

Risk Factors Comparison 2024-03-27 to 2023-03-24 Form: 10-K

Legend: **New Text** ~~Removed Text~~ Unchanged Text **Moved Text** Section

Our amended and restated certificate of incorporation provides that, unless we consent in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware will, to the fullest extent permitted by applicable law, be the sole and exclusive forum for (i) any derivative action or proceeding brought on our behalf, (ii) any action asserting a claim of breach of a fiduciary duty owed by any of our directors, officers, employees or agents to us or our stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCL, our certificate of incorporation or our bylaws, (iv) any action to interpret, apply, enforce or determine the validity of our certificate of incorporation or our bylaws or (v) any action asserting a claim against us that is governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of our capital stock will be deemed to have notice of, and consented to, the provisions of our certificate of incorporation described in the preceding sentence. This choice of forum provision may limit a stockholder's ability to bring a claim in a judicial forum that it finds favorable for disputes with us or our directors, officers, employees or agents, which may discourage such lawsuits against us and such persons. Alternatively, if a court were to find these provisions of our certificate of incorporation inapplicable to, or unenforceable in respect of, one or more of the specified types of actions or proceedings, we may incur additional costs associated with resolving such matters in other jurisdictions, which could adversely affect our business, financial condition or results of operations. This provision would not apply to suits brought to enforce a duty or liability created by the Exchange Act. Furthermore, Section 22 of the Securities Act of 1933, as amended (the "Securities Act") creates concurrent jurisdiction for federal and state courts over all such Securities Act actions. Accordingly, both state and federal courts have jurisdiction to entertain such claims. This exclusive- forum provision may limit a stockholder's ability to bring a claim in a judicial forum that it finds favorable for disputes with us or our directors, officers, or other employees, which may discourage lawsuits against us and our directors, officers, and other employees. If a court were to find either exclusive- forum provision in our amended and restated certificate of incorporation to be inapplicable or unenforceable in an action, we may incur further significant costs associated with resolving the dispute in other jurisdictions, all of which could seriously harm our business, financial condition, results of operations, and prospects. Our directors have limited liability under Delaware law. Pursuant to our certificate of incorporation, and Delaware law, our directors are not liable to us or our stockholders for monetary damages for breach of fiduciary duty, except for: liability in connection with a breach of the duty of loyalty; acts or omissions not in good faith; acts or omissions that involve intentional misconduct or a knowing violation of law; dividend payments or stock repurchases that are illegal under Delaware law; or any transaction in which a director has derived an improper personal benefit. Accordingly, except in those circumstances, our directors will not be liable to us or our stockholders for breach of their duty. Our ability to use our net operating loss carry forwards may be subject to limitation and may result in increased future tax liability. Sections 382 and 383 of the Internal Revenue Code contain rules that limit the ability of a company that undergoes an "ownership change" to utilize its net operating loss and tax credit carry forwards and certain built- in losses recognized in years after the ownership change. An "ownership change" is generally defined in Section 382 of the Internal Revenue Code as any change in ownership of more than 50 % of a corporation's stock over a rolling three- year period by stockholders that own (directly or indirectly) 5 % or more of the stock of a corporation, or arising from a new issuance of stock by a corporation. If an ownership change occurs, Section 382 generally imposes an annual limitation on the use of pre- ownership change net operating losses, which we refer to as "NOLs," credits and certain other tax attributes to offset taxable income earned after the ownership change. The annual limitation is equal to the product of the applicable long- term tax exempt rate and the value of the company's stock immediately before the ownership change. This annual limitation may be adjusted to reflect any unused annual limitation for prior years and certain recognized built- in gains and losses for the year. In addition, Section 383 generally limits the amount of tax liability in any post- ownership change year that can be reduced by pre- ownership change tax credit carryforwards. **In addition, tax net operating loss carry forwards generated in years beginning after December 31, 2017 may be carried forward indefinitely but are only available to offset 80 % of future taxable income.** This could result in increased U. S. federal income tax liability for us if we generate taxable income in a future period. Limitations on the use of NOLs and other tax attributes could also increase our state tax liability. The use of our tax attributes will also be limited to the extent that we do not generate positive taxable income in future tax periods. As a result of these limitations, we may be unable to offset future taxable income (if any) with losses, or our tax liability with credits, before such losses and credits expire. Accordingly, these limitations may increase our federal income tax liability. NOLs generated during 2018 and thereafter do not expire. As of December 31, ~~2022~~ **2023**, we had NOLs of approximately \$ ~~25.72~~ **4.5** million. We continue to assess the impact of the 2018 private placement, our "at the market" offerings, our 2020 public offering, our 2021 public offering and other transactions to determine whether an "ownership change," as defined in Section 382 of the Internal Revenue Code, has occurred and, if so, the limitations on our ability to utilize NOLs. Additionally, it is possible that future transactions may cause us to undergo one or more ownership changes. Certain of these NOLs may be also at risk of limitation in the event of a future ownership change. We have U. S. federal and state NOLs. In general, NOLs in one state cannot be used to offset income in any other state. Accordingly, we may be subject to tax in certain jurisdictions even if we have unused NOLs in other jurisdictions. Also, each jurisdiction in which we operate may have its own limitations on our ability to utilize NOLs or tax credit carryovers generated in that jurisdiction. These limitations may increase our federal, state, and / or foreign income tax liability. 38