[Company Name]

**Consulting Agreement**

This Consulting Agreement (the “**Agreement**”), made this [\_\_\_\_] day of [\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_] is entered into by [\_\_\_\_\_\_\_\_\_\_\_], a Delaware corporation (the “**Company**”), and [\_\_\_\_\_\_\_\_\_\_\_\_\_], an individual residing at [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (the “**Consultant**”).

WHEREAS, the Company desires to retain the services of the Consultant and the Consultant desires to perform certain services for the Company; and

WHEREAS, the Consultant is in the business of providing such services and has agreed to provide such services pursuant to the terms and conditions set forth in this Agreement;

NOW, THEREFORE in consideration of the mutual covenants and promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties hereto, the parties agree as follows:

1. Services. The Consultant agrees to perform such consulting, advisory and related services to and for the Company as may be reasonably requested from time to time by the Company, including, but not limited to, the services specified on Schedule A to this Agreement.
2. Term. The term of this Agreement shall commence on [Insert start date] and shall continue until [Insert termination date], unless extended by mutual consent of the parties hereto or terminated earlier pursuant to the provisions of Section 4 (such period, as it may be extended or sooner terminated, being referred to as the “**Consultation Period**”).
3. Compensation.
	1. Consulting Fees. The Company shall pay to the Consultant [a consulting fee of $[\_\_\_\_\_] per hour] **OR** [a fixed consulting fee equal to $\_\_\_ per month (prorated for any partial month). [Although it is expected that the Consultant will work approximately [##] hours per month, the monthly consulting fee is a fixed amount and shall not be subject to increase regardless of the number of hours expended in any given month by the Consultant in the provision of the services.] The Consultant shall submit to the Company [monthly] statements, in a form satisfactory to the Company, of services performed for the Company in the applicable time period. Within thirty (30) days after receipt of the statement, the Company shall pay to the Consultant, [by check,] consulting fees for all services invoiced in the statement.

[**FOR STOCK COMPENSATION, REPLACE 3.1 ABOVE WITH**: 3.1 Stock Options. In consideration for the Consultant’s services, the Company shall grant to the Consultant, subject to the approval of the Company’s Board of Directors, a non-statutory option grant under the Company’s 20[\_\_] Stock Incentive Plan for the purchase of [\_\_\_\_\_] shares of common stock of the Company at a price per share equal to the fair market value of the Company’s common stock at the time of Board approval.]

* 1. Expenses. The Consultant shall be responsible for all business expenses incurred by the Consultant in connection with, or related to, the performance of the services. [**ALTERNATIVE**: The Company shall reimburse the Consultant for all reasonable and necessary documented out of pocket expenses incurred or paid by the Consultant in connection with, or related to, the performance of Consultant’s services under this Agreement. The Consultant shall submit to the Company itemized monthly statements, in a form satisfactory to the Company, of such expenses incurred in the previous month. The Company shall pay to the Consultant amounts shown on each such statement within thirty (30) days after receipt thereof. Notwithstanding the foregoing, the Consultant shall not incur total expenses in excess of [$500.00] per month without the prior written approval of the Company.]
	2. Benefits. The Consultant shall not be entitled to any benefits, coverages or privileges, including, without limitation, health insurance, social security, unemployment, medical or pension payments, made available to employees of the Company.
1. Termination. This Agreement may be terminated prior to [Insert termination date] in the following manner: (a) by either the Company or the Consultant upon not less than [thirty (30) days] prior written notice to the other party; (b) by the non-breaching party, upon [twenty-four (24) hours] prior written notice to the breaching party if one party has materially breached this Agreement; or (c) at any time upon the mutual written consent of the parties hereto. In the event of termination, the Consultant shall be entitled to payment for services performed [**INCLUDE IF INCLUDING ALTERNATIVE LANGUAGE IN SECTION 3.2:** and (subject to the limitation in Section 3.2) for expenses paid or incurred] prior to the effective date of termination that have not been previously paid. Such payment shall constitute full settlement of any and all claims of the Consultant of every description against the Company. Notwithstanding the foregoing, the Company may terminate this Agreement effective immediately by giving written notice to the Consultant if the Consultant breaches or threatens to breach any provision of Sections 6 or 7 **[INCLUDE IF INCLUDING OPTIONAL LANGUAGE IN SECTION 8:** or 8**]**.
2. Cooperation. The Consultant shall use Consultant’s best efforts in the performance of Consultant’s obligations under this Agreement. The Company shall provide such access to its information and property as may be reasonably required in order to permit the Consultant to perform Consultant’s obligations hereunder. The Consultant shall cooperate with the Company’s personnel, shall not interfere with the conduct of the Company’s business and shall observe all rules, regulations and security requirements of the Company concerning the safety of persons and property.
3. Proprietary Information and Inventions.
	1. Proprietary Information.
		1. The Consultant acknowledges that Consultant’s relationship with the Company is one of high trust and confidence and that in the course of Consultant’s service to the Company, Consultant will have access to and contact with Proprietary Information. The Consultant will not disclose any Proprietary Information to any person or entity other than employees of the Company or use the same for any purposes (other than in the performance of the services) without written approval by an officer of the Company, either during or after the Consultation Period, unless and until such Proprietary Information has become public knowledge without fault by the Consultant.
		2. For purposes of this Agreement, Proprietary Information shall mean, by way of illustration and not limitation, all information, whether or not in writing, whether or not patentable and whether or not copyrightable, of a private, secret or confidential nature, owned, possessed or used by the Company, concerning the Company’s business, business relationships or financial affairs, including, without limitation, any Invention, formula, vendor information, customer information, apparatus, equipment, trade secret, process, research, report, technical or research data, clinical data, know-how, computer program, software, software documentation, hardware design, technology, product, processes, methods, techniques, formulas, compounds, projects, developments, marketing or business plan, forecast, unpublished financial statement, budget, license, price, cost, customer, supplier or personnel information or employee list that is communicated to, learned of, developed or otherwise acquired by the Consultant in the course of Consultant’s service as a consultant to the Company.
		3. The Consultant’s obligations under this Section 6.1 shall not apply to any information that (i) is or becomes known to the general public under circumstances involving no breach by the Consultant or others of the terms of this Section 6.1, (ii) is generally disclosed to third parties by the Company without restriction on such third parties, or (iii) is approved for release by written authorization of an officer of the Company.
		4. The Consultant agrees that all files, documents, letters, memoranda, reports, records, data sketches, drawings, models, laboratory notebooks, program listings, computer equipment or devices, computer programs or other written, photographic, or other tangible material containing Proprietary Information, whether created by the Consultant or others, which shall come into Consultant’s custody or possession, shall be and are the exclusive property of the Company to be used by the Consultant only in the performance of Consultant’s duties for the Company and shall not be copied or removed from the Company premises except in the pursuit of the business of the Company. All such materials or copies thereof and all tangible property of the Company in the custody or possession of the Consultant shall be delivered to the Company, upon the earlier of (i) a request by the Company or (ii) the termination of this Agreement. After such delivery, the Consultant shall not retain any such materials or copies thereof or any such tangible property.
		5. The Consultant agrees that Consultant’s obligation not to disclose or to use information and materials of the types set forth in paragraphs (b) and (d) above, and Consultant’s obligation to return materials and tangible property set forth in paragraph (d) above extends to such types of information, materials and tangible property of customers of the Company or suppliers to the Company or other third parties who may have disclosed or entrusted the same to the Company or to the Consultant.
		6. The Consultant acknowledges that the Company from time to time may have agreements with other persons or with the United States Government, or agencies thereof, that impose obligations or restrictions on the Company regarding inventions made during the course of work under such agreements or regarding the confidential nature of such work. The Consultant agrees to be bound by all such obligations and restrictions that are known to Consultant and to take all action necessary to discharge the obligations of the Company under such agreements.
		7. The Consultant’s obligations under this Section 6.1 shall not apply to any information that (i) is or becomes known to the general public under circumstances involving no breach by the Consultant or others of the terms of this Section 6.1, (ii) is generally disclosed to third parties by the Company without restriction on such third parties, or (iii) is approved for release by written authorization of an officer of the Company. Further, nothing herein prohibits the Consultant from communicating with government agencies about possible violations of federal, state, or local laws or otherwise providing information to government agencies or participating in government agency investigations or proceedings. In addition, notwithstanding the Consultant’s confidentiality and nondisclosure obligations, the Consultant is hereby advised as follows pursuant to the Defend Trade Secrets Act: “An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that (A) is made (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual (A) files any document containing the trade secret under seal; and (B) does not disclose the trade secret, except pursuant to court order.”
	2. Inventions.
		1. The Consultant will make full and prompt disclosure to the Company of all discoveries, ideas, inventions, improvements, enhancements, processes, methods, techniques, developments, software, and works of authorship, whether patentable or not, which are created, made, conceived or reduced to practice by the Consultant or under the Consultant’s direction or jointly with others, either (i) during the Consultation Period or (ii) after the Consultation Period if resulting or directly derived from Proprietary Information, whether or not during normal working hours or on the premises of the Company (all of which are collectively referred to in this Agreement as “**Inventions**”). The Consultant acknowledges and affirms that all such Inventions shall be the sole property of the Company. The Consultant further acknowledges that each original work of authorship which is made by the Consultant (solely or jointly with others) within the scope of and during the period of the Consultation Period and which is protectable by copyright is a “work made for hire,” as that term is defined in the United States Copyright Act. The Consultant agrees to assign and does hereby assign to the Company (or any person or entity designated by the Company) all of the Consultant’s right, title and interest in and to all Inventions and all related patents, patent applications, copyrights created in the work(s) of authorship, trademarks, trade names, and other industrial and intellectual property rights and applications therefor in the United States and elsewhere. However, this paragraph shall not apply to Inventions which do not relate to the business or research and development conducted or planned to be conducted by the Company at the time such Invention is created, made, conceived or reduced to practice and which are made and conceived by the Consultant not during normal working hours, not on the Company’s premises and not using the Company’s tools, devices, equipment or Proprietary Information. The Consultant understands that, to the extent this Agreement shall be construed in accordance with the laws of any state which precludes a requirement in an agreement to assign certain classes of inventions made by a Consultant, this paragraph shall be interpreted not to apply to any invention which a court rules and/or the Company agrees falls within such classes. The Consultant also hereby waives all claims to moral rights in any Inventions.
		2. The Consultant agrees that if, in the course of performing the services, the Consultant incorporates into any Invention developed under this Agreement any preexisting invention, improvement, development, concept, discovery or other proprietary information owned by the Consultant or in which the Consultant has an interest (“**Prior Inventions**”), (i) the Consultant will inform the Company, in writing before incorporating such Prior Inventions into any Invention, and (ii) the Company is hereby granted a nonexclusive, royalty-free, perpetual, irrevocable, transferable worldwide license with the right to grant and authorize sublicenses, to make, have made, modify, use, import, offer for sale, sell, reproduce, distribute, modify, adapt, prepare derivative works of, display, perform, and otherwise exploit such Prior Inventions, without restriction, including, without limitation, as part of or in connection with such Invention, and to practice any method related thereto. The Consultant will not incorporate any invention, improvement, development, concept, discovery or other proprietary information owned by any third party into any Invention without the Company’s prior written permission.
		3. The Consultant agrees to cooperate fully with the Company, both during and after the Consultation Period, with respect to the procurement, maintenance, and enforcement of copyrights, patents and other intellectual property rights (both in the United States and foreign countries) relating to Inventions. The Consultant shall sign all papers, including, without limitation, copyright applications, patent applications, declarations, oaths, formal assignments, assignments of priority rights, and powers of attorney, which the Company may deem necessary or desirable in order to protect its rights and interests in any Invention. The Consultant further agrees that if the Company is unable, after reasonable effort, to secure the signature of the Consultant on any such papers, any executive officer of the Company shall be entitled to execute any such papers as the agent and the attorney-in-fact of the Consultant, and the Consultant hereby irrevocably designates and appoints each executive officer of the Company as the Consultant’s agent and attorney-in-fact to execute any such papers on the Consultant’s behalf, and to take any and all actions as the Company may deem necessary or desirable in order to protect its rights and interests in any Invention, under the conditions described in this sentence.
		4. The Consultant shall maintain adequate and current written records (in the form of notes, sketches, drawings and as may be specified by the Company) to document the conception and/or first actual reduction to practice of any Invention. Such written records shall be available to and remain the sole property of the Company at all times.
4. Non-Solicitation.[[1]](#footnote-1) During the Consultation Period and for a period of [six (6)] months thereafter, the Consultant shall not, either alone or in association with others: (i) solicit, or permit any organization directly or indirectly controlled by the Consultant to solicit, any employee of the Company to leave the employ of the Company; (ii) solicit for employment, hire or engage as an independent contractor, or permit any organization directly or indirectly controlled by the Consultant to solicit for employment, hire or engage as an independent contractor, any person who is employed or engaged by the Company; and/or (iii) solicit, divert or take away, the business or patronage of any of the clients, customers or accounts or prospective clients, customers or accounts, of the Company that were contacted, solicited or served by the Consultant on behalf of the Company during the Consultation Period.
5. Non-Exclusivity[ and Non-Competition][[2]](#footnote-2). The Company retains the right to contract with other companies and/or individuals for consulting services without restriction. Similarly, the Consultant retains the right to contract with other companies or entities for the Consultant’s consulting services without restriction. [**OPTIONAL (to be included only after reviewing and considering the instructions and highlighted provisions set forth in the attached Non-Competition and Non-Solicitation Agreement)**: Notwithstanding the foregoing, and as a condition of the Consultant’s engagement with the Company, the Consultant agrees to the non-competition restrictions set forth in the Non-Competition and Non-Solicitation Agreement attached hereto as Exhibit A. The Consultant acknowledges that the additional consideration referenced in Section 1(c) of the Non-Competition and Non-Solicitation Agreement has been mutually agreed upon by the Company and the Consultant, is fair and reasonable, and is sufficient consideration for the Consultant’s compliance with his or her non-competition obligations.]
6. Other Agreements; Warranty.
	1. The Consultant hereby represents that, except as the Consultant has disclosed in writing to the Company, the Consultant is not bound by the terms of any agreement with any third party to refrain from using or disclosing any trade secret or confidential or proprietary information in the course of Consultant’s consultancy with the Company, to refrain from competing, directly or indirectly, with the business of such third party or to refrain from soliciting employees, customers or suppliers of such third party. The Consultant further represents that Consultant’s performance of all the terms of this Agreement and the performance of the services as a consultant of the Company do not and will not breach any agreement with any third party to which the Consultant is a party (including, without limitation, any nondisclosure or non-competition agreement), and that the Consultant will not disclose to the Company or induce the Company to use any confidential or proprietary information or material belonging to any current or previous employer or others.
	2. The Consultant hereby represents, warrants and covenants that Consultant has the skills and experience necessary to perform the services, that Consultant will perform said services in a professional, competent and timely manner, that Consultant has the power to enter into this Agreement and that Consultant’s performance hereunder will not infringe upon or violate the rights of any third party or violate any federal, state or municipal laws.
7. Independent Contractor Status.
	1. The Consultant shall perform all services under this Agreement as an “independent contractor” and not as an employee or agent of the Company. The Consultant is not authorized to assume or create any obligation or responsibility, express or implied, on behalf of, or in the name of, the Company or to bind the Company in any manner.
	2. The Consultant shall have the right to control and determine the time, place, methods, manner and means of performing the services. In performing the services, the amount of time devoted by the Consultant on any given day will be entirely within the Consultant’s control, and the Company will rely on the Consultant to put in the amount of time necessary to fulfill the requirements of this Agreement. The Consultant will provide all equipment and supplies required to perform the services. The Consultant is not required to attend regular meetings at the Company. However, upon reasonable notice, the Consultant shall meet with representatives of the Company at a location to be designated by the parties to this Agreement.
	3. In the performance of the services, the Consultant has the authority to control and direct the performance of the details of the services, the Company being interested only in the results obtained. However, the services contemplated by the Agreement must meet the Company’s standards and approval and shall be subject to the Company’s general right of inspection and supervision to secure their satisfactory completion.
	4. The Consultant shall not use the Company’s trade names, trademarks, service names or service marks without the prior approval of the Company.
	5. The Consultant shall be solely responsible for all state and federal income taxes, unemployment insurance and social security taxes in connection with this Agreement and for maintaining adequate workers’ compensation insurance coverage.
8. Remedies. The Consultant acknowledges that any breach of the provisions of Sections 6 or 7 **[ADD IF INCLUDING OPTIONAL LANGUAGE IN SECTION 8:** or 8 (or the Non-Competition and Non-Solicitation Agreement referenced therein)**]** of this Agreement shall result in serious and irreparable injury to the Company for which the Company cannot be adequately compensated by monetary damages alone. The Consultant agrees, therefore, that, in addition to any other remedy the Company may have, the Company shall be entitled to enforce the specific performance of this Agreement by the Consultant and to seek both temporary and permanent injunctive relief (to the extent permitted by law) without the necessity of proving actual damages or posting a bond.
9. Indemnification. The Consultant shall be solely liable for, and shall indemnify, defend and hold harmless the Company and its successors and assigns from any claims, suits, judgments or causes of action initiated by any third party against the Company where such actions result from or arise out of the services performed by the Consultant under this Agreement. The Consultant shall further be solely liable for, and shall indemnify, defend and hold harmless the Company and its successors and assigns from and against any claim or liability of any kind (including penalties, fees or charges) resulting from the Consultant’s failure to pay the taxes, penalties, and payments referenced in Section 10 of this Agreement. The Consultant shall further indemnify, defend and hold harmless the Company and its successors and assigns from and against any and all loss or damage resulting from any misrepresentation, or any non‑fulfillment of any representation, responsibility, covenant or agreement on Consultant’s part, as well as any and all acts, suits, proceedings, demands, assessments, penalties, judgments of or against the Company relating to or arising out of the activities of the Consultant and the Consultant shall pay reasonable attorneys’ fees, costs and expenses incident thereto.
10. Notices. All notices required or permitted under this Agreement shall be in writing and shall be deemed effective upon personal delivery or upon deposit in the United States Post Office, by registered or certified mail, postage prepaid, addressed to the other party at the address shown above, or at such other address or addresses as either party shall designate to the other in accordance with this Section 13.
11. Pronouns. Whenever the context may require, any pronouns used in this Agreement shall include the corresponding masculine, feminine or neuter forms, and the singular forms of nouns and pronouns shall include the plural, and vice versa.
12. Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes all prior agreements and understandings, whether written or oral, relating to the subject matter of this Agreement.
13. Amendment. This Agreement may be amended or modified only by a written instrument executed by both the Company and the Consultant.
14. Non-Assignability of Contract. This Agreement is personal to the Consultant and the Consultant shall not have the right to assign any of Consultant’s rights or delegate any of Consultant’s duties without the express written consent of the Company. Any non-consented-to assignment or delegation, whether express or implied or by operation of law, shall be void and shall constitute a breach and a default by the Consultant.
15. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts without giving effect to any choice or conflict of law provision or rule that would cause the application of laws of any other jurisdiction.
16. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, both parties and their respective successors and assigns, including any corporation with which, or into which, the Company may be merged or which may succeed to its assets or business, provided, however, that the obligations of the Consultant are personal and shall not be assigned by Consultant.
17. Interpretation. If any restriction set forth in Section 6 or Section 7 **[ADD IF INCLUDING OPTIONAL LANGUAGE IN SECTION 8:** or Section 8 (or the Non-Competition and Non-Solicitation Agreement referenced therein)**]** is found by any court of competent jurisdiction to be unenforceable because it extends for too long a period of time or over too great a range of activities or in too broad a geographic area, it shall be interpreted to extend only over the maximum period of time, range of activities or geographic area as to which it may be enforceable.
18. Survival. Sections 4 through 22 shall survive the expiration or termination of this Agreement.
19. Miscellaneous.
	1. No delay or omission by the Company in exercising any right under this Agreement shall operate as a waiver of that or any other right. A waiver or consent given by the Company on any one occasion shall be effective only in that instance and shall not be construed as a bar or waiver of any right on any other occasion.
	2. The captions of the sections of this Agreement are for convenience of reference only and in no way define, limit or affect the scope or substance of any section of this Agreement.
	3. In the event that any provision of this Agreement shall be invalid, illegal or otherwise unenforceable, the validity, legality and enforceability of the remaining provisions shall in no way be affected or impaired thereby.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, the parties hereto have executed this Consulting Agreement as of the date and year first above written.

**[COMPANY]**

By:
Name:
Title:

**CONSULTANT:**

Name:

**Schedule A**

**Description of Services**

* [Insert Description of Services]

**NOTE TO CLIENTS:**

**INCLUDING a non-competition provision for a consultant is generally discouraged, as it increases RISKS RELATED TO WORKER CLASSIFICATION.**

**BEFORE USING THIS AGREEMENT, YOU ARE STRONGLY ADVISED TO CONSULT WITH A MEMBER OF WILMERHALE’S LABOR AND EMPLOYMENT GROUP TO UNDERSTAND THE OPTIONS PRESENTED AND THEIR ASSOCIATED RISKS**

***DELETE THIS PAGE BEFORE DISTRIBUTION***

* This form is intended to comply with Massachusetts’ new non-compete law that applies to non-competition agreements entered into on or after **October 1, 2018**.
* This form must be finalized (bracketed and highlighted provisions resolved and footnotes deleted) before it is provided to a potential or current independent contractor.
* This form should only be used for independent contractors (i.e., consultants) who live or work in Massachusetts.
* This agreement must be provided to a ***new*** ***independent*** ***contractor*** by the *earlier* of the date (x) a formal offer of engagement is made, and (y) 10 business days before the contractor’s commencement of services (***this timing may necessitate sending out the agreement prior to extending an offer of engagement***).
* If provided to a ***current*** independent contractor: (i) this agreement must not become effective until at least **10 business days** after it is so provided, and (ii) the contractor must also receive “fair and reasonable” consideration in exchange for his/her execution (continued engagement as an independent contractor is not sufficient consideration).
* Once finalized, this agreement **must be signed by *both*** the Company and the independent contractor to be enforceable. Don’t forget to timely countersign!

 **LABOR AND EMPLOYMENT GROUP**

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**[This Exhibit A should be attached to the Consulting Agreement only if (i) Consultant lives or works in Massachusetts and (ii) Consultant will be subject to a non-compete obligation]**

**Exhibit A**

NON-COMPETITION AND NON-SOLICITATION AGREEMENT

This Non-Competition and Non-Solicitation Agreement (the “**Agreement**”) is made between [\_\_\_\_\_\_\_\_\_\_\_\_\_][, a Delaware corporation] (hereinafter referred to collectively with its subsidiaries as the “**Company**”), and the undersigned independent contractor (the “**Undersigned**”).

For good consideration and in consideration of the Undersigned’s engagement with the Company (an “**Engagement**”), or the continuance of Undersigned’s Engagement, and, with respect to the non-competition restrictions, the additional consideration set forth in Section 1(c), the Undersigned and the Company agree as follows:

1. Non-Competition.
	1. During the Restricted Period (as defined below), the Undersigned will not, in the Applicable Territory (as defined below), directly or indirectly, whether as an owner, partner, officer, director, employee, consultant, investor, lender or otherwise, except as the passive holder of not more than 1% of the outstanding stock of a publicly-held company, engage or assist others in engaging in any business or enterprise that is competitive with the Company’s business, including but not limited to any business or enterprise that researches, develops, manufactures, markets, licenses, sells or provides any product or service that competes with any product or service researched, developed, manufactured, marketed, licensed, sold or provided, or planned to be researched, developed, researched, manufactured, marketed, licensed, sold or provided by the Company (a “**Competitive Company**”), if the Undersigned would be performing job duties or services for the Competitive Company that are of a similar type that the Undersigned performed for the Company at any time during the last two (2) years of the Undersigned’s Engagement.
	2. Certain Definitions. Solely for purposes of this Section 1:
2. the “**Restricted Period**” shall include the duration of the Undersigned’s Engagement with the Company and the twelve (12) month[[3]](#footnote-3) period thereafter; provided, however, that the Restricted Period shall automatically be extended to two (2) years following the cessation of the Undersigned’s Engagement if the Undersigned breaches a fiduciary duty to the Company or the Undersigned unlawfully takes, physically or electronically, any property belonging to the Company. Notwithstanding the foregoing, the Restricted Period shall end immediately upon the Undersigned’s last day of Engagement with the Company if: (x) the Company terminates the Undersigned’s Engagement other than for Cause (as defined below); or (y) the Company notifies the Undersigned in writing that it is waiving the post-Engagement restrictions set forth in this Section 1 (such notice to be provided no later than the Undersigned’s last day of Engagement or by the seventh (7th) business day following the Undersigned’s notice that he or she is initiating the end of the Engagement, if later).
3. “**Applicable Territory**” shall mean the geographic areas in which the Undersigned provided services or had a material presence or influence at any time during his/her last two (2) years of Engagement.[[4]](#footnote-4)
4. “**Cause**” shall mean any of: (a) the Undersigned’s conviction of, or plea of guilty or nolo contendere to, any crime involving dishonesty or moral turpitude, or any felony; or (b) a good faith finding by the Company in its sole discretion that the Undersigned has (i) engaged in dishonesty, misconduct or gross negligence; (ii) committed an act that injures or would reasonably be expected to injure the reputation, business or business relationships of the Company; (iii) materially breached the Consulting Agreement; (iv) breached the terms of this Agreement or any other restrictive covenant or confidentiality agreement with or policy of the Company; (v) failed or refused to comply with any of the Company’s policies or procedures applicable to the Undersigned; or (vi) failed to perform the Undersigned’s duties and/or responsibilities to the Company’s satisfaction.[[5]](#footnote-5)
	1. Additional Consideration for Non-Competition Restrictions. In exchange for the Undersigned’s compliance with the restrictions set forth in this Section 1,[[6]](#footnote-6)

**[*If including garden leave (an uncommon provision for contractors), insert the following:*** during the post-Engagement portion of the Restricted Period, the Company will pay the Undersigned 50% of the highest annualized consulting fees paid to the Undersigned by the Company within the two (2) years preceding the termination of the Undersigned’s Engagement, less all applicable taxes and withholdings (the “**Non-Compete Consideration**”). The Non-Compete Consideration will be paid ratably in accordance with the Company’s regular payment schedule with respect to the Undersigned, commencing with the first payment cycle beginning after the termination of the Undersigned’s Engagement. The Undersigned understands and agrees that the Company may discontinue or otherwise not provide the Non-Compete Consideration (i) if the Restricted Period expires upon the termination of the Engagement pursuant to the last sentence of Section 1(b)(i), (ii) if the Undersigned breaches this Agreement, or (iii) during any portion of the Restricted Period that has been extended in accordance with Section 1(b)(i); provided, however, that with respect to (ii) or (iii) any such cessation shall not excuse the Undersigned’s compliance with his/her obligations under this Section 1 or otherwise in this Agreement.**] [[7]](#footnote-7)**

**OR**

**[*If including “other mutually agreed upon consideration” to be paid or granted prior to the post-Engagement period, insert description of consideration being provided, along the lines of the following***: and as more fully set forth in the Undersigned’s Consulting Agreement to which this Agreement is attached, the Company, subject to approval of its Board of Directors where applicable, will grant the Undersigned [a stock option under the Company’s stock incentive plan] [a [$$$$] Engagement fee]**]**.

**OR**

**[*If including “mutually agreed upon consideration” to be paid or granted* *during the post-Engagement period, insert description of consideration being provided, along the lines of the following****:* during the post-Engagement portion of the Restricted Period, the Company will [pay/grant] the Undersigned [*Insert description of post-Engagement payments/grants*]*“*(the “**Non-Compete Consideration**”). The Undersigned understands and agrees that the Company may discontinue or otherwise not provide the Non-Compete Consideration (i) if the Restricted Period expires upon the termination of the Engagement pursuant to the last sentence of Section 1(b)(i), (ii) if the Undersigned breaches this Agreement, or (iii) during any portion of the Restricted Period that has been extended in accordance with Section 1(b)(i); provided, however, that with respect to (ii) or (iii) any such cessation shall not excuse the Undersigned’s compliance with his/her obligations under this Section 1 or otherwise in this Agreement.**] [[8]](#footnote-8)**

The Undersigned understands and agrees that the above-stated consideration has been mutually agreed upon by the Company and the Undersigned, is fair and reasonable, and is sufficient consideration in exchange for the restrictions set forth in this Section 1.

1. Non-Solicitation.
	1. During the Undersigned’s Engagement and for a period of twelve (12) months after the termination or cessation of such Engagement for any reason, the Undersigned will not directly or indirectly:

(i) Either alone or in association with others, solicit, divert or take away, or attempt to divert or take away, the business or patronage of any of the actual or prospective clients, customers, accounts or business partners of the Company which were contacted, solicited, or served by the Company during the Undersigned’s Engagement with the Company; or

(ii) Either alone or in association with others (I) solicit, induce or attempt to induce, any employee or independent contractor of the Company to terminate his or her employment or other engagement with the Company, or (II) hire or recruit, or attempt to hire or recruit, or engage or attempt to engage as an independent contractor, any person who was employed or otherwise engaged by the Company at any time during the term of the Undersigned’s Engagement with the Company; provided, that this clause (II) shall not apply to the recruitment or hiring or other engagement of any individual whose employment or other engagement with the Company ended at least six (6) months before the recruitment, hiring, or other engagement.

* 1. If the Undersigned violates the provisions of any of the preceding paragraphs of this Section 2, the Undersigned shall continue to be bound by the restrictions set forth in such paragraph until a period of twelve (12) months has expired without any violation of such provisions. Further, the twelve (12) month post-Engagement restrictions set forth in this Section 2 shall be extended to two (2) years if the Undersigned breaches a fiduciary duty to the Company or the Undersigned unlawfully takes, physically or electronically, any property belonging to the Company.
	2. Notice of New Business Activities. The Undersigned agrees that during any period of time when the Undersigned is subject to restrictions pursuant to either Section 1 or Section 2, the Undersigned will notify any prospective employer or business associate of the terms and existence of this Agreement and the Undersigned’s continuing obligations to the Company hereunder. The Undersigned further agrees, during such period, to give notice to the Company of each new business activity the Undersigned plans to undertake, at least (10) business days prior to beginning any such activity. The notice shall state the name and address of the individual, corporation, association or other entity or organization (“**Entity**”) for whom such activity is undertaken and the name of the Undersigned’s business relationship or position with the Entity. The Undersigned also agrees to provide the Company with other pertinent information concerning such business activity as the Company may reasonably request in order to determine the Undersigned’s continued compliance with his/her obligations under this Agreement. The Undersigned hereby authorizes the Company to notify others, including but not limited to customers of the Company and any of the Undersigned’s future employers or prospective business associates, of the terms and existence of this Agreement and the Undersigned’s continuing obligations to the Company hereunder.
1. Miscellaneous.
	1. Equitable Remedies. The Undersigned acknowledges that the restrictions contained in this Agreement are necessary for the protection of the business and goodwill of the Company and are considered by the Undersigned to be reasonable for such purpose. The Undersigned agrees that any breach or threatened breach of this Agreement is likely to cause the Company substantial and irrevocable damage which is difficult to measure. Therefore, in the event of any such breach or threatened breach, the Undersigned agrees that the Company, in addition to such other remedies which may be available, shall have the right to obtain an injunction from a court restraining such a breach or threatened breach without posting a bond and the right to specific performance of the provisions of this Agreement and the Undersigned hereby waives the adequacy of a remedy at law as a defense to such relief.
	2. Obligations to Third Parties. The Undersigned represents that, except as the Undersigned has disclosed in writing to the Company, the Undersigned is not bound by the terms of any agreement with any current or previous employer or other party to refrain from using or disclosing any trade secret or confidential or proprietary information in the course of his/her Engagement with the Company, to refrain from competing, directly or indirectly, with the business of such employer or any other party, or to refrain from soliciting employees, customers or suppliers of such employer or other party. The Undersigned further represents that his/her performance of all the terms of this Agreement and the performance of his/her duties for the Company does not and will not conflict with or breach any agreement with any current or prior employer or other party (including, without limitation, any nondisclosure or non-competition agreement), and that the Undersigned will not disclose to the Company or induce the Company to use any confidential or proprietary information or material belonging to any current or previous employer or others.
	3. Not Employment Contract. The Undersigned acknowledges that this Agreement does not constitute a contract of employment, nor does it imply that the Company will continue his/her Engagement for any period of time.
	4. Acknowledgments. The Undersigned acknowledges that he or she has the right to consult with counsel prior to signing this Agreement.

[***For prospective contractors***: The Undersigned further acknowledges that he or she was provided this Agreement by the earlier of the date of (x) a formal offer of Engagement, and (y) ten (10) business days prior to the Undersigned’s commencement of Engagement with the Company.]

[***For current contractors***: The Undersigned further acknowledges that he or she was provided at least ten (10) business days to review this Agreement and that the Agreement is supported by fair and reasonable consideration independent from the Undersigned’s continued Engagement with the Company.]

* 1. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of both parties and their respective successors and assigns, including any corporation with which, or into which, the Company may be merged or which may succeed to the Company’s assets or business, provided, however, that the obligations of the Undersigned are personal and shall not be assigned by him or her. The Undersigned expressly consents to be bound by the provisions of this Agreement for the benefit of the Company or any subsidiary or affiliate thereof to which the Undersigned’s Engagement may be transferred without the necessity that this Agreement be re-signed at the time of such transfer.
	2. Interpretation. If any restriction or definition set forth in Section 1 or Section 2 is found by any court of competent jurisdiction to be unenforceable because it extends for too long a period of time or over too great a range of conduct, activities, or geographic area, it shall be interpreted to extend only over the maximum period of time, range of conduct, activities or geographic area as to which it may be enforceable.
	3. Severability. In case any provision of this Agreement shall be invalid, illegal or otherwise unenforceable, the validity, legality and enforceability of the remaining provisions shall in no way be affected or impaired thereby.
	4. Waivers. No delay or omission by the Company in exercising any right under this Agreement will operate as a waiver of that or any other right. A waiver or consent given by the Company on any one occasion is effective only in that instance and will not be construed as a bar to or waiver of any right on any other occasion.
	5. Governing Law and Consent To Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts (without reference to the conflicts of laws provisions thereof). Any action, suit, or other legal proceeding which is commenced to resolve any matter arising under or relating to any provision of this Agreement shall be commenced only in a court in Suffolk County, Massachusetts (or, if appropriate, a federal court located within Massachusetts), and the Company and the Undersigned each consents to the jurisdiction of such courts. The Company and the Undersigned each hereby irrevocably waives any right to a trial by jury in any action, suit or other legal proceeding arising under or relating to any provision of this Agreement.
	6. Option Exercise Period. Notwithstanding anything to the contrary in any other agreement by and between the Undersigned and the Company, the Undersigned acknowledges and agrees that if he or she violates any restriction contained in Section 1 or 2 of this Agreement, the Undersigned’s right to exercise any stock option granted to the Undersigned by the Company shall terminate immediately upon such violation.
	7. Entire Agreement; Amendment. This Agreement supersedes all prior agreements, written or oral, between the Undersigned and the Company relating to the subject matter of this Agreement. This Agreement may not be modified, changed or discharged in whole or in part, except by an agreement in writing signed by the Undersigned and the Company. The Undersigned agrees that any change or changes in his/her Engagement (including without limitation changes to his/her services or fees) after the signing of this Agreement shall not affect the validity or scope of this Agreement.
	8. Captions. The captions of the sections of this Agreement are for convenience of reference only and in no way define, limit or affect the scope or substance of any section of this Agreement.

[*Remainder of Page Intentionally Left Blank*]

THE UNDERSIGNED ACKNOWLEDGES THAT HE/SHE HAS CAREFULLY READ THIS AGREEMENT AND UNDERSTANDS AND AGREES TO ALL OF THE PROVISIONS IN THIS AGREEMENT.

|  |  |
| --- | --- |
|  | UNDERSIGNED |
| Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Name:  |
|  | [COMPANY] |
| Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Name:Title: |

1. If the Consultant will also be subject to a non-competition provision (see Section 8), replace Section 7 in its entirety with the following: “Non-Solicitation. As a condition of the Consultant’s engagement with the Company, the Consultant agrees to the non-solicitation restrictions set forth in the Non-Competition and Non-Solicitation Agreement attached hereto as Exhibit A.” [↑](#footnote-ref-1)
2. Including a non-competition provision for a consultant is generally discouraged, as it increases risks related to worker classification. [↑](#footnote-ref-2)
3. 12 months is the maximum duration permitted by Massachusetts’ new non-compete law. [↑](#footnote-ref-3)
4. The stated applicable territory is deemed presumptively reasonable under the new law. If the Company does not believe such breadth can adequately protect its interests, it may consider including a broader territory. [↑](#footnote-ref-4)
5. This “Cause” definition is purposely drafted very broadly because a more restrictive definition would render a company unable to impose the noncompete in too many situations. This broad definition does not prevent a company from using a different, more restrictive definition in other agreements (e.g., an equity agreement). [↑](#footnote-ref-5)
6. The Massachusetts law requires that an employer provide *either* “garden leave” (the requirements for which are incorporated into the first bracketed, highlighted text option) or “other mutually agreed upon consideration.” The law does not define or otherwise provide guidance on what constitutes other mutually agreed upon consideration, but we recommend that any such consideration be fair and reasonable. [↑](#footnote-ref-6)
7. Caution: Agreeing to provide pay during the post-Engagement non-compete period will subject the Company to a **legal claim** if it discontinues or fails to make the promised payments (except where the Company **immediately upon termination** notifies the consultant that it is waiving the post-Engagement non-competition obligation in accordance with Section 1(b)(i)). [↑](#footnote-ref-7)
8. Caution: Agreeing to provide pay during the post-Engagement non-compete period will subject the Company to a **legal claim** if it discontinues or fails to make the promised payments (except where the Company **immediately upon termination** notifies the consultant that it is waiving the post-Engagement non-competition obligation in accordance with Section 1(b)(i)). [↑](#footnote-ref-8)