers.

(c) **Confidentiality; Public Announcements**

(i) The parties hereto acknowledge that Parent and Seller have previously executed a Non-Disclosure Agreement, dated January 21, 2017 (the “NDA”) which shall continue in full force and effect in accordance with its terms, and the parties hereby agree that the information obtained pursuant to the negotiation and execution of this Agreement or the effectuation of the transactions contemplated hereby, shall be governed by the terms of the NDA.

(ii) Seller understands that Parent is a publicly traded corporation, and that the disclosure of information concerning Parent and its business affairs and financial condition is strictly regulated by the Commission and other legal and administrative bodies. Accordingly, Seller hereby agrees (i) that Parent may make or disseminate any public statement, press release or other disclosure concerning this Agreement, any schedule or exhibit attached hereto, or the transactions and relationships contemplated hereby and thereby as it deems necessary to comply

with applicable law or regulation (including, without limitation, the filing of this Agreement and its exhibits and schedules) and (ii) to take reasonable measures not to make or disseminate any public statement, press release or other disclosure concerning this Agreement, any schedule or exhibit attached hereto, or the transactions and relationships contemplated hereby and thereby, without the prior written consent of Parent (which consent may be given or withheld in its sole discretion).

(d) **Notices.** Each of the parties shall give prompt notice to the other party of: (i) any notice of, or other communication relating to, a default or event which, with notice or the lapse of time or both, would become a default, received by it or any of its subsidiaries subsequent to the date of this Agreement and prior to the Closing, under any agreement, indenture or instrument material to the financial condition, properties, businesses or results of operations of it and its subsidiaries, taken as a whole, to which it or any of its subsidiaries is a party or is subject; and (ii) any notice or other communication from any third party alleging that the consent of such third party is or may be required in connection with the transactions contemplated by this Agreement, which consent, if required, would breach the representations contained in Articles III and IV, provided, that Seller's unintentional failure to give notice under this Section 5.03(d) shall not be deemed to be a breach of covenant under this Section 5.03(d), but instead shall constitute only a breach or failure of the underlying representation or covenant, as the case may be.

(e) **Tax Cooperation; Allocation of Taxes.**

(i) Seller and Buyer agree to furnish or cause to be furnished to each other, upon request, as promptly as practicable, such information and assistance relating to the Acquired Assets and the Acquired Business as is reasonably necessary for the filing of all Tax returns, and making of any election related to Taxes, the preparation for any audit by any taxing authority, and the prosecution or defense of any claim, suit or proceeding relating to any Tax return. Seller and Buyer shall cooperate with each other in the conduct of any audit or other proceeding related to Taxes involving the Acquired Business and each shall execute and deliver such powers of attorney and other documents as are necessary to carry out the intent of this Section 5.03(e).

(ii) All real property, personal property and similar ad valorem obligations levied with respect to the Acquired Assets for a taxable period which includes (but does not end on) the Closing Date shall be apportioned between Seller and Buyer as of the Closing Date based on the number of days of such taxable period included in the Pre-Closing Tax Period and the number of days of such taxable period included in the Post-Closing Tax Period. Seller shall be liable for the proportionate amount of such taxes that is attributable to the Pre-Closing Tax Period, and Buyer shall be liable for the proportionate amount of such taxes that is attributable to the Post-Closing Tax Period. Within 90 days after the Closing, Seller and Buyer shall present a statement to the other setting forth the amount of reimbursement to which each is entitled under this Section 5.03(e) together with such supporting evidence as is reasonably necessary to calculate the proration amount. The proration amount shall be paid by the party owing it to the other within 30 days after receipt of such statement by certified mail, express mail or personal service. Thereafter, Seller shall notify Buyer upon receipt of any bill for real or personal property taxes relating to the Acquired Assets, part or all of which are attributable to the Post-Closing Period, and shall promptly deliver such bill to Buyer who shall pay the same to the appropriate taxing authority, provided that if such bill covers the Pre-Tax Closing Period, Seller shall also remit

prior to the due date of assessment to Buyer payment for the proportionate amount of such bill that is attributable to the Pre-Closing Tax Period. In the event that either Seller or Buyer shall thereafter make a payment for which it is entitled to reimbursement under this Section 5.03(e), the other party shall make such reimbursement promptly, but in no event later than 30 days after the presentation of a statement setting forth the amount of reimbursement to which the presenting party is entitled along with such supporting evidence as is reasonably necessary to calculate the amount of reimbursement. Any payment required under this Section and not made within 30 days after receipt of the statement by certified mail, express mail or personal service shall bear interest at a rate of 10% per annum.

(iii) Any transfer, documentary, sales, use or other Taxes assessed upon or with respect to the transfer of the Acquired Assets to Buyer and any recording or filing fees with respect thereto shall be the responsibility of Seller.

(f) **Employee Matters.**

(i) On the Closing Date, Buyer will offer employment to those other employees of the Acquired Business as it may determine in its sole discretion; provided that Buyer may terminate at any time after the Closing Date the employment of any employee who accepts such offer. Any such offers will be at such salary or wage and benefit levels and on such other terms and conditions as Buyer shall in its sole discretion deem appropriate. The employees who accept and commence employment with Buyer are hereinafter collectively referred to as the "Transferred Employees". Seller will not take, and will cause each of its affiliates not to take, any action which would impede, hinder, interfere or otherwise compete with Buyer's effort to hire any Transferred Employees. Buyer shall not assume responsibility for any Transferred Employee until such employee commences employment with Buyer.

(ii) Seller shall retain all obligations and liabilities under the Seller Employee Plans in respect of each employee or former employee (including any beneficiary thereof) who is not a Transferred Employee. Seller shall retain all liabilities and obligations in respect of benefits accrued as of the Closing Date by Transferred Employees under the Seller Employee Plans, and neither Buyer nor any affiliate shall have any liability with respect thereto. Except as expressly set forth herein, no assets of any Seller Benefit Plan shall be transferred to Buyer or any of its affiliates or to any plan of Buyer or any of its affiliates.

(iii) With respect to the Transferred Employees (including any beneficiary or dependent thereof), Seller shall retain (A) all liabilities and obligations arising under any group life, accident, medical, dental or disability plan or similar arrangement (whether or not insured) to the extent that such liability or obligation relates to contributions or premiums accrued (whether or not payable), or to claims incurred (whether or not reported), on or prior to the Closing Date, (B) all liabilities and obligations arising under any worker's compensation arrangement to the extent such liability or obligation relates to the period prior to the Closing Date, including liability for any retroactive workman's compensation premiums attributable to such period and (C) all other liabilities and obligations arising under the Seller Employee Plans to the extent any such liability or obligation relates to the period prior to the Closing Date, including without limitation, accruals through the Closing Date under any bonus plan or arrangement, any vacation plans, arrangements and policies. Seller shall reimburse Buyer for a

pro rata portion of any bonus paid by Buyer to any Transferred Employee in respect of any period, a portion of which includes the period on or prior to the Closing Date.

(iv) No provision of this Section 5.03(f) shall create any third party beneficiary or other rights in any employee or former employee (including any beneficiary or dependent thereof) of Seller or of any of its subsidiaries in respect of continued employment (or resumed employment) with either Buyer or the Acquired Business or any of their affiliates and no provision of this Section 5.03(f) shall create any such rights in any such Person in respect of any benefits that may be provided, directly or indirectly, under any employee benefit plan or arrangement which may be established by Buyer or any of its affiliates. No provision of this Agreement shall constitute a limitation on the rights to amend, modify or terminate after the Closing Date any such plans or arrangements of Buyer or any of its affiliates.

(g) **Post-Closing Remittances and Pro-rations and Cooperation.**

(i) If on or after the Closing Date, Seller or Buyer receives a payment from any Person that, pursuant to the terms hereof, should have been paid to the other party, Seller or Buyer, as applicable, agrees to hold in trust and remit such payment to the other party entitled thereto within five Business Days of such receipt.

(ii) Except as otherwise expressly provided herein, all ordinary course expenses related to the Acquired Assets and transferred to Buyer hereunder, in each case, for the period prior to the Closing Date, will be for the account of Seller (except to the extent included in the calculation of the Closing Working Capital) and for the period on and after the Closing Date shall be for the account of Buyer. If a party actually makes any payments that are, in whole or in part, designated as payments for the period allocated to the other party under this Section 5.03(g), such other party shall promptly (and in any case within five Business Days following receipt of request for payment) reimburse such amounts to the party so making such payments (except to the extent included in the calculation of the Closing Working Capital). For purposes of calculating pro-rations, Buyer shall be deemed to own the Acquired Assets, and, therefore be responsible for the expense thereof, as of 12:01 a.m. local time on the day after the Closing Date. All pro-rations shall be made on the basis of the actual number of days of the month that shall have elapsed as of the Closing Date.

(iii) Buyer and Seller will cooperate to transfer to Buyer, at or as soon as possible after the Closing, (A) the collection mechanics with respect of any Assumed Assets (including customer credit card payment information and accounts) and (B) the payment mechanics with respect to any Assumed Liabilities.

## ARTICLE VI CONDITIONS

**Section 6.01** **Conditions to Each Party's Obligations.** The obligation of each party to consummate the Closing is subject to the satisfaction of the following conditions:

(a) All authorizations, consents, orders or approvals of, or declarations or filings with, or expirations or terminations of waiting periods imposed by, any

Governmental Entity, and all required third party consents (as set forth on Section 6.01 of the Seller Disclosure Schedule), shall have been filed, occurred or been obtained.

(b) No statute, rule, regulation, executive order, decree or injunction shall have been enacted, entered, promulgated or enforced by any court or governmental authority which prohibits the consummation of the Closing and shall be in effect.

**Section 6.02** Conditions to Obligations of Parent and Buyer. The obligations of Parent and Buyer to consummate the Closing is subject to the satisfaction of the following further conditions:

(a) The representations and warranties of Seller set forth in this Agreement shall be true and correct in all material respects (other than those representations and warranties which are qualified as to materiality, which shall be true and correct) as of the date of this Agreement, and shall also be true in all material respects (other than those representations and warranties which are qualified as to materiality, which shall be true and correct) (except for such changes as are contemplated by the terms of this Agreement and such changes as would be required to be made in the exhibits or Seller Disclosure Schedules to this Agreement if such schedules were to speak as of the Closing Date) on and as of the Closing Date with the same force and effect as though made on and as of the Closing Date.

(b) Seller shall have performed in all material respects all obligations required to be performed by it under this Agreement at or prior to the Closing Date.

(c) Buyer shall have received a certificate signed by the Chief Executive Officer(s) of Seller confirming Sections 6.02(a) and (b).

(d) Buyer shall have received (i) resolutions duly adopted by the members of Seller approving the execution and delivery of this Agreement and all other necessary or proper organizational action to enable Seller to comply with the terms of this Agreement, and (ii) all other documents it may reasonably request relating to the existence of Seller and the authority of Seller for this Agreement, all in form and substance reasonable satisfactory to Buyer.

(e) The Boards of Directors of each of Parent and Buyer, acting in their sole and absolute discretion, shall have approved the execution, delivery and performance by each of Parent and Buyer of this Agreement and the consummation by each of Parent and Buyer of the transactions contemplated hereby.

(f) Seller shall have delivered the signed the documents and funds set forth in Sections 2.07 (b) and (c).

**Section 6.03** Conditions to Obligation of Seller. The obligation of Seller to consummate the Closing is subject to the following further conditions:



(a) The representations and warranties of Parent and Buyer set forth in this Agreement shall be true and correct in all material respects (other than those representations and warranties which are qualified as to materiality, which shall be true and correct) as of the date of this Agreement, and shall also be true in all material respects (other than those representations and warranties which are qualified as to materiality, which shall be true and correct) (except for such changes as are contemplated by the terms of this Agreement and such changes as would be required to be made in the exhibits to this Agreement if such schedules were to speak as of the Closing Date) on and as of the Closing Date with the same force and effect as though made on and as of the Closing Date.

(b) Parent and Buyer shall have performed in all material respects all obligations required to be performed by them under this Agreement at or prior to the Closing Date.

(c) Seller shall have received a certificate signed by the Chief Executive Officer of each of Parent and Buyer confirming Section 6.03(a) and (b).

(d) Seller shall have received (i) resolutions duly adopted by the Boards of Directors of Parent and Buyer approving the execution and delivery of this Agreement and all other necessary or proper corporate action to enable Buyer to comply with the terms of this Agreement, and (ii) all other documents it may reasonably request relating to the existence of Parent and Buyer and the authority of Parent and Buyer for this Agreement, all in form and substance reasonable satisfactory to Seller.

(e) Buyer shall have made the deliveries and delivered the signed documents set forth in Sections 2.07(a), (b) and (c).

## ARTICLE VII SURVIVAL; INDEMNIFICATION

**Section 7.01** **Survival.** The covenants, agreements, representations and warranties contained herein shall survive the Closing and shall remain in full force and effect until the first anniversary of the Closing Date; provided, however, that the representations and warranties contained in Sections 3.01, 3.02, 3.05(b) and 3.18 (the "Fundamental Representations") shall survive the Closing and shall remain in full force and effect until the expiration of the applicable statute of limitations (giving effect to any waiver, mitigation or extension thereof). Notwithstanding the foregoing, any covenant, agreement, representation or warranty in respect of which indemnity may be sought under Section 7.02 shall survive the time at which it would otherwise terminate pursuant to the preceding sentence, if notice of the inaccuracy or breach thereof giving rise to such right to indemnity shall have been given to the party against whom such indemnity may be sought prior to such time.

**Section 7.02** Indemnification.

(a) Seller shall indemnify Parent and Buyer and their respective officers, directors, agents and employees (the "Buyer Indemnified Parties") against and agrees to hold them

harmless from any and all damage, loss, diminution in value, liability and expense (including without limitation reasonable costs of investigation and defense and reasonable fees and expenses of lawyers, experts and other professionals) (“Damages”) incurred or suffered by any Indemnified Party, directly or indirectly (whether or not due to a Third Party Claim), arising out of, resulting from or in connection with: (i) any inaccuracy in or breach of any of the representations or warranties of Seller contained in this Agreement; (ii) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Seller pursuant to this Agreement; or (iii) the failure of Seller to perform any Excluded Liability or any obligation or liability of the Acquired Business relating to the Excluded Assets.

(b) Buyer shall indemnify Seller and its officers, directors, agents and employees (the “Seller Indemnified Parties”) against and agrees to hold them harmless from any and all Damages incurred or suffered by any Seller Indemnified Party, directly or indirectly (whether or not due to a Third Party Claim), arising out of, resulting from or in connection with: (i) any inaccuracy in or breach of any of the representations or warranties of Buyer and Parent contained in this Agreement; (ii) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Buyer pursuant to this Agreement; or (iii) the failure of Buyer to perform any Assumed Liability.

**Section 7.03 Limitations on Indemnification.** The party(ies) making a claim under this Article VII is referred to as the “Indemnified Party”, and the party against whom such claims are asserted under this Article VII is referred to as the “Indemnifying Party”. The indemnification provided for in Section 7.02 shall be subject to the following limitations:

(a) The Parties agree that their respective remedies under Section 7.02(a)(i) and 7.02(b)(i) are their sole and exclusive remedies for breaches of the representations and warranties contained in this Agreement; provided, however, that this exclusive remedy does not preclude a Party from bringing an action for specific performance or injunctive or declaratory relief or other equitable remedy to require a Party to perform its obligations under this Agreement or any Party’s rights or remedies based on fraud or intentional misrepresentations.

(b) The Indemnifying Party shall not be required to make any payment pursuant to this Article VII for any Damages of any Buyer Indemnified Party or Seller Indemnified Party, as applicable, arising out of the matters described in Section 7.02(a)(i) or 7.02(b)(i), as applicable, unless and until the aggregate amount of all Damages incurred by the Buyer Indemnified Parties or Seller Indemnified Parties, as applicable, in respect of indemnification under, as applicable, Section 7.02(a)(i) or 7.02(b)(i) (without giving effect to any materiality, Material Adverse Effect or similar qualification limiting the scope of any representation or warranty that is the subject of an indemnification claim) exceed Ten Thousand Dollars (\$10,000) (the “Basket”) and then only for the amount of such Damages in excess of the Basket.

(c) The maximum liability of the Seller pursuant to this Article VII for any Damages of the Buyer Indemnified Parties arising out of the matters described in

Section 7.02(a)(i) (except with respect to breaches of Fundamental Representations) shall be limited to 15% of the Purchase Price.

(d) The amount of any Damages suffered shall be reduced by all amounts to which an Indemnified Party is entitled and actually receives under the provisions of any applicable insurance policies, in each case net of deductibles, and all costs and expenses of recovery of such proceeds (it being understood that no Indemnified Party shall have any obligation to acquire or maintain any insurance coverage).

(e) Notwithstanding anything to the contrary contained herein, any amount included in the determination of the Closing Working Capital will not be further subject to an indemnification claim.

**Section 7.04 Procedures.**

(a) **Indemnification Notice.** An Indemnified Party shall give written notice to the Indemnifying Party as soon as reasonably practicable after becoming aware of any claim or demand (a "Claim") for which recovery against the Indemnifying Party may be sought (any such notice an "Indemnification Notice"). In the case of a Claim other than a Third Party Claim, if the Indemnifying Party does not notify the Indemnified Party in writing that it disputes such Claim within thirty (30) days from receipt of an Indemnification Notice, then the Claim specified in such Indemnification Notice shall be deemed a liability of the Indemnifying Party. The right to indemnification under this Agreement will not be affected by any failure to give, or any delay in giving, an Indemnification Notice, unless, and then only to the extent that, the rights and remedies of the party to whom such notice was to have been given are materially prejudiced as a result thereof.

(b) **Notice of Third Party Claims.** In the event of the assertion or commencement by any third party Person of any action, suit, claim or other legal proceeding claim or with respect to which an Indemnifying Party may become obligated to hold harmless, indemnify, compensate or reimburse any Indemnified Party pursuant to Section 7.02 (a "Third Party Claim"), the Indemnified Party shall give the Indemnifying Party prompt written notice thereof. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that such failure materially prejudices the defense of such Third Party Claim. Within fifteen (15) days of receipt of an Indemnification Notice regarding any Third Party Claim, the Indemnifying Party shall notify the Indemnified Party if the Indemnifying Party wishes to assume the defense or settlement of the Third Party Claim at its own expense with counsel of its choosing and acknowledge liability for any Losses, in which event the Indemnified Party will have the right to participate in the defense at its own expense. Failure by an Indemnifying Party to notify an Indemnified Party of its election to defend any Third Party Claim within fifteen (15) days of receipt of an Indemnification Notice is deemed a waiver by the Indemnifying Party of its right to defend such Third Party Claim.

(c) **Defense of Third Party Claims.** If the Indemnifying Party assumes the defense of a Third Party Claim, the Indemnifying Party must conduct the defense of the Third Party Claim reasonably actively and diligently. Such Indemnifying Party may not, in the defense of the Third Party Claim, without the written consent of the Indemnified Party (which consent will not

be unreasonably withheld, delayed or conditioned) agree to any settlement, compromise or discharge of such Third Party Claim. If the Indemnifying Party does not assume the defense of any Third Party Claim after receipt of an Indemnification Notice, the Indemnified Party may proceed with the defense of such Third Party Claim on its own, with counsel reasonably satisfactory to Indemnifying Party. If an Indemnified Party so proceeds with the defense of any such Third Party Claim: (i) subject to the other provisions of this Section 7, all reasonable and documented out-of-pocket expenses relating to the defense of such Third Party Claim, to the extent indemnifiable hereunder, shall be borne and paid exclusively by the Indemnifying Party, (ii) Indemnifying Party shall have the right to participate in (but not control) the defense of such Third Party Claim at its own expense, and (iii) Indemnifying Party shall cooperate with the Indemnified Parties in all reasonable respects in connection with the defense of such Third Party Claim, including making available records relating to such Third Party Claim and furnishing, without expense (other than reimbursement of actual out-of-pocket expenses) to the defending party, management employees of the non-defending party as may be reasonably necessary for the preparation of the defense of such Third Party Claim.

(d) **Settlement of Third Party Claims.** In the event the Indemnified Parties assume the defense of a Third Party Claim pursuant to Section 7.04(c), the Indemnified Parties shall have the right to settle, adjust or compromise any Third Party Claim; *provided, however*, that if an Indemnified Party settles, adjusts or compromises any such Third Party Claim without the consent of the Indemnifying Party, such settlement, adjustment or compromise shall not be determinative of whether the Indemnified Party is entitled to indemnification hereunder (or the amount of Damages incurred by the Indemnified Party) in connection with such Third Party Claim (it being understood that if the Indemnified Party requests the Indemnifying Party's consent to a settlement, adjustment or compromise, Indemnifying Party shall not unreasonably withhold or delay such consent).

## **ARTICLE VIII TERMINATION AND AMENDMENT**

**Section 8.01** **Termination.** This Agreement may be terminated at any time prior to the Closing Date:

- (a) by mutual consent of Buyer and Seller;
- (b) by either Buyer or Seller if the Closing shall not have been consummated before November 30, 2018 (unless the failure to consummate the Closing by such date shall be due to the action or failure to act of the party seeking to terminate this Agreement); or
- (c) by either Buyer or Seller if (i) the conditions to such party's obligations shall have become impossible to satisfy or (ii) any permanent injunction or other order of a court or other competent authority preventing the consummation of the Closing shall have become final and non-appealable.

**Section 8.02** **Effect of Termination.** In the event of the termination and abandonment of this Agreement pursuant to Section 8.01 hereof, this Agreement shall forthwith become void

and have no effect, without any liability on the part of any party hereto or its affiliates, directors, officers or stockholders, other than the provisions of Section 5.03(c). Nothing contained in this Section 8.02 shall relieve any party from liability for any breach of this Agreement.

**Section 8.03** Amendment. This Agreement may not be amended except by an instrument in writing signed on behalf of each of the parties hereto.

**Section 8.04** Extension; Waiver. At any time prior to the Closing Date, the parties hereto may, to the extent legally allowed, (i) extend the time for the performance of any of the obligations or other acts of the other parties hereto, (ii) waive any inaccuracies in the representations and warranties contained herein or in any document delivered pursuant hereto and (iii) waive compliance with any of the agreements or conditions contained herein. Any agreement on the part of a party hereto to any such extension or waiver shall be valid only if set forth in a written instrument signed on behalf of such party.

## ARTICLE IX MISCELLANEOUS

**Section 9.01** Notices. Any notice or other communication required or permitted to be delivered to any party under this Agreement shall be in writing and shall be deemed properly delivered, given and received: (a) if delivered by hand, when delivered; (b) if sent by electronic mail or other electronic transmission, upon delivery; and (c) if sent by overnight delivery via a national courier service, the third Business Day after being sent, in each case to the address set forth beneath the name of such party below (or to such other address as such party shall have specified in a written notice given to the other parties hereto):

(a) if to Parent or Buyer, to:

Mobivity Holdings Corp.  
55 N. Arizona Place, Suite 310  
Chandler, AZ 85225  
Attn: Dennis Becker, CEO  
and

(b) if to Seller, to

Belly, Inc.  
125 S. Clark Street, 17<sup>th</sup> Floor  
Chicago, IL 60603  
Attn: Daniel Gloede

**Section 9.02** Descriptive Headings. The descriptive headings herein are inserted for convenience only and are not intended to be part of or to affect the meaning or interpretation of this Agreement.

**Section 9.03 Counterparts.** This Agreement may be executed in two or more counterparts, all of which shall be considered one and the same agreement and shall become effective when two or more counterparts have been signed by each of the parties and delivered to the other parties, it being understood that all parties need not sign the same counterpart. The exchange of a fully executed Agreement (in counterparts or otherwise) by electronic transmission in .PDF format or by facsimile shall be sufficient to bind the parties to the terms and conditions of this Agreement.

**Section 9.04 Entire Agreement; Assignment.** This Agreement (a) constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof (other than any confidentiality agreement between the parties; any provisions of such agreements which are inconsistent with the transactions contemplated by this Agreement being waived hereby) and (b) shall not be assigned by operation of law or otherwise, provided that Buyer may assign its rights and obligations to any other wholly owned subsidiary of Parent or Buyer, but no such assignment shall relieve Buyer of its obligations hereunder if such assignee does not perform such obligations.

**Section 9.05 Governing Law; Jurisdiction.**

(a) This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware as applied to agreements among the residents of such state made and to be performed entirely within such state (without giving effect to principles of conflicts of laws).

(b) Any dispute, controversy or claim, whether based on contract, tort, statute, fraud, misrepresentation or any other legal theory (a "Dispute") between the Buyer or Parent, on the one hand, and Seller, on the other hand, arising out of or relating to this Agreement, any obligations hereunder or the relationship of the parties under this Agreement shall be settled by binding arbitration conducted in the State of Delaware in accordance with the then current arbitration rules of JAMS as modified by the following provisions of this Agreement:

(i) If the amount in dispute exceeds \$500,000, three neutral arbitrators shall be selected by the parties from the JAMS panel list, one of whom shall be chosen by the Seller, one of whom shall be chosen by the Buyer and the third to be chosen by the two arbitrators chosen by the Seller and the Buyer; *provided*, that if the two arbitrators chosen by the Seller and the Buyer are unable to reach agreement with respect to the third arbitrator, the third shall be chosen in accordance with the appointment rules of JAMS. If the amount in dispute is less than \$500,000, selection of one neutral arbitrator by the parties shall be from JAMS panel list and shall be chosen by the Seller and the Buyer together; *provided*, that if the Seller and the Buyer are unable to reach agreement with respect to the arbitrator, the arbitrator shall be chosen in accordance with appointment rules of JAMS. The arbitrators shall be experienced in complex business matters and mergers and acquisitions transactions.

(ii) The arbitration process shall be conducted on an expedited basis by the regional office of JAMS located in Delaware. Proceedings in arbitration shall begin no later than 45 days after the filing of the Dispute with JAMS and shall be scheduled to

conclude no later than 180 days after the filing of the Dispute (including delivery of the written judgment under clause (vi) below). All hearings, unless otherwise agreed to by the parties, shall be held in the State of Delaware.

(iii) The Seller and the Buyer may obtain and take discovery, including requests for production, interrogatories, requests for admissions and depositions, as provided by the Federal Rules of Civil Procedure; *provided* that the arbitrator(s) may, in his, her or their discretion, set parameters on the timing and/or completion of this discovery and may order additional pre-hearing exchange of information, including, without limitation, exchange of summaries of testimony or exchange of statements of positions.

(iv) The arbitration proceedings and all testimony, filings, documents and information relating to or presented during the arbitration proceedings shall be disclosed exclusively for the purpose of facilitating the arbitration process and for no other purpose.

(v) The award of the arbitrator(s) shall be made in a written opinion containing a concise reasoned analysis of the basis upon which the award was made.

(vi) A judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

(vii) The parties to any arbitration shall share equally the fees and costs of JAMS and the arbitrator(s). The prevailing party or parties shall be entitled to recover from the adverse parties his, her or its actual reasonable attorneys' fees and costs incurred in connection with the arbitration and the enforcement thereof.

(viii) Any party may apply to a court having jurisdiction to: (A) enforce this agreement to arbitrate; (B) seek provisional injunctive relief so as to maintain the status quo until the arbitration award is rendered or the controversy is otherwise resolved; (C) avoid the expiration of any applicable limitations period; (D) preserve a superior position with respect to other creditors; or (E) challenge or vacate any final judgment, award or decision of the arbitrator(s) that does not comport with the express provisions of Section 9.05(b)(ix).

(ix) The arbitrator(s) are only authorized to, and only have the consent of the parties to, interpret and apply the terms and conditions of this Agreement in accordance with the governing law. The arbitrator(s) are not authorized to, and shall not, order any remedy not permitted by this Agreement and shall not change any term or condition of this Agreement, deprive either party of any remedy expressly provided hereunder or provide any right or remedy that has not been expressly provided hereunder. In the event that the arbitrator(s) exceed their authority under this Agreement and violate this provision, either party may petition a court of competent jurisdiction to vacate the arbitration award on the grounds that the arbitrator(s) exceeded their authority.

(x) The Federal Arbitration Act, 9 U.S.C. Sections 1 through 14 (as amended and including any successor provision), except as modified hereby, shall govern the interpretation and enforcement of this Section 9.05(b).

Notwithstanding the foregoing, the parties shall continue performing their respective obligations under this Agreement while the Dispute is being resolved unless and until such obligations are terminated or expire in accordance with the provisions hereof.

**Section 9.06 Specific Performance.** The parties hereto agree that if any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached, irreparable damage would occur, no adequate remedy at law would exist and damages would be difficult to determine, and that the parties shall be entitled to specific performance of the terms hereof, in addition to any other remedy at law or equity.

**Section 9.07 No Waiver Relating to Claims for Fraud, Intentional Misrepresentation or Willful Misconduct.** The liability of any Person under Article 7 will be in addition to, and not exclusive of, any other liability that such Person may have at law or in equity based on such Person's fraud, intentional misrepresentation or willful misconduct. Notwithstanding anything to the contrary contained in this Agreement, none of the provisions set forth in this Agreement, including the provisions set forth in Article 7, shall be deemed a waiver by any party to this Agreement of any right or remedy which such party may have at law or in equity based on any other Person's fraud, intentional misrepresentation or willful misconduct, nor will any such provisions limit, or be deemed to limit: (a) the amounts of recovery sought or awarded in any such claim; (b) the time period during which any such claim may be brought; or (c) the recourse which any such party may seek against another Person with respect to such a claim.

**Section 9.08 Expenses.** Whether or not the Closing is consummated, all costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the party incurring such costs and expenses.

**Section 9.09 Bulk Sales Laws.** Buyer and Seller each hereby waive compliance by Seller with the "bulk sales", "bulk transfer" or similar laws of any state. Seller agrees to indemnify and hold Buyer harmless against any and all claims, losses, damages, liabilities, costs and expenses incurred by Buyer or any of its affiliates as a result of any failure to comply with any such "bulk sales", "bulk transfer" or similar laws.

**Section 9.10 Parties in Interest.** This Agreement shall be binding upon and inure solely to the benefit of each party hereto, and nothing in this Agreement, express or implied, is intended to or shall confer upon any other person or persons any rights, benefits or remedies of any nature whatsoever under or by reason of this Agreement.



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed as of the date first written above.

**MOBIVITY HOLDINGS CORP.**

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

Name: Dennis Becker

Title: Chief Executive Officer

**MOBIVITY, INC.**

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

Name: Dennis Becker

Title: Chief Executive Officer

**BELLY, INC.**

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

Name: Daniel Gloede

Title: Chief Executive Officer

**LOAN AND SECURITY AGREEMENT**

**THIS LOAN AND SECURITY AGREEMENT** (this “**Agreement**”) dated as of November 14, 2018 (the “**Effective Date**”) is by and between **WINTRUST BANK**, an Illinois state chartered bank (together with its successors and assigns, “**Bank**”), and **MOBIVITY, INC.**, a Nevada corporation (“**Borrower**”).

**RECITALS:**

- A. Borrower has requested that Bank provide Borrower with a single term loan; and
- B. Bank is willing to make such term loan to Borrower upon the terms and provisions and subject to the conditions set forth herein.

**NOW, THEREFORE**, in consideration of the mutual agreements contained herein, and of any loan made to or for the benefit of Borrower by Bank, and for other good and valuable consideration, the receipt, sufficiency and adequacy of which are hereby acknowledged, the parties hereto (intending to be legally bound) hereby agree as follows:

**1      ACCOUNTING AND OTHER TERMS**

Accounting terms not defined in this Agreement shall be construed in accordance with GAAP. Calculations and determinations made in connection with this Agreement shall be made following GAAP applied on a consistent basis. Capitalized terms not otherwise defined in this Agreement shall have the meanings set forth in Section 13. All other terms contained in this Agreement, unless otherwise indicated, shall have the meaning provided by the Code to the extent such terms are defined therein.

**2      LOAN AND TERMS OF PAYMENT**

**2.1      Promise to Pay.** Borrower hereby unconditionally promises to pay Bank the outstanding principal amount of all Credit Extensions and accrued and unpaid interest thereon as and when due in accordance with this Agreement.

**2.1.1    Term Loan.**

(a)      Term Loan. On the terms and subject to the conditions of this Agreement, Bank agrees to extend to Borrower in one advance a single term loan on the Effective Date, in an aggregate principal amount equal to One Million and No/100 Dollars (\$1,000,000.00) (the “**Term Loan**”). Any amount of the Term Loan borrowed and repaid or prepaid under this Agreement may not be reborrowed.

(b)      Borrowing. On the Effective Date, Bank shall make the proceeds of the Term Loan available to Borrower by wire transfer of such proceeds, in accordance with instructions provided to (and acceptable to) Bank by Borrower.

(c)      Term Loan Note. The Term Loan shall be evidenced by a promissory note (as amended, restated, supplemented or otherwise modified from time to time, and together with any renewals or extensions thereof or exchanges or substitutions therefor, the “**Term Loan Note**”), duly executed and delivered by Borrower, in form and substance reasonably satisfactory to Bank, with appropriate insertions, dated the Effective Date, payable by Borrower to the order of Bank in the principal amount equal to the Term Loan.

(d)      Repayment. On each Payment Date beginning with December 1, 2018 and ending on the Term Loan Maturity Date, Borrower shall make a scheduled payment of all interest accrued hereunder on the Term Loan since the immediately preceding Payment Date (or, in the case of the first interest payment being made by Borrower hereunder on December 1, 2018, since the Effective Date). On each Payment Date beginning with June 1, 2018 and ending on the Term Loan Maturity Date, Borrower shall make a scheduled principal payment on the Term Loan in the amount of Thirty Three Thousand Three Hundred Thirty Three and 33/100 Dollars (\$33,333.33) plus accrued and unpaid interest thereon, as such amounts may be adjusted to give effect to any prepayment of the Term

Loan in accordance with the terms of this Agreement. Any remaining unpaid balance (including any and all principal and interest accrued thereon) of the Term Loan shall be payable in cash on the Term Loan Maturity Date.

(e) Voluntary Prepayment. Borrower may at any time and from time to time prepay the outstanding principal amounts outstanding under the Term Loan (in whole or in part); provided that any such prepayment shall be accompanied by the payment of all accrued and unpaid interest on such amount so prepaid. Such prepayment of principal shall be applied to the scheduled payments of the outstanding principal balance of the Term Loan at such time in the inverse order of maturity.

**2.2 Acceleration.** Unless sooner paid in full in accordance with Section 2.1.1(d) hereof, the then outstanding balance of the Term Loan (together with all accrued interest thereon) shall become immediately due and payable upon the earliest to occur of the (x) Term Loan Maturity Date; (y) acceleration of the Obligations pursuant to Section 9.1 hereof; and (z) termination of this Agreement in accordance with its terms.

**2.3 Interest; Default Rate; Loan Account.**

(a) Interest Rate. Subject to Section 2.3(b), the principal amount outstanding of the Term Loan shall accrue interest at a floating per annum rate equal to the Applicable Rate, which interest shall be payable monthly in accordance with Section 2.1.(d) above and Section 2.3(f) below.

(b) Default Rate. Immediately upon the occurrence and during the continuance of an Event of Default, Obligations shall bear interest at a rate per annum which is three percent (3.00%) above the Applicable Rate (the "**Default Rate**"), which Default Rate may be deemed to commence as of the date of the occurrence of any Event of Default at Bank's sole discretion, unless Bank otherwise elects from time to time in its sole discretion to impose a lesser increase. Fees and expenses which are required to be paid by Borrower pursuant to the Loan Documents (including, without limitation, Bank Expenses) but are not paid when due shall bear interest until paid at a rate equal to the highest rate at any time applicable to the Obligations. Payment or acceptance of the increased interest rate provided in this Section 2.3(b) is not a permitted alternative to timely payment and shall not constitute a waiver of any Event of Default or otherwise prejudice or limit any rights or remedies of Bank.

(c) Adjustment to Interest Rate. Changes to the interest rate of any Credit Extension based on changes to the Prime Rate shall be effective on the effective date of any change to the Prime Rate and to the extent of any such change. Each determination by Bank of an interest rate shall be conclusive and binding for all purposes, absent manifest error.

(d) Computation; 360-Day Year. In computing interest, the date of the making of any Credit Extension shall be included and the date of payment shall be excluded; provided, however, that if any Credit Extension is repaid on the same day on which it is made, such day shall be included in computing interest on such Credit Extension. Interest shall be computed on the basis of a 360-day year for the actual number of days elapsed.

(e) Debit of Accounts. Bank may debit any of Borrower's Deposit Accounts maintained with Bank (other than Deposit Accounts exclusively used for payroll, payroll taxes and other employee wage and benefit payments to or for the benefit of Borrower's employees) for principal and interest payments or any other amounts Borrower owes Bank when due or declared due in accordance with the terms hereof. These debits shall not constitute a set-off.

(f) Interest Payment Date. Unless otherwise provided herein, interest is payable monthly in arrears on the Payment Date.

(g) Borrower's Loan Account. Bank shall maintain a loan account (the "**Loan Account**") on its books for Borrower in which shall be recorded (i) the Term Loan made on the Effective Date by Bank to Borrower pursuant to this Agreement, (ii) all payments made by Borrower on the Term Loan, and (iii) all other appropriate debits and credits as provided in this Agreement, including, without limitation, all fees, charges, expenses and interest. All entries in the Loan Account shall be made in accordance with Bank's customary accounting practices as in effect from time to time. Borrower promises to pay the amount reflected as owing by Borrower under its Loan Account (absent manifest error) and all of its other obligations hereunder as such amounts become due or are declared due pursuant to the terms of this Agreement. Notwithstanding the foregoing, the failure so to record any such amount or any error in so recording any such amount shall not limit or otherwise affect

Borrower's obligations under this Agreement or under the Term Loan Note to repay the outstanding principal amount further evidenced thereby together with all interest accruing thereon.

(h) Statements. The Term Loan, and all other debits and credits provided for in this Agreement, shall be evidenced by Borrower's Loan Account. Until such time as Bank shall have rendered to Borrower written statements of account as provided herein, the balance in the Loan Account, as set forth on Bank's most recent computer printout, shall be rebuttably presumptive evidence of the amounts due and owing Bank by Borrower. From time to time Bank shall render to Borrower a statement setting forth the balance of the Loan Account, including principal, interest, expenses and fees. Each such statement shall be subject to subsequent adjustment by Bank but shall, absent manifest errors or omissions, be presumed correct and binding upon Borrower.

**2.4 Fees.** Borrower shall pay to Bank:

(a) [Intentionally Omitted];

(b) [Intentionally Omitted]; and

(c) Bank Expenses. All Bank Expenses (including reasonable attorneys' fees and expenses for documentation, negotiation and revision of, or amendments to, this Agreement (and the other Loan Documents) and the closing of the transaction contemplated hereby) incurred through and after the Effective Date, when due.

**2.5 Yield Protection.** If, after the date of this Agreement, any Change in Law: (a) subjects Bank to any tax, duty, charge or withholding on or from payments due from Borrower (excluding franchise taxes and taxation of the net income or receipts of Bank), or changes the basis of taxation (excluding with respect to franchise taxes and taxation of the net income or receipts of Bank) of payments to Bank in respect of its Credit Extensions or other amounts due it hereunder; or (b) imposes, modifies, or increases or deems applicable any reserve, assessment, insurance charge, special deposit or similar requirement against assets of, deposits with or for the account of, or credit extended by, Bank; or (c) imposes any other condition the result of which is to increase the cost to Bank of making, funding or maintaining advances or reduces any amount receivable by Bank in connection with advances, or requires Bank to make any payment calculated by reference to the amount of advances held or interest received by it, by an amount deemed material by Bank; or (d) affects the amount of capital required or expected to be maintained by Bank or any corporation controlling Bank and Bank determines the amount of capital required is increased by or based upon the existence of this Agreement or its obligation to make Credit Extensions hereunder, then, within five (5) Business Days of receipt of written demand as provided below in this Section, Borrower agrees to pay Bank that portion of such increased expense incurred (including any reduction in the rate of return on capital to an amount below that which it could have achieved but for such law, rule, regulation, policy, guideline or directive and after taking into account Bank's policies as to capital adequacy) or reduction in an amount received which Bank reasonably determines is attributable to making, funding and maintaining any Credit Extension. Bank shall deliver a written statement to Borrower as to the amount due, if any, under this Section that shall set forth in reasonable detail the calculations upon which Bank determined such amount and shall be final, conclusive and binding on Borrower in the absence of demonstrable error.

**2.6 Payments.** All payments (including prepayments) to be made by Borrower under any Loan Document shall be made in immediately available funds in United States Dollars, without setoff or counterclaim, before 3:00 p.m. Central time on the date when due at Bank's office at 231 South LaSalle Street, 3<sup>rd</sup> Floor, Chicago, Illinois 60603, or at such other place as Bank directs in writing from time to time, or, in Bank's sole and absolute discretion, by appropriate debits to any Deposit Account of Borrower (other than Deposit Accounts exclusively used for payroll, payroll taxes and other employee wage and benefit payments to or for the benefit of Borrower's employees) maintained with Bank. Payments of principal and/or interest received after 3:00 p.m. Central time are considered received at the opening of business on the next Business Day. When a payment is due on a day that is not a Business Day, the payment shall be due the next Business Day, and additional fees or interest, as applicable, shall continue to accrue until paid. Borrower hereby irrevocably authorizes and instructs Bank to direct debit any of Borrower's operating accounts or other Deposit Accounts (other than Deposit Accounts exclusively used for payroll, payroll taxes and other employee wage and benefit payments to or for the benefit of Borrower's employees) with Bank for all principal, interest and other amounts owing under this Agreement without any advance notice required to be furnished to Borrower by Bank (and any other amounts that are permitted to be set off by Bank in accordance with the terms hereof), due hereunder with respect to the Term Loan and the other Obligations. Bank will reflect any such debits in the monthly statements furnished to Borrower in the ordinary course. All payments by Borrower under this Agreement shall be made free and clear of, and without deduction for, any present or future income,

excise, stamp or other taxes, fees, levies, duties, withholdings or other charges of any nature whatsoever, now or hereafter imposed by any taxing authority.

**2.7 Limitation on Charges.** It being the intent of the parties that the rate of interest and all other charges to Borrower be lawful, if for any reason the payment of a portion of the interest or other charges otherwise required to be paid under this Agreement would exceed the limit which Bank may lawfully charge Borrower, then the obligation to pay interest or other charges shall automatically be reduced to such limit and, if any amounts in excess of such limit shall have been paid, then such amounts shall at the sole option of Bank either be credited to the principal amount of the Obligations or refunded to Borrower (or any combination of the foregoing) so that under no circumstances shall the interest or other charges required to be paid by Borrower hereunder exceed the maximum rate allowed by applicable law, and Borrower shall not have any action against Bank for any damages arising out of the payment or collection of any such excess interest.

**2.8 Mandatory Prepayments.** Upon receipt by Borrower of the proceeds of any asset sale or disposition outside its normal course of business, Borrower shall make a prepayment of the then outstanding principal amount of the Term Loan in an amount equal to one hundred percent (100%) of the Net Cash Proceeds of such asset sale or disposition. Notwithstanding the foregoing and provided no Default or Event of Default has occurred and is continuing, such prepayment shall not be required to the extent Borrower reinvests the Net Cash Proceeds of such disposition, or a material portion thereof, in assets of a kind then used or usable in the business of Borrower and in which Bank has a first priority perfected Lien, within thirty (30) days after the date of such disposition or enters into a binding commitment thereof within such period and subsequently makes such reinvestment within ninety (90) days of Borrower entering into such binding commitment, provided until such date of reinvestment, either a fully executed Control Agreement shall be delivered to Bank with respect to such Net Cash Proceeds or such Net Cash Proceeds shall be deposited into a Deposit Account over which Bank has a first priority perfected Lien.

### **3 CONDITIONS OF LOANS**

**3.1 Conditions Precedent to Credit Extension.** Bank's obligation to make the Credit Extension and fund the Term Loan is subject to the condition precedent that Bank shall have received, in form and substance reasonably satisfactory to Bank, such documents, and completion of such other matters, as Bank may reasonably deem necessary or appropriate, including, without limitation:

- (a) the representations and warranties in this Agreement and the other Loan Documents shall be true, correct, and complete on the Funding Date of the Credit Extension, and no Default or Event of Default shall have occurred and be continuing or result from the Credit Extension;
- (b) in Bank's reasonable discretion, there has not been any Material Adverse Change;
- (c) duly executed original signatures of Borrower (and any other applicable Person) to this Agreement, the Term Loan Note and all other Loan Documents (not otherwise specifically identified below in this Section);
- (d) Borrower's Operating Documents (certified by a Responsible Officer) and a long form good standing certificate of Borrower certified by the Secretary of State of the State of Nevada as of a date no earlier than thirty (30) days prior to the Effective Date;
- (e) certificates of good standing and foreign qualification of Borrower (for the States of Nevada and Illinois), certified by the applicable Secretary of State as of a date no earlier than thirty (30) days prior to the Effective Date;
- (f) a notice of borrowing and disbursement request duly signed by Borrower;
- (g) one or more subordination agreements in form and substance reasonably satisfactory to Bank with respect to all Subordinated Debt existing as of the Effective Date, if any;
- (h) certified copies, dated as of a recent date, of UCC tax, lien, judgment, bankruptcy and pending suit searches, in all jurisdictions as Bank shall reasonably request, and Lien searches on Borrower from the U.S. Patent and Trademark Office and U.S. Copyright Office, in each case accompanied by written evidence

(including any UCC termination statements) that the Liens indicated in any such UCC search results either constitute Permitted Liens or have been or, in connection with the initial Credit Extension, will be terminated or released, including any payoff letter required in connection therewith;

(i) the Perfection Certificate of Borrower, together with the duly executed original signature thereto;

(j) evidence satisfactory to Bank that the insurance policies required by Section 6.5 are in full force and effect, together with appropriate evidence showing lender loss payable and additional insured clauses (together with endorsements in favor of Bank);

(k) certified copy of resolutions of Borrower's Board and, if applicable, shareholders regarding this Agreement, the other Loan Documents, the Belly Purchase Agreement and the transactions contemplated hereby and thereby;

(l) UCC financing statement naming Borrower as debtor and Bank as secured party in each jurisdiction reasonably required by Bank;

(m) payment of the fees and Bank Expenses then due as specified in Section 2.4;

(n) the Belly Purchase shall have been consummated (or shall be consummated substantially simultaneously with Bank's funding of the Term Loan) in accordance with the terms of the Belly Purchase Documents and in compliance with applicable law, and Bank shall have received true, complete and correct certified copies of the Belly Purchase Agreement and all other Belly Purchase Documents. The representations and warranties in the Belly Purchase Documents of Borrower and, to the knowledge of Borrower, each other Person party thereto shall be true and correct (except to the extent such representations and warranties expressly refer to a specific date, in which case they shall be true and correct as of such date);

(o) Bank shall have received from Borrower, at the written direction of Belly, or shall receive substantially simultaneously, out of the consideration payable in the Belly Purchase, Three Million Dollars (\$3,000,000) in immediately available funds and without deduction or offset of any kind, which funds shall have been applied to reduce the outstanding balance in Belly's loan account with Bank (Account No. [\_\_\_\_]); and

(p) such other documents, schedules and certificates as Bank may reasonably request.

In addition, Bank shall be satisfied with the results of all of its legal, tax and regulatory due diligence on Borrower and its Affiliates.

**3.2 Covenant to Deliver.** Borrower agrees to deliver to Bank each item required to be delivered to Bank under this Agreement as a condition precedent to any Credit Extension. Borrower expressly agrees that a Credit Extension made prior to the receipt by Bank of any such item shall not constitute a waiver by Bank of Borrower's obligation to deliver such item, and the making of any Credit Extension in the absence of a required item shall be in Bank's sole discretion.

#### **4 CREATION OF SECURITY INTEREST**

**4.1 Grant of Security Interest.** Borrower hereby grants Bank, to secure the payment and performance in full of all of the Obligations when due or declared due pursuant hereto, a continuing security interest in, and pledges and collaterally assigns to Bank, the Collateral, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof.

Borrower acknowledges that it previously has entered, and/or may in the future enter, into one or more Treasury Management Agreements with Bank. Regardless of the terms of any Treasury Management Agreement, Borrower agrees that any amounts Borrower owes Bank thereunder shall be deemed to be Obligations hereunder and that it is the intent of Borrower and Bank to have all such Obligations secured by the first priority perfected security interest in the Collateral granted herein (subject only to Permitted Liens).

Bank's Lien in the Collateral shall continue until (i) the Obligations (other than inchoate indemnity or reimbursement obligations or other obligations which, by their terms, survive termination of this Agreement) are

paid and satisfied in cash in full, and (ii) the Bank's commitment to extend any Credit Extensions as provided hereunder is terminated. Upon such termination and from time to time reasonably thereafter, Bank will, at Borrower's sole cost and expense, execute and deliver such documents as reasonably requested by Borrower solely to evidence the termination and release of its security interest in the Collateral. In the event (a) all Obligations (other than inchoate indemnity or reimbursement obligations or other obligations which, by their terms, survive termination of this Agreement), except for Treasury Management Services, are satisfied in cash in full, and (b) this Agreement is terminated (other than provisions herein that survive any such termination), Bank shall terminate the security interest granted herein upon Borrower providing cash collateral acceptable to Bank in its good faith business judgment for Treasury Management Services, if any.

**4.2 Preservation of Collateral and Perfection of Security Interests Therein.** Borrower agrees that it shall execute and deliver to Bank, concurrently with the execution of this Agreement, and at any time or times hereafter at the reasonable request of Bank instruments and documents as Bank may reasonably request, in a form reasonably satisfactory to Bank, to perfect and keep perfected the Bank's Lien in the Collateral or to otherwise protect and preserve the Collateral and Bank's Liens therein (including, without limitation, if and as applicable, financing statements, and Borrower shall pay the cost of filing or recording the same in all public offices deemed necessary by Bank). Bank is authorized to file such financing statements as Bank reasonably deems necessary. Borrower shall make appropriate entries upon its financial statements disclosing Bank's first position priority Lien in the Collateral (subject only to Permitted Liens).

**4.3 Priority of Security Interest.** Borrower represents, warrants, and covenants that the security interest granted herein to Bank is and shall at all times continue to be a first priority perfected security interest in the Collateral (subject only to Permitted Liens that expressly have superior priority to Bank's Lien under this Agreement, if any). If Borrower shall acquire a Commercial Tort Claim (as defined in the Code), Borrower shall promptly notify Bank in a writing signed by Borrower of the general details thereof and grant to Bank in such writing a security interest therein and in the proceeds thereof, all upon the terms of this Agreement, with such writing to be in form and substance reasonably satisfactory to Bank.

**4.4 Authorization to File Financing Statements.** Borrower hereby authorizes Bank to file UCC financing statements (and UCC amendment and continuation statements), without notice to Borrower, with all appropriate jurisdictions to perfect or protect Bank's interest or rights hereunder, including a notice that any disposition of the Collateral, by either Borrower or any other Person, shall be deemed to violate the rights of Bank under the Code. Such financing statements shall describe the Collateral as is set forth on Exhibit A attached hereto.

## **5 REPRESENTATIONS AND WARRANTIES**

Borrower represents and warrants to Bank until payment in full in cash of all outstanding Obligations and this Agreement no longer remains in effect, as follows:

**5.1 Due Organization, Authorization; Power and Authority; Enforceability.** (a) Borrower is a corporation in good standing and duly existing under the laws of the State of Nevada and is qualified and licensed to do business and is in good standing in any other jurisdiction in which the conduct of its business or ownership of property requires that they be qualified except where the failure to do so would not reasonably be expected to have or cause a Material Adverse Effect. In connection with this Agreement, Borrower has delivered to Bank a completed certificate signed by Borrower, entitled "Perfection Certificate" (the "**Perfection Certificate**"). Borrower's exact legal name is that indicated on the Perfection Certificate and on the signature page hereof. Borrower is an organization of the type and is organized in the jurisdiction set forth in the Perfection Certificate. The Perfection Certificate accurately sets forth Borrower's organizational identification number or accurately states that Borrower has none. The Perfection Certificate accurately sets forth Borrower's place of business, or, if more than one, its chief executive office as well as Borrower's mailing address (if different than its chief executive office). Except as set forth in the Perfection Certificate, Borrower (and each of its predecessors) has not, in the past five (5) years, changed its jurisdiction of formation, organizational structure or type, or any organizational number assigned by its jurisdiction. All other information set forth on the Perfection Certificate pertaining to Borrower and each of its Subsidiaries is accurate and complete (it being understood and agreed that Borrower may from time to time update certain information in the Perfection Certificate after the Effective Date in writing to the extent permitted by one or more specific provisions in this Agreement). If Borrower is not now a Registered Organization but later becomes one, Borrower shall promptly notify Bank of such occurrence and provide Bank with Borrower's organizational identification number. As of the Effective Date, Borrower has no Subsidiaries. On the Effective Date, the capitalization of Borrower is as set forth on Schedule 5.1 attached hereto.

(b) The execution, delivery and performance by Borrower of the Loan Documents to which it is a party have been duly authorized and are within Borrower's corporate powers, and do not (i) conflict with any of Borrower's Operating Documents, (ii) contravene, conflict with, constitute a default under or violate any material Requirement of Law, (iii) contravene, conflict or violate any applicable order, writ, judgment, injunction, decree, determination or award of any Governmental Authority by which Borrower or any of its Subsidiaries or any of their property or assets may be bound or affected which would reasonably be expected to result in material liability to Borrower, (iv) require any action by, filing, registration, or qualification with, or Governmental Approval from, any Governmental Authority (except such Governmental Approvals which have already been obtained and are in full force and effect), or (v) constitute an event of default under any material agreement by which Borrower is bound. Borrower is not in default under any agreement to which it is a party or by which it is bound in which the default would reasonably be expected to have a Material Adverse Effect.

(c) This Agreement and all of the other Loan Documents to which Borrower is a party are the legal, valid and binding obligations of Borrower and are enforceable against Borrower in accordance with their respective terms, subject to bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditor's rights and remedies generally.

**5.2 Collateral.** (a) Borrower has good title to, has rights in, and the power to transfer each item of the Collateral upon which it purports to grant a Lien hereunder, free and clear of any and all Liens except Permitted Liens. Borrower has no Deposit Accounts other than the Deposit Accounts maintained with Bank or the Deposit Accounts described in the Perfection Certificate delivered to Bank in connection herewith. The Accounts are bona fide, existing obligations of the Account Debtors. The Collateral is not in the possession of any third party bailee (such as a warehouse) except as otherwise provided in the Perfection Certificate or subject to a landlord agreement or bailee agreement as required pursuant to Section 6.14 or Section 7.2, as applicable. None of the components of the Collateral shall be maintained at locations other than as provided in the Perfection Certificate or as permitted pursuant to Section 7.2. All Inventory is of good and marketable quality, free from defects, in all material respects.

(b) Borrower is the sole owner of the Intellectual Property which it owns or purports to own except for (i) non-exclusive licenses granted to its customers in the ordinary course of business, (ii) over-the-counter software that is commercially available to the public, and (iii) material Intellectual Property licensed to Borrower and noted on the Perfection Certificate. No part of the Intellectual Property which Borrower owns or purports to own and which is material to Borrower's business has been judged invalid or unenforceable, in whole or in part. To the best of Borrower's knowledge, no claim has been made to Borrower in writing that any part of the Intellectual Property material to Borrower's business violates the rights of any third party (whether for infringement or otherwise) except to the extent such claim would not reasonably be expected to have a Material Adverse Effect. Except as noted on the Perfection Certificate, to Borrower's knowledge Borrower is not a party to, nor is it bound by, any Restricted License.

**5.3 Accounts Receivable.** For all Accounts, all statements made and all unpaid balances appearing in all invoices, instruments and other documents evidencing such Accounts are and shall be true and correct and all such invoices, instruments and other documents, and all of Borrower's Books are genuine and in all respects what they purport to be. Following the occurrence and during the continuation of an Event of Default, Bank may notify any Account Debtor owing Borrower money of Bank's security interest in such funds and verify the amount of such Account. All sales and other transactions underlying or giving rise to each Account shall comply in all material respects with all applicable laws and governmental rules and regulations. Borrower has no knowledge of any actual or imminent Insolvency Proceeding of any Account Debtor. To Borrower's knowledge, all (i) signatures and endorsements from third parties on all documents, instruments, and agreements relating to Accounts are genuine, and (ii) all such documents, instruments and agreements are legally enforceable in accordance with their terms against such third parties.

**5.4 Litigation.** There are no actions or proceedings pending or, to the knowledge of the Responsible Officers, threatened in writing by or against Borrower or any of its Subsidiaries involving more than, individually or in the aggregate, One Hundred Thousand Dollars (\$100,000). There is no litigation and are no actions, claims, suits or proceedings pending or, to Borrower's knowledge, threatened that would prevent or seek to prevent consummation of the financing arrangements contemplated pursuant to this Agreement or the other Loan Documents.

**5.5 Financial Statements; Financial Condition.** All financial statements for Borrower and any of its Subsidiaries delivered to Bank fairly present in all material respects Borrower's financial condition and Borrower's



results of operations. There has not been any material deterioration in Borrower's financial condition since the date of the most recent financial statements submitted to Bank by Borrower.

**5.6 Solvency.** To Borrower's knowledge, the fair salable value of Borrower's enterprise exceeds the fair value of its liabilities; Borrower is not left with unreasonably small capital after the transactions in this Agreement; and Borrower is able to pay its debts (including trade debts) as they mature.

**5.7 Regulatory Compliance.** Borrower is not an "investment company" or a company "controlled" by an "investment company" under the Investment Company Act of 1940, as amended. Borrower is not engaged as one of its important activities in extending credit for margin stock (under Regulations X, T and U of the Federal Reserve Board of Governors). Borrower has complied in all material respects with the Federal Fair Labor Standards Act. Borrower has not violated any laws, ordinances or rules (including, without limitation, Environmental Laws), the violation of which would reasonably be expected to have a Material Adverse Effect. None of Borrower's or any of its Subsidiaries' properties or assets has been used by Borrower or any Subsidiary in disposing, producing, storing, treating, or transporting any hazardous substance other than legally. Borrower and each of its Subsidiaries have obtained all consents, approvals and authorizations of, made all declarations or filings with, and given all notices to, all Government Authorities that are necessary to continue their respective businesses as currently conducted, to the extent the failure to do so would reasonably be expected to cause a Material Adverse Effect.

**5.8 Subsidiaries; Investments.** Borrower does not own any stock, partnership interest or other equity securities of any Person except for Permitted Investments.

**5.9 Tax Returns and Payments; Pension Contributions.** Borrower has timely filed all required tax returns and reports, and Borrower has timely paid all foreign, federal, state and local taxes, assessments, deposits and contributions owed by Borrower. Borrower may defer payment of any contested taxes, provided that Borrower (a) in good faith contests its obligation to pay the taxes by appropriate proceedings promptly and diligently instituted and conducted, (b) notifies Bank in writing of the commencement of, and any material development in, the proceedings, (c) posts bonds or takes any other steps required to prevent the governmental authority levying such contested taxes from obtaining a Lien upon any of the Collateral that is other than a Permitted Lien. Borrower is unaware of any claims or adjustments proposed for any of Borrower's prior tax years which would reasonably be expected to result in additional taxes becoming due and payable by Borrower. Borrower has paid all amounts necessary to fund all present pension, profit sharing and deferred compensation plans in accordance with their terms, and Borrower has not withdrawn from participation in, and has not permitted partial or complete termination of, or permitted the occurrence of any other event with respect to, any such plan which would reasonably be expected to result in any liability of Borrower, including any liability to the Pension Benefit Guaranty Corporation or its successors or any other governmental agency.

**5.10 PATRIOT Act; FCPA; Absence of Enemy Status.** Borrower is not identified in any OFAC List. Borrower and each of its Affiliates are in compliance with (a) the Trading with the Enemy Act, and each of the foreign assets control regulations of the United States Treasury Department (31 CFR, Subtitle B Chapter V, as amended) and any other enabling legislation or executive order relating thereto, (b) the PATRIOT Act and (c) other federal or state laws relating to "know your customer" and anti-money laundering rules and regulations. No part of the proceeds of any Credit Extension will be used directly or indirectly for any payments to any government official or employee, political party, official of a political party, candidate for political office, or anyone else acting in an official capacity, in order to obtain, retain or direct business or obtain any improper advantage, in violation of the United States Foreign Corrupt Practices Act of 1977, as amended. Borrower is not an "enemy" or an "ally of the enemy" within the meaning of Section 2 of the Trading with the Enemy Act (50 U.S.C. App. §§ 1 et seq.), as amended. Borrower is not in violation of, nor will the use of any Credit Extension violate, the Trading with the Enemy Act, as amended, or any executive orders, proclamations or regulations issued pursuant thereto, including, without limitation, regulations administered by the Office of Foreign Asset Control of the Department of the Treasury (31 C.F.R. Subtitle B, Chapter V).

**5.11 [Intentionally Omitted].**

**5.12 Full Disclosure.** No representation, warranty or other statement of Borrower in any certificate or statement given to Bank, as of the date such representation, warranty, or other statement was made, taken together with all such certificates and statements given to Bank, contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements contained in such certificates or statements not misleading in light of the circumstances in which they were made (it being recognized by Bank that the projections and forecasts

provided by Borrower in good faith and based upon reasonable assumptions are not viewed as facts and that actual results during the period or periods covered by such projections and forecasts may differ from the projected or forecasted results).

**5.13 Environmental Matters.** Borrower has complied with Environmental Laws regarding transfer, construction on and operation of its business and property, except to the extent any such non-compliance could not reasonably be expected to result in a Material Adverse Effect. As of the Effective Date, Borrower has not received any written information request, notice of potential responsibility, notice of violation or deficiency, order, complaint, investigation, letters or other communication, to Borrower or any officer thereof, from the United States Environmental Protection Agency or other federal, state or local agency or authority, or any other Person, public or private, concerning any intentional or unintentional act or omission which involves an actual or alleged violation of Environmental Law.

**5.14 ERISA Matters.** Borrower maintains no employee pension plan, retirement plan or similar plan to which Title IV of ERISA applies.

**5.15 Definition of "Knowledge."** For purposes of the Loan Documents, whenever a representation or warranty is made to Borrower's knowledge or awareness, to the "best of" Borrower's knowledge, or with a similar qualification, knowledge or awareness means the actual knowledge of the Responsible Officers after reasonable investigation.

## **6 AFFIRMATIVE COVENANTS**

Borrower covenants that, until payment in full in cash of all outstanding Obligations and this Agreement no longer remains in effect, it shall:

**6.1 Government Compliance.** Maintain its and all its Subsidiaries' corporate or limited liability company (as applicable) legal existence and good standing in their respective jurisdictions of formation and maintain qualification in each jurisdiction in which the failure to so qualify would reasonably be expected to have a Material Adverse Effect. Borrower shall comply, and have each Subsidiary comply, with all laws, ordinances and regulations to which it is subject (including, without limitation, Environmental Laws and ERISA), noncompliance with which would have a Material Adverse Effect.

**6.2 Financial Statements, Reports, Certificates.** Deliver to Bank (all reports and financial statements shall be in form and substance reasonably satisfactory to Bank):

(a) [Intentionally Omitted].

(b) [Intentionally Omitted].

(c) Quarterly Financial Statements. As soon as available, but no later than forty five (45) days after the last day of each fiscal quarter of Borrower, a company prepared consolidated balance sheet and income statement and statement of cash flows covering Borrower's consolidated operations for such fiscal quarter certified by a Responsible Officer and in form and scope acceptable to Bank (the "**Quarterly Financial Statements**");

(d) Quarterly Compliance Certificate. Within forty five (45) days after the last day of each fiscal quarter of Borrower and together with the Quarterly Financial Statements, a duly completed Compliance Certificate signed by a Responsible Officer, certifying that as of the end of such fiscal quarter, Borrower was in full compliance with all of the terms and conditions of this Agreement, and setting forth calculations of EBITDA and, if applicable, showing compliance with the financial covenant set forth in this Agreement and such other information as Bank shall reasonably request, substantially in the form attached hereto as Exhibit B;

(e) Annual Audited Financial Statements. As soon as available, but no later than one hundred eighty (180) days after the last day of Borrower's fiscal year, audited consolidated financial statements of Borrower prepared under GAAP, consistently applied, together with an unqualified opinion on the financial statements from an independent certified public accounting firm acceptable to Bank in its reasonable discretion (and in form and scope reasonably acceptable to Bank);

(f) Certain Other Statements/Notices. Within five (5) days of delivery, copies of all statements, reports and notices sent or made available to all of Borrower's security holders or to all of the holders of Subordinated Debt;

(g) SEC Filings. Within five (5) days of filing, copies of all periodic and other reports, proxy statements and other materials filed by Parent with the SEC, any Governmental Authority succeeding to any or all of the functions of the SEC or with any national securities exchange, or distributed to Parent's shareholders. Documents required to be delivered pursuant to the terms hereof (to the extent any such documents are included in materials otherwise filed with the SEC) may be delivered electronically and if so delivered, shall be deemed to have been delivered on the date on which Parent posts such documents, or provides a link thereto, on Parent's website on the Internet at Parent's website address;

(h) Legal Action Notice. A prompt report of any legal actions pending or threatened in writing against Borrower or any of its Subsidiaries that would reasonably be expected to result in damages or costs to Borrower or any of its Subsidiaries of, individually or in the aggregate, One Hundred Thousand Dollars (\$100,000) or more;

(i) Annual Budget; Other Board-Approved Projections. An annual budget approved by Borrower's Board as soon as available but not later than thirty (30) days prior to the start of each fiscal year of Borrower in a form reasonably acceptable to Bank;

(j) Company Registration. If Parent or Borrower proposes to register any of its securities under the Securities Act of 1933 (as amended and together with the rules and regulations promulgated thereunder) in connection with the public offering of such securities solely for cash, the Borrower shall, at such time, promptly give Bank notice of such registration;

(k) Notice of Material Adverse Change or Default. (a) Promptly (but in no event later than within two (2) days of a Responsible Officer learning of the occurrence of any of the following) provide Bank with written notice thereof which describes the same and the steps being taken by Borrower with respect thereto: (i) the occurrence of a Default or an Event of Default, or (ii) any Material Adverse Change;

(l) Affiliate Transactions. Upon Bank's request from time to time, a reasonably detailed description of each transaction valued in excess of Twenty-Five Thousand Dollars (\$25,000) between Borrower and any of its Affiliates during the time period reasonably requested by Bank, which shall include, without limitation, the amount of money either paid or received, as applicable, by Borrower in such transactions;

(m) Tax Returns. If applicable and promptly upon Bank's request, when actually filed, copies of the annual federal and state income tax returns of Borrower for the immediately preceding year or any extension request for the filing thereof and, if requested by Bank, copies of all reports filed with any federal, state or local Governmental Authority;

(n) Ownership. As soon as available (but in no event later than within forty-five (45) days of any such change), a new Schedule 5.1 identifying in reasonable detail any material change to the ownership or capitalization of Borrower;

(o) Commercial Tort Claims. If Borrower shall at any time hereafter acquire a Commercial Tort Claim (as defined in the Code) with an amount in controversy that exceeds Twenty-Five Thousand Dollars (\$25,000), individually or in the aggregate, Borrower shall promptly (and in any event within five (5) days) notify Bank of same in a writing signed by Borrower (describing such claim in reasonable detail) and grant to Bank in such writing (at the sole cost and expense of Borrower) a continuing, first-priority security interest therein and in the proceeds thereof (subject only to Permitted Liens), with such writing to be in form and substance satisfactory to Bank in its reasonable determination; and

(p) Other Information. Such other information, reports, sales projections, budgets and operating plans reasonably requested by Bank (which all must be in form and scope reasonably acceptable to Bank).

**6.3 Equipment; Returns.** Use commercially reasonable efforts to keep all Equipment in good and marketable condition (ordinary wear and tear and casualty damage, and as permitted by Section 7.1 hereof, excepted), free from material defects.

**6.4 Taxes; Pensions.** Timely file, and require each of its Subsidiaries to timely file, all required tax returns and reports and timely pay, and require each of its Subsidiaries to timely pay, all foreign, federal, state and local taxes, assessments, deposits and contributions owed by Borrower and each of its Subsidiaries, except for deferred payment of any taxes contested pursuant to the terms of Section 5.9, and shall deliver to Bank, on demand, appropriate certificates attesting to such payments, and pay all amounts necessary to fund all present pension, profit sharing and deferred compensation plans in accordance with their terms.

**6.5 Insurance.** Keep its business and the Collateral insured for risks and in amounts customary for companies in Borrower's industry and location and as Bank may reasonably request. Insurance policies shall be in a form, with companies, and in amounts that are satisfactory to Bank. All property policies shall have a lender's loss payable endorsement showing Bank as lender loss payee and waive subrogation against Bank and shall provide that the insurer must give Bank at least thirty (30) days' notice before canceling, amending, or declining to renew its policy. All liability policies shall show, or have endorsements showing, Bank as an additional insured, and all such policies (or the loss payable and additional insured endorsements) shall provide that the insurer shall give Bank at least thirty (30) days' notice before canceling, amending, or declining to renew its policy. At Bank's request, Borrower shall deliver certified copies of policies and evidence of all premium payments. Proceeds payable under any policy shall, at Bank's option, be payable to Bank on account of the Obligations. If Borrower fails to obtain insurance as required under this Section 6.5 or to pay any amount or furnish any required proof of payment to third persons and Bank, Bank may make all or part of such payment or obtain such insurance policies required in this Section 6.5, and take any action under the policies Bank deems prudent.

UNLESS BORROWER PROVIDES BANK WITH EVIDENCE OF THE INSURANCE COVERAGE REQUIRED BY THIS AGREEMENT, BANK MAY PURCHASE INSURANCE AT BORROWER'S EXPENSE REASONABLY NECESSARY TO PROTECT BANK'S INTERESTS IN THE COLLATERAL. THIS INSURANCE MAY, BUT NEED NOT, PROTECT THE INTERESTS OF BORROWER IN THE COLLATERAL. THE COVERAGE PURCHASED BY BANK MAY NOT PAY ANY CLAIMS THAT BANK MAKES OR ANY CLAIM THAT IS MADE AGAINST BANK IN CONNECTION WITH THE COLLATERAL. BORROWER MAY LATER CANCEL ANY SUCH INSURANCE PURCHASED BY BANK, BUT ONLY AFTER PROVIDING BANK WITH EVIDENCE THAT BORROWER HAS OBTAINED INSURANCE AS REQUIRED BY THIS AGREEMENT. IF BANK PURCHASES INSURANCE FOR THE COLLATERAL, BORROWER WILL BE RESPONSIBLE FOR THE COSTS OF THAT INSURANCE, INCLUDING INTEREST AND ANY OTHER CHARGES THAT BANK MAY IMPOSE IN CONNECTION WITH THE PLACEMENT OF THE INSURANCE, UNTIL THE EFFECTIVE DATE OF THE CANCELLATION OR EXPIRATION OF THE INSURANCE. THE COSTS OF THE INSURANCE MAY BE ADDED TO THE OBLIGATIONS SECURED HEREBY. THE COSTS OF THE INSURANCE MAY BE MORE THAN THE COST OF INSURANCE BORROWER MAY BE ABLE TO OBTAIN ON ITS OWN.

**6.6 [Intentionally Omitted].**

**6.7 Financial Covenant.** Maintain at all times, calculated on a consolidated basis with respect to Borrower and its Subsidiaries:

(a) Minimum Fixed Charge Coverage Ratio. A Fixed Charge Coverage Ratio not less than the amount indicated for such period of determination as identified on the following chart:

<b>Period of Determination</b>	<b>Minimum Fixed Charge Coverage Ratio for Such Period</b>
The three (3) month period ending June 30, 2019	1.20 to 1.00
The six (6) month period ending September 30, 2019	1.20 to 1.00
The nine (9) month period ending December 31, 2019	1.20 to 1.00
The twelve (12) month period ending March 31, 2019, and as of the last day of each fiscal quarter thereafter on a trailing twelve (12) month basis	1.20 to 1.00

## **6.8 Protection of Intellectual Property Rights.**

(a) (i) Protect, defend and maintain the validity and enforceability of its material Intellectual Property to the extent Borrower determines that such protection, defense and/or maintenance is in its best interests, (ii) promptly advise Bank in writing of material infringements of its Intellectual Property of which Borrower becomes aware, and (iii) not allow any Intellectual Property material to Borrower's business to be abandoned, forfeited or dedicated to the public without Bank's prior written consent (such consent not to be unreasonably withheld, conditioned or delayed).

(b) Use commercially reasonable efforts to provide written notice to Bank five (5) Business Days prior to entering into or becoming bound by any Restricted License (other than over-the-counter software that is commercially available to the public). Subject to the terms of Exhibit A attached hereto, Borrower shall use commercially reasonable efforts to take such steps as Bank reasonably requests to obtain the consent of, or waiver by, any Person whose consent or waiver is necessary for (i) any Restricted License to be deemed "Collateral" and for Bank to have a security interest in it that might otherwise be restricted or prohibited by law or by the terms of any such Restricted License, whether now existing or entered into in the future, and (ii) Bank to have the ability in the event of a liquidation of any Collateral to dispose of such Collateral in accordance with Bank's rights and remedies under this Agreement and the other Loan Documents.

**6.9 Litigation Cooperation.** Without limitation of Section 6.10, from the date hereof and continuing through the termination of this Agreement, make available to Bank, without expense to Bank, Borrower and its officers, employees and agents and Borrower's books and records, to the extent that Bank may deem them reasonably necessary to prosecute or defend any third-party suit or proceeding instituted by or against Bank with respect to any Collateral or relating to Borrower.

## **6.10 Access to Collateral; Books and Records.**

(a) Allow Bank, or its agents or designees, at reasonable times, on reasonable prior notice (provided no notice of any kind is required if an Event of Default has occurred and is continuing), to visit Borrower's place of business (or any other place where the Collateral is kept or located), inspect the Collateral, conduct a field audit, collateral audit and analysis of Borrower's Accounts, Inventory and make such other verification concerning the Collateral as Bank may consider reasonable under the circumstances, and inspect, examine, audit and copy Borrower's Books. Such inspections or audits shall be conducted no more often than once every twelve (12) months unless an Event of Default has occurred and is continuing (and then as frequently as requested by Bank).

(b) Borrower agrees to and shall pay on demand of Bank all reasonable costs, expenses and fees incurred by Bank in connection with this Section 6.10, and all such amounts shall (x) accrue interest payable to Bank at the Default Rate from two (2) Business Days after Bank's demand thereof until paid in full in cash, (y) be added to the Obligations, and (z) be secured by the Collateral.

**6.11 Use of Proceeds.** Borrower shall use the proceeds of the Credit Extensions solely to pay a portion of the consideration payable under the Belly Purchase Agreement in connection with the Belly Purchase and not for personal, family, household, agricultural or other purposes.

**6.12 Meetings.** Borrower shall use commercially reasonable efforts to make its senior management available to meet with (and cooperate in good faith with) Bank upon its reasonable request from time to time at Borrower's principle place of business or as otherwise mutually agreed in order to evaluate structure relevancy and review financial performance, financial covenant(s) and other material changes to the business and operations of Borrower.

**6.13 Post-Closing Delivery of Landlord Waiver.** Borrower shall deliver, in form and substance satisfactory to Bank, within ninety (90) days of the Effective Date, a landlord's waiver for Borrower's leased location at 55 N. Arizona Place, # 310, Chandler, AZ 85225 in favor of Bank by the landlord thereof, together with the duly executed original signatures thereto (together with a copy of the applicable real estate lease, as amended).

**6.14 Further Assurances.** Promptly execute any further instruments or documents and take such further action as Bank reasonably requests to perfect or continue Bank's Lien in the Collateral or to otherwise more fully effect the purposes of this Agreement and the other Loan Documents.

Borrower shall not, until payment in full in cash of all outstanding Obligations and this Agreement no longer remains in effect, do any of the following without Bank's prior written consent:

**7.1 Dispositions.** Convey, sell, lease, transfer, assign, or otherwise dispose of (collectively, "Transfer"), or permit any of its Subsidiaries to Transfer, all or any part of its business, assets or property, except for Transfers: (a) of Inventory in the ordinary course of business; (b) of Equipment which is worn-out, obsolete or no longer used or useful in the ordinary course of business; (c) in connection with Permitted Liens and Permitted Investments; (d) of non-exclusive licenses for the use of the property of Borrower or its Subsidiaries in the ordinary course of business; and (e) involving assets valued at less than One Hundred Thousand Dollars (\$100,000) in the applicable transaction.

**7.2 Changes in Business, Ownership, or Business Locations.** (a) Engage in or permit any of its Subsidiaries to engage in any material business other than the businesses currently engaged in by Borrower and such Subsidiary, as applicable, or reasonably related thereto; (b) take any action to liquidate, wind up or dissolve or otherwise cease to conduct business in the ordinary course consistent with Borrower's past practice; (c) enter into any transaction or series of related transactions in which the equity holders of Borrower who were not equity holders immediately prior to the first such transaction own more than forty-nine and nine-tenths of one percent (49.9%) of the voting equity interests of Borrower immediately after giving effect to such transaction or related series of such transactions; (d) change its fiscal year; or (e) form or establish any Subsidiary except to the extent Borrower has provided at least fifteen (15) days' prior notice to Bank of the creation of any such Subsidiary; provided, however, that Borrower and such Subsidiary shall promptly execute and deliver all joinders, amendments, consents, promissory notes, and such other agreements, documents, certificates and instruments reasonably requested by Bank to cause such Subsidiary to become a Borrower, or guarantor of the Obligations, hereunder.

Borrower shall not, without at least thirty (30) days' prior written notice to Bank: (1) add any new offices or business locations, including warehouses (unless such new offices or business locations contain less than Twenty-Five Thousand Dollars (\$25,000) in Borrower's assets or property) or deliver any portion of the Collateral valued, individually or in the aggregate, in excess of Twenty-Five Thousand Dollars (\$25,000) to a bailee at a location other than to a bailee and at a location already disclosed in the Perfection Certificate, (2) change its jurisdiction of organization, (3) change its organizational structure or type, (4) change its legal name, or (5) change any organizational number (if any) assigned by its jurisdiction of organization. If any office or business location, including any warehouse, that contains assets or property of Borrower valued, individually or in the aggregate, in excess of Twenty-Five Thousand Dollars (\$25,000), and Bank and the applicable landlord are not already parties to a landlord agreement governing both the Collateral and the location to which Borrower intends to store such Collateral, then Borrower will use commercially reasonable efforts to cause such landlord to execute and deliver a landlord agreement in form and substance satisfactory to Bank in its reasonable discretion. If Borrower intends to deliver any portion of the Collateral valued, individually or in the aggregate, in excess of Twenty-Five Thousand Dollars (\$25,000) to a bailee, and Bank and such bailee are not already parties to a bailee agreement governing both the Collateral and the location to which Borrower intends to deliver the Collateral, then Borrower will use commercially reasonable efforts to cause such bailee to execute and deliver a bailee agreement in form and substance satisfactory to Bank in its reasonable discretion.

**7.3 Mergers or Acquisitions.** Merge or consolidate, or permit any of its Subsidiaries to merge or consolidate, with any other Person, or acquire, or permit any of its Subsidiaries to acquire, all or substantially all of the capital stock or equity interests, assets or property of another Person. A Subsidiary may merge or consolidate into another Subsidiary (as long as such Subsidiary is bound to the terms hereof as a Borrower) or into Borrower.

**7.4 Indebtedness.** (a) Create, incur, assume, guaranty, or be liable for any Indebtedness, or permit any Subsidiary to do so, other than Permitted Indebtedness, or (b) prepay any Indebtedness or take any actions that impose on Borrower an obligation to prepay any Indebtedness except Indebtedness due or owing to Bank or in accordance with any applicable subordination agreement.

**7.5 Encumbrance.** Create, incur, allow, assume or suffer any Lien on any of its assets or property, or assign or convey any right to receive income, including the sale of any Accounts, or permit any of its Subsidiaries to do so, except for Permitted Liens, permit any Collateral not to be subject to the first priority security interest granted herein, or enter into any agreement, document, instrument or other arrangement (except with or in favor of Bank) with any Person which directly or indirectly prohibits or has the effect of prohibiting Borrower or any Subsidiary

from assigning, mortgaging, pledging, granting a security interest in or upon, or encumbering any of Borrower's or any Subsidiary's Intellectual Property, except as is otherwise permitted in Section 7.1 and the definition of "Permitted Liens" herein. Any reference in any of the Loan Documents to a Permitted Lien is not intended to subordinate or postpone, and shall not be interpreted as subordinating or postponing, or as any agreement to subordinate or postpone, any Lien created by any of the Loan Documents to any Permitted Lien.

**7.6 [Intentionally Omitted].**

**7.7 Distributions; Investments.** (a) Pay any dividends or make any distribution or payment on account of, or redeem, retire or purchase, any capital equity interests (other than (i) distributions or dividends consisting solely of Borrower's capital equity interests that do not violate Section 7.2 hereof, and/or (ii), so long as no Event of Default has then occurred and is continuing or shall result therefrom, redemptions under founder, restricted equity and/or incentive equity documents that have been approved by the Borrower's board of directors so long as the redemption price is no higher than the lower of cost and fair market value); or (b) directly or indirectly make any Investment other than Permitted Investments, or permit any of its Subsidiaries to do so.

**7.8 Transactions with Affiliates.** Directly or indirectly enter into or permit to exist any material transaction with any Affiliate of Borrower, except for transactions that are in the ordinary course of Borrower's business, upon fair and reasonable terms that are no less favorable to Borrower than would be obtained in an arm's length transaction with a non-affiliated Person.

**7.9 Subordinated Debt.** (a) Make or permit any payment on any Subordinated Debt, except under the terms of the subordination, intercreditor or other similar agreement to which such Subordinated Debt is subject, or (b) amend any provision in any document relating to the Subordinated Debt which would increase the amount thereof or adversely affect the subordination thereof to Obligations owed to Bank.

**7.10 Negative Pledge on Intellectual Property.** Notwithstanding anything to the contrary contained herein, create, incur, allow, assume or suffer any Lien on, or sell, transfer or assign, any of its Intellectual Property (other than, if at any time applicable, in favor of Bank or in connection with an applicable license in accordance with Borrower's ordinary course of business).

**7.11 Compliance.** Become an "investment company" or a company controlled by an "investment company", under the Investment Company Act of 1940, as amended, or undertake as one of its important activities extending credit to purchase or carry margin stock (as defined in Regulation U of the Board of Governors of the Federal Reserve System), or use the proceeds of any Credit Extension for that purpose; cause or permit to occur an unfunded pension fund obligation and liability with respect to a plan subject to Title IV of ERISA to the extent such unfunded pension fund obligation and liability would reasonably be expected to result in taxes, penalties and other liability to Borrower or any ERISA Affiliate of Borrower which, in the aggregate, would have or would reasonably be likely to have a Material Adverse Effect; permit a Reportable Event or Prohibited Transaction, as defined in ERISA, to occur; fail to comply with the Federal Fair Labor Standards Act or violate any other foreign, federal, state or local law, rule or regulation, if the violation would reasonably be expected to have a Material Adverse Effect, or permit any of its Subsidiaries to do so; withdraw or permit any Subsidiary to withdraw from participation in, permit partial or complete termination of, or permit the occurrence of any other event with respect to, any present pension, profit sharing and deferred compensation plan which could reasonably be expected to result in any liability of Borrower, including any liability to the Pension Benefit Guaranty Corporation or its successors or any other governmental agency.

**7.12 Belly Purchase Documents.** Without the prior written consent of Bank (a) enter into or consent to any modification or alteration of the Belly Purchase Agreement or any other Belly Purchase Document or otherwise amend, modify, cancel or supplement in any respect any provisions of any Belly Purchase Documents in any way adverse to the interests of Bank under the Loan Documents or (b) fail to comply with its obligations and liabilities under the Belly Purchase Documents in any material respect.

**8 EVENTS OF DEFAULT**

Any one of the following shall constitute an event of default (an "Event of Default") under this Agreement:

**8.1 Payment Default.** Borrower fails to (a) make any payment of principal or interest with respect to any Credit Extension on its due date, or (b) pay any other Obligations within three (3) Business Day of its due date (which three (3) Business Day cure period shall not apply to payments due on the Term Loan Maturity Date). During the cure period, the failure to make or pay any payment specified under clause (b) hereunder is not an Event of Default (but no Credit Extension will be made during the cure period);

**8.2 Covenant Default.**

(a) Borrower fails or neglects to perform any obligation in Sections 2.2, 6.2, 6.4, 6.5, 6.7, or 6.11, or violates any covenant in Section 7; or

(b) Borrower fails or neglects to perform, keep, or observe any other term, provision, condition, covenant or agreement contained in this Agreement, and as to any default (other than those specified in this Section 8) under such other term, provision, condition, covenant or agreement that can be cured, has failed to cure the default twenty (20) days after the earlier of (x) receipt of written notice or the occurrence thereof or (y) Borrower's knowledge of the occurrence thereof (but no Credit Extensions shall be made during such cure period). For clarification, cure periods provided under this subsection shall not apply, among other things, to financial covenants or any other covenants set forth in clause (a) above;

**8.3 Material Adverse Change.** A Material Adverse Change occurs;

**8.4 Attachment; Levy; Restraint on Business.**

(a) (i) The service of process seeking to attach, by trustee or similar process, any assets or funds of Borrower or of any entity under the control of Borrower (including a Subsidiary), or (ii) a notice of lien or levy is filed against any of Borrower's assets by any government agency, and the same under subclauses (i) and (ii) hereof are not, within sixty (60) days after the occurrence thereof, discharged or stayed (whether through the posting of a bond or otherwise); provided, however, no Credit Extensions shall be made during any such sixty (60) day cure period; or

(b) (i) any portion of Borrower's assets with an aggregate value in excess of Two Hundred Fifty Thousand Dollars (\$250,000) is attached, seized, levied on, or comes into possession of a trustee or receiver, or (ii) any court order enjoins, restrains, or prevents Borrower from conducting any material part of its business;

**8.5 Insolvency.** (a) Borrower is unable to pay its debts (including trade debts) as they become due or otherwise becomes insolvent; (b) Borrower commences an Insolvency Proceeding; or (c) an Insolvency Proceeding is commenced against Borrower and not dismissed or stayed within thirty (30) days (but no Credit Extensions shall be made while of any of the conditions described in clause (a) exist and/or until any Insolvency Proceeding is dismissed);

**8.6 Other Agreements.** There is, under any agreement to which Borrower is a party with a third party or parties, (a) any uncured default resulting in a right by such third party or parties, whether or not exercised, to accelerate the maturity of any Indebtedness in an amount individually or in the aggregate in excess of Two Hundred Fifty Thousand Dollars (\$250,000); or (b) any default by Borrower, the result of which would have a Material Adverse Effect;

**8.7 Judgments.** One or more judgments, orders, or decrees for the payment of money in an amount, individually or in the aggregate, of at least Two Hundred Fifty Thousand Dollars (\$250,000) (not covered by independent third-party insurance as to which liability has been accepted by such insurance carrier) shall be rendered against Borrower and the same are not, within thirty (30) days after the entry thereof, discharged, satisfied or paid in full or execution thereof stayed or bonded pending appeal, or such judgments are not discharged, satisfied or paid in full prior to the expiration of any such stay (provided that no Credit Extensions will be made prior to the discharge, stay, or bonding of such judgment, order, or decree);

**8.8 Misrepresentations.** Borrower or any Person acting for Borrower makes any representation, warranty, or other statement now or later that is incorrect in any material respect when made: (i) in this Agreement or any Loan Document; or (ii) in any writing (which expressly includes email) delivered to Bank in connection with this Agreement or any Loan Document or to induce Bank to enter this Agreement or any Loan Document, or the administration of the Term Loan and the other transactions contemplated hereby, to the extent the applicable



representation, warranty or statement would reasonably be expected to have influenced any material decision made by Bank;

**8.9 Loan Documents.** Any material breach of, noncompliance with or default under any other Loan Document shall occur by Borrower, after expiration of any applicable notice or cure period provided therein, if any;

**8.10 Subordinated Debt.** Any document, instrument, or agreement evidencing any Subordinated Debt shall for any reason be revoked or invalidated or otherwise cease to be in full force and effect, any Person shall be in breach thereof or contest in any manner the validity or enforceability thereof or deny that it has any further liability or obligation thereunder, or the Obligations shall for any reason be subordinated or shall not have the priority contemplated by this Agreement;

**8.11 Injunctive Order.** Borrower or any of its Subsidiaries is enjoined, restrained, or in any way prevented by the order of any court or any administrative or regulatory agency from conducting all or any material part of its business affairs for a continuous period in excess of fourteen (14) calendar days; or

**8.12 Invalidity of Lien or Guaranty.** Any Lien securing the Obligations or any guaranty of the Obligations hereunder shall, in whole or in part, cease to be a perfected first priority Lien (subject only to the Permitted Liens) on account of actions taken or failed to be taken by Borrower; this Agreement or any of the other Loan Documents to which Borrower is a party, shall (except in accordance with its terms), in whole or in part, terminate, cease to be effective, or cease to be the legally valid, binding and enforceable obligations of Borrower; or Borrower shall directly or indirectly, contest in any manner such effectiveness, validity, binding nature or enforceability.

## **9 BANK'S RIGHTS AND REMEDIES**

**9.1 Rights and Remedies.** While an Event of Default occurs and continues Bank may, without notice or demand, do any or all of the following, all of which are authorized by Borrower:

(a) declare all Obligations immediately due and payable (but if an Event of Default described in Section 8.5 occurs all Obligations are immediately due and payable without any action by Bank);

(b) cease advancing money or extending credit to or for Borrower's benefit under this Agreement or under any other agreement between Borrower and Bank;

(c) [Intentionally Omitted];

(d) [Intentionally Omitted];

(e) settle or adjust disputes and claims directly with Account Debtors for amounts on terms and in any order that Bank considers advisable, notify any Person owing Borrower money of Bank's security interest in such funds, and verify the amount of such account;

(f) make any payments and do any acts it considers necessary or reasonable to protect the Collateral and/or its security interest in the Collateral. Borrower shall assemble the Collateral if Bank requests and make it available as Bank designates. Bank may enter premises where the Collateral is located, take and maintain possession of any part of the Collateral, and pay, purchase, contest, or compromise any Lien which appears to be prior or superior to its security interest and pay all expenses incurred. Borrower grants Bank a license to enter and occupy any of its premises, without charge, to exercise any of Bank's rights or remedies;

(g) apply to the Obligations any (i) balances and deposits of Borrower it holds, or (ii) any amount held by Bank owing to or for the credit or the account of Borrower;

(h) sell, assign, or lease any or all of the Collateral, and ship, reclaim, recover, store, finish, maintain, repair, prepare for sale, advertise for sale, and sell the Collateral. Bank is hereby granted a non-exclusive, royalty-free license or other right to use, without charge, Borrower's labels, Patents, Copyrights, mask works, rights of use of any name, trade secrets, trade names, Trademarks, and advertising matter, or any similar property as it pertains to the Collateral, in completing production of, advertising for sale, and selling any Collateral and, in

connection with Bank's exercise of its rights under this Section, Borrower's rights under all licenses and all franchise agreements inure to Bank's benefit;

(i) place a "hold" on any Deposit Account or other account maintained with Bank (other than Deposit Accounts exclusively used for payroll, payroll taxes and other employee wage and benefit payments to or for the benefit of Borrower's employees) and/or deliver a notice of exclusive control, any entitlement order, or other directions or instructions pursuant to any Control Agreement or similar agreements providing control of any Collateral;

(j) demand and receive possession of Borrower's Books; and

(k) exercise all rights and remedies available to Bank under the Loan Documents or at law or equity, including all remedies provided under the Code (including disposal of the Collateral pursuant to the terms thereof).

In addition to all such rights and remedies provided herein, the sale, assignment, lease or other disposition of the Collateral, or any part thereof, by Bank after and during the continuance of an Event of Default may be for cash, credit or any combination thereof, and Bank may purchase all or any part of the Collateral at public or, if permitted by law, private sale, and in lieu of actual payment of such purchase price, may set-off the amount of such purchase price against the Obligations of Borrower then owing. Any sales of such Collateral may be adjourned from time to time with or without notice. Bank may, in its reasonable discretion, cause the Collateral granted by Borrower to remain on Borrower's premises, at Borrower's expense, pending sale or other disposition of such Collateral. Bank shall have the right upon the occurrence and during the continuance of an Event of Default to conduct such sales on Borrower's premises, at Borrower's expense, or elsewhere, on such occasion or occasions as Bank may see fit.

Upon the occurrence and during the continuance of any Event of Default, Bank shall have the right to enter upon the premises of Borrower where the Collateral granted by Borrower is located without any obligation to pay rent to Borrower, or any other place or places where such Collateral is believed to be located and kept, and remove such Collateral therefrom to the premises of Bank or any agent of Bank, for such time as Bank may desire, in order to effectively collect, sell, assign, lease, transfer or liquidate such Collateral. Upon the occurrence and during the continuance of any Event of Default, Bank shall have the right to obtain access to Borrower's data processing equipment, computer hardware and software relating to the Collateral and to use all of the foregoing and the information contained therein in any manner Bank deems appropriate. Upon the occurrence and during the continuance of an Event of Default, Bank shall have the right to notify post office authorities to change the address for delivery of Borrower's mail to an address designated by Bank and to receive, open and process all mail addressed to Borrower.

Any notice required to be given by Bank of a sale, lease or other disposition or other intended action by Bank, with respect to any of the Collateral granted by Borrower, which is deposited in the United States mail, postage prepaid and duly addressed to Borrower at the address specified in Section 10, at least ten (10) calendar days prior to such proposed action shall constitute fair and reasonable notice to Borrower of any such action. The net proceeds realized by Bank upon any such sale or other disposition, after deduction for the expense of retaking, holding, preparing for sale, selling or the like and the reasonable attorneys' and paralegal' fees and expenses incurred by Bank in connection therewith, shall be applied as provided herein toward satisfaction of the Obligations. Bank shall account to Borrower for any surplus realized upon such sale or other disposition, and Borrower shall remain liable for any deficiency. The commencement of any action, legal or equitable, or the rendering of any judgment or decree for any deficiency shall not affect Bank's Liens in the Collateral until the Obligations (other than contingent obligations for which no claims have been asserted) are fully paid in cash. Borrower agrees that Bank has no obligation to preserve rights to the Collateral against any other Person. Demand, presentment, protest and notice of nonpayment are hereby waived by Borrower. Borrower also waives the benefit of all valuation, appraisal and exemption laws. Borrower acknowledges that it has been advised by its counsel with respect to this transaction and this Agreement, including, without limitation, all waivers contained herein.

**9.2 Power of Attorney.** Borrower hereby irrevocably appoints Bank as its lawful attorney-in-fact, exercisable upon the occurrence and during the continuance of an Event of Default, to: (a) endorse Borrower's name on any checks or other forms of payment or security; (b) sign Borrower's name on any invoice or bill of lading for any Account or drafts against Account Debtors; (c) settle and adjust disputes and claims about the Accounts directly with Account Debtors, for amounts and on terms Bank determines reasonable; (d) make, settle, and adjust

all claims under Borrower's insurance policies; (e) pay, contest or settle any Lien, charge, encumbrance, security interest, and adverse claim in or to the Collateral, or any judgment based thereon, or otherwise take any action to terminate or discharge the same; and (f) transfer the Collateral into the name of Bank or a third party as the Code permits. Borrower hereby appoints Bank as its lawful attorney-in-fact to sign Borrower's name on any documents necessary to perfect or continue the perfection of Bank's security interest in the Collateral regardless of whether an Event of Default has occurred until all Obligations (other than inchoate indemnification and reimbursement obligations and other obligations which, by their terms, survive termination of this Agreement) have been satisfied in full and Bank is under no further obligation to make Credit Extensions hereunder. Bank's foregoing appointment as Borrower's attorney in fact, and all of Bank's rights and powers, coupled with an interest, are irrevocable until all Obligations (other than inchoate indemnification and reimbursement obligations and other obligations which, by their terms, survive termination of this Agreement) have been fully repaid in cash and performed and Bank's obligation to provide Credit Extensions terminates.

**9.3 Protective Payments.** Without limitation of Section 6.5, if Borrower fails to pay any insurance premium or fails to pay any other amount which Borrower is obligated to pay under this Agreement or any other Loan Document for more than five (5) Business Days after Borrower's receipt of written notice of such failure, Bank may obtain such insurance or make such payment, and all amounts so paid by Bank are Bank Expenses and immediately due and payable, bearing interest at the then highest rate applicable to the Obligations, and secured by the Collateral. Bank will use reasonable efforts to provide Borrower with notice of Bank obtaining such insurance at the time it is obtained or within a reasonable time thereafter; provided, however, the failure to provide any such notice shall not be deemed to be a breach by Bank hereunder. No payments by Bank are deemed an agreement to make similar payments in the future or Bank's waiver of any Event of Default.

**9.4 Application of Payments and Proceeds Upon Event of Default** If an Event of Default has occurred and is continuing, Bank may apply any funds in its possession, whether from Borrower account balances, payments, proceeds realized as the result of any collection of Accounts or other disposition of the Collateral, or otherwise, to the Obligations in such order as Bank shall determine in its sole discretion. Any surplus shall be paid to Borrower or other Persons legally entitled thereto; Borrower shall remain liable to Bank for any deficiency. If Bank, in its good faith business judgment, directly or indirectly enters into a deferred payment or other credit transaction with any purchaser at any sale of Collateral, Bank shall have the option, exercisable at any time, of either reducing the Obligations by the principal amount of the purchase price or deferring the reduction of the Obligations until the actual receipt by Bank of cash therefor.

**9.5 Bank's Liability for Collateral.** So long as Bank complies with reasonable banking practices and applicable law regarding the safekeeping of the Collateral in the possession or under the control of Bank, Bank shall not be liable or responsible for: (a) the safekeeping of the Collateral; (b) any loss or damage to the Collateral; (c) any diminution in the value of the Collateral; or (d) any act or default of any carrier, warehouseman, bailee, or other Person. Borrower bears all risk of loss, damage or destruction of the Collateral.

**9.6 No Waiver; Remedies Cumulative.** Bank's failure, at any time or times, to require strict performance by Borrower of any provision of this Agreement or any other Loan Document shall not waive, affect, or diminish any right of Bank thereafter to demand strict performance and compliance herewith or therewith. No waiver hereunder shall be effective unless signed by the party granting the waiver and then is only effective for the specific instance and purpose for which it is given. Bank's rights and remedies under this Agreement and the other Loan Documents are cumulative. Bank has all rights and remedies provided under the Code, by law, or in equity. Bank's exercise of one right or remedy is not an election and shall not preclude Bank from exercising any other remedy under this Agreement or other remedy available at law or in equity, and Bank's waiver of any Event of Default is not a continuing waiver. Bank's delay in exercising any remedy is not a waiver, election, or acquiescence.

**9.7 Demand Waiver.** Borrower waives demand, notice of default or dishonor, notice of payment and nonpayment, notice of any default, nonpayment at maturity, release, compromise, settlement, extension, or renewal of accounts, documents, instruments, chattel paper, and guarantees held by Bank on which Borrower is liable.

## **10 NOTICES**

All notices, consents, requests, approvals, demands, or other communication by any party to this Agreement or any other Loan Document must be in writing and shall be deemed to have been validly served, given, or delivered: (a) upon the earlier of actual receipt and three (3) Business Days after deposit in the U.S. mail, first

class, registered or certified mail return receipt requested, with proper postage prepaid; (b) upon transmission, when sent by electronic mail or facsimile transmission; (c) one (1) Business Day after deposit with a reputable overnight courier with all charges prepaid; or (d) when delivered, if hand-delivered by messenger, all of which shall be addressed to the party to be notified and sent to the address, facsimile number, or email address indicated below. Bank or Borrower may change its mailing or electronic mail address or facsimile number by giving the other party written notice thereof in accordance with the terms of this Section 10. If to Borrower: Mobivity, Inc., 55 N. Arizona Place, Suite 310, Chandler, Arizona 85225; Attn: Dennis Becker, CEO; Phone: [\_\_\_\_]; Email: [\_\_\_\_]; with a copy to: Greenberg Traurig, LLP; 3161 Michelson Drive, Suite 1000, Irvine, California 92612; Attn: Daniel K. Donahue, Esq.; Phone: (949) 732-6557; Fax: (949) 732-6501; Email: [DonahueD@gtlaw.com](mailto:DonahueD@gtlaw.com); and if to Bank: Wintrust Ventures; 231 South LaSalle Street, 3<sup>rd</sup> Floor, Chicago, Illinois 60603; Attn: Bailey E. Moore; Phone: (312) 291-2912; Fax: (888) 330-8969; Email: [bmoore@wintrust.com](mailto:bmoore@wintrust.com); with a copy to: Duane Morris LLP, 190 South LaSalle Street, Suite 3700, Chicago, Illinois 60603; Attn: Brian P. Kerwin, Esq.; Phone: (312) 499-6737; Fax: (312) 499-6701; Email: [bpkerwin@duanemorris.com](mailto:bpkerwin@duanemorris.com).

## **11 CHOICE OF LAW, VENUE, AND JURY TRIAL WAIVER**

THIS AGREEMENT SHALL BE CONSTRUED IN ALL RESPECTS IN ACCORDANCE WITH, AND ENFORCED AND GOVERNED BY THE INTERNAL LAWS OF THE STATE OF ILLINOIS, WITHOUT REGARD TO CONFLICTS OF LAW PRINCIPLES THAT WOULD REQUIRE THE APPLICATION OF OTHER LAWS.

Borrower and Bank each submit to the exclusive jurisdiction of the State and Federal courts in Cook County, Illinois; provided, however, that nothing in this Agreement shall be deemed to operate to preclude Bank from bringing suit or taking other legal action in any other jurisdiction to realize on the Collateral or any other security for the Obligations, or to enforce a judgment or other court order in favor of Bank. Borrower expressly submits and consents in advance to such jurisdiction in any action or suit commenced in any such court, and Borrower hereby waives any objection that it may have based upon lack of personal jurisdiction, improper venue, or forum non conveniens and hereby consents to the granting of such legal or equitable relief as is deemed appropriate by such court.

Borrower hereby waives personal service of the summons, complaints, and other process issued in such action or suit and agrees that service of such summons, complaints, and other process may be made by registered or certified mail addressed to Borrower at the address set forth in, or subsequently provided by Borrower in accordance with, Section 10 and that service so made shall be deemed completed upon the earlier to occur of Borrower's actual receipt thereof or three (3) days after deposit in the U.S. mail, proper postage prepaid.

**TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, BORROWER AND BANK EACH WAIVE THEIR RIGHT TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION ARISING OUT OF OR BASED UPON THIS AGREEMENT, ANY OTHER LOAN DOCUMENT OR ANY CONTEMPLATED TRANSACTION HERETO OR THERETO, INCLUDING CONTRACT, TORT, BREACH OF DUTY AND ALL OTHER CLAIMS. THIS WAIVER IS A MATERIAL INDUCEMENT FOR BOTH PARTIES TO ENTER INTO THIS AGREEMENT. EACH PARTY HAS REVIEWED THIS JURY TRIAL WAIVER WITH ITS RESPECTIVE COUNSEL.**

## **12 GENERAL PROVISIONS**

**12.1 Successors and Assigns.** This Agreement binds and is for the benefit of the successors and permitted assigns of each party hereto; provided, however, Borrower may not assign this Agreement or any rights or obligations under it without Bank's prior written consent (which may be granted or withheld in Bank's sole discretion). Bank has the right, without the consent of or notice to Borrower, to sell, transfer, assign, negotiate, or grant participation in all or any part of, or any interest in, Bank's obligations, rights, and benefits under this Agreement and the other Loan Documents. Notwithstanding anything to the contrary set forth herein, for clarification, Bank may at any time pledge or assign a security interest in all or any portion of its rights under this Agreement and applicable promissory notes to secure obligations of Bank, including any pledge or assignment to secure obligations to any Federal Reserve Bank (including as collateral security pursuant to Regulation A and any Operating Circular issued by such Federal Reserve Bank), and such loan(s) and promissory note(s) shall be fully transferable as provided therein.

**12.2 Indemnification.** Borrower agrees to and shall defend, protect, pay, indemnify and hold Bank and its directors, officers, employees, agents, attorneys, or any other Person affiliated with or representing Bank (each, an "Indemnified Person") harmless from and against any and all liabilities, obligations, losses, damages, demands, interest, penalties, actions, proceedings, judgments, suits, claims, costs, expenses (including, without limitation, Bank Expenses) and disbursements of any kind or nature whatsoever (including, without limitation, the reasonable fees and disbursements of counsel for the Indemnified Persons, including, without limitation, in connection with any investigative, administrative or judicial proceeding, or settlement, whether or not the Indemnified Persons shall be designated by a party thereto, or otherwise), which may be imposed on, paid, suffered or incurred by, or asserted against any Indemnified Person (whether direct, indirect or consequential, and whether based on any federal, state or local laws, rules, regulations or other statutory regulations, including, without limitation, securities and commercial laws, intellectual property laws, ERISA and Environmental Laws, statutes and regulations, under common law or at equitable cause, or on contract or otherwise) in any manner relating to or arising out of this Agreement or any or all of the other Loan Documents (and any amendment, waiver, renegotiation, restructuring, or consent relating hereto or thereto), or the Collateral or any other assets or property of Borrower, or any act, event or transaction related or attendant hereto or thereto, the making and the management of any Credit Extension or the use or intended use of the proceeds of any or all Credit Extensions; provided, that Borrower shall not have any obligation to any Indemnified Person hereunder for matters to the extent caused by or resulting from the willful misconduct or gross negligence of such Indemnified Person as finally determined by a court of appropriate jurisdiction in a non-appealable judgment (in which such Indemnified Person and Bank have had a reasonable opportunity to be heard). To the extent that the undertaking to indemnify, pay and hold harmless set forth in the preceding sentence may be unenforceable because it is violative of any law or public policy, Borrower shall contribute the maximum portion which it is permitted to pay and satisfy under applicable law, to the payment and satisfaction of all matters incurred by the Indemnified Persons. Any such amount identified in this Section incurred by any of the Indemnified Persons shall be paid to the applicable Indemnified Persons on demand, together with interest thereon at the Default Rate from the day after such demand until paid by Borrower, be added to the Obligations and be secured by the Collateral. The provisions of and undertakings and indemnifications set out in this Section 12.2 shall survive the payment in full of the Obligations (other than inchoate indemnification and reimbursement obligations and other obligations which, by their terms, survive termination of this Agreement) and the termination of this Agreement.

**12.3 Time of Essence; Waiver of Application of Payments; Etc.** Time is of the essence for the performance of all Obligations in this Agreement. Borrower acknowledges that Bank, in entering into this Agreement and agreeing to make any Credit Extension to Borrower hereunder, has relied upon the accuracy of the covenants, agreements, representations and warranties made herein by Borrower and the information delivered by Borrower to Bank in connection herewith (including, without limitation, all financial information and data). Notwithstanding any contrary provision contained in this Agreement or in any of the other Loan Document, after the occurrence and during the continuance of an Event of Default, Borrower irrevocably waives the right to direct the application of any and all payments at any time or times hereafter received by Bank from Borrower or with respect to any of the Collateral, and Borrower does hereby irrevocably agree that Bank shall have the continuing exclusive right to apply and reapply any and all payments received at any time or times hereafter, whether with respect to the Collateral or otherwise, against the Obligations in such manner as Bank may deem advisable, notwithstanding any entry by Bank upon any of its books and records.

**12.4 Severability of Provisions.** Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions or the remaining provisions of this Agreement.

**12.5 Limitation of Bank Liability.** Bank shall be under no obligation to take any steps necessary to preserve rights in the Collateral against any other parties, but may do so at its option, and all expenses incurred in connection therewith shall be payable by Borrower.

**12.6 Amendments in Writing; Waiver; Integration.** No purported amendment or modification of any Loan Document, or waiver, discharge or termination of any obligation under any Loan Document, shall be enforceable or admissible unless, and only to the extent, expressly set forth in a writing signed by the party against which enforcement or admission is sought. Without limiting the generality of the foregoing, no oral promise or statement, nor any action, inaction, delay, failure to require performance or course of conduct shall operate as, or evidence, an amendment, supplement or waiver or have any other effect on any Loan Document. Any waiver

granted shall be limited to the specific circumstance expressly described in it, and shall not apply to any subsequent or other circumstance, whether similar or dissimilar, or give rise to, or evidence, any obligation or commitment to grant any further waiver. The Loan Documents represent the entire agreement regarding the subject matter hereof and supersede prior negotiations or agreements relating hereto. All prior agreements, understandings, representations, warranties, and negotiations between the parties about the subject matter of the Loan Documents merge into the Loan Documents.

**12.7 Counterparts; Inconsistencies.** This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which, when executed and delivered, is an original, and all taken together, constitute one Agreement. A signature hereto sent or delivered by facsimile or other electronic transmission (including, without limitation, via .pdf) shall be as legally binding and enforceable as a signed original for all purposes. To the extent any terms or provisions contained in any other Loan Document are inconsistent or conflict with the terms and provisions of this Agreement, the terms and provisions of this Agreement shall control and govern.

**12.8 Survival.** All covenants, representations and warranties made in this Agreement continue in full force until this Agreement has terminated pursuant to its terms and all Obligations (other than inchoate indemnity obligations and any other obligations which, by their terms, are to survive the termination of this Agreement) have been indefeasibly paid in full in cash and satisfied. Without limiting the foregoing, except as otherwise provided in Section 4.1, the grant of security interest by Borrower in Section 4.1 shall survive until the termination of all Treasury Management Agreements. Sections 2.5, 2.7, 11, 12.2, 12.7, 12.14 and 12.15 shall expressly survive any termination of this Agreement until the applicable statute of limitations shall have run.

**12.9 Confidentiality.** In handling any confidential information, Bank shall exercise the same degree of care that it exercises for its own proprietary information, but disclosure of information may be made: (a) to Bank's Subsidiaries or Affiliates (so long as such Subsidiaries and Affiliates adhere to the applicable confidentiality obligations set forth herein) (such Subsidiaries and Affiliates, together with Bank, collectively, "**Bank Entities**"); (b) to prospective transferees or purchasers of any interest in the Credit Extensions (provided, however, Bank shall use its commercially reasonable efforts to obtain any prospective transferee's or purchaser's agreement to the terms of this provision); (c) as required by law, regulation, subpoena, or other order; (d) to Bank's regulators or as otherwise required in connection with Bank's examination or audit; (e) as Bank considers appropriate in exercising rights and remedies under the Loan Documents; (f) to its lawyers, accountants and workout or turnaround consultants; and (g) to any other third-party service providers of Bank so long as such service providers have executed a confidentiality agreement with Bank with terms no less restrictive than those contained herein. Confidential information does not include information that is either: (i) in the public domain or in Bank's possession when disclosed to Bank, or becomes part of the public domain after disclosure to Bank through no fault of Bank; or (ii) disclosed to Bank by a third party if Bank does not know that the third party is prohibited from disclosing the information.

Bank Entities may use the confidential information for reporting purposes and the development and distribution of databases and market analyses so long as such confidential information is aggregated and anonymized prior to distribution unless otherwise expressly permitted by Borrower. The provisions of the immediately preceding sentence shall survive the termination of this Agreement.

**12.10 Right of Set Off.** Borrower hereby grants to Bank, a lien, security interest and right of set off as security for all Obligations to Bank, whether now existing or hereafter arising upon and against all deposits, credits, collateral and property, now or hereafter in the possession, custody, safekeeping or control of Bank or any entity under the control of Bank (including a Bank subsidiary) or in transit to any of them. At any time after the occurrence and during the continuance of an Event of Default, without demand or notice, Bank may set off the same or any part thereof and apply the same to any liability or obligation of Borrower even though unmatured and regardless of the adequacy of any other collateral securing the Obligations. ANY AND ALL RIGHTS TO REQUIRE BANK TO EXERCISE ITS RIGHTS OR REMEDIES WITH RESPECT TO ANY OTHER COLLATERAL WHICH SECURES THE OBLIGATIONS, PRIOR TO EXERCISING ITS RIGHT OF SETOFF WITH RESPECT TO SUCH DEPOSITS, CREDITS OR OTHER PROPERTY OF BORROWER ARE HEREBY KNOWINGLY, VOLUNTARILY AND IRREVOCABLY WAIVED.

**12.11 Electronic Execution of Documents.** The words "execution," "signed," "signature" and words of like import in any Loan Document shall be deemed to include electronic signatures or the keeping of records in electronic form, each of which shall be of the same legal effect, validity and enforceability as a manually executed

signature or the use of a paper-based recordkeeping systems, as the case may be, to the extent and as provided for in any applicable law, including, without limitation, any state law based on the Uniform Electronic Transactions Act.

**12.12 Captions.** The headings used in this Agreement are for convenience only and shall not affect the interpretation of this Agreement.

**12.13 Construction of Agreement.** The parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties hereto, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

**12.14 Marshaling; Payments Set Aside.** Bank shall be under no obligation to marshal any assets in favor of Borrower or any other Person or against or in payment of any or all of the Obligations. If the incurrence or payment of any of the Obligations by Borrower or the transfer to Bank of any property or assets is or should for any reason be subsequently invalidated, declared to be fraudulent or preferential, set aside and/or required to be repaid to a trustee, receiver or any other party or Person under any federal or state bankruptcy law or code, state or federal law, common law or equitable cause or otherwise, including, without limitation, provisions of the federal bankruptcy code relating to fraudulent conveyances, preferences, or other voidable or recoverable payments of money or transfers of property (collectively, a “**Voidable Transfer**”), and if Bank is required to repay or restore, in whole or in part, any such Voidable Transfer, or elects to do so upon the reasonable advice of its counsel, then, as to any such Voidable Transfer, or the amount thereof that Bank is required or elects to repay or restore, and as to all reasonable costs, expenses, and attorneys’ fees of Bank, the Obligations shall automatically be fully revived, reinstated, and restored and shall exist as though such Voidable Transfer had never been made.

**12.15 Costs and Expenses.** Borrower agrees to and shall pay on demand any and all of the reasonable out-of-pocket costs and expenses of Bank (including, without limitation, the reasonable fees and out-of-pocket expenses of Bank’s outside counsel and its paralegals; all UCC tax, lien, pending suit, judgment and bankruptcy searches and all UCC filing fees; all corporate/limited liability company search fees; all certified document costs; all financial and legal due diligence expenses; all search, filing and recording fees for any federally or state registered intellectual property (ownership, lien or otherwise); all audit, field exam and appraisal costs and fees; costs and expenses incurred by Bank in connection with pre-approved travel expenses of its associates, due diligence, background checks on members of management of Borrower, and appraisals; and, if applicable, real estate appraisal fees, survey fees, recording and title commitment and insurance costs, and any environmental report or analysis) in connection with the structuring, preparation, negotiation, execution, delivery and closing of: (i) this Agreement, the other Loan Documents and all other instruments, agreements, certificates or documents provided for herein or delivered or to be delivered hereunder, and (ii) any and all amendments, modifications, joinders, supplements and waivers executed and delivered pursuant hereto or any Loan Document or in connection herewith or therewith. Borrower further agrees that Bank, in its reasonable discretion, may setoff or deduct all such unpaid amounts from the aggregate proceeds of any Credit Extension or debit such amounts from the operating accounts of Borrower maintained with Bank.

The out-of-pocket costs and expenses that Bank incurs in any reasonable manner or way with respect to the following shall be part of the Obligations, payable by Borrower on demand if at any time after the date of this Agreement Bank: (i) employs counsel in good faith for advice or other representation (A) with respect to the amendment, modification, administration or enforcement of this Agreement or any of the other Loan Documents, or with respect to any Collateral or other assets securing any of the Obligations hereunder, (B) to represent Bank in any work-out or any type of restructuring of any of the Obligations, or any litigation, contest, dispute, suit or proceeding or to commence, defend or intervene or to take any other action in or with respect to any litigation, contest, dispute, suit or proceeding (whether instituted by Bank, Borrower or any other Person) in any way or respect relating to this Agreement, the other Loan Documents, Borrower’s affairs or any Collateral hereunder or other assets pursuant to any of the other Loan Documents, or (C) to enforce any of the rights of Bank with respect to Borrower provided in this Agreement, under any of the other Loan Documents, or otherwise (whether at law or in equity); (ii) takes any action upon the occurrence or during the continuance of an Event of Default to protect, preserve, store, ship, appraise, prepare for sale, collect, sell, liquidate or otherwise dispose of any or all of the Collateral hereunder or any collateral under any other Loan Document; and/or (iii) seeks to enforce or enforces any of the rights and remedies of Bank with respect to Borrower. Without limiting the generality of the foregoing, such expenses, costs, charges and fees include: reasonable out-of-pocket fees, costs and expenses of outside attorneys, paralegals, accountants, appraisers, valuation specialists, expert witnesses, auctioneers, court reports, management consultants and other

consultants; court costs and expenses; court reporter fees, costs and expenses; duplication costs; long distance telephone charges; and courier and telecopier charges.

Borrower further agrees to pay, and to save Bank harmless from all liability for, any stamp, transfer, sales or other taxes which may be payable in connection with or related to the execution or delivery or performance of this Agreement, any or all of the other Loan Documents, the borrowings hereunder, the issuance of the Revolving Credit Note, or of any other instrument, agreement, certificate or document provided for herein or delivered or to be delivered hereunder or in connection herewith, provided that Borrower shall not be liable for Bank's income tax liabilities.

All of Borrower's obligations provided for in this Section 12.15 shall be Obligations secured by the Collateral, shall be paid to Bank on demand (together with interest thereon at the Default Rate from the day after such demand until paid by Borrower), and shall survive repayment of any Credit Extension or any termination of this Agreement or any other Loan Document.

In the event Borrower shall fail to pay taxes, insurance, audit fees and expenses, consulting fees, filing, recording and search fees, assessments, fees, costs or expenses which Borrower is, under any of the terms hereof or of any of the other Loan Documents, required to pay, or fails to keep the Collateral free from other Liens, except as permitted elsewhere herein, Bank may, in its reasonable discretion upon notice to Borrower, pay or make expenditures for any or all of such purposes, and the amounts so expended shall be paid to Bank on demand (together with interest thereon at the Default Rate from the day after such demand until paid by Borrower), be added to the Obligations and be secured by the Collateral.

**12.16 Customer Identification - PATRIOT Act Notice.** Bank hereby notifies Borrower that pursuant to the requirements of the PATRIOT Act, and Bank's policies and practices, Bank is required to obtain, verify and record certain information and documentation that identifies Borrower, which information includes the name and address of Borrower and such other information that will allow Bank to identify Borrower in accordance with the PATRIOT Act. In addition, Borrower shall (a) ensure that no Person who owns a controlling interest in or otherwise controls Borrower is or shall be listed on the OFAC Lists, (b) not use or permit the use of the proceeds of any Credit Extension to violate any of the foreign asset control regulations of OFAC or any enabling statute or Executive Order relating thereto, and (c) comply with all applicable Bank Secrecy Act laws and regulations, as amended. Borrower shall not permit the transfer of any interest in Borrower to any Person (or any beneficial owner of such entity) who is listed on the OFAC Lists. Borrower shall not knowingly enter into a real estate lease with any party who is listed on the OFAC Lists. Borrower shall immediately notify Bank if Borrower has knowledge that any equity holder of Borrower is listed on the OFAC Lists or (i) is indicted on or (ii) arraigned and held over on charges involving money laundering or predicate crimes to money laundering. Borrower shall immediately notify Bank if Borrower knows that any of its Affiliates is listed on the OFAC Lists or (A) is convicted on, (B) pleads *nolo contendere* to, (C) is indicted on or (D) is arraigned and held over on charges involving money laundering or predicate crimes to money laundering. Bank may immediately contact the Office of Foreign Assets Control and any other government agency Bank deems appropriate in order to comply with its obligations under any law, regulation, order or decree regulating or relating to terrorism and international money laundering.

**12.17 Relationship.** The relationship of the parties to this Agreement is determined solely by the provisions of this Agreement. The parties do not intend to create any agency, partnership, joint venture, trust, fiduciary or other relationship with duties or incidents different from those of parties to an arm's-length contract.

**12.18 Third Parties.** Nothing in this Agreement, whether express or implied, is intended to: (a) confer any benefits, rights or remedies under or by reason of this Agreement on any Persons other than the express parties to it and their respective permitted successors and permitted assigns; (b) relieve or discharge the obligation or liability of any Person not an express party to this Agreement; or (c) give any Person not an express party to this Agreement any right of subrogation or action against any party to this Agreement.

## **13 DEFINITIONS**

**13.1 Definitions.** As used in the Loan Documents, the word "shall" is mandatory, the word "may" is permissive, the word "or" is not exclusive, the words "includes" and "including" are not limiting, the singular includes the plural, and numbers denoting amounts that are set off in brackets are negative. Wherever in this Agreement the phrase "reasonable satisfaction", "reasonably satisfactory", "reasonably determines", or "reasonable determination" (or substantially similar phrase) of Bank is used, such phrases shall be interpreted to be from the



point of view of a senior secured lender in the exercise of its commercially reasonable judgment. The words “hereof”, “herein” and “hereunder” and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. As used in this Agreement, the following capitalized terms have the following meanings:

“**Account**” is any “account” as defined in the Code with such additions to such term as may hereafter be made, and includes, without limitation, all accounts receivable and other sums owing to Borrower.

“**Account Debtor**” is any “account debtor” as defined in the Code with such additions to such term as may hereafter be made.

“**Affiliate**” is, with respect to any Person, each other Person that owns or controls directly or indirectly the Person, any Person that controls or is controlled by or is under common control with the Person, and each of that Person’s senior executive officers, directors, partners and, for any Person that is a limited liability company, that Person’s managers and members.

“**Agreement**” is defined in the preamble hereof.

“**Applicable Rate**” means, as of any date of determination, a variable rate per annum equal to the Prime Rate plus one and one-half percent (1.50%).

“**Bank**” is defined in the preamble hereof.

“**Bank Entities**” is defined in Section 12.9.

“**Bank Expenses**” are any and all reasonable out-of-pocket costs and expenses (including, without limitation, reasonable attorneys’ fees and expenses) for preparing, amending, negotiating, administering, defending and enforcing the Loan Documents (including, without limitation, those incurred in connection with litigation, workouts, restructuring, appeals or Insolvency Proceedings) or otherwise incurred with respect to Borrower, and any and all audit fees and expenses.

“**Belly**” means Belly, Inc., a Delaware corporation.

“**Belly Purchase**” means the purchase by Borrower of substantially all of the assets of Belly’s digital loyalty programs for small and mid-sized business, as more fully described in (and otherwise in accordance with) the Belly Purchase Agreement.

“**Belly Purchase Agreement**” means that certain Asset Purchase Agreement, dated as of the Effective Date, by and among Mobivity Holdings Corp., a Nevada corporation, Borrower and Belly, Inc., a Delaware corporation.

“**Belly Purchase Documents**” means any document, agreement or instrument entered into by Borrower in connection with the Belly Purchase Agreement.

“**Board**” is Borrower’s board of directors.

“**Borrower**” is defined in the preamble hereof.

“**Borrower’s Books**” are all Borrower’s books and records including ledgers, federal and state tax returns, records regarding Borrower’s assets or liabilities, the Collateral, business operations or financial condition, and all computer programs or storage or any equipment containing such information.

“**Business Day**” is any day other than a Saturday, Sunday or other day on which commercial banks are authorized or required to be closed for the conduct of commercial banking business in the State of Illinois.

“**Capital Expenditures**” means, as to any Person, any and all expenditures of such Person for fixed assets, including, without limitation, the incurrence of Capitalized Lease Obligations, all as determined in accordance with GAAP, except that Capital Expenditures shall not include (a) expenditures for fixed assets to the extent such

expenditures are paid for or reimbursed from the proceeds of insurance or (b) any portion that is financed through Indebtedness (other than the Obligations).

“**Capitalized Lease Obligations**” means any amount payable with respect to any lease of any tangible or intangible property (whether real, personal or mixed), however denoted, which is required by GAAP to be reflected as a liability with respect to capital leases on the face of the balance sheet of the lessee thereunder; provided that, notwithstanding the foregoing or any change in CAAP occurring after the Effective Date, any liability that is (or would have been, if then existing) treated as an operating lease under GAAP as of the Effective Date shall not constitute Capitalized Lease Obligations.

“**Cash Equivalents**” means (a) marketable direct obligations issued or unconditionally guaranteed by the United States or any agency or any State thereof having maturities of not more than one (1) year from the date of acquisition; (b) commercial paper maturing no more than one (1) year after its creation and having the highest rating from either Standard & Poor’s Ratings Group or Moody’s Investors Service, Inc.; (c) Bank’s certificates of deposit issued maturing no more than one (1) year after issue; and (d) money-market funds that constitute Cash Equivalents of the kinds described in clauses (a) through (c) of this definition.

“**CERCLA**” means the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 et seq., as amended.

“**Change in Law**” means the occurrence, after the date of this Agreement, of any of the following: (a) the adoption or taking effect of any law, rule, regulation, policy, guideline, directive or treaty, (b) any change in any law, rule, regulation, policy, guideline, directive or treaty or in the administration, interpretation, implementation or application thereof by any Governmental Authority or (c) the making or issuance of any request, rule, guideline or directive (whether or not having the force of law) by any Governmental Authority; provided that notwithstanding anything herein to the contrary, (x) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives thereunder or issued in connection therewith and (y) all requests, rules, guidelines or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority) or the United States or foreign regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a “Change in Law,” regardless of the date enacted, adopted or issued.

“**Claims**” is defined in Section 12.2.

“**Code**” or “**UCC**” is the Uniform Commercial Code, as the same may, from time to time, be enacted and in effect in the State of Illinois; provided, that, to the extent that the Code is used to define any term herein or in any Loan Document and such term is defined differently in different Articles or Divisions of the Code, the definition of such term contained in Article or Division 9 shall govern; provided further, that in the event that, by reason of mandatory provisions of law, any or all of the attachment, perfection, or priority of, or remedies with respect to, Bank’s Lien on any Collateral is governed by the Uniform Commercial Code in effect in a jurisdiction other than the State of Illinois, the terms “**Code**” and/or “**UCC**” shall mean the Uniform Commercial Code as enacted and in effect in such other jurisdiction solely for purposes of the provisions thereof relating to such attachment, perfection, priority, or remedies and for purposes of definitions relating to such provisions.

“**Collateral**” is any and all properties, rights and assets of Borrower described on Exhibit A.

“**Commodity Account**” is any “commodity account” as defined in the Code with such additions to such term as may hereafter be made.

“**Compliance Certificate**” is that certain certificate substantially in the form attached hereto as Exhibit B.

“**Contingent Obligation**” is, for any Person, any direct or indirect liability, contingent or not, of that Person for: (a) any indebtedness, lease, dividend, letter of credit or other obligation of another such as an obligation, in each case, directly or indirectly guaranteed, endorsed, co-made, discounted or sold with recourse by that Person, or for which that Person is directly or indirectly liable; (b) any obligations for undrawn letters of credit for the account of that Person; and (c) all obligations from any interest rate, currency or commodity swap agreement, interest rate cap or collar agreement, or other agreement or arrangement designated to protect a Person against fluctuation in interest rates, currency exchange rates or commodity prices; but “Contingent Obligation” does not include endorsements in the ordinary course of business. The amount of a Contingent Obligation is the stated or

determined amount of the primary obligation for which the Contingent Obligation is made or, if not determinable, the maximum reasonably anticipated liability for it determined by the Person in good faith; but the amount may not exceed the maximum of the obligations under any guarantee or other support arrangement.

“**Control Agreement**” is any control agreement entered into among the depository institution at which Borrower maintains a Deposit Account or the securities intermediary or commodity intermediary at which Borrower maintains a Securities Account or a Commodity Account, Borrower, and Bank pursuant to which Bank obtains control (within the meaning of the Code) over such Deposit Account, Securities Account, or Commodity Account, which control agreement must be in form and substance acceptable to Bank.

“**Copyrights**” are any and all copyright rights, copyright applications, copyright registrations and like protections in each work or authorship and derivative work thereof, whether published or unpublished and whether or not the same also constitutes a trade secret.

“**Credit Extension**” is the single Term Loan made on the Effective Date and any other extension of credit by Bank for Borrower’s benefit under this Agreement.

“**Default**” means (i) an event, circumstance or condition which through the passage of time or the service of notice or both would (assuming no action is taken to cure the same) mature into an Event of Default and (ii) an event, circumstance or condition that constitutes and Event of Default.

“**Default Rate**” is defined in Section 2.3(b).

“**Deposit Account**” is any “deposit account” as defined in the Code with such additions to such term as may hereafter be made.

“**Dollars**” “**dollars**” or use of the sign “**\$**” means only lawful money of the United States and not any other currency, regardless of whether that currency uses the “**\$**” sign to denote its currency or may be readily converted into lawful money of the United States.

“**EBITDA**” shall mean, without duplication, (a) Net Income, plus (b) Interest Expense, plus (c) to the extent deducted in the calculation of Net Income, depreciation expense and amortization expense, plus (d) income tax expense (including, without limitation, any distributions made to Borrower’s shareholders with respect to income tax), in each case as identified by Borrower’s standard accounting practices in accordance with GAAP consistent with past practices.

“**Effective Date**” is defined in the preamble hereof.

“**Environmental Laws**” means all federal, state and local laws, statutes, rules, regulations, ordinances, programs, permits, orders and consent decrees relating to environmental and occupational health and safety matters applicable to Borrower and its business, assets and property, including, without limitation, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., as amended; CERCLA; the Toxic Substance Act, 15 U.S.C. § 2601 et seq., as amended; the Clean Water Act, 33 U.S.C. § 466 et seq., as amended; the Clean Air Act, 42 U.S.C. § 7401 et seq., as amended; the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 et seq., as amended; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 et seq., as amended; the Safe Drinking Water Act, 41 U.S.C. § 300f et seq., as amended; the Federal Water Pollution Control Act, 33 U.S.C. § 125 et seq., as amended; state and federal superlien and environmental cleanup programs; and U. S. Department of Transportation hazardous materials regulations.

“**Equipment**” is all “equipment” as defined in the Code with such additions to such term as may hereafter be made, and includes without limitation all machinery, fixtures, goods, vehicles (including motor vehicles and trailers), and any interest in any of the foregoing.

“**ERISA**” is the Employee Retirement Income Security Act of 1974, and its regulations.

“**ERISA Affiliate**” means any corporation, trade or business, which together with Borrower would be treated as a single employer under Section 4001(b)(1) of ERISA.

“**Event of Default**” is defined in Section 8.

“**Exchange Act**” is the Securities Exchange Act of 1934, as amended.

“**Fixed Charge Coverage Ratio**” means, for any period of determination, (a) Free Cash Flow for such period divided by (b) Fixed Charges for such period, all as determined for Borrower and its Subsidiaries on a consolidated basis in accordance with GAAP as applied on a consistent basis.

“**Fixed Charges**” means, for any period of determination, the sum of the following, without duplication (a) Interest Expense, plus (b) scheduled payments of principal on Indebtedness for borrowed money of Borrower (including the Term Loan), plus (c) scheduled payments of Capitalized Lease Obligations to the extent permitted hereunder, each as paid or payable in cash for such period and all as determined for Borrower and its Subsidiaries on a consolidated basis in accordance with GAAP as applied on a consistent basis.

“**Free Cash Flow**” means, for any period of determination, EBITDA, plus (a) equity capital injections into Borrower during such period, less (b) Capital Expenditures by Borrower during such period (other than Capital Expenditures financed with the proceeds of purchase money Indebtedness or Capitalized Lease Obligations to the extent permitted hereunder), less (c) cash dividends or distributions by Borrower to its equity holders (including for the payment of taxes) during such period, less (d) income taxes of Borrower paid in cash during such period, all as determined for Borrower and its Subsidiaries on a consolidated basis in accordance with GAAP as applied on a consistent basis.

“**Funding Date**” is any date on which a Credit Extension is made to or for the account of Borrower which shall be a Business Day.

“**GAAP**” is generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other Person as may be approved by a significant segment of the accounting profession, which are applicable to the circumstances as of the date of determination.

“**General Intangibles**” is “general intangibles” as defined in the Code, including, without limitation, any and all general intangibles, choses in action, causes of action, rights to the payment of money (other than Accounts), and all other intangible personal property of Borrower of every kind and nature wherever located and whether currently owned or hereafter acquired by Borrower (other than Accounts), including, without limitation, corporate, limited liability company or other business records, computer software, advertising materials, distributions on certificated and uncertificated securities, investment property, securities entitlements, goodwill, operational manuals, product formulas for industrial processes, blueprints, drawings, rights and benefits under contracts, licenses, license agreements, permits, approvals, authorizations which are associated with the operation of Borrower’s business and granted by any Person, franchises, deposit accounts, tax refunds, tax refund claims, and any letters of credit, guarantee claims, security interests or other security held by or granted to Borrower to secure payment by an Account Debtor of Borrower’s Accounts, any recoveries or amounts received in connection with any litigation or settlement of any litigation, security and other deposits, options to purchase or sell real or personal property, rights in all litigation presently or hereafter pending (whether in contract, tort or otherwise), insurance policies (including without limitation key man, property damage, and business interruption insurance), payments of insurance and rights to payment of any other kind.

“**Governmental Approval**” is any consent, authorization, approval, order, license, franchise, permit, certificate, accreditation, registration, filing or notice, of, issued by, from or to, or other act by or in respect of, any Governmental Authority.

“**Governmental Authority**” is any nation or government, any federal, state, local or other political subdivision thereof, any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative functions of or pertaining to government, any securities exchange and any self-regulatory organization.

“**Indebtedness**” is, with respect to any Person, as of the date of determination thereof, (a) all of such Person’s indebtedness for borrowed money (including, without limitation, the principal portion of the Obligations), (b) all indebtedness of such Person or any other Person secured by any Lien with respect to any property or asset owned or held by such Person, regardless whether the indebtedness secured thereby shall have been assumed by such Person or such Person has become liable for the payment thereof, (c) Capitalized Lease Obligations, (d) all

obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (e) all obligations in respect of letters of credit, whether or not drawn, and bankers' acceptances issued for the account of such Person (to the extent not cash collateralized), (f) any obligations for the deferred purchase price of property or services with respect to which a Person is liable, contingently or otherwise, as obligor or otherwise, including earnouts, (g) the principal portion of all obligations of such Person under synthetic leases, (h) the Indebtedness of any partnership or unincorporated joint venture in which such Person is a general partner or joint venturer to the extent such Indebtedness is recourse to such Person, (i) Redeemable Equity Interests, and (j) Contingent Obligations and any other guarantees by such Person, or any undertaking by such Person to be liable for, the debts or obligations of any other Person of the type described in clauses (a) through (i) above. Notwithstanding the foregoing, as used herein, the term "Indebtedness" shall not include trade payables and accrued expenses incurred by such Person in accordance with customary practices and in the ordinary course of business of such Person.

"**Indemnified Person**" is defined in Section 12.2.

"**Insolvency Proceeding**" is any proceeding by or against any Person under the United States Bankruptcy Code, or any other bankruptcy or insolvency law, including assignments for the benefit of creditors, compositions, extensions generally with its creditors, or proceedings seeking reorganization, arrangement, or other relief.

"**Intellectual Property**" means all of Borrower's right, title, and interest in and to the following:

- (a) its Copyrights, Trademarks and Patents;
- (b) any and all trade secrets and trade secret rights, including, without limitation, any rights to unpatented inventions, know-how, operating manuals;
- (c) any and all source code;
- (d) any and all design rights which may be available to a Borrower;
- (e) any and all claims for damages by way of past, present and future infringement of any of the foregoing, with the right, but not the obligation, to sue for and collect such damages for said use or infringement of the Intellectual Property rights identified above; and
- (f) all amendments, renewals and extensions of any of the Copyrights, Trademarks or Patents.

"**Interest Expense**" means for any fiscal period, interest expense (whether cash or non-cash) determined in accordance with GAAP for the relevant period ending on such date, including, in any event, interest expense with respect to any Credit Extension and other Indebtedness of Borrower and its Subsidiaries, including, without limitation or duplication, all commissions, discounts, or related amortization and other fees and charges with respect to letters of credit and bankers' acceptance financing and the net costs associated with interest rate swap, cap, and similar arrangements, and the interest portion of any deferred payment obligation (including leases of all types).

"**Inventory**" is all "inventory" as defined in the Code in effect on the date hereof with such additions to such term as may hereafter be made.

"**Investment**" is any beneficial ownership interest in any Person (including stock, partnership interest or other securities), and any loan, advance or capital contribution to any Person.

"**Lien**" is a claim, mortgage, deed of trust, levy, charge, pledge, hypothecation, security interest or other encumbrance of any kind, whether voluntarily incurred or arising by operation of law or otherwise against any asset or property.

"**Loan Account**" is defined in Section 2.3(g).

"**Loan Document(s)**" is, individually or collectively as the context requires, this Agreement, the Term Loan Note, any Control Agreement, any landlord agreement or bailee agreement, the Perfection Certificate, any Treasury Management Agreement, any subordination or intercreditor agreement, any other note, or notes or guaranties executed by Borrower, and any other present or future agreement between Borrower and/or for the benefit of Bank, all as amended, restated, or otherwise modified.

**“Material Adverse Effect”** or **“Material Adverse Change”** is (a) an impairment in the creation, attachment, perfection or priority of Bank’s first priority Lien in the Collateral or in the value of such Collateral; (b) any material adverse change in, or material adverse effect upon, Borrower’s business, performance, assets, properties or operations; (c) an impairment of the legality, validity or enforceability of this Agreement, the Term Loan Note, any Control Agreement, or any other material Loan Document or the rights and remedies of Bank hereunder or thereunder; (d) a material impairment of the prospect of repayment of any portion of the Obligations; or (e) a determination by Bank, based upon information available to it and in its reasonable judgment, that there is a reasonable likelihood that Borrower shall fail to comply with the financial covenant in Section 6.7 during the next succeeding financial reporting period.

**“Net Cash Proceeds”** means, with respect to any transaction or event, an amount equal to the cash proceeds received by Borrower from or in respect of such transaction or event (including proceeds of any non-cash proceeds of such transaction), less any direct costs and out-of-pocket expenses paid to a Person that are reasonably and actually incurred by Borrower solely in connection therewith.

**“Net Income”** means, as calculated on a consolidated basis for Borrower and its Subsidiaries for any period as at any date of determination, the net profit (or loss), after provision for taxes, of Borrower and its Subsidiaries for such period taken as a single accounting period.

**“Obligations”** are any and all of each Borrower’s liabilities, obligations and Indebtedness to Bank or, as applicable, any Affiliate of Bank, of any and every kind and nature, whether heretofore, now or hereafter owing, arising, due or payable and howsoever evidenced, created, incurred, acquired, or owing, whether primary, secondary, direct, indirect, contingent, absolute, fixed or otherwise (including, without limitation, payments of or for principal, interest, fees, costs, expenses, Bank Expenses, and/or indemnification, and obligations of performance, and applicable fees, and all amounts with respect to Treasury Management Services of Borrower), including, without limitation, any interest that, but for the provisions of the United States Bankruptcy Code, if applicable, would have accrued and all interest which accrues during the pendency of any bankruptcy or insolvency proceeding, whether or not allowed in such proceeding), in each case, under and pursuant to this Agreement (whether relating to any Credit Extension or otherwise) or the other Loan Documents to which Borrower is a party, and any refinancings, substitutions, extensions, rearrangements, renewals, replacements and modifications for or of any or all of the foregoing.

**“OFAC Lists”** means, collectively, the Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Asset Control, the Department of the Treasury pursuant to Executive Order No. 13224, 66 Fed. Reg. 49079 (Sept. 2001) and/or any other list of terrorists or terrorist organizations maintained pursuant to any of the rules and regulations of or by the Office of Foreign Asset Control, the Department of the Treasury or pursuant to any other applicable Executive Orders, as such lists may be amended or supplemented from time to time.

**“Operating Documents”** are, for any Person, such Person’s formation documents, as certified with the Secretary of State of such Person’s state of formation on a date that is no earlier than 30 days prior to the Effective Date, and, (a) if such Person is a corporation, its bylaws in current form, (b) if such Person is a limited liability company, its limited liability company agreement (or similar agreement), and (c) if such Person is a partnership, its partnership agreement (or similar agreement), each of the foregoing with all current amendments or modifications thereto.

**“Parent”** means Mobility Holdings Corp., a Nevada corporation.

**“Patents”** means all patents, patent applications and like protections including without limitation improvements, divisions, continuations, renewals, reissues, extensions and continuations-in-part of the same.

**“PATRIOT Act”** means the USA PATRIOT Act (Title III of Pub. L. 107-56, signed into law October 26, 2001), as amended.

**“Payment Date”** is the first (1st) calendar day of each month.

**“Perfection Certificate”** is defined in Section 5.1.

**“Permitted Indebtedness”** is:

- (a) Borrower's Indebtedness to Bank under this Agreement and the other Loan Documents;
- (b) Indebtedness existing on the Effective Date and identified in reasonable detail on the Perfection Certificate;
- (c) Subordinated Debt (if any);
- (d) unsecured Indebtedness to trade creditors incurred in the ordinary course of business;
- (e) Indebtedness incurred as a result of endorsing negotiable instruments received in the ordinary course of business;
- (f) Indebtedness secured by Liens permitted under clauses (a) and (c) of the definition of "Permitted Liens" hereunder; and
- (g) extensions, refinancings, modifications, amendments and restatements of any items of Permitted Indebtedness (a) through (f) above, provided that the principal amount thereof is not increased or the terms thereof are not modified to impose more burdensome terms upon Borrower, as the case may be.

**"Permitted Investments" are:**

- (a) Investments (including, without limitation, Subsidiaries) existing on the Effective Date and identified in reasonable detail on the Perfection Certificate;
- (b) Investments consisting of cash and Cash Equivalents maintained with Bank or, if required by Bank, subject to a Control Agreement in accordance with the terms hereof or otherwise secured by a perfected first priority Lien in favor of Bank (subject only to Permitted Liens);
- (c) Investments consisting of deposit accounts subject to, if required by Bank, a Control Agreement in accordance with the terms hereof;
- (d) Investments consisting of the endorsement of negotiable instruments for deposit or collection or similar transactions in the ordinary course of Borrower;
- (e) Investments consisting of travel advances and employee relocation loans and other employee loans and advances in the ordinary course of business, and loans to employees, officers or directors relating to the purchase of equity securities of Borrower or its Subsidiaries pursuant to employee stock purchase plans or agreements approved by Borrower's Board of Directors;
- (f) Investments consisting of notes receivable of, or prepaid royalties and other credit extensions, to customers and suppliers who are not Affiliates, in the ordinary course of business; provided that this paragraph (f) shall not apply to Investments of Borrower in any Subsidiary; and
- (g) Investments (including Indebtedness) received in connection with the insolvency or reorganization of customers or suppliers who are not Affiliates, in the ordinary course of business.

**"Permitted Liens" are:**

- (a) Liens existing on the Effective Date and identified in reasonable detail on the Perfection Certificate or arising under this Agreement and the other Loan Documents;
- (b) Liens for taxes, fees, assessments or other government charges or levies, either (i) not due and payable or (ii) being contested in good faith and for which Borrower maintains adequate reserves on its Books, provided that no notice of any such Lien has been filed or recorded under the Internal Revenue Code of 1986, as amended, and the Treasury Regulations adopted thereunder;
- (c) purchase money Liens or capital leases (i) on Equipment acquired or held by Borrower incurred for financing the acquisition of the Equipment securing no more than Two Hundred Thousand Dollars (\$200,000) in

the aggregate amount outstanding, or (ii) existing on Equipment when acquired, if the Lien is confined to the property and improvements and the proceeds of the Equipment;

(d) Liens of carriers, warehousemen, suppliers, or other Persons that are possessory in nature arising in the ordinary course of business so long as such Liens attach only to Inventory, securing liabilities which are not delinquent or remain payable without penalty or which are being contested in good faith and by appropriate proceedings which proceedings have the effect of preventing the forfeiture or sale of the property subject thereto;

(e) Liens to secure payment of workers' compensation, employment insurance, old-age pensions, social security and other like obligations in each case incurred in the ordinary course of business (other than Liens imposed by ERISA);

(f) Liens incurred in the extension, renewal or refinancing of the indebtedness secured by Liens described in (a) through (c), but any extension, renewal or replacement Lien must be limited to the property encumbered by the existing Lien and the principal amount of the indebtedness may not increase;

(g) leases or subleases of real property granted in the ordinary course of Borrower's business (or, if referring to another Person, in the ordinary course of such Person's business), and leases, subleases, non-exclusive licenses or sublicenses of personal property (other than Intellectual Property) granted in the ordinary course of Borrower's business (or, if referring to another Person, in the ordinary course of such Person's business), if the leases, subleases, licenses and sublicenses do not prohibit granting Bank a security interest therein;

(h) non-exclusive licenses of Intellectual Property granted to third parties in the ordinary course of business;

(i) Liens arising from attachments or judgments, orders, or decrees in circumstances not constituting an Event of Default under Section 8.4 or 8.7;

(j) Liens in favor of other financial institutions arising in connection with Borrower's deposit and/or securities accounts held at such institutions, provided that, if Bank requires, Bank has a perfected security interest in the amounts held in such deposit and/or securities accounts; and

(k) Precautionary financing statements filed in connection with operating leases permitted by this Agreement.

"**Person**" is any individual, sole proprietorship, partnership, limited liability company, joint venture, company, trust, unincorporated organization, association, corporation, institution, public benefit corporation, firm, joint stock company, estate, entity or government agency.

"**Prime Rate**" means the floating per annum rate of interest most recently published in the Money Rates column of the Wall Street Journal as the prime or base rate. If publication of the Wall Street Journal is discontinued, Bank, in its sole discretion, shall designate another daily financial or governmental publication of national circulation to be used to determine the Prime Rate. The effective date of any change in the Prime Rate shall for purposes hereof be the date the Prime Rate is changed by Bank. Bank shall not be obligated to give notice of any change in the Prime Rate. The "Prime Rate" is not necessarily the lowest rate of interest that Bank charges its customers.

"**Quarterly Financial Statements**" is defined in Section 6.2(c).

"**Redeemable Equity Interests**" means, as to any Person, any equity interest of such Person that, either by its terms, by the terms of any security into which it is convertible or exchangeable or otherwise, (a) is or upon the happening of an event or passage of time would be required to be redeemed or repurchased in whole or in part (except for consideration comprised of equity interests which are not Redeemable Equity Interests) at any time on or prior to three (3) years after the Term Loan Maturity Date; (b) is redeemable (or subject to being repurchased) in whole or in part at the option of the holder thereof (except for consideration comprised of equity interests that are not Redeemable Equity Interests) at any time prior to such date or (c) is convertible into or exchangeable (in whole or in part) for Indebtedness of such Person or any of its Subsidiaries at any time prior to such date.



“**Registered Organization**” is any “registered organization” as defined in the Code with such additions to such term as may hereafter be made.

“**Requirement of Law**” is as to any Person, the organizational or governing documents of such Person, and any law (statutory or common), treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

“**Responsible Officer**” is any of the Chief Executive Officer, President, Chief Financial Officer and Chief Operating Officer of Borrower.

“**Restricted License**” is any material license or other agreement with respect to which Borrower is the licensee that explicitly prohibits Borrower from granting a security interest in Borrower’s interest in such license or agreement or any other property.

“**SEC**” shall mean the Securities and Exchange Commission, any successor thereto, and any analogous Governmental Authority.

“**Securities Account**” is any “securities account” as defined in the Code with such additions to such term as may hereafter be made.

“**Subordinated Debt**” is unsecured indebtedness incurred by Borrower subordinated to all of Borrower’s now or hereafter indebtedness to Bank under the Loan Documents (pursuant to a subordination, intercreditor, or other similar agreement in form and substance reasonably satisfactory to Bank entered into between Bank and the other creditor), on terms acceptable to Bank.

“**Subsidiary**” is, as to any Person, a corporation, partnership, limited liability company or other entity of which shares of stock or other ownership interests having ordinary voting power (other than stock or such other ownership interests having such power only by reason of the happening of a contingency) to elect a majority of the board of directors or other managers of such corporation, partnership or other entity are at the time owned, or the management of which is otherwise controlled, directly or indirectly through one or more intermediaries, or both, by such Person. Unless the context otherwise requires, each reference to a Subsidiary herein shall be a reference to a Subsidiary of Borrower.

“**Tax Code**” means the Internal Revenue Code of 1986 (or any amended or successor version that is substantively comparable and not materially more onerous to comply with) and any current or future regulations or official interpretations thereof.

“**Term Loan**” is defined in Section 2.1.1(a).

“**Term Loan Maturity Date**” means the date that is thirty-six (36) months following the Effective Date (unless sooner accelerated pursuant to Section 9.1).

“**Term Loan Note**” is defined in Section 2.1.1(c).

“**Trademarks**” means any trademark and servicemark rights, whether registered or not, applications to register and registrations of the same and like protections, and the entire goodwill of the business of Borrower connected with and symbolized by such trademarks.

“**Transfer**” is defined in Section 7.1.

“**Treasury Management Services**” are any products, credit services, and/or financial accommodations previously, now, or hereafter provided to Borrower or any of its Subsidiaries by Bank or any Bank Affiliate, including, without limitation, any letters of credit, cash management services (including, without limitation, merchant services, direct deposit of payroll, business credit and debit cards, and check cashing services), ACH transactions interest rate swap arrangements, and foreign exchange services as any such products or services may be identified in Bank’s various agreements related thereto.

“**Treasury Management Agreement**” is defined in the definition of Treasury Management Services.

“United States” or “U.S.” means the United States of America.

“Voidable Transfer” has the meaning specified in Section 12.14.

[Signature Pages Follow]

IN WITNESS WHEREOF, the parties hereto have duly executed this Loan and Security Agreement as of the Effective Date.

**BORROWER:**

MOBIVITY, INC.,  
a Nevada corporation

By \_\_\_\_\_  
Name: Dennis Becker  
Title: Chief Executive Officer

**BANK:**

WINTRUST BANK

By \_\_\_\_\_  
Name: Bailey Eastman Moore  
Title: Vice President

Signature Page to Loan and Security Agreement

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**EXHIBIT A – COLLATERAL DESCRIPTION**

The Collateral consists of all of Borrower's right, title and interest in and to the following personal property, whether now owned or hereafter acquired or arising, and wherever located:

All goods, Accounts (including health-care receivables), Equipment, Inventory, contract rights or rights to payment of money, leases, license agreements, franchise agreements, General Intangibles (except as expressly provided below), commercial tort claims, documents, instruments (including any promissory notes), chattel paper (whether tangible or electronic), cash, deposit accounts, certificates of deposit, fixtures, letters of credit rights (whether or not the letter of credit is evidenced by a writing), securities, and all other investment property, supporting obligations, and financial assets, and all of Borrower's Books relating to the foregoing, and any and all claims, rights and interests in any of the above and all substitutions for, additions, attachments, accessories, accessions and improvements to and replacements, products, proceeds and insurance proceeds of any or all of the foregoing.

Notwithstanding the foregoing, the Collateral does not include any Intellectual Property; provided, however, the Collateral shall include all Accounts, General Intangibles that consist of rights to payment and all proceeds of Intellectual Property; provided, further, if a judicial authority (including any bankruptcy court) would hold that a security interest in the underlying Intellectual Property is necessary to have a security interest in such Accounts and such property that are proceeds of Intellectual Property, then the Collateral shall automatically, and effective as of the Effective Date, include the Intellectual Property to the extent necessary to permit perfection of Bank's security interest in such Accounts and such other property of Borrower that are proceeds of the Intellectual Property.

Pursuant to the terms of a negative pledge with Bank set forth in the Loan Agreement, Borrower has agreed not to encumber any of its Intellectual Property without Bank's prior written consent.

**LIST OF SUBSIDIARIES**

Mobivity, Inc., a Nevada corporation

Livelenz Inc., a Nova Scotia, Canada, Limited Company

**CERTIFICATION OF PRINCIPAL EXECUTIVE OFFICER**  
**Pursuant to Rule 13a-14(a) adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002**

I, Dennis Becker, certify that:

1. I have reviewed this report on Form 10-K of Mobivity Holdings Corporation;
  2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
  3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
  4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
    - a) Designed such disclosure controls and procedures or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
    - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
    - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
    - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
  5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent functions):
    - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
    - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.
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/s/ Dennis Becker  
Dennis Becker  
Chief Executive Officer  
(Principal Executive Officer)

April 1, 2019

**CERTIFICATION OF PRINCIPAL FINANCIAL OFFICER**  
**Pursuant to Rule 13a-14(a) adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002**

I, Charles Mathews, certify that:

1. I have reviewed this report on Form 10-K of Mobivity Holdings Corporation;
  2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
  3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
  4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
    - a) Designed such disclosure controls and procedures or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
    - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
    - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
    - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
  5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent functions):
    - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
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b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

/s/ Charles Mathews  
Charles Mathews  
Chief Financial Officer  
*(Principal Financial Officer)*

April 1, 2019

**CERTIFICATION PURSUANT TO  
18 U.S.C. SECTION 1350,  
AS ADOPTED PURSUANT TO  
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report on Form 10-K of Mobivity Holdings Corp., a Nevada corporation (the "Company"), for the period ended December 31, 2018, as filed with the Securities and Exchange Commission on the date hereof (the "Report"), we, Dennis Becker, Chief Executive Officer of the Company, and Charles Mathews, Chief Financial Officer of the Company, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that:

- (1) The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
- (2) The information contained in the Report fairly presents, in all material respects, the financial condition and result of operations of the Company.

Dated: April 1, 2019

*/s/ Dennis Becker*

\_\_\_\_\_  
Dennis Becker  
Chief Executive Officer  
(Principal Executive Officer)

*/s/ Charles Mathews*

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Charles Mathews  
Chief Financial Officer  
(Principal Financial and Accounting Officer)