

CONFIDENTIAL

Attachment D

THIS INSTRUMENT AND ANY SECURITIES ISSUABLE PURSUANT HERETO HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE “ACT”), OR UNDER THE SECURITIES LAWS OF CERTAIN STATES. THESE SECURITIES MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED, PLEDGED OR HYPOTHECATED EXCEPT AS PERMITTED UNDER THE ACT AND APPLICABLE STATE SECURITIES LAWS PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT OR AN EXEMPTION THEREFROM.

CONVERTIBLE PROMISSORY NOTE

[____], 2020

FOR VALUE RECEIVED, [____], a [Delaware Corporation/limited liability company] (“**Borrower**” or the “**Company**”), promises to pay to the New York State Energy Research and Development Authority, a New York public benefit corporation (“**Lender**”), at a location to be designated by Lender, in legal tender of the United States, the principal sum of [____]¹ Dollars (\$[____]) (the “**Principal Amount**”), together with interest on the Principal Amount outstanding at the Interest Rate (as defined below) per annum for the period beginning on the date hereof and ending on the Maturity Date (as defined below), which interest shall be calculated on the basis of actual days elapsed and a 360-day year, upon the terms and conditions specified in this Convertible Promissory Note (this “**Note**”). The “**Interest Rate**” means the rate of four percent (4%) per annum on the unpaid principal amount of this Note outstanding from time to time.

1. **Maturity.** The Principal Amount of this Note, or such amount as may be outstanding hereunder from time to time and all accrued and unpaid interest, is due and payable on [____], 20[____]² (the “**Maturity Date**”). So long as this Note remains outstanding, the Company may make a one-time request (a “**Company Extension Request**”) to extend the Maturity Date to [____], 20[____]³ (the “**Extended Maturity Date**”). Such Company Extension Request shall be made in writing to the Lender no later than [sixty (60)] days prior to the Maturity Date. The decision to extend the Maturity Date shall be made by the Lender in its sole and absolute discretion. The Lender shall notify the Company of its decision with respect to any Company Extension Request no later than [thirty (30)] days prior to the Maturity Date. In the event that the Lender grants the Company’s extension request, this Note shall be deemed amended and modified such that the Extended Maturity Date shall become the new Maturity Date and any and all references in this Note to the Maturity Date shall mean the Maturity Date as extended pursuant to the terms of this Section 1. Any payment of the Principal Amount hereunder shall be made to Lender at the address designated in Section 10 hereof. Upon payment in full of the Principal Amount and interest and any other obligations payable hereunder, this Note shall be surrendered to Borrower for cancellation. This Note is being issued pursuant to that certain Convertible Note Purchase Agreement dated as of [____], 20[____]⁴ by and among Borrower and Lender [and other signatories thereto]⁵ (the “**Note Purchase Agreement**”). Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Note Purchase Agreement.

2. **Conversion and Termination.**

2.1. **Automatic Conversion.** Upon the closing of a Qualified Financing (as defined below), provided that such closing date occurs prior to the earlier of: (a) the Maturity Date; (b) the repayment by Borrower of the Principal Amount and all accrued and unpaid interest due under this Note or (c) a Change of Control Transaction (as defined below), and provided, further, that the Lender has not exercised its option under Section 2.3 hereof, the entire outstanding balance, including the Principal Amount, and all accrued but unpaid interest and thereon and any other obligations thereunder, of this Note shall automatically convert into Conversion Securities (as defined below) obtained by dividing (i) the Principal Amount plus accrued but unpaid interest by (ii) the Qualified Conversion Price (as defined below) without any further action

¹ Not to exceed \$500,000.

² The second anniversary of the closing date.

³ The third anniversary of the closing date.

⁴ The date of the Note.

⁵ Consider whether founders should also execute Convertible Note Purchase Agreement.

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on the part of either Borrower or Lender, whereupon this Note shall automatically be deemed canceled. The Conversion Securities issued to Lender shall be issued to Lender with the same rights, preferences and privileges as are received by investors who have purchased, or are purchasing, the same type of equity of Borrower in the Qualified Financing, except with respect to (x) the per [share/membership unit] liquidation preference, which shall equal the per [share/membership unit] liquidation preference received by Next Round Securities; (y) price-based anti-dilution protection, which shall be based on the Qualified Conversion Price; and (z) dividend rights, which will be based on the Qualified Conversion Price. No fractional securities of Conversion Securities shall be issued. Any fraction of a Conversion Security resulting from this calculation shall be paid in cash to Lender upon such conversion equal to such fraction multiplied by the price per Conversion Security. Borrower hereby covenants and agrees to cause the Conversion Securities, when issued pursuant to this Section 2.1, to be validly issued, fully paid and nonassessable, and free from all taxes, liens and charges with respect to the issuance thereof (other than any liens that may be imposed by Lender).

2.2. Change of Control. Notwithstanding anything contained herein to the contrary, in the event a Change of Control Transaction occurs while the Note is outstanding, the Lender shall be entitled to the following amount which shall become immediately due and payable: the greater of (A) the Principal Amount of, plus all accrued but unpaid interest thereon and any other obligations accrued and unpaid hereunder; and (B) such amount as would have been payable to the Lender if the Note was converted into a number of [shares of the Company's Common Stock/membership units] obtained by dividing (i) the Principal Amount of, plus all accrued and unpaid interest on, and any other obligations accrued and unpaid under, the Note by (ii) the Alternate Conversion Price (as defined below).

2.3. Loan Conversion Option. The Lender shall have the option, exercisable upon written notice delivered to the Borrower not less than ten (10) Business Days prior to the closing of any Qualified Financing, to convert the Principal Amount of, plus all accrued and unpaid interest on, and any other obligations accrued and unpaid under, the Note to a term loan (the "**Term Loan**"). The effective date of any such conversion (the "**Loan Conversion Effective Date**") shall be the date of closing of such Qualified Financing. On the Loan Conversion Effective Date, Borrower's obligations to pay the Principal Amount, all accrued and unpaid interest thereon, and any other obligations accrued and unpaid under the Note shall become obligations under the Term Loan. Interest on the Principal Amount, including any interest accrued on and after the date of filing of any petition with respect to the Company under the Bankruptcy Code, shall continue to accrue under the Term Loan at the Interest Rate. The Principal Amount, together with all accrued and unpaid interest thereon, and any other obligations accrued and unpaid under, the Term Loan shall be due and payable by the Borrower in thirty-six (36) equal monthly installments beginning on the first day of the calendar month immediately succeeding the calendar month including the Loan Conversion Effective Date. Except for Borrower's obligations under Sections 2 (other than Borrower's obligations under this Section 2.3 and Section 2.5), 4, and 6 hereunder, all of Borrower's obligations under this Note shall be obligations of the Borrower under the Term Loan, and this Note, as modified by this Section 2.3, shall evidence Borrower's obligations to the Lender under the Term Loan. Borrower's obligations under the Term Loan shall not be assigned, by operation of law or otherwise, by the Borrower without the prior written consent of the Lender.

2.4. Definitions.

(a) "**Alternate Conversion Price**" means the price per [share/membership unit] equal to 80% of the price per [share/membership unit] paid to the Company or its equity holders in connection with a Change of Control Transaction.

(b) "**Business Day**" shall mean the hours between 9:00 a.m. – 4:00 p.m., Eastern time, Monday through Friday, other than the following days: (a) New Year's Day, Dr. Martin Luther King, Jr. Day, Lincoln's Birthday, Washington's Birthday (celebrated on President's Day), Good Friday, Memorial Day, the day before Independence Day, Independence Day, Labor Day, Columbus Day, Election Day, Veterans' Day, the day before and after Thanksgiving Day, Thanksgiving Day, Christmas Eve, Christmas Day and New Year's Eve, (b) a legal holiday in the State of New York, and (c) any other day on which the U.S. Federal Reserve Bank or commercial banks in New York State are authorized or required by law to close. For purposes hereof, if any day listed above as a day on which the Lender is closed falls on a Sunday, such day is celebrated on the following Monday. If any day listed above as a day on which a bank is closed falls on a Saturday, such day is celebrated the preceding Friday.

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(c) “**Change of Control Transaction**” means the consummation of (i) a reorganization, merger, consolidation or recapitalization of Borrower (a “**Business Combination**”), other than a Business Combination in which the combined voting power of the outstanding voting securities of the surviving or resulting entity immediately following the Business Combination is held by the persons who, immediately prior to the Business Combination, were the holders of the voting securities of Borrower; (ii) a complete liquidation or dissolution of Borrower; (iii) a sale of all or substantially all of Borrower’s assets; (iv) any transaction or series of related transactions (other than a Qualified Financing) that result in the issuance of capital stock, or the right to purchase capital stock, such that immediately after the issuance of such capital stock, the holders thereof would own an amount greater than 50% of the issued and outstanding capital stock on a fully diluted basis or (v) any transaction or series of related transactions in which the current holders of the voting securities of Borrower sell or exchange more than 50% of the voting securities of Borrower then held by such persons.

(d) “**Conversion Securities**” means that number of securities of the Next Round Securities sold in the Qualified Financing as is equal to the quotient obtained by dividing (i) the amount of this Note (including the Principal Amount and accrued but unpaid interest and any other unpaid obligations thereunder) being converted by (ii) the Conversion Price, rounded down to the nearest whole [share/membership unit], and as adjusted thereafter.

(e) “**Next Round Securities**” means Borrower’s intended designated series or class of equity securities of the Company which are issued in connection with a Qualified Financing, provided, that such equity securities shall be senior to or *pari passu* with its existing securities with respect to rights, preferences and privileges.

(f) “**Qualified Conversion Price**” means the price per [share/membership unit] equal to 80% of the price per [share/membership unit] that third party investors pay for Next Round Securities purchased in the Qualified Financing.

(g) “**Qualified Financing**” means the closing of the sale of Borrower’s Next Round Securities in which Borrower receives aggregate gross sale proceeds of not less than \$[_____] ⁶ (exclusive of the conversion of principal and accrued interest on the Note into Conversion Securities).

2.5. Termination of Rights. All rights with respect to this Note shall terminate upon the earlier of: (i) the payment of the Principal Amount then outstanding and all accrued and unpaid interest, and any other obligations of the Borrower accrued and unpaid, hereunder, including in the event that the Lender exercises its option under Section 2.3 hereof, or (ii) unless the Lender has exercised his option under Section 2.3 hereof, the conversion, under either of Section 2.1 or Section 2.2 of all of the Principal Amount subject hereto and accrued interest thereon and any other obligations of the Borrower accrued and unpaid hereunder, whether or not this Note has been surrendered to Borrower (such date, the “**Note Termination Date**”).

2.6. Notice of Transactions. Borrower shall give Lender at least ten (10) days’ written notice of the closing of any Qualified Financing or Change of Control Transaction (provided that this notice period may be waived on behalf of all Lender by the Majority Lender).

3. Events of Default. Each of the following shall constitute an “**Event of Default**” in which case, the entire unpaid principal of this Note, together with all accrued and unpaid interest on the original Principal Amount, and any other due and unpaid obligations hereunder, shall become and be immediately due and payable upon written demand of Lender, without any other notice or demand of any kind or any presentment or protest:

3.1. Borrower shall fail to pay when due any Principal Amount or any interest payment pursuant to the terms of this Note and such payment shall not have been made within two (2) Business Days of such due date.

3.2. Borrower’s failure to comply with any of the terms or covenants of this Note and such compliance continues for ten (10) Business Days after receipt of written notice from Lender.

⁶ The greater of \$500,000 or 2 X the original Principal Amount of the Note.

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3.3. If Borrower (i) makes a general assignment for the benefit of creditors, or (ii) applies for, consents to, acquiesces in, or files a petition or an answer seeking, the appointment of a trustee, receiver, liquidator, debtor in possession, or assignee in bankruptcy or insolvency of itself or of all or a substantial portion of its assets, or a reorganization, arrangement with creditors or other remedy, relief or adjudication available to or against a debtor under any bankruptcy or insolvency law or any law relating to relief of debtors.

3.4. Upon the commencement of any action for the dissolution or liquidation of Borrower, or the commencement of any case or proceeding for reorganization or liquidation of debts of Borrower under the Bankruptcy Code or any other state or federal law now or hereafter enacted for the relief of debtors, whether instituted by or against Borrower, or upon the appointment of a receiver, liquidator, custodian, trustee or similar official or fiduciary for Borrower or for any of the property of Borrower, and in any such case such proceeding is not terminated or dismissed within sixty (60) days after filing.

4. Adjustment Provisions. The number and character of Conversion Securities issuable upon conversion of this Note (or any other equity securities or property at the time receivable or issuable upon conversion of this Note) and the Conversion Price therefor, are subject to adjustment upon occurrence of the following events between the date this Note is issued and the Note Termination Date:

4.1. Adjustment for Recapitalizations, etc. If the conversion is made under Section 2 above, the Conversion Price of this Note and the number of Conversion Securities issuable upon conversion of this Note shall each be proportionally adjusted to reflect any reclassification, recapitalization or other similar event affecting the number of Conversion Securities (or such other equity securities).

4.2. Adjustment for Reorganization, Consolidation, Merger. In case of any reorganization of Borrower, after the date of this Note, or in case, after such date, Borrower (or any such entity) shall consolidate with or merge into another entity or convey all or substantially all of its assets to another entity and then distribute the proceeds to its equity holders, then, and in each such case, Lender, upon the conversion of this Note (as provided in Section 2) at any time after the consummation of such reorganization, consolidation, merger or conveyance, shall be entitled to receive, in lieu of the securities and property receivable upon the conversion of this Note prior to such consummation, the securities or property to which Lender would have been entitled upon the consummation of such reorganization, consolidation, merger or conveyance if Lender had converted this Note immediately prior thereto, all subject to further adjustment as provided in this Note, and the successor or purchasing entity in such reorganization, consolidation, merger or conveyance (if other than Borrower) shall duly execute and deliver to Lender a supplement hereto acknowledging such entity's obligations under this Note.

4.3. Notice of Adjustments. Borrower shall promptly give written notice of each adjustment or readjustment of the Conversion Price or the number of Conversion Securities or other securities issuable upon conversion of this Note. The notice shall describe the adjustment or readjustment and show in reasonable detail the facts on which the adjustment or readjustment is based.

4.4. No Change Necessary. The form of this Note need not be changed because of any adjustment in the Conversion Price or in the number of Conversion Securities issuable upon its conversion.

4.5. Reservation of Securities. If at any time the number of Conversion Securities or other securities issuable upon conversion of this Note shall not be sufficient to effect the conversion of this Note, Borrower will take such action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued Conversion Securities or other securities issuable upon conversion of this Note as shall be sufficient for such purpose.

5. Loss, Theft, Destruction or Mutilation. Upon receipt of evidence satisfactory to Borrower of the loss, theft, destruction or mutilation of this Note and, in the case of such loss, theft or destruction, upon delivery to Borrower of an indemnity undertaking reasonably satisfactory to Borrower, or, in the case of any such mutilation, upon surrender of this Note to Borrower, Borrower will issue a new note, of like tenor and principal amount, in lieu of or in exchange for such lost, stolen, destroyed or mutilated Note.

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6. Lender's Rights.

6.1. The Lender shall not be entitled, as a Convertible Security holder, to vote or receive [dividends/distribution or allocations] or be deemed the holder of the Company's [capital stock/membership units] for any purpose, nor shall anything contained herein be construed to confer upon the Holder, as such, any of the rights of a [stockholder/member] of the Company or any right to vote for the election [of directors or] upon any matter submitted to [stockholders/members] at any meeting thereof, or to give or withhold consent to any [corporate/company] action (whether upon any recapitalization, issuance of [stock/membership units], reclassification of [stock/membership units], [change of par value,] consolidation, merger, conveyance, or otherwise) or to receive notice of meetings, or to receive [dividends/distributions or allocations or subscription rights] or otherwise until the Note shall have been converted and the [shares/membership units] convertible upon the terms hereof shall have become deliverable, as provided herein.

6.2. This Note may not be assigned, by operation of law or otherwise, by the Company without the prior written consent of the Lender. Upon the conversion of this Note, one or more certificates for the number of [shares/membership units] in which the Lender is entitled to receive pursuant to this Note shall be issued by the Company as soon as practicable after such conversion. No fractional [shares/membership units] or scrip representing fractional [shares/membership units] shall be issued upon the conversion of this Note, but in lieu of such fractional [shares/membership units] the Company shall make a cash payment therefor on the basis of the price per [share/membership unit] of the Company's equity securities, as reasonably determined by the Lender, on the date of such conversion.

7. Covenants of the Company.

7.1. Affirmative Covenants of the Company. For so long as this Note is outstanding, the Company shall:

(a) Use of Proceeds. Use the proceeds of the Note exclusively for the payment of employee payroll, rent with respect to its real property leases, working capital and other general corporate purposes.

(b) Compliance with PON [] Documents. Comply with all provisions of the solicitation documents comprising the documentation issued under Lender's Program Opportunity Notice (PON) [] as such documents existed at the time the Borrower's application was submitted to Lender.⁷

7.2. Negative Covenants of the Company. For so long as this Note is outstanding, the Company shall not:

(a) Dividend Payments. Declare or make, directly or indirectly, any dividends or distributions on any of its Equity Securities[other than Permitted Tax Distributions].

(b) Principal Payments. Make any payments of principal under any indebtedness other than payments of principal under third-party loans or rent under third-party operating leases for the purchase or lease of equipment used by the Company in the ordinary course of its business.

(c) New Indebtedness. Incur, after the date hereof; any indebtedness other than indebtedness to trade creditors, including indebtedness incurred with corporate credit cards; and endorsement of instruments or other payment items for deposit, in each case in the ordinary course of business of the Company.

(d) Liens. Create, incur, assume or suffer to exist any lien or encumbrance upon any of its property, assets or revenues, whether now owned or hereafter acquired, except for liens such as carriers', warehousemen's, mechanics', materialmen's, repairmen's or other like liens or encumbrances arising in the ordinary course of business which are not overdue for a period of more than thirty (30) days or which are being

⁷ Note to Draft: This can be further elaborated on when the PON documents are finalized.

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contested in good faith and by appropriate proceedings diligently conducted; provided that adequate reserves with respect thereto are maintained on the books of the Company.

(e) Use of Proceeds. Use the proceeds of this Note, whether directly or indirectly, and whether immediately, incidentally or ultimately, to purchase or carry margin stock (within the meaning of Regulation U of the Board of Governors of the Federal Reserve System of the United States) or to extend credit to others for the purpose of purchasing or carrying margin stock or to refund indebtedness originally incurred for such purpose.

(f) Definition. For purposes of this Section 7, “**Permitted Tax Distributions**” means for any taxable period, distributions by the Company to its holders of Equity Securities to pay federal, foreign, state and local income taxes that are attributable to the taxable income of the Company for such period, equal to the product of (i) the net taxable income of the Company for such taxable year (or portion thereof), reduced by any cumulative net taxable loss with respect to all prior taxable years (or portions thereof) beginning after the date hereof (determined as if all such periods were one period) to the extent such cumulative net taxable loss is of a character (ordinary or capital) that would permit such loss to be deducted against the income of the taxable year in question (or portion thereof) and (ii) the highest combined marginal federal and applicable state and/or local income tax rate (taking into account, to the extent applicable, the deductibility of state and local income taxes for U.S. federal income tax purposes, and the character of the taxable income in question (i.e., long term capital gain, qualified dividend income, etc.).]

8. Severability. In the event any one or more of the provisions of this Note shall for any reason be held to be invalid, illegal or unenforceable, in whole or in part or in any respect, or in the event that any one or more of the provisions of this Note operate or would prospectively operate to invalidate this Note, then and in any such event, such provision(s) only shall be deemed null and void and shall not affect any other provision of this Note and the remaining provisions of this Note shall remain operative and in full force and effect and in no way shall be affected, prejudiced, or disturbed thereby.

9. Prepayment. The Principal Amount due hereunder may be prepaid by Borrower, in whole and not in part, at any time prior to the Maturity Date, upon not less than [five (5)] Business Days’ written notice to the Lender. Any such repayment of the Principal Amount shall be accompanied by the payment of all accrued and outstanding interest thereon, and any other accrued and outstanding obligations hereunder, as of and including the date upon which such prepayment is made.

10. Notice. Any notice, other communication or payment required or permitted hereunder shall be in writing and shall be deemed to have been given upon delivery if personally delivered or upon deposit if deposited in the United States mail for mailing by certified mail, postage prepaid, and addressed as set forth in the Note Purchase Agreement.

11. Transfer of Note. This Note shall be transferrable by the Lender, provided, that, so long as no default shall have occurred hereunder and no breach of the Note Purchase Agreement shall have occurred, the Lender shall not transfer, convey or assign this Note to a competitor of the Borrower. This Note may be transferred only upon surrender of the original Note for registration of transfer, duly endorsed, or accompanied by a duly executed written instrument of transfer in form satisfactory to Borrower. Thereupon, a new Note for like Principal Amount will be issued to, and registered in the name of, the transferee. The Principal Amount is payable only to the registered holder of the Note.

12. Waivers. No delay on the part of Lender in exercising any right hereunder shall operate as a waiver of such right or any other right. Borrower waives presentment for payment, notice of dishonor, protest, notice of protest, diligence of collection, and any other notice of any kind, and the parties hereby consent to any number of renewals or extensions of time for payment hereof, which renewals and extensions shall not affect the liability of any party to this Note; and Borrower further agrees that Lender may accept, by way of compromise or settlement, from any party, a sum or sums less than the amount of this Note, and may give releases to such parties without affecting the liability of any other party for the unpaid balance. Any such renewals or extensions may be made, and any such partial payments accepted, or releases given, without notice to any such party.

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13. Governing Law. This Note shall be construed and enforced in accordance with, and all questions concerning the construction, validity, interpretation and performance of this Note shall be governed by, the internal laws of the State of New York, without giving effect to any choice of law or conflict of law provision or rule (whether of the State of New York or any other jurisdictions) that would cause the application of the laws of any jurisdictions other than the State of New York. All actions or proceedings in connection with this Note shall be brought in accordance with New York CPLR §505. Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Note shall be brought against the parties hereto exclusively in either the Supreme Court of the State of New York sitting in either New York County or Albany County, or, if it has or can acquire jurisdiction, in the United States District Court sitting in either New York County or Albany County, and each of the parties consents to the jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue laid therein.

14. Headings; Gender and Number. The headings in this Note is for purposes of reference only and shall not limit or otherwise affect any of the terms hereof. All pronouns and other words used herein shall include all genders and the singular and the plural as the context requires.

[Signature Page Follows]

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IN WITNESS WHEREOF, the undersigned Borrower has executed this Note as of the date first set forth above.

[_____], [INC/LLC].

By: _____

Name:

Title: